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## Chapter 5

# The European Court of Justice and (Quasi-)Judicial Bodies of International Organisations

Christina Eckes

**Abstract** In a considerable number of areas, the European Union has developed its own state-like foreign policy. One important dimension is participation in international legal regimes. This is membership of international organisations and the signing of multilateral conventions. Because of the EU's internal complexity participation in international legal regimes raises many issues of a constitutional nature. The Court of Justice has repeatedly been asked to scrutinise whether a particular case of participation is in compliance with EU law. In this regard, it is fair to say that the Court of Justice's greatest concern has been the preservation of the autonomy of the EU legal order and more specifically the autonomous interpretation of EU law by the Court itself. Indeed, the Court has not so far accepted that it must be submitted to the authority of any external (quasi-)judicial structure. The two most prominent examples of international (quasi-)judicial bodies that have had and will continue to have a normative impact on the EU are the dispute settlement mechanism of the World Trade Organization and the European Court of Human Rights. As is well known the EU is a member of the WTO, while negotiations for accession to the European Convention on Human Rights are ongoing. The underlying questions are: How does, will and should the Court of Justice deal with the decisions of these two (quasi-)judicial bodies? What could be the reasons for the Court of Justice's concern about the autonomy of the EU legal order?

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### 5.1 Introduction

The European Union (EU) is a unique legal construction. Without being a state, it has incrementally developed state-like features—including in many areas its own foreign policy. One important dimension of the EU’s state-like international appearance is participation in international legal regimes. The Court of Justice’s concern for the autonomy of the EU legal order has in the past been one of the greatest internal obstacles to EU participation. Particular concerns have been raised by membership of international organisations and the signing of multilateral conventions where these international regimes set up (quasi-)judicial bodies, which were feared to threaten the exclusive jurisdiction of the Court of Justice over the EU legal order.

Any participation in international legal regimes leads to the surrender of some autonomy. When a state or the EU becomes a member of an international organisation, it has signed up under international law to respect the rules of that organisation. This usually means that it is bound by: (1) the founding treaties (primary law), (2) the decisions of the political organs (secondary law), and (3) the decisions of any (quasi-)judicial organs (quasi-judicial decisions). This third category of (quasi-)judicial decisions is the focus of this paper because in the past they have been seen as the greatest threat to the autonomy of the EU legal order and of the Court of Justice itself. The two most problematic and well-known examples are decisions of the World Trade Organization (WTO) dispute settlement mechanism<sup>1</sup> and rulings of the European Court of Human Rights (ECtHR).<sup>2</sup> Even though the two legal regimes (WTO and the European Convention on Human Rights (ECHR)) serve very different

<sup>1</sup> See also [Chap. 7](#) of this volume.

<sup>2</sup> See also [Chap. 6](#) of this volume.

purposes and are structurally difficult to compare, both regimes are more “constitutionalised” than other specialised international legal regimes. This is largely due to their developed enforcement mechanisms and the constitutional discourse resulting therefrom. Also, it was argued that at present (before EU accession to the ECHR) the Court of Justice treats “the “Geneva system” in many ways like the “Strasbourg system”.”<sup>3</sup> Both legal regimes are rule-based and benefit from predictability and effectiveness. Other examples of international (quasi-)judicial bodies do not lend themselves for comparison because they either do not exercise a form of jurisdiction that is likely to create a threat to the EU’s autonomy,<sup>4</sup> or demonstrate great deference to the Court of Justice.<sup>5</sup>

Section 5.2 gives an overview of the Court of Justice’s long-standing concern for the autonomy of the EU legal order, in particular with regard to international judicial bodies. It then discusses why the decisions of (quasi-)judicial bodies should be analysed separately from the founding treaties or conventions (primary law). Section 5.3 turns to the EU’s membership of the WTO and the Court of Justice’s approach to WTO dispute decisions. Section 5.4 addresses the negotiations on the EU’s accession to the ECHR and the decisions of the ECtHR. The final section, Sect. 5.5, draws conclusions and addresses the following questions: how does, will and should the Court of Justice deal with the decisions of these two (quasi-)judicial bodies? What could be the reasons for the Court of Justice’s concern about the autonomy of the EU legal order?

## 5.2 EU Autonomy

Participation in international organisations is a simple fact of life for states. For an international actor with certain state-like functions such as the EU, participation in international organisations has become a necessity for effective policy-making and to fulfil the tasks conferred upon it by the EU Treaties.

The EU’s relationship with international organisations is complex and it would be an over-simplification to say that the EU is more concerned about its autonomy than states. States also increasingly pay attention to the protection of individuals and of national power structures from uncontrollable effects flowing from international law.<sup>6</sup> Also, as we will see below with regard to the ECHR, states have

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<sup>3</sup> Editorial Comments, 2005 Common Market Law Review 42:584.

<sup>4</sup> The EFTA court, for instance, that has taken the place of the proposed EEA court (see the discussion of Opinion 1/91 below), does not settle disputes between the contracting parties to the EEA agreement.

<sup>5</sup> The Arbitral Tribunal under the UN Convention on the Law of the Sea (UNCLOS), to which the EU is also a party, suspended the *Mox Plant* case pending the Court of Justice’s decision, see ECJ Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-4635.

<sup>6</sup> This is probably best illustrated by the discussions surrounding counter-terrorist sanctions against individuals, see Eckes 2009.

very different approaches to international law and autonomy. Yet, the Court of Justice has repeatedly been concerned with what is usually called the protection of the “autonomy” of the EU legal order.<sup>7</sup>

### 5.2.1 *The Case Law*

Concern for the EU’s autonomy has guided the Court of Justice’s case law internally,<sup>8</sup> but also externally in its opinions on the compatibility of international agreements with the Treaties.<sup>9</sup> Internally and hence towards the Member States, the focus has been the primacy of EU law over national law. Ultimately, this includes the monopoly on review by the Court of Justice,<sup>10</sup> but not a monopoly on interpretation of EU law. On the contrary, Member States’ courts must interpret and give effect to EU law as part of a hierarchal structure with the Court of Justice on the apex. Their autonomy as “EU courts” must be protected from international bodies.<sup>11</sup> Externally, the Court of Justice’s particular concern has been its own autonomy vis-à-vis other (quasi-)judicial bodies. This started with Opinion 1/76 on the European Laying-up Fund for Inland Waterway Vessels,<sup>12</sup> and the Court of Justice has returned to the autonomy of the EU judiciary on several occasions: in Opinion 1/91 on the European Economic Area (EEA),<sup>13</sup> in Opinion 2/94 on the accession of the Community to the ECHR,<sup>14</sup> and in Opinion 1/00 on the European Common Aviation Area,<sup>15</sup> as well as in the case of *Mox Plant*.<sup>16</sup> These cases have been examined in much detail in the literature. It might be worth adding a few remarks about a recent case, though. In Opinion 1/09, on the creation of a unified patent litigation system,<sup>17</sup> the autonomy of the EU legal order, and in particular of the EU judiciary, was the decisive argument to declare the draft agreement in

<sup>7</sup> See also [Chap. 2](#) of this volume and the case law discussed in this chapter, [Sect. 5.2.1](#).

<sup>8</sup> ECJ Case 6/64 *Costa v ENEL* [1964] *ECR* 585; ECJ Case 314/85 *Foto-Frost* [1987] *ECR* 4199.

<sup>9</sup> Article 218(11) TFEU.

<sup>10</sup> ECJ Case 314/85 *Foto-Frost* [1987] *ECR* 4199.

<sup>11</sup> See ECJ Opinion 1/09 *Unified Patent Litigation System* [2011] *ECR* I-0000.

