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Eckes, C.

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Part III

**Implementation and Effects of IDS  
Rulings in the EU Legal Order**



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# International Rulings and the EU Legal Order: Autonomy as Legitimacy?

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CHRISTINA ECKES\*

## I. Introduction

In its settled case law, the Court of Justice of the European Union (CJEU) defends the autonomy of the EU legal order from national and international law. The latter has recently been reconfirmed in the Court's opinion on the EU's planned accession to the European Convention on Human Rights (ECHR).<sup>1</sup> At the same time, political forces within the EU wish to commit the EU to a growing number of different forms of international dispute settlement (IDS) mechanisms. The Lisbon Treaty has, as is well known, made EU accession to the ECHR possible and, arguably, made it an obligation of the EU institutions. It has also extended the EU's competences to allow it to conclude international agreements concerning foreign direct investment<sup>2</sup> and hence opened up the possibility to set up Investor–State Dispute Settlement (ISDS) mechanisms.<sup>3</sup> The two most prominent and topical examples of IDS mechanisms to which the EU is in the process of committing are, hence, the European Court of Human Rights (ECtHR) and ISDS mechanisms.

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<sup>1</sup> Opinion 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454 (hereinafter 'Opinion 2/13').

<sup>2</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (hereinafter 'TFEU'), Art 207(4).

<sup>3</sup> This is, in any event, the interpretation of the Commission. See in this context the pending Opinion 2/15 *Request for an Opinion Submitted by the European Commission Pursuant to Article 218(11) TFEU* [2015] OJ C363/18 (hereinafter 'Opinion 2/15') on the EU's competence to conclude the Free Trade Agreement with Singapore (SFTA). Member States have concluded about 1,500 bilateral investment treaties, all of which contain similar provisions on investment protection and ISDS. The EU has, so far, only concluded a Free Trade Agreement with Canada (CETA) and SFTA with ISDS. Based on two criteria (market potential and need for better protection of foreign investments) the Commission has compiled a list of five countries and one regional entity (Canada, China, India, Mercosur, Russia and Singapore), which will be privileged partners for the negotiation of the first investment agreements.

The latter may in the future be replaced by an ‘Investment Court System’ as proposed by the Commission in September 2015.<sup>4</sup>

Most recently, the EU has agreed ISDS in the context of Free Trade Agreements with Canada (CETA) and Singapore (SFTA).<sup>5</sup> The negotiations of an investment dispute settlement mechanism in the context of Transatlantic Trade and Investment Partnership (TTIP) are still ongoing.<sup>6</sup> The process of EU accession to the ECHR, after the finalisation of the draft accession agreement in 2013, has for the moment ground to a (temporary) halt as a result of the negative opinion of the CJEU in December 2014. Both ISDS (and the proposed Investment Court System) and the EU’s accession to the ECHR are highly controversial.<sup>7</sup> Many fear that ISDS will interfere with the internal policy making process, circumvent the existing constitutional structures of the domestic polity and lack the independence of domestic or international courts. The ECtHR and EU accession to the ECHR, by contrast, enjoy a reasonably high level of public support. The CJEU fears, however, that accession may undermine the autonomy of the EU legal order.

This chapter investigates the influence that the EU’s participation in IDS has on the autonomy and as a consequence on the legitimacy of the EU legal order. It argues in particular that (a certain degree of) autonomy is necessary for the forms of legitimacy, on which EU law and the CJEU traditionally rely, such as, for example, procedural and reason-based legitimacy.<sup>8</sup> This does not exclude the possibility that other forms of legitimacy may replace them, but it supports the argument that if participation in certain IDS mechanisms reduces the autonomy of EU law and of the CJEU, on face value this also reduces the legitimacy of EU law. This raises the question of whether participation in IDS mechanisms is more problematic for the EU than for nation states. It ultimately also raises the question of whether the EU is well-placed to meet the challenges of the increasingly interwoven (quasi-) judicial landscape of a globalised world.

This chapter is structured as follows. Section II sketches different conceptions of legitimacy, links them to autonomy and introduces the autonomy of EU law, as it is understood by the CJEU. This lays the groundwork for the discussion that follows on how the EU’s autonomy and legitimacy are affected by participation in

<sup>4</sup> See both the Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America of 17 June 2013, available at: <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> and Commission proposal on investment protection and the investment court system (ICS), published on 16 September 2015, available at: [http://europa.eu/rapid/press-release\\_IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5651_en.htm) (with further links).

<sup>5</sup> Neither of the two agreements has entered into force at the time of writing. The EP voted in favour of CETA on 15 February 2017; yet national parliaments must still approve CETA before it can take full effect. A request for an opinion of the CJEU is pending on the EU’s competences to sign and ratify the SFTA. Only after the Court has given its opinion will the approval procedure be launched.

<sup>6</sup> See n 4 above.

<sup>7</sup> Commission consultation on ISDS resulted in 149,399 online contributions, the absolute majority of which were critical or even hostile. The CJEU annulled the draft accession agreement for being incompatible with EU law, see Opinion 2/13 (n 1). See also D Halberstam, “‘It’s the Autonomy, Stupid!’ A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward’ (2015) 16 *German Law Journal* 105.

<sup>8</sup> See s II.A.

IDS mechanisms. Section III categorises different IDS to which the EU is subject and zooms in on the two above-mentioned types of IDS mechanisms: the ECtHR after the EU's accession to the ECHR and the ISDS/Investment Court System. Section IV discusses how these two IDS mechanisms affect the CJEU's position and the autonomy and legitimacy of EU law. Section V concludes.

## II. Legitimacy, Autonomy and the Autonomy of EU Law

This section does three things. First, it differentiates between different forms of legitimacy. Second, it explains how they relate to autonomy. Third, it outlines how the CJEU and the EU legal system rely on the different forms of legitimacy and how the CJEU conceives of the autonomy of the EU legal order. This lays the groundwork for the discussion in the following sections on how different IDS mechanisms impact on the EU's autonomy and legitimacy.

### A. Legitimacy

Legitimacy is the most common answer to the question of political justification, that is, how can the exercise of public power be justified to those who disagree on reasonable grounds? Different theorists have argued about how legitimacy is 'created' and of what it consists. A first distinction should be made between legitimacy in the *normative sense* and legitimacy in the *sociological sense*. The former implies ideas about the moral rightness or wrongness of some action or institution. The latter refers to legitimacy *beliefs*, that is, the attitudes of people. It does not entail a direct moral judgment.<sup>9</sup> While a certain disenchantment with supranational and international structures, such as the EU and the Council of Europe, can be identified by a simple study of national media and politics, this enquiry is not an empirical one. This chapter will not investigate the sociological legitimacy of EU law. This also explains why recognition is here seen as necessary for the authority of EU law, that is, its effect and ability to ensure compliance, but it is not taken account of as a direct source of legitimacy.<sup>10</sup>

Normative legitimacy can be conferred in different ways. The public will confer *democratic legitimacy*.<sup>11</sup> The law confers *legal legitimacy*.<sup>12</sup> The reliability of the

<sup>9</sup> For a different view see J-R Sieckmann, *The Logic of Autonomy: Law, Morality and Autonomous Reasoning* (Oxford, Hart Publishing, 2012).

<sup>10</sup> See s II.B.

<sup>11</sup> For an instructive view see AE Stie, 'Evaluating the Democratic Legitimacy of Institutionalised Decision-making Procedures. A Deliberative Perspective', Fourth Pan-European Conference on EU Politics, Riga 25–28 September 2008: [www.jhubc.it/ecpr-riga/virtualpaperroom/062.pdf](http://www.jhubc.it/ecpr-riga/virtualpaperroom/062.pdf).

<sup>12</sup> Above all, see J Raz, *The Authority of Law—Essays on Law and Morality* (Oxford, Oxford University Press, 2009).

process that produces a decision confers *procedural legitimacy*.<sup>13</sup> Finally, legitimacy can be drawn from reason (*reason-based legitimacy*), which is not based on actual support but on the fact that citizens ‘may reasonably be expected to endorse’ the foundations of a decision.<sup>14</sup>

Legitimacy can, further, be evaluated in terms of whether it meets either a certain procedural or substantive standard. This allows us to distinguish a proceduralist and a substantivist conception of democratic legitimacy; a proceduralist and a substantivist account of reason-based legitimacy; and so forth. Yet, while the procedural and the substantive standard of evaluation are different they should not be seen as unrelated. Procedures cannot be pointless, arbitrary or unjustifiable. They would not confer legitimacy to the outcome. They must serve a substantive purpose, such as ensuring democratic participation, rational decision making, equality or autonomy.

The different sources of legitimacy stand in a *complementary relationship* to each other. The modern constitutional state relies on a combination of these sources, including centrally democratic legitimacy. Modern democracy theory has further moved towards a deliberative rather than a crudely majoritarian understanding of democracy.<sup>15</sup> Deliberative democracy is the banner used for a number of democracy theories. Their core-distinguishing feature is that they do not focus on aggregation of individual pre-political preferences but on a process of open debate leading to an agreed policy (the collective will). Hence, deliberative democracy should not be understood as divorced from or even transcending politics. It is rather the best self-understanding of representative democracy. This results in an essential tension between democratic legitimacy and judicial review, which will be further explored in the following section with reference to the collective autonomy of a polity.

## B. Legitimacy and Autonomy

All of the normative conceptions of legitimacy presuppose a certain degree of autonomy of the structure in which public power is exercised. Autonomy literally comes from auto (self) and nomy (law) and means ‘one who gives oneself one’s own law’. Individual or private autonomy and collective or public autonomy should be distinguished. Kant’s philosophy laid the groundwork for the modern

<sup>13</sup> R Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, Princeton University Press, 2013). Barnett argues that the legitimacy of a Constitution depends on providing procedures that reliably result in just outcomes.