<sup>12</sup> ECJ Opinion 1/76 *draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels* [1977] *ECR* 741. In this case, the Court of Justice rejected the establishment of a fund tribunal consisting of six of its own judges. It expressed concern about the possibility of a conflict of jurisdiction in the event of two parallel preliminary ruling procedures on the interpretation of the agreement (one before the fund tribunal and one before the Court of Justice) and on the impartiality of those judges who sit on both judicial bodies.

<sup>13</sup> ECJ Opinion 1/91 *EEA* [1991] *ECR* I-6079.

<sup>14</sup> ECJ Opinion 2/94 *Accession to the ECHR* [1996] *ECR* I-1759.

<sup>15</sup> ECJ Opinion 1/00 *ECAA* [2002] *ECR* I-3493, paras 21, 23 and 26.

<sup>16</sup> ECJ Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] *ECR* I-4635.

<sup>17</sup> ECJ Opinion 1/09 *Unified Patent Litigation System* [2011] *ECR* I-0000, see in particular paras 73–89.

question incompatible with EU law. The Court of Justice's main concern in this case was that the newly established European and Community Patents Court would take over the powers of the Member States, including making references to the Court of Justice under Article 267 TFEU in disputes concerning European and Community patents.<sup>18</sup> Hence, the autonomy concern is ongoing and extends not only to the substantive interpretation of EU law but also to the EU law functions of the courts of the Member States.

However, the Court confirmed as a matter of principle in the EEA Opinion that the EU can be a party to an international agreement that sets up a judicial body to solve disputes between the contracting parties and that the Court of Justice would be bound by that judicial body's interpretation of the international agreement.<sup>19</sup> The greatest obstacle in the past appears to have been the fear that another judicial body might deliver binding rulings on issues of EU law.<sup>20</sup>

It is fair to say that the autonomy of the EU legal order is an old but ongoing concern of the Court of Justice, which is not likely to go away any time soon. On the contrary, with the increasing quantity and quality (impact) of cross-border activities in a globalised world the autonomy of domestic structures will come further under pressure.

### ***5.2.2 The Greatest Threat to Autonomy: (Quasi-)Judicial Decisions?***

This section explains why the (quasi-)judicial decisions of international organisations should be discussed separately from the founding treaties or conventions (primary law) and the "secondary law" adopted by the political bodies of these international organisations. In the case of the WTO, these are the decisions of the Appellate Body and in the case of the ECHR these are rulings by the Strasbourg Court.

It makes sense to look at (quasi-)judicial decisions separately<sup>21</sup>; not only because the Court of Justice's concern with the autonomy of the EU legal order is particularly directed towards (quasi-)judicial decisions that might contain interpretations of EU law, but also because of their nature. (Quasi-)judicial decisions are a specific and binding interpretation of general rules.

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<sup>18</sup> *Ibid.*, paras 80–81.

<sup>19</sup> ECJ Opinion 1/91 *EEA* [1991] *ECR* I-6079, paras 39–40: The EU's "capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions."

<sup>20</sup> *Ibid.*, paras 33–36.

<sup>21</sup> See for an argument in favour of the direct effect of WTO dispute decisions but against the direct effect of WTO law more broadly: Eeckhout 2011, 375 et seq.

(Primary) WTO law, for instance, leaves WTO members with considerable room for manoeuvre, while WTO dispute decisions are very specific and “shall be [...] unconditionally accepted by the parties to the dispute”.<sup>22</sup> The WTO Appellate Body is called a “body” rather than a court or tribunal and its decisions are called “reports” and need to be formally approved by the WTO’s highest political organ, the Dispute Settlement Body (DSB). However, they are confirmed pursuant to negative consent where a decision is adopted by the DSB except when all WTO members oppose it (including the winning party to the dispute).<sup>23</sup> This vests them in practice with all the binding force of a judicial decision. The case law of the ECtHR offers an interpretation of what is meant with human rights provisions that are phrased as open-ended and incomplete, such as Article 5(1): “Everyone has the right to liberty and security of person.” The ECtHR’s decisions are binding on the parties to the case.<sup>24</sup> In neither case is there any room for manoeuvre or negotiation.

Another question could be whether it should make a difference whether or not a State or the EU is a party to the proceedings and hence is directly obliged under international law to give effect to the ruling. In this sense, (quasi-)judicial decisions could be seen as limited in scope. However, both the case law of the ECtHR<sup>25</sup> and the decisions of the WTO dispute settlement mechanism function through the building of a precedent-based system that leads to an autonomous interpretation of the Convention and WTO law respectively, to which later decisions refer. Therefore, for the present discussion on the normative impact of these decisions in the domestic legal order, the difference between the proceedings to which a state or the EU is a party and those where this is not the case is limited. The main difference remains that, e.g. in the case of the ECtHR, it appears easier for a state and its national courts to distinguish decisions that concern other states as to the facts: they concern, after all, a different domestic legal system and hence a different situation.

In any international organisation or convention regime, there is a positive correlation between the level of constitutionalisation and the normative impact of that regime. Normative impact is often used as an argument for the need for greater constitutional constraints. At the same time, as can be best demonstrated with the example of the EU,<sup>26</sup> this results in a circular development between

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<sup>22</sup> See Article 17(14) Dispute Settlement Understanding.

<sup>23</sup> *Ibid.*

<sup>24</sup> Article 53 ECHR: The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties. Article 54 ECHR: The judgement of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

<sup>25</sup> Greer 2003 goes as far as to argue that the ECtHR’s primary function is “constitutional justice” rather than “individual justice”. This, of course, is subject to societal change, see: ECtHR *Cossey v UK* [1990] application no. 10843/84, Judgment (Plenary), Series A, Volume 184, para 35.

<sup>26</sup> The effectiveness of EU law is the result of the interplay between the Member States’ acceptance of supremacy and direct effect (normative impact), on the one hand, and a strong court and respect for the rule of law and human rights (constitutionalisation) on the other.

factors that reinforce each other: a greater normative impact requires a higher level of constitutionalisation and a higher level of constitutionalisation entails greater effectiveness, enforceability and/or legitimacy, all of which cumulate in a greater normative impact. This is also true for the development from the GATT to the WTO.

EU accession to the ECHR is and will be different from EU accession to the WTO. International trade is as a subject-matter which is very different from human rights, both in terms of political sensitivity and in terms of EU competence. Further, the two are structurally different. The WTO is based on negotiation. The ECHR simply requires compliance. EU accession to the ECHR raises different and complex questions of EU constitutional law, including in the long term and after all the technicalities have been agreed. However, at this point the WTO can serve as a point of comparison, mainly because it is—like the ECHR—a fairly well-developed, i.e. constitutionalised, specialised international legal regime. Both regimes have been subject to constitutional discourse that is grounded in a not state-bound understanding of what is constitutional.<sup>27</sup> The ECtHR has repeatedly referred to the ECHR as a “constitutional instrument of European public order”.<sup>28</sup>

To better understand what is meant by “constitutional” in the context of a non-state structure, it is helpful to look at the criteria Neil Walker has developed in this context.<sup>29</sup> He mentions: (1) the development of an explicit constitutional discourse; (2) the claim to foundational legal authority; (3) the development of a jurisdictional scope/sphere of competences; (4) the claim to interpretative autonomy; (5) an institutional structure governing the polity; (6) the criteria for and the rights and obligations of citizenship; and (7) representation of membership. Both for the WTO and the ECHR, the judicialisation of the regime is the most important constitutionalising factor. Judicialisation has established and defended the “jurisdictional scope”, a certain “interpretative autonomy”, with subscription to “rule of law values such as certainty, predictability and consistent and coherent reasoning”.<sup>30</sup> This, in turn, has led to a constitutional discourse. Hence, while neither the WTO nor the ECHR can compare with the EU in terms of constitutionalisation, they both have entered some form of constitutional discourse and this is predominantly the case because of their powerful (quasi-)judicial bodies, which have also determined the normative impact of these legal regimes.

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<sup>27</sup> For the WTO see Walker 2001. For the ECHR see e.g. Stone Sweet 2009, in particular Section II.A; Greer 2003, 405–433.

<sup>28</sup> See ECtHR *Loizidou v Turkey* (Preliminary Objections) [1995] Application No. 310, Series A, para 75; ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (GC) [2005] Application No. 45036/98; ECtHR *Behrami & Behrami v France* [2007] Application No. 71412/01; ECtHR *Saramati v France, Germany and Norway* (GC) [2007] Application No. 78166/01, para 145.

<sup>29</sup> Walker 2001, 35.

<sup>30</sup> *Ibid.*, 50–51. For the ECHR compare Alec Stone Sweet’s analysis, Stone Sweet 2009.



## 5.3 The Present: The EU in the WTO

### 5.3.1 Participation

The EU has not only joined the WTO as a full member. It has also largely taken over from the Member States' representation<sup>31</sup> and adjudication of disputes within the WTO. The Agreement Establishing the WTO is a mixed agreement. In practice, however, mixity has been replaced by a dominance of the Union within the WTO. This is particularly visible in the dispute settlement procedure.<sup>32</sup> While in the earlier days EU Member States still acted as litigants in the WTO dispute settlement mechanism,<sup>33</sup> the Commission now represents as a single actor the Union and the Member States in all WTO litigation.<sup>34</sup> In actions against individual Member States,

<sup>31</sup> See also Chap. 7 of this volume.

<sup>32</sup> See e.g. Antoniadis 2004, 327.

<sup>33</sup> WT/DS86 *Sweden—Measures Affecting the Enforcement of Intellectual Property Rights* (Complainant: United States) 28 May 1997; WT/DS83 *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights* (Complainant: United States) 14 May 1997; WT/DS82 *Ireland—Measures Affecting the Grant of Copyright and Neighbouring Rights* (Complainant: United States) 14 May 1997; WT/DS80 *Belgium—Measures Affecting Commercial Telephone Directory Services* (Complainant: United States) 2 May 1997; WT/DS68 *Ireland—Customs Classification of Certain Computer Equipment* (Complainant: United States) 14 February 1997; WT/DS131 *France—Certain Income Tax Measures Constituting Subsidies* (Complainant: United States) 5 May 1998; WT/DS130 *Ireland—Certain Income Tax Measures Constituting Subsidies* (Complainant: United States) 5 May 1998; WT/DS129 *Greece—Certain Income Tax Measures Constituting Subsidies* (Complainant: United States) 5 May 1998; WT/DS128 *Netherlands—Certain Income Tax Measures Constituting Subsidies* (Complainant: United States) 5 May 1998; WT/DS127 *Belgium—Certain Income Tax Measures Constituting Subsidies* (Complainant: United States) 5 May 1998.

<sup>34</sup> In the list of disputes on the WTO website, no Member State has brought a complaint. Cases brought by or against the Union since 1 January 2009: WT/DS425 *China—Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union* (Complainant: European Union) 25 July 2011; WT/DS424 *United States—Anti-Dumping Measures on Imports of Stainless Steel Sheet and Strip in Coils from Italy* (Complainant: European Union) 1 April 2011; WT/DS409 *European Union and a Member State—Seizure of Generic Drugs in Transit* (Complainant: Brazil) 12 May 2010; WT/DS408 *European Union and a Member State—Seizure of Generic Drugs in Transit* (Complainant: India) 11 May 2010; WT/DS407 *China—Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union* (Complainant: European Union) 7 May 2010; WT/DS405 *European Union—Anti-Dumping Measures on Certain Footwear from China* (Complainant: China) 4 February 2010; WT/DS401 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products* (Complainant: Norway) 5 November 2009; WT/DS400 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products* (Complainant: Canada) 2 November 2009; WT/DS397 *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (Complainant: China) 31 July 2009; WT/DS396 *Philippines—Taxes on Distilled Spirits* (Complainant: European Communities) 29 July 2009; WT/DS395 *China—Measures Related to the Exportation of Various Raw Materials* (Complainant: European Communities) 23 June 2009; WT/DS389 *European*

the Commission conducts the consultations<sup>35</sup> and takes up the defence in the Panel.<sup>36</sup> However, it should not be forgotten that between the EU and the GATT it was not a matter of love at first sight. Indeed, the GATT's most important principle of non-discrimination, the most-favoured nation rule, and European integration stand in open conflict with each other—at least in principle.<sup>37</sup> At the beginning, there was also resistance from GATT signatories, which ultimately accepted the *status quo*.<sup>38</sup> Today, this is of course history. The EU's role in the WTO is largely uncontested. It has virtually replaced the Member States.

### 5.3.2 Decisions of the WTO Appellate Body

While the WTO could be largely seen as lacking the capacity to produce secondary law,<sup>39</sup> it has an exceptionally well-developed dispute settlement mechanism and hence produces quasi-judicial decisions that do not require consent and that are subject to an enforcement mechanism (trade sanctions). As is well known and possibly discussed too often,<sup>40</sup> the Court of Justice does not give direct effect to decisions of the WTO dispute settlement mechanism. This means that these decisions cannot directly be used as a yardstick against which acts of the EU institutions can be

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(Footnote 34 continued)

Communities—*Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States* (Complainant: United States) 16 January 2009.

<sup>35</sup> This was the case in the last complaint that was brought against an individual Member State: WT/DS210 *Belgium—Administration of Measures Establishing Customs Duties for Rice* (Complainant: United States) 12 October 2000. In WT/DS173 *France—Measures Relating to the Development of a Flight Management System* (Complainant: United States) 21 May 1999 and WT/DS125 *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs* (Complainant: United States) 4 May 1998 an identical request for consultations was addressed to the Union, see WT/DS172 *European Communities—Measures Relating to the Development of a Flight Management System* (Complainant: United States) 21 May 1999; WT/DS124 *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs* (Complainant: United States) 30 April 1998.

<sup>36</sup> See e.g. WT/DS67 *United Kingdom—Customs Classification of Certain Computer Equipment* (Complainant: United States) 22 June 1998; WT/DS68 *Ireland—Customs Classification of Certain Computer Equipment* (Complainant: United States) 22 June 1998.

<sup>37</sup> As a matter of principle this has not changed even though Article XXIV GATT has solved the legal problem.

<sup>38</sup> Licková 2008, 473.

<sup>39</sup> Only a few bodies are capable of adopting decisions, see also Chap. 6 of this volume.

<sup>40</sup> Paasivirta and Kuijper 2005 emphasise that WTO law and decisions of the dispute settlement bodies are the exception that confirm the rule that international agreements do form part of the EU legal order and can have direct effect. More recently also decisions of the UNCLOS Tribunal, see ECJ Case C-308/06 *Intertanko* [2008] ECR I-4057.

reviewed. On appeal in the case of *Biret*,<sup>41</sup> the Court of Justice indicated in passing that the question of whether WTO dispute decisions enjoyed direct effect could be examined separately from general WTO law. This gave rise to speculation as to whether a WTO dispute decision could enjoy direct effect. However, in the case of *Van Parys*,<sup>42</sup> the Court closed this avenue and made clear that the nature of the dispute settlement mechanism did not justify conferring direct effect on WTO dispute decisions. It later confirmed this line in the case of *FIAMM*.<sup>43</sup>

The Court's rejection of the direct effect of decisions of the WTO dispute settlement mechanism is based on several strands of argument. The first focuses on the nature of the WTO dispute settlement mechanism. Both in *Van Parys* and in *FIAMM* the Court emphasised the fact that WTO dispute resolution relied on negotiation between the parties. It focussed on the temporary measures of compensation and the suspension of concessions. The second strand traces the effect of WTO dispute decisions back to the effect of WTO law as such. In *FIAMM*, the Court further explained that WTO dispute decisions do not have direct effect because they apply WTO law which does not have direct effect either.<sup>44</sup> Thirdly, and this is a motivation that the Court does not make explicit, the Court might want to avoid acting in the place of or even against the legislator.<sup>45</sup> It should be added that this is not to say that WTO law does not play a role in disputes before the Court of Justice. The Court routinely interprets secondary EU law consistently with WTO law.<sup>46</sup>

The issue of the exclusive jurisdiction of the Court of Justice for the interpretation of EU law has not been a central issue in the discussion of the (potential) effects of decisions of the WTO dispute settlement bodies.<sup>47</sup> However, decisions exist in which the Panel or Appellate Body took a position on the allocation of responsibility on the basis of the division of competences or tasks between the EU

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<sup>41</sup> ECJ Case C-93/02 P *Biret International v Council (Biret)* [2003] ECR I-10497.