<sup>14</sup> J Rawls, *Political Liberalism* (New York, Columbia University Press, 2005) 137: ‘Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.’

<sup>15</sup> J Elster (ed), *Deliberative Democracy* (Cambridge, Cambridge University Press, 1998) and JS Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford, Oxford University Press, 2002).

understanding of individual autonomy or autonomous agency.<sup>16</sup> He understood autonomy as the capability to recognise morality and to act accordingly, assuming that individuals are autonomous when they operate on the basis of the understanding that they are capable of steering their own actions following reason and transcending the empirical circumstances of nature.<sup>17</sup> Drawing on the writings of Rousseau<sup>18</sup> and Habermas,<sup>19</sup> collective autonomy of a polity is here understood as both *analogous to* and *dependent on* individual autonomy. *In analogy* to individual autonomy, collective autonomy does not require that it must be free of all legal or factual constraints but it must be able to form a collective will based on the assumption that it can steer its own course of action. The polity can consequently commit to external legal constraints without losing its autonomy; yet, it must remain able to form a collective will that aims to determine the political course that the policy takes.<sup>20</sup> *Depending on* individual autonomy, collective will-forming requires that the individual participants actually possess the liberty to make decisions and determine their actions.

Constitutional and judicial review by unelected judges stands in essential tension with, and may even pose a threat to, autonomous will-forming. Yet it also forms part of the construction that ensures collective autonomy. It ensures that the collective will is formed pursuant to pre-established (constitutional) rules, including both procedural and substantive rules that allow the equal and free participation of all in the collective will-forming.<sup>21</sup> Constitutional and judicial review are, hence, a functional and fundamental requirement. On the one hand, constitutional and judicial review protect the framework conditions for collective will-forming and, on the other hand, they ensure that all participants are treated as individually autonomous. Informative in this regard is Habermas' procedural account of democratic legitimacy, which presumes that a collective will can only be formed in a legally structured political community.<sup>22</sup> In this legally structured political community, courts guarantee equal subjective liberties, equal

<sup>16</sup> I Kant, *Grundlegung zur Metaphysik der Sitten und Kritik der Praktischen Vernunft* (Frankfurt, Suhrkamp, 2000).

<sup>17</sup> Kant, *ibid.* See Habermas, who draws on this analogy for his understanding of sovereignty. J Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Polity, 1996).

<sup>18</sup> See J-J Rousseau, *Discourse on Political Economy and Social Contract* (Oxford, Oxford University Press, 1994). Rousseau understands decisions to express the collective will when they have been adopted following procedures that allow all participants to understand themselves as subject only to laws that they have given themselves.

<sup>19</sup> Habermas (n 17) 110: 'only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted' and 449: 'citizens should always be able to understand themselves also as the authors of the law to which they are subject as addressees'.

<sup>20</sup> This presupposes the distinction introduced by Rousseau between the will of all (aggregation of all individual wills) and the collective will (common will formed in a deliberative process).

<sup>21</sup> This follows roughly Habermas (n 17). See for a detailed analysis of Habermas' stand on democracy and judicial review, C Zürn, 'Deliberative Democracy and Constitutional Review' (2002) 21 *Law and Philosophy* 467.

<sup>22</sup> See Habermas (n 17) 448.



membership rights and legal protection of these rights.<sup>23</sup> Constitutionalism and the rule of law are a precondition for democratic legitimacy.

The contribution of courts and the law to deliberative democratic legitimacy is thus ambiguous. They are not *necessarily* seen as limiting democracy, but can also be viewed as reinforcing it. Much depends on the institutional design, the specific issue at stake, and the yardstick that the court both formally and actually uses. While courts may be counter-majoritarian they also engender or preserve deliberation, for example by reducing coercion and protecting space for participation (eg protecting human rights) or by directly protecting deliberative space (eg through media laws). In fact, the same court may be seen at times as limiting or as furthering democracy.<sup>24</sup> Furthermore, besides (at least potentially) engendering an environment contributive to deliberation, certain institutions, such as domestic courts, are constructed in a way that allows them to deliberate more comprehensively about certain choices and take more adequate account of detailed and specialised information than voters. They are also obliged to offer a fuller and better-argued justification for their choices than politicians are. Traditionally, the judiciary thus draws legitimacy from its constitutional mandate (legal legitimacy), the predetermined procedures it follows (procedural legitimacy) and from the convincing quality of its legal reasoning (reason-based legitimacy). Reason-based legitimacy results from judges construing (interpreting and constructing)<sup>25</sup> the law before them through hermeneutics, in a way that ensures that their judicial decisions sit coherently with the ‘relevant’ existing legal propositions.<sup>26</sup>

### C. The Autonomy of EU Law

The CJEU argues, essentially, that the autonomy of the EU legal order requires two things: first, the Court itself must be in the position to determine the content, validity and reach of EU law and, second, this determination must be made within the logic of the EU legal order rather than being dependent on any form of recognition by national or international law.<sup>27</sup> At the same time, the authority

<sup>23</sup> See, for a detailed account and analysis of the extent and intensity of constitutional review foreseen by Habermas, Zürn (n 21).

<sup>24</sup> This is the common understanding of the role of the US Supreme Court, which is viewed as having done one and the other in different periods. See also the ability and inability of the Italian Constitutional Court to apply constitutional checks on Berlusconi (F Hoffmeister, ‘Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?’ in A von Bogdandy and P Sonnevend, *Constitutional Crisis in the European Constitutional Area* (Oxford, Hart Publishing, 2015) 195, 206–10).

<sup>25</sup> R Poscher, ‘Hermeneutics, Jurisprudence and Law’ in J Malpas and H-H Gander (eds), *The Routledge Companion to Philosophical Hermeneutics* (London, Routledge, 2015) 451–65.

<sup>26</sup> N MacCormick, *Rhetoric and The Rule of Law* (Oxford, Oxford University Press, 2005) 189 et seq; N MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Clarendon Press, 1978) 152, 195.

<sup>27</sup> C Eckes, ‘The European Court of Justice and (Quasi-)Judicial Bodies of International Organisations’ in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence* (New York, Springer Science & Business Media, 2012) Ch 5, 85–113.

and effectiveness of decisions of the CJEU and of EU law depend on recognition by national governments, parliaments and judges, as well as individuals.<sup>28</sup> Recognition may take place in different ways, for example, practical recognition when judges apply, and governments follow, EU law, or formal recognition that national law validates or incorporates EU law.

Under the banner of protecting the autonomy (and arguably the legitimacy) of the EU legal order, the CJEU has several times defended its monopoly to determine the relationships between the different legal spheres of national, European and international law *authoritatively for the EU legal order*. Internally, the CJEU insists on an autonomous interpretation of EU law, independent from the legal concepts used by the different national legal orders of the Member States.<sup>29</sup> The main purpose of this internal autonomy is to guarantee the effectiveness and uniform application of EU law across the EU in the different national contexts. Externally, the autonomy of the EU legal order has been most relevant in the CJEU's rulings and opinions on *international* commitments of the EU and its Member States. In this context, the autonomy of the EU legal order serves a number of different purposes: the protection of fundamental rights,<sup>30</sup> the protection of the political institutions' scope of manoeuvre,<sup>31</sup> independence from international law,<sup>32</sup> and above all the protection of the CJEU's monopoly to interpret EU law.<sup>33</sup> The CJEU's concept of autonomy covers institutional procedural and substantive interpretative issues, which both need to remain subject to the independent determination of the CJEU. Ultimately, the different purposes of external autonomy melt into the main objective: to protect the monopolist position of the CJEU as the final arbiter not only of the relation between EU law and international law, but also of all relations within the EU legal order, be they inter-institutional, or between the Member States and the EU, or between individuals and the EU and, to a more limited extent, between individuals and the Member States.

Time and again, the Court has defended its own judicial monopoly by declaring envisaged international agreements that would commit the EU to IDS to be incompatible with the EU Treaties.<sup>34</sup> This has made it difficult for the political

<sup>28</sup> Moreover the CJEU accepts public international law to fill the cracks of EU law if the latter does not comprehensively regulate the field, see eg Case 41/74 *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133, [1974] ECR 1337, referring to the international duty of states to receive back their own nationals, but see also Case C-364/10 *Hungary v Slovak Republic*, ECLI:EU:C:2012:630, considering the application of diplomatic law between Member States.

<sup>29</sup> Established in Case 26/62 *Van Gend en Loos*, ECLI:EU:C:1963:1, [1963] ECR 1.

<sup>30</sup> Joined Cases C-402/05 P and C-415/05P *Kadi and AlBarakaat*, ECLI:EU:C:2008:461, [2008] ECR I-6351.

<sup>31</sup> Case C-149/96, *Portugal v Council*, ECLI:EU:C:1999:574, [1999] ECR I-8395.

<sup>32</sup> The CJEU approaches the ECHR as a source of inspiration of the general principles of EU law.

<sup>33</sup> Opinion 1/91, *EEA*, ECLI:EU:C:1991:490, [1991] ECR I-6079; Opinion 2/94 *Accession to the ECHR* [1996] ECR I-1759; Opinion 1/00 *ECAA*, ECLI:EU:C:2002:231, [2002] ECR I-3493; Opinion 1/09 *Unified Patent Litigation System*, ECLI:EU:C:2011:123, [2011] ECR I-1137; Opinion 2/13 (n 1).

<sup>34</sup> *ibid*. See also N Jaaskinen and A Sikora, 'The Exclusive Jurisdiction of the Court of Justice of the European Union and the Unity of the EU Legal Order' in M Cremona, A Thies and RA Wessel (eds), *The EU and International Dispute Settlement* (Oxford, Hart Publishing, 2016).

actors to submit the EU to binding IDS mechanisms. It also opens up a discussion regarding the reasons for which the courts of one legal system should deny political actors the choice of submitting the domestic legal order to the binding force of rulings of external judicial bodies. This is the core question underlying the discussion of whether the CJEU's aim and manner of protecting the autonomy of the EU legal order is legitimate.