<sup>42</sup> ECJ Case C-377/02 *Van Parys* [2005] ECR I-1465. See on the same issue and with the same outcome in more detail Advocate General Léger C-351/04 *IKEA Wholesale* [2007] ECR I-7727, paras 77 et seq.

<sup>43</sup> ECJ Cases C-120/06 P and C-121/06 P *FIAMM v Council and Commission* [2008] ECR I-6513.

<sup>44</sup> *Ibid.*

<sup>45</sup> See also [Chap. 7](#) of this volume.

<sup>46</sup> See for example ECJ Case C-70/94 *Werner v Germany* [1995] ECR I-3189, para 23 and ECJ Case C-83/94 *Leifer and Others* [1995] ECR I-3231, para 24; but see also for an example where the Court did not have recourse to the technique of consistent interpretation ECJ Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723. See in more detail on the attitude of the Court of Justice to giving effect to WTO dispute decisions [Chap. 7](#) of this volume.

<sup>47</sup> This is very different for the ECtHR, see *infra*.

and its Member States under EU law.<sup>48</sup> The situation is comparable to the discussion on future scenarios in which the ECtHR might give binding rulings in which it touches upon questions of internal EU law.<sup>49</sup> In cases that could have been problematic, the Appellate Body has displayed considerable deference towards the EU. In the case of *Selected Customs Matters*, for instance, the Appellate Body was essentially invited to declare that the entire EU customs system was not sufficiently coherent.<sup>50</sup> However, it chose not to enter into this argument.

## 5.4 The Future: The EU Acceding to the European Convention on Human Rights

### 5.4.1 Accession Negotiations

The most topical example of the EU becoming a contracting party to an international convention is its accession to the ECHR.<sup>51</sup> The accession discussion has been ongoing since the 1970s<sup>52</sup> and culminated in 1994 with the Court of Justice terminating all accession attempts under the old Treaty framework.<sup>53</sup> The situation changed on 1 December 2009 with the entry into force of the Lisbon Treaty. The EU's accession to the ECHR has now become an obligation under EU law.<sup>54</sup>

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<sup>48</sup> See e.g. WT/DS62/R *European communities—customs classification of certain computer equipment (LAN case)* (Complainant: United States) 22 June 1998; WT/DS67 *United Kingdom—Customs Classification of Certain Computer Equipment* (Complainant: United States) 22 June 1998; WT/DS68 *Ireland—Customs Classification of Certain Computer Equipment* (Complainant: United States) 22 June 1998.

<sup>49</sup> See above.

<sup>50</sup> Cases WT/D315/1 *European Communities—Selected Customs Matters*, request for consultation by the US, 21 September 2004; WT/DS 315/R *European Communities—Selected Customs Matters*, Report of the Panel, 16 June 2006, paras 2.2–2.31; WT/D315/AB/R *European Communities—Selected Customs Matters* Report of the AB, 13 November 2006, para 69.

<sup>51</sup> Official talks on the EU's accession to the ECHR started on 7 July 2010. On the side of the Council of Europe, its Steering Committee for Human Rights (CDDH) negotiated with the Commission the necessary legal steps for the EU's accession to the ECHR. The draft accession agreement together with its explanatory report was finalised in June 2011 (Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)16). See also [Chap. 6](#) of this volume.

<sup>52</sup> See e.g. Memorandum of the Commission of 4 April 1979, Bulletin of the European Communities, supp. 2/79.

<sup>53</sup> ECJ Opinion 2/94 *accession of the Community to the ECHR* [1996] ECR I-1759.

<sup>54</sup> Article 6(2) TEU “The Union shall accede...” and Protocol 8. See also on the side of the ECHR Article 59(2) ECHR as amended by Protocol 14.

Jean Paul Jacqué predicted that the accession of the EU to the ECHR will “deprive academics and lawyers involved in the European legal discourse of one of their favourite topics of discussion”,<sup>55</sup> namely what the relationship between the two courts should be and how to deal with conflicting substantive decisions. Yet as Jacqué’s further analysis demonstrates, not all issues have been finally resolved and also actual accession might still be a long way off.<sup>56</sup> One remaining (technical) issue is for instance that the EU may make reservations, declarations and derogations under the Convention when it accedes to the ECHR.<sup>57</sup> The Convention is not *one* comprehensive list of human rights. It consists of multiple protocols<sup>58</sup> that need to be separately ratified and contracting parties to the ECHR, including EU Member States, have chosen not to be bound by particular provisions (by making a reservation).<sup>59</sup> An example is the UK’s reservation concerning Article 2 of the First Protocol, the right to education, in which the UK states that it will respect parents’ religious and philosophical convictions to the extent that this is compatible with providing efficient instruction and training and avoids unreasonable public expenditure. The EU’s reservation will determine the scope of protection under the Convention for the whole realm of EU law, including for the Member States when acting within that realm, be it by implementing EU law or even by derogating from EU law.

The EU’s concern with the Court of Justice’s autonomy and indeed its monopoly to interpret EU law was one of the dominant points of discussion in the

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<sup>55</sup> Jacqué 2011.

<sup>56</sup> The CDDH submitted the draft accession agreement (8th Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission, Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)16) on 14 October 2011 to the Committee of Ministers of the Council of Europe (see para 15 of Document CDDH(2011)009). The Parliamentary Assembly of the Council of Europe as well as both Courts will give their opinion on the agreement. It will then need to be adopted by the Committee of Ministers. The EU will finally accede to the ECHR after the accession agreement has entered into force, which will be the case after it is ratified by all states parties to the ECHR as well as the EU itself.

<sup>57</sup> Document CDDH-UE(2011)16 *ibid.*, para 27.

<sup>58</sup> On 1 October 2011, 15 protocols are open for signature. Protocol 1 (property; education; elections); Protocol 4 (civil imprisonment, free movement, expulsion); Protocol 6 (restriction of death penalty); Protocol 7 (crime and the family); Protocol 12 (discrimination); Protocol 13 (complete abolition of death penalty) and of course on procedural issues Protocol 14 (entered into force on 1 June 2010) as well as Protocol 11 (entered into force on 1 November 1998).