The focus of this chapter lies on the impact that international rulings may have on the ability of the EU to take autonomous decisions that can draw from the above explained forms of legitimacy. First, the internal political and legislative process within the EU offers (limited and often criticised)<sup>35</sup> democratic and procedural legitimacy through the participation of the European Parliament, citizens' consultations and indirect democratic control of national representatives through national structures. In this regard, review by the CJEU may be seen as particularly problematic because it has a stronger entrenching force than ordinary judicial review. The other EU institutions are bound by the decisions of the Court. If the Member States wish to rein in a decision of the CJEU, they will need to amend the Treaties, which involves a long and complex procedure requiring ratification in all 28 Member States. Second, the EU courts and national courts offer legal legitimacy by ensuring that the exercise of public power complies with EU law. And, third, decisions of the EU courts and national courts offer, if they are well-reasoned, reason-based legitimacy. The Lisbon Treaty has introduced a new appointment procedure for judges to the CJEU,<sup>36</sup> which aims to ensure their judicial qualification and, ultimately, their ability to offer reason-based legitimacy. Both the institutional position of the judiciary and its reasoning must, within the framework of the law, be relatively autonomous to be able to offer independent justification through legal, procedural, reason-based legitimacy.

### III. IDS Mechanisms

The EU is the largest trading block in the world. It has concluded many trade agreements and will continue to do so. With its new post-Lisbon competences these will cover matters of investment. In October 2015, the Commission presented its new trade and investment strategy, in which it addressed common criticisms and emphasised that EU trade policy should become more 'responsible', meaning it will be more effective, more transparent and will protect not only the EU's interests, but also its values.<sup>37</sup> The Commission further declared its

<sup>35</sup> See literature on the democratic deficit of the EU, eg A Follesdal and S Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44(3) *Journal of Common Market Studies* 533–62.

<sup>36</sup> Arts 253–55 TFEU.

<sup>37</sup> Commission, 'EU's new trade and investment strategy of October 2015', Foreword by C Malmström, [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf).

conviction that multilateralism, and in particular the use of IDS including in free trade agreements (FTAs), is one way of achieving these aims.

The EU participates in a variety of IDS mechanisms, which are institutionally and contextually very different. For this reason they also raise different problems as regards their potential impact on the autonomy and legitimacy of the EU legal order. Section III.A aims to group IDS in categories and identify which IDS features may be particularly problematic for the EU legal order. Section III.B focuses in on the ECtHR and ISDS as two topical IDS mechanisms, which are potentially problematic from an EU perspective.

## A. Different Categories of IDS Mechanisms

The EU has long been subject to the World Trade Organization (WTO) dispute settlement mechanism. The Agreement Establishing the WTO is a mixed agreement. Both the EU and all its Member States are parties. Within the WTO however, this mixed nature has, in practice, been replaced by a dominance of the EU. However, it should not be forgotten that the EU and the General Agreement on Tariffs and Trade (GATT) did not ‘fall in love at first sight’. Indeed, the GATT’s most important principle of non-discrimination, the most-favoured-nation rule, and European integration stand, at least in principle, in open conflict with each other.<sup>38</sup> Today, however, any broader legal concerns as to the general compatibility of the EU’s WTO membership with EU law are history. Indeed, the EU rates amongst the most active users of the WTO dispute settlement mechanism. It routinely acts as a respondent, including in cases brought by a third state against an EU Member State.<sup>39</sup> At the same time, it is well known that the CJEU holds decisions of the WTO dispute settlement body at arm’s length by not conferring direct effect on them.<sup>40</sup> They are hence binding but cannot be enforced against EU law by private parties.

For the UN Convention on the Law of the Sea (UNCLOS) and the International Tribunal for the Law of the Sea (ITLOS) the CJEU chose a similar route, accepting that the EU is bound but denying direct effect. Since 1998 the EU has been a contracting party to UNCLOS. While the EU (then the European Community)

<sup>38</sup> The most-favoured-nation rule is based on equal treatment and aims to reduce barriers to trade between *all* parties, while regional integration aims to create privileged relations for a group of countries. As a matter of principle this has not changed even though Art XXIV GATT has solved the legal problem.

<sup>39</sup> See C Eckes, ‘The European Court of Justice and (Quasi-) Judicial Bodies of International Organizations’ in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence* (The Hague, Asser Press, 2013) 85–109; Disputes by Country/Territory (*World Trade Organization*) [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm).

<sup>40</sup> *ibid.* See also: A Thies, ‘EU Membership of the WTO: International Trade Disputes and Judicial Protection of Individuals by EU Courts’ (2013) 2(2) *Global Constitutionalism* 237.

had a rather reserved attitude towards the ITLOS at the beginning,<sup>41</sup> by 2000 Chile and the EU had already agreed to establish a special Chamber of ITLOS.<sup>42</sup> Yet since UNCLOS does not have direct effect,<sup>43</sup> it may be expected that ITLOS rulings would also be denied direct effect.

The EU successfully participates in some IDS mechanisms, while others are seen as problematic by the CJEU, for example the ECtHR and, potentially, certain ISD mechanisms. Three criteria seem to allow different IDS mechanisms to be distinguished. First, a distinction can be made between IDS mechanisms that deal with disputes between states (or the EU) and those receiving complaints by *individuals*. The EU is not, so far, subject to any binding IDS mechanism that receives complaints from individuals. Indeed, the EU's own history of integration, which has largely been triggered by decentralised enforcement of EU law by individuals, is a testimony to the force that individual complaint mechanisms may have. Furthermore, it would be more difficult to keep decisions of IDS mechanisms that rule on complaints from individuals at arm's length by denying direct effect to them. Moreover, challenges brought by individuals concern specific legal situations rather than general policies. While a specific ruling may have a powerful influence on general policies, a specific violation of an individual right cannot easily be 'taken account of', it must actually be specifically addressed. Adapting the interpretation of law may not be enough: specific changes may be necessary to remedy the violation. Hence, IDS mechanisms that receive complaints by individuals are *prima facie* more problematic for the autonomy of the EU legal order than intergovernmental IDS.

Second, a distinction may be made with regard to the subject matter of the judicial dispute. Human rights are, for many reasons, a particularly intense interference with the autonomy or sovereignty of a polity. First, human rights are by definition a '*horizontal*' policy, ie they deploy their effect across all substantive policy areas. This raises particular problems with regard to containing the effect of any given ruling, including on the division of competence within a multilayered context. Second, judicial review of human rights constitutes *constitutional* review as opposed to ordinary judicial review. From a democratic perspective, constitutional review by unelected judges is particularly problematic, because human rights are necessarily formulated in a very open manner and require interpreting and filling in based on value choices. Third, human rights have a *cultural* dimension. While a general convergence and integration of human rights norms between different legal contexts may be observed,<sup>44</sup> the differences are often what go to the

<sup>41</sup> The Commission proposed to the Council in 1999 that no preference should be expressed for any of the three dispute settlement procedures provided for in UNCLOS, namely ITLOS, an arbitral tribunal or a special arbitral tribunal. The Council never formally decided on the line proposed by the Commission, and the Commission withdrew the proposal in 2004.

<sup>42</sup> Earlier that year the EU had brought the case before the WTO. Both cases remain suspended at the time of writing.

<sup>43</sup> Case C-308/06 *Intertanko*, ECLI:EU:C:2008:312, [2008] ECR I-4057.

<sup>44</sup> See perhaps E de Wet and J Vidmar, 'Conflicts between International Paradigms: Hierarchy versus Systemic Integration' (2013) 2 *Global Constitutionalism* 196.

core of what a polity sees as defining its identity.<sup>45</sup> Fourth, minimum standards of human rights are difficult to maintain. They often result in a specific determination of how to strike the balance between different rights and, hence, this will determine relatively precisely the scope of manoeuvre left for public policy. This all makes them particularly problematic for the autonomy of the domestic policy maker. It also explains why they have played and continue to play an important role in the debate on EU legal integration. On the one hand, national courts have pressured the EU to protect fundamental rights as a condition for them to accept the primacy of EU law. On the other hand, EU fundamental rights protection is a way of constitutionalising the European legal order, which is largely perceived as happening at the expense of national sovereignty. Fundamental rights remain the subject of continuous tug-of-war matches between the CJEU and the German Federal Constitutional Court (GFCC).<sup>46</sup> Again, the EU's own history may be a warning to the transformative potential of fundamental rights. The CJEU could reasonably expect greater pressure from the highest national courts if it was legally bound and had to enforce external determinations of fundamental rights standards that clashed with the internal, national and/or European interpretations of these rights.

Finally, a distinction should be made based on the institutional setup of the different IDS mechanisms. Some follow a quasi-judicial model of adjudication with institutional safeguards of independence of the judges and a stare decisis system.<sup>47</sup> Some act as a mechanism of last resort by requiring the exhaustion of domestic remedies before actually admitting a case.<sup>48</sup> The institutional set up may impact on the autonomy and legitimacy of the domestic legal order in a nuanced manner. Quasi-judicial models ensure a higher level of legal and procedural legitimacy of the rulings of the IDS mechanism, while the exhaustion requirement allows

<sup>45</sup> For example regarding issues such as abortion in the public debate surrounding the Constitutional Treaty.

<sup>46</sup> In 2013, for example, the CJEU decided Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, paras 19–21, explaining that the EU Charter of Fundamental Rights is applicable to Member States' actions within the 'scope of EU law'. The GFCC in *Counter-Terrorism Database*, Judgment of 24 April 2013, 1 BvR 1215/07, warned the CJEU not to interpret 'scope of EU law' too broadly (s C, last para: 'for the questions ... which only concern German fundamental rights, the European Court of Justice is not the lawful judge according to Art 101 sec 1 GG. The ECJ's decision in the case *Åkerberg Fransson* ... does not change this conclusion. As part of a cooperative relationship between the Federal Constitutional Court and the European Court of Justice (cf BVerfGE 126, 286 <307>), this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the Member States (Art 23 sec 1 sentence 1 GG) in a way that questioned the identity of the Basic Law's constitutional order (cf BVerfGE 89, 155 <188>; 123, 267 <353 and 354>; 125, 260 <324>; 126, 286 <302 et seq>; 129, 78 <100>). The decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR'). The CJEU confirmed its position in Case C-418/11 *Texdata Software*, ECLI:EU:C:2013:588, paras 72–73.

<sup>47</sup> For example, the ECtHR and the WTO Appellate Body.

<sup>48</sup> For example, the ECtHR.

domestic courts a first shot at determining not only the dispute at hand but also the relationship between different legal spheres, and hence allows them to determine the hierarchy of legal relations. The latter does not guarantee deference of the IDS mechanism to the domestic judiciary, but it may allow it to take place in practice. The following section will examine in more detail two examples of IDS mechanisms to which the Member States and the EU institutions aim to commit the EU. These have both been seen as highly problematic either by the CJEU or—where the Court has not yet had the opportunity to rule—by a variety of societal actors and public opinion.

## B. Two Particularly Problematic Examples of IDS Mechanisms

Two IDS mechanisms that the EU has recently agreed, or attempted to agree, are particularly problematic for the autonomy and legitimacy of the EU legal order. One is the EU's submission to the binding judicial authority of the ECtHR, ie EU accession to the ECHR, and the other is ISDS ('the Investment Court System'). Both are IDS mechanisms that would allow individuals to bring legal challenges against the EU. In this regard, they are often compared.<sup>49</sup> Both deal with indeterminate rights and interests. At the same time, they are fundamentally different with regard to their institutional set up and objectives.

### *i. The ECtHR Post Accession to the ECHR*

The ECtHR rules on human rights violations in all policy fields. After accession, this would cover all EU policies, including those falling within the highly politicised ex-Union pillars, now called the Area of Freedom, Security and Justice (AFSJ) and the Common Foreign and Security Policy (CFSP). The ECtHR's review would also extend to secondary EU law adopted pursuant to the legislative procedures of the EU. It would thus constitute classic constitutional review, which can be particularly problematic from a democratic perspective. In order to ensure the political autonomy of the polity, ie the ability of citizens to make their own laws through deliberative democratic processes, constitutional review should not replace the choices of the legislator with those of the unelected judiciary. Habermas considers constitutional review as contributing to the democratic process and not paternalistic to the extent that it enforces procedures and ensures the effective exercise of participation rights, rather than reviewing the content of socio-economic rights.<sup>50</sup> The ECtHR largely aims to protect the autonomous political choices of the Contracting Parties with the legal concept of a 'margin of appreciation' which reserves space for political decisions in which judicial review will not interfere. The margin

<sup>49</sup> S Schill, 'International Investment Law and Comparative Public Law—An Introduction' in S Schill, *International Investment Law and Comparative Public Law* (Oxford, Oxford University Press, 2010) 16.

<sup>50</sup> Habermas (n 17) 242–66.



of appreciation aims to strike the delicate balance of ensuring effective protection of human rights without imposing paternalistic choices. As regards value choices, the EU's position is not essentially different from the position of states. The margin of appreciation may equally ensure the EU's autonomy to make substantive value choices. The great difference between the position of the EU and a state pertains to the ECtHR's ability to make a binding determination of the hierarchical relations between different legal norms, and thus interfere with the power relations within the EU.

In Opinion 2/13, the CJEU found that the agreement setting out the legal framework for EU accession to the ECHR was incompatible with EU law, essentially because it endangered the autonomy of the EU legal order.<sup>51</sup> Indeed, the CJEU treats the concern over autonomy as a second-order reason in the Razian sense of a meta-consideration that displaces all first-order reasons.<sup>52</sup> In other words, in the view of the CJEU, the protection of the autonomy of the EU legal order must be ensured, not on a balance of interests but as an absolute value. As explained above, the CJEU understands the autonomy of EU law to mean that EU law is valid in itself without the intervention or recognition of national or international law. The CJEU regards protecting the autonomy of the EU legal order as identical to protecting its own ability to maintain *from the authoritative perspective of EU law* that EU law 'stems from an *independent source of law*'.<sup>53</sup> This unilateral claim of the CJEU, while remaining unconfirmed by national courts, is central to the balance of powers within the EU legal order. The mutually agreed suspension of the decision over the 'last word' between the CJEU on the one hand and national constitutional and supreme courts on the other depends on the ability of each of the judicial actors (the CJEU and the national constitutional courts) to make their own claims within the logic of their own legal order. If the CJEU's absolute claim of original validity of EU law could be challenged, not only from the perspective of national and international law, but *within the logic of EU law*, this would allow national courts to end the suspension and make a universally valid claim. The core question is hence whether the autonomy threat, as the Court perceives it, is realistic. If this is answered in the positive, the CJEU should, within the framework of its legal mandate under the EU treaties, be seen as correct in protecting the autonomy of the EU legal order, on which its legitimacy and ultimately its existence depends.

<sup>51</sup> See also Jaaskinen and Sikora (n 34); T Lock, 'The Not So Free Choice of EU Member States in International Dispute Settlement' in M Cremona, A Thies and RA Wessel (eds), *The EU and International Dispute Settlement* (Oxford, Hart Publishing, 2016).

<sup>52</sup> Raz calls first-order considerations: 'reasons for action' that have been drawn directly from 'considerations of interest, desire or morality' and second-order considerations: 'reason[s] to act on or refrain from acting on a reason', see J Raz, *Practical Reason and Norms* (Oxford, Oxford University Press, 1975) at 34 and 39, respectively. Raz's framework of first and second-order considerations is often used in the human rights context as an argument against balancing and a justification for giving rights priority over other considerations, see, for example, RH Pildes, 'Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law' (1994) 45 *Hastings Law Journal* 711.

<sup>53</sup> Opinion 2/13 (n 1), para 166. Emphasis added.



Essentially, accession could be a threat for the EU's autonomy for three interconnected reasons. First, the ECtHR enjoys an exceptional status within the EU legal order. It is not only one of the sources of the general principles of EU law, but has over time been vested with an elevated status that requires it to interpret the EU Treaties in conformity with the ECHR. Second, EU law is of international origin. This makes the relationship between the ECHR and EU law different from the relationship between the ECHR and national law in that the 'domestic nature' and hence the foundations of the EU legal order are essentially contested and contestable. From the perspective of international law and the ECtHR, all states are monolithic while the EU can ultimately be dissolved into its Member States. Third, the EU is a compound rather than unitary actor, with numerous internal parts, ie the Member States, which all possess full international personality and may equally contest the original validity of EU law.

As to the first point, the ECHR enjoys a supreme status within EU law. Within the EU legal order, the constitutional status of the ECHR is codified in Article 6(3) of the Treaty on European Union (TEU), which refers to the ECHR, together with the constitutional traditions of the Member States, as the core source for the EU's general principles. Furthermore, Articles 52(3) and 53 of the EU Charter of Fundamental Rights (CFR) underline the particular relevance of the ECHR for the interpretation of the Charter. They declare that a fundamental right, which is recognised both by the Charter and by the ECHR, has the same meaning and scope as laid down by the ECHR and that nothing in the Charter may adversely affect rights protected under the Convention. Furthermore, even though only the Preamble, not the main text,<sup>54</sup> of the Charter refers to the *case law of the ECtHR* the CJEU ruled in *J McB v LE* that where rights in the Charter correspond to rights in the ECHR the Court of Justice should follow the ECtHR's case law.<sup>55</sup> Moreover, EU fundamental rights, which are not only inspired but interpreted in line with the ECHR and the case law of the ECtHR, are part of the 'foundations' of EU law. In the case of *Kadi I* the Court ruled that these foundations constitute a layer of law that is hierarchically superior to the rules expressed in them.<sup>56</sup> That particular case concerned the right of Member States to derogate from EU law under Article 351 TFEU, which the Court held to be limited by these foundations. As a consequence, the foundations are vested with a status supreme to 'ordinary' primary law. This reading of the legal hierarchy between the foundations of the Union, based inter alia on the ECHR and EU primary law, is confirmed by the *Cresson* and

<sup>54</sup> Charter of Fundamental Rights of European Union [2000] OJ C364/1, Art 52(3) (hereinafter 'Charter of Fundamental Rights').

<sup>55</sup> Case C-400/10 *PPU JMcB v LE*, ECLI:EU:C:2010:582, [2010] ECR I-8965, para 53. The explanations to the Charter provide a list of 'corresponding rights'. This appears to offer a good basis for interpretation of the scope of the CJEU's ruling.

<sup>56</sup> *Kadi* (n 30) paras 303–04.

*Ocalan* cases.<sup>57</sup> In both cases, the CJEU held that EU primary law must be read in the light of the ECHR.

Post accession, the ECHR would be legally binding on the EU and the EU institutions, both under international and EU law. Furthermore, the ECtHR's rulings in cases to which the EU is a party would become directly binding on the EU. Yet in practice, national courts take account of the ECtHR's case law more broadly, not only in cases to which their state was a party. For the Member States, in addition to their international legal obligations, the ECHR would become binding within the scope and as a matter of EU law. The EU courts, as well as national courts, would have to enforce the ECHR and the binding decision of the ECtHR above EU law.<sup>58</sup> At the same time, the CJEU would, of course, continue to hold the monopoly of judicial interpretation over the EU fundamental rights and the foundations of EU law. Technically, this would allow the CJEU to insist on an interpretation that differs from the position of the ECtHR. Yet in the light of the clear choices of Article 6(3) TEU and Articles 52(3) and 53 CFR, it would be difficult for the CJEU to change its position on the elevated status of the ECHR.