<sup>59</sup> Article 57 ECHR; see also on the necessary clarity of reservations: ECtHR *Belilos v Switzerland* [1988] Application No. 10328/83. For a valid reservation see ECtHR *Jecius v Lithuania* [2002] Application No. 34578/97. For a list of all declarations and reservations by all Contracting Parties see: <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=06/06/2011&CL=ENG&VL=1> (last visited on 23 April 2012).

negotiation on the terms of the EU's accession to the ECHR.<sup>60</sup> On the side of the ECHR, further technical and legal modifications, such as the establishment of the co-respondent mechanism,<sup>61</sup> were conceded to ensure the autonomous judicial authority of the Court of Justice over EU law.<sup>62</sup> The co-respondent mechanism is aimed at addressing the difficulty of apportioning responsibility. Apportioning responsibility is not the same as attribution, but it cannot be completely disjointed either.<sup>63</sup> Attribution to the EU or its Member States, however, cannot ignore the power division between the EU and its Member States under internal EU law. This is where the ECtHR could deliver rulings that threaten the judicial monopoly of the Court of Justice to give an autonomous and binding interpretation of EU law. The situation appears to be comparable with the situation under consideration in Opinion 1/91. In this case, the Court found the system of judicial supervision under the EEA incompatible with EU law because the EEA Court would have had to "rule on the respective competences of the Community and the Member States" in order to decide who would have been the correct party to the dispute under the mixed agreement in each case.<sup>64</sup> The division of competences was a problem under the EEA Agreement but not under the ECAA Agreement because the former was a mixed agreement while the latter was an agreement between the Community and third states (the EU Member States were not parties) at the time it was submitted to the Court of Justice for an opinion on its compatibility with EU law.<sup>65</sup>

The final draft accession agreement introduces a co-respondent mechanism, with the joint responsibility of the respondent and co-respondent for the common case, in order to disburden the Strasbourg Court from the task of assessing the distribution of competences between the EU and its Member States. Further, if the Court of Justice was not involved in the case and the EU becomes a co-respondent it is possible to stay the proceedings before the ECtHR and give the Court of Justice the opportunity to scrutinise compliance with the Convention. This is similar to the arrangements made under the second EEA Agreement<sup>66</sup> and under the ECAA Agreement.<sup>67</sup> Both place the Court of Justice in the privileged position that it can be asked for an interpretation before the ruling is given. Both

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<sup>60</sup> Lock 2011. See also the Robert Schuman Foundation's Policy Paper, European issues No. 218, of 7 November 2011.

<sup>61</sup> Article 3 of CDDH-UE (2011) 16fin; see also the Explanatory report to the agreement, para 54.

<sup>62</sup> Explanatory report to Protocol No. 14, para 101.

<sup>63</sup> See the discussions on attribution in ECtHR *Behrami & Behrami v France* [2007] Application No. 71412/01; ECtHR *Saramati v France, Germany and Norway* (GC) [2007] Application No. 78166/01. See also Articles 3 and 4 of the draft articles on the responsibility of international organisations, 2011.

<sup>64</sup> ECJ Opinion 1/91 *EEA* [1991] *ECR* I-6079, para 34.

<sup>65</sup> The ECAA Agreement had been substantially amended and had become a mixed agreement by the time it was signed in 2006. See Bronckers 2007, 609.

<sup>66</sup> Accepted by the Court of Justice in Opinion 1/92 *EEA II* [1992] *ECR* I-2821.

<sup>67</sup> ECJ Opinion 1/00 *ECAA* [2002] *ECR* I-3493.

substantive parts of the EEA and the ECAA Agreements are tailored according to the model of EU law. The ECHR, by contrast, does not replicate EU law. Yet, many rights under the Charter of Fundamental Rights are largely identical to the ECHR. Hence, even though it is rather the Charter that is drawn up with an eye on the Convention than the other way around, the substantive overlap is comparable.

Finally, the Court of Justice might be asked to give an opinion on the compatibility of the (future) ECHR accession agreement with EU law. However, it is difficult to imagine that the Court will block the way to accession. This was similar when the Court was asked to give an Opinion on the WTO Agreement.<sup>68</sup> Here, too, it would have been a disaster if internal quarrels had hindered the EU in acceding to the WTO. The EU had already taken over large parts of the Member States' activities in the WTO.

#### 5.4.2 A Comparison with the Status Quo

The question is whether at present (before EU accession to the ECHR) the ECtHR could not be seen as facing the exact same questions of allocating (rather than apportioning) responsibility between the EU and its Member States. The EU cannot—until accession—be held responsible before the Strasbourg Court. This does not exclude holding the Member States responsible under the ECHR even if they merely execute or implement EU law.<sup>69</sup> Yet, their responsibility does not cover the actions of the EU that cannot be attributed to them. In the case of *Connolly*, for instance, the ECtHR rejected the admissibility of an application by an employee of the European Commission challenging, on several accounts, a disciplinary procedure that had resulted in the suspension of the applicant from work.<sup>70</sup> The decision of whether the Member States can be held responsible for actions of the EU or whether the actions exclusively fall within the independent internal EU sphere also require an interpretation of the internal workings of the EU. The difference after accession will be that the EU itself is bound under international law to accept the ECtHR's rulings and give effect to them. This will place the Court of Justice in the position to have to determine their binding force and status within the EU legal order.

It might seem exaggerated to consider *Connolly* as an example of a type of ruling that could threaten the autonomy of the EU. However, this case turns on the question of whether the contested act was an act of the EU or whether it was an act of the Member States. This evaluation requires a closer look at the internal

<sup>68</sup> ECJ Opinion 1/94 WTO Agreement [1994] ECR I-5267.

<sup>69</sup> ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (GC) [2005] Application No. 45036/98.

<sup>70</sup> ECtHR, *Connolly v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and UK*, Application No. 73274/01 (available in French only).



workings of the EU. Similarly, in the well-known case of *Matthews* concerning the right of the citizens of Gibraltar to vote for the European Parliament (EP), the ECtHR examined whether the EP had the “characteristics of a “legislature” in Gibraltar”,<sup>71</sup> which can only be decided in view of the function of the EP under EU law. Further in the case of *Bosphorus*, concerning the impoundment of an aircraft in Ireland intended to give effect to a sanctions regime adopted by the UN and implemented by an EU regulation, the ECtHR examined the legal nature and force of Ireland’s obligation under the relevant regulation. The Court specifically discussed that an EU regulation is ““binding in its entirety” and “directly applicable” in all Member States [which] means that it takes effect in the internal legal orders of Member States without the need for domestic implementation”.<sup>72</sup> The nature of regulations was and still is straightforwardly determined by the European Treaties.<sup>73</sup> Examining the nature and extent of Member States’ obligations under EU law, however, can also be more difficult and controversial. This would be the case, for instance, if the ECtHR was to examine one of the EU law concepts based on case law, such as the direct effect of directives or the obligation of consistent interpretation—or primacy for that matter.

A particular problem could arise from the lack of jurisdiction under the Common Foreign and Security Policy (CFSP). CFSP is a policy area in which, even after Lisbon, the Court of Justice does not have the power to give preliminary rulings and can receive direct actions for a review of legality (not interpretation) only as far as they are directed against a very specific measure, namely CFSP decisions providing for restrictive measures against natural or legal persons within the meaning of Article 215(2) TFEU.<sup>74</sup> This could potentially give rise to problems. First, the EU is carrying out multiple peace-keeping missions under the CFSP that could lead to potential complaints before the ECtHR.<sup>75</sup> Second, CFSP decisions providing for restrictive measures against individuals could give rise to questions of interpretation relating to an alleged breach of human rights that the Court of Justice cannot receive. One could think of a case relating to the interpretation of “the funds and other financial assets or economic resources”<sup>76</sup> or whether these funds actually belong to the listed person, similar to the case of *M*.<sup>77</sup> Third, to date sanctions adopted under Article 215(2) TFEU are still based on a pre-Lisbon common position that is governed by

<sup>71</sup> ECtHR *Matthews v UK* [1999] Application No. 24833/94, paras 45 et seq.

<sup>72</sup> ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (GC) [2005] Application No. 45036/98, para 145.

<sup>73</sup> Article 288 TFEU.

<sup>74</sup> Article 275 TFEU.

<sup>75</sup> The best example of this is a *Behrami*-type situation, see ECtHR *Behrami & Behrami v France* [2007] Application No. 71412/01.

<sup>76</sup> See Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, *OJ* 2001 L 344/93, Article 2.