As to the second and third points, the 'domestic' nature of the EU legal order, its 'separateness' from international law and its 'original validity' claim are constructions of the CJEU. The CJEU and most EU legal scholars conceive of the EU legal order as a (quasi-)constitutional system.<sup>59</sup> By contrast, international law and international legal scholars understand EU law as a special and potentially self-contained subsystem of public international law.<sup>60</sup> The EU's claim to autonomy from international law is further *legally limited* by the fact that the Member States collectively have the power to amend the treaty framework. Moreover, while the primacy of EU law is in practice widely accepted, national constitutional and supreme courts, national governments and national legal scholars dispute the Court's original validity claim. This constellation, in which the international legal framework imposes limits and national actors call the autonomy of EU law into question, makes the EU legal order as constructed by the CJEU *essentially contested and contestable*. In practice, the different *essentially irreconcilable* positions have amounted to a delicate system of checks by national constitutional and supreme courts and balances of different political forces, in which all actors 'bark but not bite'.<sup>61</sup> This delicate equilibrium of irreconcilable claims to sovereignty and

<sup>57</sup> Case C-432/04 *Commission of the European Communities v Édith Cresson*, ECLI:EU:C:2006:455, [2006] ECR I-6387, para 112; Case C-229/05 P *Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK) and Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v Council of the European Union*, ECLI:EU:C:2007:32, [2007] ECR I-439, conclusion in para 83.

<sup>58</sup> Art 46(1) ECHR; see the discussion of the status of the ECHR within the EU legal order above.

<sup>59</sup> For the CJEU, see *Kadi* (n 30); Case 294/83 *Parti écologiste 'Les Verts' v European Parliament*, ECLI:EU:C:1986:166, [1986] ECR-1339. For legal scholars, see eg R Schütze, *European Constitutional Law* (Cambridge, Cambridge University Press, 2012).

<sup>60</sup> See eg the attempts to accommodate the EU in the ARIQ.

<sup>61</sup> See differently: N Petersen, 'Karlsruhe Not Only Barks, But Finally Bites—Some Remarks on the OMT Decision of the German Constitutional Court' (2015) 15 *German Law Journal* 321.

autonomy functions because none of the parties hold the monopoly of interpreting the nature of EU law or the relationship between the different legal spheres. Each actor can only make claims, which are valid within the logic of their own legal order.

This would change after accession. The ECtHR sees the EU as an ‘international organization’ to which the states ‘have transferred part of their sovereignty’.<sup>62</sup> It refers to EU law as ‘international legal obligations’ of the contracting parties.<sup>63</sup> Indeed, the core of its argument in *Bosphorus*, justifying the presumption of equivalent protection, is based on a view of the CJEU as an ‘international machinery for supervising fundamental rights’.<sup>64</sup> Hence, the international nature of EU law is closely interlinked with the ECtHR’s deference to the CJEU. Indeed, the ECtHR accepts ‘that compliance with European Union law by a Contracting Party constitutes a legitimate general-interest objective’.<sup>65</sup> Post accession, the *Bosphorus* doctrine would, logically, no longer be applicable,<sup>66</sup> but this does not mean that it should be expected that the ECtHR would also change its reading of EU law as international law. Member States and, in particular, national courts, can rely on international law (including rulings of the ECtHR) in order to challenge the CJEU’s construction of the EU legal order. Indeed, rulings of the ECtHR that challenge the CJEU’s perspective of the EU as an autonomous legal order would, after accession, be a powerful tool in the hands of the Member States and national courts which could be used to challenge the EU legal order from within. This view of the EU law as international law, with the attached consequences both for the relation between EU law and international law and EU law and national law, would be binding on the CJEU. This would potentially allow national courts to drive a wedge into the judicial construction of the EU as an autonomous legal order.

The situation of the EU is also very different from the situation of federal states. While federate units may politically challenge the federal level, they are part of a hierarchical legal structure that cannot be essentially contested within its own logic. Moreover, they do not—as long as they are part of the federation—enjoy an independent status as subjects of international law for purposes of state responsibility. On the contrary, under international law and in IDS mechanisms (including the ECtHR) federate states are treated as one unitary unit. Federate units cannot act independently of their federal level on the international plane, nor can they independently be held responsible pursuant to the rules of state responsibility.

<sup>62</sup> *Bosphorus Hava Yollari Turizm ve Ticaret AS v Ireland* (App No 45036/98) (2006) 42 EHRR 1, para 154 and following case law.

<sup>63</sup> *ibid.*

<sup>64</sup> For example *Michaud v France* (Application no 12323/11) (ECtHR, 6 December 2012).

<sup>65</sup> *Bosphorus* (n 62), paras 150–51.

<sup>66</sup> C Eckes, ‘EU Accession to the ECHR: Between Autonomy and Adaptation’ (2013) 76 *The Modern Law Review* 254. Considering the application of *Bosphorus* post-accession as uncertain: L Besselink, ‘The Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions’ (*FIDE*, 2012) [www.fide2012.eu/index.php?doc\\_id=94](http://www.fide2012.eu/index.php?doc_id=94).

This also means that they cannot actively rely on international law to challenge the status or existence of the federal level.

By way of conclusion, after accession the ECtHR would exercise constitutional review over fundamental political choices made by the EU institutions. Human rights under the ECHR not only allow the ECtHR to make value choices, but with their indeterminacy they even *require* such choices. Yet, even more relevant for the autonomy of the EU is the fact that the ECtHR would also rule on the relationship between legal spheres, which is interpreted very differently by the ECtHR (EU law as international law subject to the rules of international law) and the CJEU (autonomous domestic legal order). Post accession, the ECtHR would offer a different interpretation of the relationship between EU law and international law that would be *binding on the EU and the CJEU*, potentially even *with an elevated status within the EU legal order*, and that would allow national courts to challenge the core relationship between national, international and EU law from *within the logic of EU law*. This would allow national courts to undermine the monopoly of legal interpretation of the CJEU over EU law.

I should add that I do not argue here that the CJEU's reading of the original validity of EU law is any more convincing than the national or international narrative. I simply point out that accession, because it allows national courts to rely on international law and the case law of the ECtHR which at present enjoys an elevated status within the EU legal order, would impact on the delicate equilibrium of irreconcilable claims to sovereignty and autonomy within the EU legal order. I agree with the CJEU that making the ECHR and the case law of the ECtHR directly binding on the EU, ie accession, has the potential to undermine the status quo of suspended irreconcilable claims to sovereignty and autonomy. This would challenge the CJEU's ability to interpret EU law as if the EU legal order was a domestic and autonomous legal order, because the Court would be bound by an external legal source enjoying an elevated status within its own legal order, which would be legally binding (cases to which the EU is a party) or at least authoritatively determinative (all case law of the ECtHR) for both the EU and its Member States. This would have consequences for the EU legal order, which could no longer determine its own course as if it was autonomous, as the CJEU currently interprets EU law. It would, ultimately, undermine the democratic legitimacy of EU secondary law.

Finally, it would be enough to threaten the system if following accession a number of national supreme or constitutional courts, such as Germany, Poland or the Czech Republic, relied on rulings of the ECtHR to make a credible and serious threat that they would withdraw their support of the supreme effects of EU law within the national legal order. Hence, the fact that some national systems do not pose this threat and may not be in the position to tip the balance of powers, for example those that do not possess a constitutional court, such as the Netherlands and Sweden, does not challenge the thesis that accession is a threat to EU autonomy. Furthermore, these systems may pose other problems, such as in the Netherlands the ECHR enjoys a high status and direct effect and can directly be used to challenge Dutch law.

ii. *Investor–State Dispute Settlement and the Proposed Investment Court System*

ISDS mechanisms ‘increasingly develop into a mechanism of global governance with arbitral tribunals crafting and concretising treaty-overarching standards of investment protection with prospective effects on host states and investors’,<sup>67</sup> as well as public policy-makers. Their effects on governance are precisely the reason why they should be evaluated against the fundamental procedural and substantive values of modern constitutional law. Their very *purpose* is to manage political risks, or more specifically to limit the regulatory powers of the host state, in order to protect foreign investors from arbitrary or discriminatory actions but arguably also beyond.

Traditional ISDS mechanisms, as agreed by the member states in approximately 1,500 bilateral investment agreements (BITs) and by the EU in CETA and SFTA, lack an institutional connection to the domestic judiciary and do not possess any comparable constitutional guarantees of rights, principles, democratic legitimacy or independence.<sup>68</sup> They are usually ad hoc mechanisms that are not part of any institutional structure that could ensure internal coherence. This leads to arbitrators taking quite different, sometimes opposing positions on fundamental questions of law and interpretation. ISDS hence cannot draw from the same reason-based legitimacy as courts.<sup>69</sup> At the same time and despite these inconsistencies, investment arbitration is continuing to grow into a quasi-precedent system that creates treaty-overarching standards of investment law,<sup>70</sup> which is then an even more powerful threat to domestic policy choices.

ISDS allows *reasoning* and the taking of binding decisions *outside of any constitutional framework*, usually without requiring exhaustion of domestic remedies and with very limited possibilities to appeal the ISDS decisions within the domestic judicial system. It determines questions that touch upon the value choices and the social fabric of society in isolation and without being subject to further checks. This has a more indirect impact on reason-based legitimacy. It is an inherent function of law to frame disputes.<sup>71</sup> Law determines what are legally relevant and irrelevant facts and only the former have a direct impact on the ruling. Because of its disconnection from permanent judicial systems, ISDS mechanisms determine the common interest within the framework of investment law and in some isolation from other value choices. Common goods, constitutional values

<sup>67</sup> Schill (n 49) 4.

<sup>68</sup> See on conflicts of interests of ad hoc appointed arbitrators who want to continue a career in any given commercial environment or within the arbitration business itself: P Eberhardt and C Olivet, ‘Profiting from Injustice’ (*Transnational Institute and Corporate Europe Observatory*, 2012) [http://corporateeurope.org/sites/default/files/profitting-from-crisis\\_0.pdf](http://corporateeurope.org/sites/default/files/profitting-from-crisis_0.pdf).

<sup>69</sup> As explained in s IIA above.

<sup>70</sup> Schill (n 49) 20.

<sup>71</sup> See on the phenomenon of framing, eg M Lopez-Santana, ‘The Domestic Implications of European Soft Law: Framing and Transmitting Change in Employment Policy’ (2006) 13 *Journal of European Public Policy* 481.

and objectives often compete on an unequal footing with international trade and investment since they may not easily fit into, or are given a lower relevance in, this framework. This may in principle affect all policy choices to protect non-investment values, such as public health, the environment or labour standards. It constitutes a shift towards extra-state, private and commercial justice.

ISDS mechanisms are not generally obliged to proceed in public.<sup>72</sup> Yet both the ISDS procedure itself, and the costly awards that may be granted to the investor, may have a regulatory chill on decision-makers at different levels—local, regional, national and European. This potentially paralysing effect is arguably greater than the effect of the threat of legal proceedings, because of the high costs involved and because the protection of public interests may come under much greater pressure than would be the case in ordinary court proceedings. International investment arbitration is a party-owned process without public participation channels. It rebalances the separation of power not only in favour of the executive, but also in favour of ‘party autonomy’. The latter seems odd in view of the fact that, rather than dealing with commercial disputes between private parties, ISDS concerns state–investor relationships and public policy choices. The focus on party autonomy, for example in appointing the arbitrators, arguably, structurally places the private party, which will typically be a large multinational in an ISDS dispute, in a stronger position than it would have within the domestic court system. This privileges foreign investors as compared to other parties affected by domestic policy choices.

Additionally, investment treaties usually leave broad interpretative leeway to arbitrators. In the SFTA, for example, investors can bring claims that the state’s conduct breached ‘fair and equitable treatment’, ‘due process’, or ‘legitimate expectation’ or that it amounted to a ‘denial of justice in criminal, civil and administrative proceedings’, ‘manifestly arbitrary conduct’, or ‘harassment, coercion, abuse of power or similar bad faith conduct’.<sup>73</sup> A claim that has been interpreted very widely in the past,<sup>74</sup> and which the SFTA consciously aimed to limit, is protection from ‘indirect expropriation’. In a dispute between Mexico and the US landfill company Metalclad, the arbitrators were confronted with a decision of provincial authorities to deny permission to construct an underwater waste-disposal system

<sup>72</sup> See, however, Art X.33 ‘Transparency of Proceedings’ of CETA, requiring, in principle, public hearings, and Art 9.22 and Art 2 of Annex 9-G of SFTA, requiring, in principle, public hearings with a wide clause to protect confidential information.

<sup>73</sup> Ch 9 ‘Investment Protection’ and Annexes 9 A-C of SFTA. See also S 4: Investment Protection (Arts X.9-13) of CETA.

<sup>74</sup> *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1 and the claims brought by Philip Morrison and the pharmaceutical company Eli Lilly in Australia, Canada and Uruguay (*Philip Morris Asia Ltd v Australia*, PCA Case No 2012-12; *Philip Morris Brands Sarl et al v Uruguay*, ICSID Case No ARB/10/7; *Eli Lilly v Canada*, ICSID Case No UNCT/14/2). Examples illustrating the opposite can be given, see, for example, *Methanex v US*, in which an ISDS panel underscored the right of governments to regulate for public purposes, including regulation that imposes economic burdens on foreign investors ([www.state.gov/s/l/c5818.htm](http://www.state.gov/s/l/c5818.htm), accessed 28 October 2015), but this does not falsify the *potential* impact of ISDS on domestic policy making.

because of a risk that it might affect water quality in that area. The arbitrators defined indirect expropriation to cover

covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State.<sup>75</sup>

Metalclad was awarded 15.6 million dollars. In the EU legal system, by contrast, the CJEU has been very reluctant to protect future business interests as part of the right to property.<sup>76</sup>

In another, and ongoing, dispute, Vattenfall has challenged the German political decision to shut down all nuclear power plants on German territory. It has brought claims both before the International Centre for Settlement of Investment Disputes (ICSID)<sup>77</sup> and the German Federal Constitutional Court (GFCC).<sup>78</sup> The EU Commission has chosen to support Germany in the ICSID process as *amicus curiae*, because it considers it a breach of EU law that a company from one Member State should bring a claim against another Member State to an ISDS mechanism, rather than to the CJEU.<sup>79</sup> The Commission seems to understand EU law to regulate such disputes exhaustively and hence sees the involvement of an ISDS mechanism as a threat to the authority and, ultimately, the autonomy of EU law.

As stated above, the Commission is at the same time involved in negotiating further agreements with ISDS. In order to tackle some of the criticisms against traditional ISDS mechanisms, in September 2015 the Commission presented its proposal to move to an ‘Investment Court System’ that would replace existing ISDS mechanisms in all ongoing and future EU investment negotiations, including TTIP.<sup>80</sup> This public Investment Court System would be composed of a tribunal of first instance and an appeal tribunal, operating with independent judges with high legal qualifications comparable to those required for the members of permanent international courts, such as the International Court of Justice and the WTO Appellate Body. It would, further, be subject to a code of conduct to avoid conflicts of interest.<sup>81</sup> The ability of investors to take a case before the tribunal would be ‘precisely defined’ and limited to cases such as targeted discrimination

<sup>75</sup> *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1 (Award) (2001) 40 ILM 36 para 103.

<sup>76</sup> Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz*, ECLI:EU:C:1979:290, [1979] ECR 3727.

<sup>77</sup> ARB/12/12, submitted on 31 May 2012.

<sup>78</sup> Together with two German energy providers, E.ON and RWE, who could not bring a claim before ICSID because they did not qualify as foreign investors. The hearing before the GFCC took place on 15 March 2016. In principle the two procedures run in parallel. It is possible that the rulings may not even refer to each other.

<sup>79</sup> [www.sueddeutsche.de/wirtschaft/rueckschlag-fuer-vattenfall-klage-ein-freund-wie-ein-feind-1.2662865](http://www.sueddeutsche.de/wirtschaft/rueckschlag-fuer-vattenfall-klage-ein-freund-wie-ein-feind-1.2662865).

<sup>80</sup> Commission proposal on investment protection and the investment court system (ICS) (n 4). On face value this departs from the Negotiation directives (n 4).

<sup>81</sup> See also Commission, ‘EU’s new trade and investment strategy’ (n 37) 21.



on the base of gender, race, religion or nationality; expropriation without compensation; or denial of justice. Governments' right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements. The proceedings would be transparent, hearings open and comments available online; moreover, parties with an interest in the dispute would have a right to intervene.<sup>82</sup> The Commission's proposal is part and parcel of a broader trend towards judicialisation of adjudication in EU FTAs<sup>83</sup> and would move ISDS from being an extra-judicial arbitration mechanism into the realm of the judiciary. The Commission's proposal cannot dispel all doubts of the legitimacy of the system; for example, the framing issue and the subordination of non-investment related public policy choices remain problematic. It would, however, improve the coherence of approach and the independence of arbitrators. It would also reduce the private autonomy bias of arbitration that is part of the current system. The latter would help to frame investor–state disputes as what they are: a claim by an individual that the public exercise of power was incompatible with the principles and norms by which the public authority was bound. This is, and should be, different from finding a pragmatic outcome for a dispute between two private parties. This framing is crucial to justify the situation where, ultimately, public taxpayer money may be used to pay large awards to private parties. The proposed Investment Court System would remain separate from domestic judicial structures, including the CJEU. Yet, even without being in a position formally to review the final awards, domestic courts would presumably have some influence in deciding how to give effect to these awards, since they would not necessarily have direct effect within the domestic legal order.<sup>84</sup>

Not only the complete lack of trust of the public in ISDS,<sup>85</sup> but also the criticism of many scholars,<sup>86</sup> as well as the European Parliament<sup>87</sup> and the EU

<sup>82</sup> Commission proposal (n 4).

<sup>83</sup> See already I García Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in L Bartels, Federico Ortino, *Regional Trade Agreements and the WTO Legal System* (Oxford, Oxford University Press, 2006). The author is now the chief negotiator of TTIP.

<sup>84</sup> See, however, the formulation of Art 30(2) 'Enforcement of awards' of the Commission's proposal of 16 September 2015, requiring that 'Each Party shall recognize an award rendered pursuant to this Agreement as binding enforce the pecuniary obligation within its territory as if it were a final judgment of a court in that Party'. Available at [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf).

<sup>85</sup> See the Commission proposal (n 4).

<sup>86</sup> For example, B Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement with the Public Interest Contributing to the Democratic Deficit?' (2008) 41 *Vanderbilt Journal of Transnational Law* 775; D Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge, Cambridge University Press, 2008).

<sup>87</sup> European Parliament Report on the Future of European Investment Policy (2010/2203(INI)) [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2011-0070+0+DOC+PDF+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2011-0070+0+DOC+PDF+V0//EN), see G: 'whereas after the first dispute settlement cases of the 1990s, and in spite of generally positive experiences, a number of problems became clear because of the use of vague language in agreements being left open for interpretation, particularly concerning the possibility of conflict between private interests and the regulatory tasks of public authorities, for example in cases where the adoption of legitimate legislation led to a state being condemned by international arbitrators for a breach of the principle of "fair and equitable treatment"'. See for a rather positive assessment of



Commission,<sup>88</sup> seem to make it ill-advised to continue setting up traditional ISDS. This is the case for the EU, at least, which is arguably in a more difficult position than states with regard to ISDS. The legitimacy concerns that ISDS raises with regard to deliberative democracy, as well as the economic framing of disputes, meet two weak spots of the EU. The difficulty of democratically legitimising decisions within the compound multi-level structure of the EU are well known<sup>89</sup> and the EU has long been criticised for prioritising the liberalist economic perspective.<sup>90</sup> Hence, where EU agreements set up ISDS, which result in less transparency and an economic bias, this weakens the EU's legitimacy in areas where it is already challenged. This may be one of the reasons why the Commission has expressed its intention more clearly than the EU Member States, setting out its aim to improve transparency and independence of investment arbitration, make it subject to stricter rules, protect domestic value choices and bring it closer to the domestic judiciary.