<sup>77</sup> ECJ Case C-340/08 *M and Others* [2010] *ECR* I-3913. This is a case concerning the question of whether the subsistence allowance of a spouse of the listed person was covered.



pre-Lisbon rules and consequently remains outside of the Court's reach.<sup>78</sup> Fourth, if counter-terrorist sanctions against individuals have taught us anything it is that the EU institutions are willing to interpret their Treaty powers creatively to adopt whatever measure they deem necessary. Hence, future CFSP measures could impact on the rights of individuals in ways that we cannot predict today. However, particularly in the area of CFSP, EU accession to the ECHR could, from the perspective of the individual, make all the difference between having access to justice or not, since actions by the EU will no longer fall outside the personal scope of the Strasbourg Court's jurisdiction.<sup>79</sup>

### 5.4.3 Decisions of the ECtHR Under Domestic Law

Rather than making the EU more of a “human rights organisation”<sup>80</sup> comparable to the ECHR, accession will place the EU in a position more similar to its Member States. However, the fact that the EU will be in a state-like position as regards its obligations under the ECHR means that it is bound under international law just as all other Contracting Parties. It does not immediately answer the question of what the normative impact of ECtHR decisions will be in the EU legal order. As with other international law, the reception in the domestic legal order is determined by domestic law.

States receive decisions of the ECtHR in very different ways. The German Federal Constitutional Court (GFCC), for example, has explicitly ruled that the Convention, just as any other binding international law in Germany, has the same status as ordinary laws (*Gesetzesrang*) and takes effect within the framework of the German Constitution.<sup>81</sup> This means that it ranks below the German Constitution,<sup>82</sup> with the consequence that ordinary courts must observe and apply the Convention, while before the GFCC the ECHR (only) serves as an “interpretation aid” in determining the contents and scope of fundamental rights and fundamental

<sup>78</sup> This practice will continue. In Case C-130/10, *Parliament v Council*, of 19 July 2012, the CJEU confirmed that it is possible to adopt measures under Article 215(2) TFEU in order to give effect to pre-Lisbon common positions [paras 96 et seq]. In the same case, the CJEU interpreted Article 215(2) TFEU broad enough to serve as a legal basis for all existing types of EU counter-terrorist sanctions [paras 50 et seq]. This will strictly limit the future use of Article 75 TFEU—the TFEU sanctions competence that does not require a prior CFSP decision.

<sup>79</sup> ECtHR *Behrami & Behrami v France* [2007] Application No. 71412/01.

<sup>80</sup> Rosas 2011.

<sup>81</sup> GFCC, Decision of 14 October 2004, 2 BvR 1481/04 (*Görgülü*; *ECHR decision*). See more recently GFCC, Decision of 4 May 2011, 2 BvR 2365/09; 2 BvR 740/10; 2 BvR 2333/08; 2 BvR 1152/10; 2 BvR 571/10 (*Preventive Detention*).

<sup>82</sup> See explicitly GFCC, Decision of 4 May 2011 (*Preventive Detention*) *ibid.*, second headnote (*Leitsatz*): “Die Europäische Menschenrechtskonvention steht zwar innerstaatlich im Rang unter dem Grundgesetz.”; see also para 94 “...Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte auf der Ebene des einfachen Rechts...”.

principles protected under the German Constitution.<sup>83</sup> Most recently, the GFCC has accepted that “...decisions of the [...] ECtHR, which contain new aspects for the interpretation of the Basic Law, are equivalent to legally relevant changes, which may lead to the final and binding effect of a Federal Constitutional Court decision being transcended.”<sup>84</sup> The GFCC accepts the ECHR as binding at the level of ordinary laws but uses it as an interpretation aid only for constitutional matters. Indeed, even in cases to which Germany has been a party and where it is consequently legally bound to give effect to under international law,<sup>85</sup> the GFCC only “takes account of the valuations made by the ECtHR”.<sup>86</sup>

Indeed, the GFCC’s approach to the ECHR and the case law of the ECtHR can be compared—as regards the outcome, not the argument—to the current (pre-accession) approach of the Court of Justice. The Court of Justice has given the ECHR special significance in the EU legal order and taken much inspiration from it, including long before a reference to the ECHR was incorporated into the Treaties.<sup>87</sup> More recently the Court has even dropped its traditional “general principles” or “source of inspiration” approach and has started referring directly to the rights guaranteed in the ECHR.<sup>88</sup> However, the ECHR and the case law of the ECtHR are not directly binding sources of law in the EU legal order; they remain highly relevant aids of interpretation before the Court in Luxembourg.

In the UK, the European Convention is not itself part of UK law and the decisions of the ECtHR are not directly legally binding under UK law. The ECHR is given effect by the Human Rights Act 1998. However, the Human Rights Act does not require Parliament to legislate compatibly with the Convention nor does it oblige the courts to disregard national laws that are incompatible with the Convention. The UK Supreme Court decided most recently in the case of *McCaughey*<sup>89</sup> that the principle that the Human Rights Act should mirror the ambit of the European Convention must be balanced against the (national legal) principle that the Human Rights Act cannot operate retrospectively. The case concerned the obligation to conduct an

<sup>83</sup> GFCC, Decision of 4 May 2011 (*Preventive Detention*), para 86: ‘Auslegungshilfe’.

<sup>84</sup> Press release no. 31/3011 of 4 May 2011. See also the first headnote (*Leitsatz*) of the decision of 4 May 2011 (*Preventive Detention*): “Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, die neue Aspekte für die Auslegung des Grundgesetzes enthalten, stehen rechtserheblichen Änderungen gleich, die zu einer Überwindung der Rechtskraft einer Entscheidung des Bundesverfassungsgerichts führen können.”

<sup>85</sup> ECtHR *M v Germany* [2009] Application No. 19359/04 (preventive detention).

<sup>86</sup> Press release no. 31/3011 of 4 May 2011. See also: second headnote (*Leitsatz*) of decision of 4 May 2011 (*Preventive Detention*): “Der Konventionstext und die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte dienen auf der Ebene des Verfassungsrechts als Auslegungshilfen für die Bestimmung von Inhalt und Reichweite von Grundrechten und rechtsstaatlichen Grundsätzen des Grundgesetzes”.

<sup>87</sup> ECJ Case 222/84 *Johnston* [1986] ECR 1651, para 18.

<sup>88</sup> ECJ Case C-413/99 *Baumbast* [2002] ECR I-7091, para 72; ECJ Case C-60/00 *Carpenter* [2002] ECR I-6279, paras 41–2; ECJ Case C-200/02 *Kunqian Catherine Zhu Chen* [2004] ECR I-9925, para 16.

<sup>89</sup> UK Supreme Court *McCaughey* [2011] UKSC 20, 18 May 2011.

investigation into controversial deaths. The UK excluded obligations under national law arising from an event that had occurred before the Human Rights Act had entered into force (the death of the person in question), irrespective of whether the case at hand would have a good possibility of succeeding before the Strasbourg Court. The ECtHR had imposed obligations flowing from an event that had occurred before the state had become a contracting party to the ECHR. Hence, as a basic position the Human Rights Act mirrors the rights under the Convention, but not in all circumstances. Precedence is given to the national understanding of the ECHR, not the interpretation of the ECtHR. Again this does not amount to full incorporation but keeps the ECHR at a distance. In this sense, it allows the UK courts to do the same as the Court of Justice at present (pre-accession): to give the Convention and its interpretation by the Strasbourg Court a domestic reading.

The Netherlands, with a (moderate)<sup>90</sup> monist tradition, takes a different approach: it places binding obligations of international law above the national constitution.<sup>91</sup> Decisions of the ECtHR can be directly invoked before national courts. In this reading, the ECHR offers more protection under Dutch law than currently (pre-accession) under EU law. After accession the precise effects of rulings of the ECtHR under EU law remain to be determined. This explains why from the particular Dutch perspective, EU accession might potentially appear to reduce the rights of the applicant in cases where previously the Netherlands was found by the ECtHR to be the relevant actor. After accession, the EU is asked to determine the internal question of whether a/the Member State(s) and/or the EU is/are responsible. *If* this determination results in the responsibility of the EU and *if* the Court of Justice continues to keep the ECHR and the case law of the ECtHR at arm's length, e.g. by not giving it (at least) the same status as the EU Treaties, the protection of individuals might, from a Dutch perspective, suffer. At the same time, after accession the Court of Justice might be willing to give broader effect to decisions of the ECtHR than Germany and the UK. Hence, it would not be justified to lament a general reduction of protection. The enforcement mechanisms within the EU legal order are strong.<sup>92</sup> Indeed, they are much stronger than the enforcement mechanisms under the ECHR.<sup>93</sup> Further, EU accession will generally fill the gaps revealed by cases such as *Connolly*<sup>94</sup> and resulting from the fact that at present the rulings of the Court of Justice are not subject to review by the ECtHR.

The status and effects of the ECHR and the case law of the ECtHR might still have to be determined by the Court of Justice. Yet, the ECHR enjoys a special

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<sup>90</sup> It is considered moderate because international customary law does have internal effect but does not take precedence over a conflicting rule of Dutch law (HR 6 March 1959; NS 1962,2 (Nyugat)).

<sup>91</sup> Article 94 of the Dutch Constitution. Except for provisions of international agreements that are not binding on everyone ("een ieder verbindend").

<sup>92</sup> Articles 258 and 260 TFEU.

<sup>93</sup> Article 46 ECHR and Protocol 14. The implementation of rulings is monitored by the Committee of Ministers.

<sup>94</sup> See also ECtHR *Behrami & Behrami v France* [2007] Application No. 71412/01.

constitutional force and can be said to fulfil, in the field of human rights, a constitutional function within Europe. It is difficult to see in practice how in a “Union of law”<sup>95</sup> the Court of Justice could follow an argument or give a ruling that openly clashes with a decision of the ECtHR. In any event, the *Rechtfertigungsdefizit*<sup>96</sup> is much lower if the Court does not accept the ECtHR’s position on competence matters concerning internal EU law than on a matter of substantive interpretation of human rights. On a substantive level the two Courts have so far shown great respect for each other’s decisions.<sup>97</sup> The ECtHR has so far had regard to the “specific characteristics of the Union and the Union law”.<sup>98</sup> In the case of *Bosphorus*, the ECtHR went as far as to establish the presumption that the protection under EU law is equivalent to the protection under the Convention if no manifest deficiency is shown in the individual case. This presumption applies to the situation where the ECtHR has jurisdiction because there is a national measure implementing EU law but the Member State did not have any discretion. The draft agreement also recognises the “specific legal order” of the EU.<sup>99</sup> Indeed, while the rules on the side of the ECtHR appear to be fairly detailed there are no guidelines for the Court of Justice as to how to deal with the decisions of the ECtHR. Protocol 8 annexed to the Lisbon Treaty only stipulates that accession may affect neither the competence division between the Union and its Member States (Article 2) nor the exclusive jurisdiction of the Court of Justice (Article 3). Any rules on how the Court of Justice would have to treat decisions of the ECtHR, however, would have to be rooted in the European Treaties to be binding on the Court of Justice and, as the Lisbon Treaty has abundantly demonstrated, Treaty amendments are cumbersome and take a long time. The most practical solution will be to continue to rely on judicial dialogue in different degrees and shades, which would allow being bound in practice by (hypothetical) reservations toward decisions on internal matters of EU law. After accession the ECtHR’s decisions will be formally binding on the Union as a matter of international law. In an extreme case this could result in a finding of non-compliance if the Court of Justice rejects an interpretation by the ECtHR of internal matters of EU law. However, it seems that in most cases it will be possible to reconcile an interpretative difference in a way that does not result in non-compliance.

Finally, the logic behind the ECHR is different from the WTO Agreement. While it is doubtful whether WTO dispute decisions leave room for negotiation, as

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<sup>95</sup> The EU is committed to the rule of law: see Article 2 TEU on values; for case law see e.g. ECJ Case 294/83 *Parti Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339, para 23; ECJ Case 314/85 *Foto-Frost* [1987] ECR 4199, para 16; ECJ Case C-314/91 *Weber v Parliament* [1993] ECR I-1093, para 8.

<sup>96</sup> “Justification deficit”—this term is borrowed from: Habermas 1973.

<sup>97</sup> One case stands out in which, it could be argued, the Court of Justice departed from the position of the ECtHR: ECJ Case C-17/98 *Emesa Sugar* [2000] ECR I-665.

<sup>98</sup> Article 1 of Protocol No. 8 relating to Article 6 (2) TEU dealing with the accession of the Union to the ECHR.

<sup>99</sup> Final paragraph of the preamble to the draft agreement.

the Court assumes, the WTO Agreement is a framework in which members negotiate with each other on a formally equal footing. In the ECHR, the core objective is to protect citizens from their States. This is not even formally based on the assumption of equality, or reciprocity for that matter. Finally, while there might be political or economic considerations to delay compliance with a WTO dispute decision, it is more difficult to see why the EU should not immediately give effect to a decision of the ECtHR, e.g. legislative reform to prevent similar violations or individual measures to erase the consequences, such as compensation. It seems more difficult to see an overriding domestic policy consideration that would justify a delay in the latter case.

## 5.5 Conclusions: If the EU Can Have Its Cake and Eat It, It Should Also Do So!

Interpreting case law and identifying legal rules and principles are the tasks of legal scholars. These are daunting tasks in the face of the Delphic case law of the Court of Justice in the area of external relations. Caution is advised in drawing too far-reaching general conclusions from individual cases that might be limited to their particular circumstances.<sup>100</sup> However, it appears fair to say that the Court of Justice has a long-standing and ongoing concern for the autonomy of the EU legal order and its own jurisdiction. Further, in a world where the autonomy of international players is exposed to more and more external constraints this concern is unlikely to go away.

The negotiations surrounding the accession of the EU to the ECHR, as the probably most influential human rights regime, are the most recent example where the EU's autonomy concern has posed and will continue to pose many questions. At the same time, the EU's accession to the ECHR might lead the Court to accept for the first time the binding force and direct effect of another court's decisions concerning a subject-matter that places exceptional constraints on autonomy. It will be interesting to see the Court of Justice's understanding of the precise status and effects of the ECtHR's decisions within the EU legal order.

Generally speaking, while the Court of Justice has taken a balanced intermediate approach to international law and its effects within the EU legal order,<sup>101</sup> it has been cautious concerning the effects of decisions of (quasi-)judicial bodies. Indeed, so far it has not accepted that it must be bound by the decisions of any external (quasi-)judicial body. Yet, both EU law (Article 6(3) TEU) and the status

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<sup>100</sup> Several scholars have convincingly argued this with regard to the investment treaty cases: ECJ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805; ECJ Case C-433/03 *Commission v Germany* [2005] ECR I-6985; and ECJ Case C-246/07 *Commission v Sweden* [2010] ECR I-0000. See e.g. De Baere 2011, 111.

<sup>101</sup> Eckes 2011.

of the ECHR (“constitutional instrument of European public order”) can be cited in support of the argument that decisions of the ECtHR require and deserve greater force than decisions of other external (quasi-)judicial bodies, including the WTO dispute settlement bodies. However, the choice is not black and white. The Court of Justice could generally accept the binding force and direct effect of decisions of the ECtHR but express reservations if and when the ECtHR goes too far in interpreting EU law. On the substantive level, the ECHR lays down a minimum standard<sup>102</sup> only and the ECtHR has been firm in its rulings but cautious in establishing a margin of appreciation for the Contracting Parties. With particular regard to the Court of Justice, it has even gone one step further by establishing a presumption of equivalent protection.<sup>103</sup> Deference appears to be the soft approach by international courts that have no interest in accepting a complete EU shield that would turn the EU into a federation and would no longer allow the court to directly hold Member States responsible.