Moreover, investment arbitration may interfere with the autonomy of EU law where it has the potential to undermine the CJEU's exclusive competence to give a 'definite' interpretation of EU law. Investment arbitration does not usually require the exhaustion of local judicial remedies. This may result in a situation in which the CJEU has not had the opportunity to rule on the EU law issues at stake. Yet the imposition of investment awards, even though it concerns questions of responsibility rather than competence, may require considering the competence division between the EU and the Member States, including under the international investment agreement, which is commonly a mixed agreement that specifically avoids a clear determination of the division of internal competence.<sup>91</sup> Hence, even though the *interpretation of EU law* in the context of investment arbitration is not directly authoritative or binding within the EU legal order, it applies pressure to define competences, whose definition has been consciously left open by the choice for mixed agreements. A solution to avoid rulings on the division of competence might be to proceduralise competence decisions<sup>92</sup> or to require the investment arbitrators to request guidance from the CJEU in cases where an interpretation of EU law is necessary. Moreover, it may be difficult to deny direct effect

ISDS, PJ Kuijper, I Pernice, S Hindelang, M Schwarz and M Reuling, 'Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements', study of 4 September 2014, written for the European Parliament (EXPO/B/INTA/2014/08-09-10).

<sup>88</sup> See the Commission proposal (n 4).

<sup>89</sup> See literature on the EU's democratic deficit (n 35).

<sup>90</sup> Recently: G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 *European Law Journal* 2.

<sup>91</sup> Opinion 2/15 (n 3) in which the Commission asks the Court whether the Union has the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore.

<sup>92</sup> An attempt to proceduralise the competence question is the Declaration of Transparency under Art 26.3.b(ii) of the Energy Charter Treaty which reads: 'The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days.'

to ISDS rulings in order to limit their internal enforceability within the EU legal order, both in the light of the settled case law of the CJEU and in the light of the Commission's proposal.<sup>93</sup>

ISDS arbitrators may consider EU law as public international law, domestic law or possibly even as a fact.<sup>94</sup> An example where ISDS arbitration even explicitly found EU law to be subordinate to international investment law is the *AES* case, in which Hungary claimed that the tariff reductions that allegedly infringed the fair and equitable treatment standard of an investment treaty were required by EU law.<sup>95</sup>

EU policies potentially challenged before ISDS mechanisms may be expected to be largely the 'less political' regulatory policies of the former Community pillar, such as internal market or competition law policies. Yet, ISDS also deals with fundamental societal choices and open-textured norms. The direct threat to the autonomy of the EU legal order may even be greater since ISDS does not coherently apply any specific legal institution, equivalent to the margin of appreciation applied by the ECtHR, that protects the political discretion in a predictable way. The following section will examine the impact of ISDS on the legitimacy and autonomy of the EU legal order, including a comparison of the impact of ISDS with the potential impact of EU accession to the ECHR.

## IV. Consequences of Participating in IDS

### A. Institutional (Self-)conception of the CJEU as a Domestic Court

While from an external perspective the CJEU is regularly seen as an international tribunal,<sup>96</sup> the Court claims that the autonomy of the EU legal order vis-à-vis international law depends on its ability to rule as a domestic court. This is also a question of legitimacy for the EU legal order. AG Jacobs, for example, concluded in 2002 in *Unión de Pequeños Agricultores (UPA)* that:

It may also be noted that although the European Communities originate in a set of Treaties concluded by the Member States in the context of public international law, the Community legal order has developed in such a way that it would no longer be accurate

<sup>93</sup> See n 4 above.

<sup>94</sup> The latter is how the ECtHR sees domestic law.

<sup>95</sup> *AES v Hungary*, ICSID Case No ARB/07/22 (Award) (23 September 2010), para 7.6.6; see M Parish, 'International Courts and the European Legal Order' (2012) 23 *European Journal of International Law* 141, 148.

<sup>96</sup> Stephen Wiles, 'International Tribunals: What is the ECJ' (*Harvard Law School Library*) <http://guides.library.harvard.edu/content.php?pid=100079&sid=754878>. See also above on the ECtHR's perspective on the CJEU in *Bosphorus* (n 62).

to describe it as a system of intergovernmental cooperation, *nor would it be appropriate to describe the Court of Justice as an international tribunal*.<sup>97</sup>

As is well-known, AG Jacobs made in this opinion a strong plea to reverse the settled case law and interpret individual standing less restrictively, but failed to persuade the Court. Yet his opinion remains ‘a coherent, exhaustive, and thoughtful attempt to plug what many critics regard as a serious gap in the system of judicial remedies established by the [European] Treat[ies]’.<sup>98</sup> What is interesting in the present context is that AG Jacobs came to the conclusion that, already in 2002, the Community was

firmly established and its legislative process, to a large extent based on the adoption of measures by majority voting in the Council of Ministers and the European Parliament, [was] sufficiently robust to withstand judicial scrutiny at the instigation of individuals ... [Union] law now affects the interests of individuals directly, frequently and deeply; there is therefore a correspondingly greater need for effective judicial protection against unlawful action.<sup>99</sup>

The AG hence concluded that because the EU exercised such far-reaching powers that interfered with the rights of individuals, a domestic, and hence a more robust, judicial structure was necessary. The CJEU could no longer legitimately be seen as an international court. Twelve years later, the now President of the CJEU argued, a week before the Court issued Opinion 2/13, that the CJEU should be seen as a supreme court in that it combines the roles of a highest national court and a constitutional court.<sup>100</sup> Yet the fact that arguments about the nature of the CJEU are still made, as well as the fact that as recently as 2011 the Publications Office of the EU itself labelled the CJEU an international court,<sup>101</sup> demonstrate that the CJEU’s nature as a domestic court is not beyond doubt, including within the EU itself.

Opinion 2/13 and the draft agreement on the EU’s accession to the ECHR are equally illustrative of this continuous difficulty in placing the CJEU within the existing categories of domestic or international judicial body. In the context of Opinion 2/13, the Commission argued in favour of seeing the CJEU as a domestic court. It submitted that ‘[w]ith regard ... to the prior exhaustion of domestic remedies, ... the draft agreement guarantees that remedies before the Courts of the EU

<sup>97</sup> Case C-50/00 P *Union de Pequeños Agricultores v Council (UPA)* [2002] ECR I-6677, Opinion of AG Jacobs, para 78.

<sup>98</sup> R Greaves, ‘A Commentary on Selected Opinions of Advocate General Jacobs’ (2005) 29 *Fordham International Law Journal* 713.

<sup>99</sup> Case C-50/00 P, *UPA*, Opinion of AG Jacobs (n 97) para 77.

<sup>100</sup> Koen Lenaerts, blog of 10 December 2014: ‘Deswegen muss man den EuGH richtigerweise als einen Supreme Court betrachten, also eine Mischung von oberstem Gericht und Verfassungsgericht’, available at: <http://verfassungsblog.de/dass-der-eugh-als-internationales-gericht-angesehen-wird-ist-ein-grosses-misserstaendnis-interview-mit-prof-dr-koen-lenaerts>.

<sup>101</sup> ‘European and International Courts’ (Publications Office, 25 February 2011) <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=URISERV:l16007>. ‘There are many courts that operate at international level, and it is not always easy to distinguish their jurisdiction. The aim of this summary is to present the European courts and to distinguish between those which are part of the European Union and those which belong to other international organisations.’

must be exhausted before an application against an act on the part of the EU can be validly brought before the ECtHR' and that 'the second indent in Article 1(5) of the draft agreement states that the term "domestic" in Article 35(1) ECHR is to be understood as relating also, mutatis mutandis, to the internal legal order of the EU'.<sup>102</sup> Moreover, it referred to Article 5 of the draft agreement, which 'states that proceedings before the Courts of the EU are not to be understood as constituting "procedures of international investigation or settlement"',<sup>103</sup> nor, in fact, as means of dispute settlement within the meaning of Article 55 of the ECHR. Hence, the Commission also argued in favour of treating the CJEU as a domestic court.

At the same time, the accession agreement places the CJEU in a special position as compared to domestic courts. The prior involvement procedure, which allows the ECHR to hold proceedings to ask for the CJEU's interpretation of EU law, treats the CJEU differently from the constitutional courts of the other contracting parties, which do not enjoy such privilege. This complicated approach of treating the CJEU as a domestic court, while ensuring special privileges, is an acknowledgement of the compound judicial structure of the EU, in which the CJEU stands in a cooperating rather than hierarchical relationship with national courts. While national constitutional courts have the last word on the validity of rulings of ordinary national courts, the CJEU depends on the willingness of national courts to recognise and follow its decisions. Indeed, the CJEU found the accession agreement to be incompatible with EU law because it treated the EU too much like a state,<sup>104</sup> which might have endangered the CJEU's ability to call upon Member States to comply with the EU principle of mutual trust.