One conclusion could be that the danger for the autonomy of the EU legal order has taken too central a place in the discussion surrounding EU accession to the ECHR. We have seen that the current situation (the EU is not a Contracting Party) does not exclude pronouncements on aspects of internal EU law either when the ECtHR determines whether Member States can be held responsible or whether the particular act in question falls exclusively within the realm of influence of the EU institutions. At the same time, several considerations might justify the Court of Justice’s (and ultimately the EU’s) focus on autonomy. First, the EU is a unique and very complex legal construction. Particularly internally, it has come a long way. EU law is of a highly integrated nature; it develops under the dicta of the Court of Justice, which has very much helped to establish its ‘differentness’; new legal constructions such as the directly elected European Parliament and perhaps even more importantly EU citizenship give it state-like features<sup>104</sup>; the principle of sincere cooperation transforms “the status of sovereign States into that of Member States of the European Union.”<sup>105</sup> However, the separateness of the EU both from national and international law are to a large extent based on case law and hence the Court of Justice’s autonomous interpretation of EU law—this is precisely the focus of the Court’s concern.

Second, international law considers states as the ultimate, sovereign and equal actors.<sup>106</sup> Even if international law is evolving and is increasingly recognising

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<sup>102</sup> Article 53 ECHR.

<sup>103</sup> ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (GC) [2005] Application No. 45036/98. Of course, it remains uncertain what will happen with the presumption after EU accession to the ECHR.

<sup>104</sup> For an argument on the importance of the latter see: Hoeksma 2011.

<sup>105</sup> Neframi 2010, 323.

<sup>106</sup> Article 2(1) UN Charter; Kelsen 1966, 290–294 and 551–588; Brownlie 2008. See even Hart 1961, 217. On political sovereignty, see Beck 2002, 48–49.

individuals<sup>107</sup> and non-state entities<sup>108</sup> as actors, it is and remains state-centric. States, including EU Member States, remain “powerful if not predominant” players even in the globalised world,<sup>109</sup> even if their sovereignty is in tension with the increasing rule of law pretensions of international law<sup>110</sup> and their power might at times be “eroded or even reconfigured” by normative cross-border activities.<sup>111</sup> By contrast, non-state entities, such as the EU, have to establish and defend their separateness from international law and their ability to take legally relevant action. Theoretically, the dilemma of the EU’s differentness has only been unsatisfactorily solved by the *sui generis* thesis,<sup>112</sup> which acknowledges the inaccuracy of the binary understanding of a state or non-state entity. It does not however offer a better theoretical foundation for how international law *should* see the EU. In practice, the transfer of public powers from the Member States to the EU does not have parallels. This particular situation has found recognition not only by the EU Member States that treat EU law differently from international law.<sup>113</sup> Third parties equally enter into mixed agreements with both the EU and its Member States as contracting parties<sup>114</sup> and agree to “disconnection clauses” that allow Member States to remain for their mutual relations within the scope of EU law “disconnected” from the general regime of the international agreement. One could almost go as far as to state that “[a] generalized understanding has emerged that whenever an EU Member State comes to the international negotiation table, the European-law implications will be part of the agenda.”<sup>115</sup>

Third, international human rights regimes are seen as a particular threat even to state sovereignty.<sup>116</sup> In the case of the EU, interpretations of the ECtHR could

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<sup>107</sup> See already in 1965, Coplin 1965, 628 et seq.; focusing on the participation of the individual in the international legal order, McCorquodale 2003. See on the particular subject of individual sanctions, Eckes 2009.

<sup>108</sup> Kingsbury 1992.

<sup>109</sup> Snyder 2010, p. 12. See also Hollis 2005, 137 et seq.

<sup>110</sup> Hathaway 2008, 115 et seq., who ultimately sees international delegation as an exercise of state sovereign authority and not a diminution thereof.

<sup>111</sup> E.g. when they delegate powers to external bodies, Article 24(1) of the German Constitution: “Der Bund kann durch Gesetz Hoheitsrechte auf zwischenstaatliche Einrichtungen übertragen.”

<sup>112</sup> For a good overview see Hlavac 2010.

<sup>113</sup> Many national Constitutions confer a particular status on EU law, different from international law: Article 23 of the German Constitution; The Dutch Raad van State (Council of State) no longer refers to Article 94 of the Dutch Constitution (the effect of binding obligations of international law in the national legal order) but accepts primacy as flowing directly from EU law (e.g.: *ABR v S, Metten*, 7 July 1995, AB 1997, 117); Section 2(1) of the UK European Communities Act of 1972 that is expressed in forthright terms which are absolute and all-embracing. Any rights or obligations created by the Treaty are to be given legal effect in the UK without more ado (*Bulmer v Bollinger* [1974] Ch 401, 419, *per* Lord Denning.).

<sup>114</sup> The majority of international agreements concluded by the EU are mixed agreements (see e.g. Hillion and Koutrakos (eds) 2010).

<sup>115</sup> Licková 2008, 464.

<sup>116</sup> Wotopka and Tsutsui 2008, 724 et seq.



seriously constitute a threat to the complex EU construction, both in terms of internal power division and in terms of the trust of EU citizens in the EU endeavour. With the Member States enjoying the convenience, the EU has taken over adjudication in the WTO. Will it do the same in the field of human rights? From the perspective of legitimacy and the trust of its citizens the stakes for taking on responsibility for the sake of establishing competence appear to be higher in the field of human rights. Should the EU's aim be to be treated on an equal footing with the other Contracting Parties under the ECHR? Would an extension of the *Bosphorus* line to all EU law strengthen the EU's autonomy? It would first of all allow the EU to escape full external control and undermine, to some extent, the objective of accession.

Finally, it remains a possibility that the Court of Justice will be asked to rule on the compatibility of the EU's accession to the ECHR with EU law. Any decision by the Court of Justice against EU accession to the ECHR could be seen to cut both ways. On the one hand, it would be an attempt to protect the EU's autonomy. On the other hand, a negative decision would mean that the EU cannot become a Contracting Party to the ECHR with all the same rights and obligations as a state. Such full membership implies the recognition of a state-like capacity under this particular specialised regime of international law (ECHR). Numerous UN Conventions<sup>117</sup> and Council of Europe conventions,<sup>118</sup> as well as the WTO and the UN Convention on the Law of the Sea,<sup>119</sup> recognise the European Union as capable to participate in specialised international legal regimes on an (almost) equal footing with states. This "third party" recognition of the EU's special features strengthens the EU's argument for separateness (or autonomy) from both its Member States and international law. Further, a negative decision (would be) based on the fear that the EU might lose its autonomy when treated on an equal footing with states. This highlights—to say the least—the EU's weaknesses on this point.

If the EU can have its cake and eat it—have specialised international legal regimes, show additional deference and understanding for its differentness, while claiming the rights of states—it should also do so! From the perspective of the EU, this will further develop its "autonomy in practice", irrespective of lacking theoretical underpinnings and irrespective of the rather hypothetical question of "who has the last word".

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<sup>117</sup> E.g. most recently: UN Convention on the Rights of Persons with Disabilities, available at: <http://www.un.org/disabilities> (last accessed 23 April 2012).

<sup>118</sup> The complete list of the Council of Europe's treaties gives an overview of all Council of Europe conventions open to the EU, available at: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>; indicated in the column "U". Notice also the tremendous increase in recent years: 17 of 135 conventions or additional protocols signed between 1949 and 1989 are open to the EU. 34 of 76 conventions or additional protocols signed between 1990 and 2011 are open to the EU. See also more generally on the "normative interaction" between the Council of Europe and the EU in [Chap. 6](#) of this volume.

<sup>119</sup> See: Articles IX and XI of the WTO Agreement of 1994 and Article 305(1)(f) UNCLOS in combination with Annex IX.



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