The nature of the CJEU as a domestic court thus remains contested, both from an internal or from an external perspective. To allow an external body to determine that the CJEU is an international tribunal would take away the CJEU's 'wiggle room' to decide which role it takes vis-à-vis international law but also vis-à-vis national courts. As pointed out by AG Jacobs, but also visible in the *Kadi* cases in which the CJEU defended EU fundamental rights standards against external interference,<sup>105</sup> the ability of the Court to take the role of a domestic court is relevant to the level of fundamental rights protection that the Court can offer. It may also be necessary to ensure the legitimacy of the EU legal order, in the light of its extensive and intensive powers, and to protect it from external interference. If the Court lost this ability, national constitutional and supreme courts might challenge its position (even more strongly). At the same time, since the CJEU does not possess the institutional position of a domestic court (it cannot annul the

<sup>102</sup> Opinion 2/13 (n 1), para 89.

<sup>103</sup> *ibid.*

<sup>104</sup> K Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015, <http://1exagu1grkmq3k572418odoooy.wpengine.netdna-cdn.com/wp-content/uploads/2015/02/The-Principle-of-Mutual-Recognition-in-the-area-of-Freedom-Security-and-Justice.pdf>.

<sup>105</sup> C Eckes, 'Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?' (2012) 18 *European Law Journal* 230.

decisions of national courts), it remains in a somewhat vulnerable position. This is why the CJEU could not accept being treated as ‘other’ domestic courts under the accession agreement and why it protects its judicial monopoly and the autonomy of the EU legal order so vigorously.

## B. EU Autonomy and Legitimacy: Contested and Under Pressure

Autonomy and legitimacy are interlinked, in that autonomy is a necessary precondition for the sources of legitimacy on which the EU relies.<sup>106</sup> The autonomy of the EU legal order is essentially contested. The legitimacy of the will forming and decision making within the EU also remains more strongly contested than the will forming and decision making in States. The combination of these factors justifies the belief of the CJEU that the protection of the autonomy of the EU legal order is a second-order reason which justifies opposing interference with its judicial monopoly as necessary to protect the autonomy of the EU legal order without further balancing it against other reasons. The EU is here in a different position than the Member States.

IDS mechanisms are particularly problematic for the EU’s autonomy if they constitute constitutional review, bind the EU at a superior level or suffer from legitimacy problems themselves. Two IDS have been identified as particularly problematic: the ECtHR after EU accession to the ECHR and ISDS mechanisms.

ISDS mechanisms are problematic for two central reasons: they may undermine the democratic legitimacy of the exercise of public power and the legal and reason-based legitimacy of judicial decision making. ISDS does not offer an authoritative and binding interpretation of domestic law, including EU law. The obligation to pay monetary compensation is not a declaration of invalidity of a domestic policy.<sup>107</sup> Also, in contrast to the importance of the ECHR and the ECtHR case law for the interpretation of EU law, rulings of ISDS mechanisms do not benefit from any particular status or authority within the EU legal order. Yet, in the case of the EU, which often struggles to build up sociological legitimacy even though it has certain levels of other types of legitimacy, this may be particularly problematic. If the EU sets up ISDS mechanisms in international agreements with third states this may ultimately result in a lowering of the EU’s own legitimacy. Within the EU, in particular, the low legitimacy of ISDS decisions may have more threatening consequences for the EU’s own feeble democratic legitimacy than it would have for a state. IDS mechanisms, which are themselves very controversial as to their legitimacy, may directly undermine the legitimacy of domestic legal orders, which have to take account and potentially even give effect to these decisions. Moreover,

<sup>106</sup> See s II above.

<sup>107</sup> This may be different for restitution or specific performance (see A Dimopoulos, *EU Foreign Investment Law* (Oxford, Oxford University Press, 2011) 119).

interference with the autonomy of the EU legal order would additionally hamper the EU's capacity to build up other types of legitimacy.

The EU's accession to the ECHR is more difficult to challenge on normative grounds. With all its flaws, the ECHR tames nationalist excesses, promotes human rights and creates a community of values.<sup>108</sup> It exerts an independent external check on human rights that contributes as a matter of principle to the legitimacy of the decision-making within a polity. Indeed, in abstract, accession seems like a way to bolster the CJEU's legitimacy: it offers an external control, which in most cases will result in a confirmation of the CJEU's rulings. Moreover, the ECtHR has demonstrated high deference to the CJEU in the past. Yet, as we have seen above, accession may expose an already vulnerable flank of the EU legal order for constitutional courts to finally bite.

In both contexts—ISDS and the ECtHR—the EU will act alongside its Member States rather than taking over their position. The enormous costs of ISDS<sup>109</sup> make it unlikely that the EU will assume full responsibility as it does, for example, in the WTO dispute settlement mechanism.<sup>110</sup> Similarly, the political cost of being found in violation of the ECHR make it unlikely that the EU will widely assume responsibility for acts of the Member States.

## V. Conclusions

Several scholars and philosophers have suggested more broadly that the EU could be the natural response to the challenges that states face because of globalisation.<sup>111</sup> However, this chapter argues that the EU's particular nature may also stand in the way of closer international judicial cooperation. The Court's fear of the undermining effect of international rulings is symptomatic in this regard.

The autonomy of the EU legal order is not absolute—quite the opposite. This insight is central to understanding the CJEU's position and to understand its autonomy concern as fear of losing authority and legitimacy. Within the EU, a continuous unresolved constitutional limbo situation ensures the functioning of

<sup>108</sup> Groundbreaking in this regard: *El-Masri v the Former Yugoslav Republic of Macedonia* (App No 39630/09) (ECtHR, 13 December 2012); *Al Nashiri v Poland* (App No 28761/11) (ECtHR, 16 February 2015) and *Husayn (Abu Zubaydah) v Poland* (App No 7511/13) (ECtHR, 24 July 2014).

<sup>109</sup> A Dimopoulos, 'The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities' (2014) 51 *Common Market Law Review* 1671.

<sup>110</sup> See eg EC-LAN (WTO Panel Report of 22 June 1998, WT/DS62/R, WT/DS67/R, WT/DS68/R); EC-Asbestos (WTO Appellate Body Report of 12 March 2001, WT/DS135/AB/R); EC-Biotech (WTO Panel Report of 29 September 2006, WT/DS291, 292, 293/R).

<sup>111</sup> U Beck, 'Europa als Antwort auf die Globalisierung' in H-U Joerges (ed), *Der Kampf um den Euro. Wie riskant ist die Währungsunion?* (Hamburg, Hoffmann & Campe, 1998) 19–23; P Bofinger, J Habermas and J Nida-Rümelin, 'Einspruch gegen die Fassadendemokratie' *Frankfurter Allgemeinen Zeitung* (Frankfurt, 3 August 2012) [www.faz.net/aktuell/feuilleton/kurswechsel-fuer-europa-einspruch-gegen-die-fassadendemokratie-11842820.html](http://www.faz.net/aktuell/feuilleton/kurswechsel-fuer-europa-einspruch-gegen-die-fassadendemokratie-11842820.html).

the compound legal order. I have here defended the CJEU's perspective as correct from the viewpoint of EU law as interpreted by the CJEU. This does not mean that the Court's perspective is 'an absolute truth'. Indeed, the CJEU's concern with autonomy is reasonable, because the autonomy of the EU legal order has been, and can be, challenged from the perspectives of international law and most national constitutions.

The Court's particular concern with regard to the EU's accession to the ECHR is further justified because of the exceptional status and impact of the ECtHR's rulings within the EU legal order that, if exploited by national courts, threatens the delicate power equilibrium within the EU. ISDS does not enjoy this exceptional status but threatens to undermine the EU's and a state's legitimacy in a similar way. However, the EU may nonetheless be more vulnerable to this threat to its legitimacy. The EU's democratic weakness and its difficulty in overcoming its historic economic bias are the reasons why undemocratic ISDS decisions that prioritise interests of big multinational investors are more damaging to the legitimacy of the EU than they are to the legitimacy of a state.

In Opinion 2/13, the CJEU, building on its prior case law, established a high bar for EU commitment to ISDS mechanisms. If old-style ISDS was challenged before the CJEU it might encounter the same fate. The CJEU essentially aims to protect the autonomy of the EU legal order from external interference by protecting its own monopoly of jurisdiction over EU law. This conception has been discussed in this chapter. *Prima facie* it may seem an overly narrow conception of autonomy. Yet the developed understanding of collective autonomy as legitimacy relies on protection by the judiciary. In this understanding the reason-based legitimacy of the judicial branch requires (a certain) autonomy from the outside, and also the democratic, procedural and legal legitimacy of a polity requires protection by the judiciary of procedures and value choices. In the specific context of the EU the role of the CJEU as guardian of the autonomy of the EU may be problematic from a democratic perspective.<sup>112</sup> It is essential to protect the EU's autonomy, and ultimately legitimacy, from interference by the Member States. This is particularly true if the EU legal order is to commit to a binding external judicial mechanism that could be used by the Member States, through their national courts, to challenge the EU's autonomy from within.<sup>113</sup>

On face value, the position of this chapter may seem contradictory in the light of the pluralist debate. On the one hand, it defends the CJEU's position by pointing out the persuasive power of the Court's legitimacy and autonomy concerns with regard to the EU's participation in certain ISDS mechanisms. On the other, it may be seen as defending a constitutionalist perspective with regard to the EU internally by attaching high value to the CJEU's monopoly of jurisdiction over EU law and by emphasising the potential threat resulting from the ability of national

<sup>112</sup> See s II.A above.

<sup>113</sup> See s III.B.i above.

courts to challenge the authority of the CJEU from within. However, the constitutional pluralism within the EU legal order is precisely the reason why the EU should fear binding authoritative determinations from the outside of its substantive foundations, the nature of the EU legal order or the role of the CJEU. The very fact that EU law and the CJEU struggle on a daily basis to maintain recognition of its authority by internal judicial and political actors makes the CJEU's concern with autonomy from outside claims so convincing. The EU legal order is, more than any state including federal states, vulnerable to a challenge by an internal actor relying on international law binding on the EU.



