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Eckes, C.

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# *The Court of Justice's Participation in Judicial Discourse: Theory and Practice*

CHRISTINA ECKES<sup>1</sup>

## I. INTRODUCTION

JUDGES ARGUE WITHIN a legal frame of reference. They identify and interpret this frame and read factual situations before them in the light of it. By interpreting the law and the facts coherently with the relevant legal frame of reference they aim to objectively justify their decisions. This may sound naïve and often be much less heroic in practice. However, the core value of separation of powers and of independent judicial review is widely accepted, including the added value of the judiciary's attempts to objectify what is 'just' outside of the political power struggle. Judicial discourse, it is here argued, could help the judiciary to continue to offer this objectifying value in a pluricontextual setting,<sup>2</sup> where the internal and the external become increasingly interlocked because policy making is increasingly externalised, rights relevant decisions are taken by the executive outside the domestic constitutional framework, and an increasing number of players claim authority, including ultimate authority, to govern a legal situation.<sup>3</sup>

The chapter hopes to contribute to the thinking about the role of the judiciary in a pluricontextual setting and turns to the European Union (hereafter referred to as 'the EU' or 'the Union') for inspiration. Within the EU the relationship between EU law, on the one hand, and the Member States collectively and individually on

<sup>1</sup> I would like to thank Dennis van Berkel and Stephan Hollenberg for their comments on earlier drafts and Robbert-Jan Winters for his research assistance. All remaining errors are of course my own. This chapter loosely draws on my earlier work published as: C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 *MLR* 254 and 'European Union Legal Methods—Moving Away From Integration' in U Neergaard and R Nielsen (eds), *European Legal Method—Towards a New European Legal Realism?* (Copenhagen, DJØF Publishing, 2013).

<sup>2</sup> Throughout the text the term legal 'context' is chosen rather than 'level' or 'order', since the different contexts are not layered because they do not relate hierarchically to each other and public international law (PIL) is not organised to a degree that would justify calling it an order.

<sup>3</sup> For a more detailed distinction between the different phenomena, see N Barber, *The Constitutional State* (Oxford, Oxford University Press, 2010) ch 9.

the other, is characterised by an ongoing pulling and pushing of law and politics.<sup>4</sup> Both the Court of Justice of the European Union (CJEU) and Member States' courts have long functioned in this setting. The Union legal order is a compound constitutionalised construction with interlocking claims of ultimate authority. This chapter considers what could be learned from interaction between different judiciaries within the EU legal order for the CJEU's approach to external claims of authority.

Traditionally, the phenomenon that courts refer to decisions of other jurisdictions is called 'judicial dialogue'.<sup>5</sup> This chapter however uses the term 'discourse', which, from Latin *discursus*, refers more loosely to 'running to and from' rather than to the purposeful directed exchange that 'dialogue' seems to evoke. This appears appropriate since judicial interaction ranges from 'ignoring' or 'appearing to have considered' to 'taking into account' or 'making references'.<sup>6</sup> Furthermore, with the participation of an ever-increasing number of international judicial bodies, as well as an increasing number of highest courts within the EU,<sup>7</sup> the interaction has moved from a dialogue to 'a round table discussion' or a 'multilogue'.<sup>8</sup>

The chapter is structured as follows. Section II lays out the theoretical grounding of the value and necessity of judicial reasoning. It then makes the argument that both within the EU and beyond the boundaries of the EU legal order, the same philosophical arguments and theories require not only an inward looking judicial reasoning but also a discourse with other judicial bodies. Section III looks consequently into the practice of judicial interaction between the CJEU and the courts of the Member States (internal discourse) and then to the interaction between the CJEU and international judicial bodies (external discourse). This sets the scene for section IV, which addresses the core questions of this chapter: What lessons can the CJEU learn from the internal European judicial discourse that can be transferred to the external discourse with international courts and tribunals? What considerations should guide the CJEU's external relations case law in the described pluricontextual setting?

<sup>4</sup> For an excellent analysis, see L van Middelaar, *De passage naar Europa—Geschiedenis van een begin* (Groningen, Historische Uitgeverij, 2009).

<sup>5</sup> See, for example: A Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1 *European Journal of Legal Studies* 1; C Baudenbacher, 'The EFTA Court, the ECJ, and the Latter's Advocates General—a Tale of Judicial Dialogue' in A Arnulf, P Eeckhout, and T Tridimas (eds), *Continuity and Change in EU Law* (Oxford, Oxford University Press, 2008); H Lambert, 'Transnational Judicial Dialogue, Harmonization and the Common European Asylum System' (2009) 58 *ICLQ* 519.

<sup>6</sup> Bruno de Witte questioned whether we can speak of a conversation between judges/courts: B de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process' in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (Oxford, Hart Publishing, 2002).

<sup>7</sup> See on the participation of the courts of the newer Member States, W Sadurski, "Solange, Chapter 3": Constitutional Courts in Central Europe—Democracy—European Union' (2006) *EUI Working Paper* no 40.

<sup>8</sup> The latter term is used by: M Cartabia, 'Europe and Rights: Taking Dialogue Seriously?' (2009) 5 *European Competition Law Review* 5.

## II. THE VALUE OF JUDICIAL DISCOURSE

Legal reasoning is commonly and appropriately supported by coherence theories.<sup>9</sup> Coherence theories require that any proposition that is to be justified (judicial decision) harmoniously relates to other propositions that find reasonable support (recognised claims of judicial authority; authoritative norms). Justification of a judicial decision takes place in the world of legal propositions in a legal, mind-dependent context rather than reality. The aim is to 'objectify' the decision of what is just or unjust and to communicate in a legal context with others about the supporting reasons.<sup>10</sup> If we accept the justifying value of placing judicial decisions within a coherent relationship with norms that are recognised as authoritative it is logical that all *relevant* norms would have to be considered. The latter requires an interpretation of law as a meaningful whole and a decision on which norms are relevant. In a pluricontextual setting, this includes external claims of (ultimate) authority that compete with internal claims of ultimate authority. As a consequence, the reference framework will have to be determined by recognising or rejecting these external claims. *Ultimate* authority is only claimed where the external authority supposes that no internal recognition of the specific proposition is necessary for its validity inside the domestic legal context. EU law for instance claims ultimate authority within national legal orders. Even if originally recognition by national authorities was necessary, individual provisions of EU law now become part of the national legal context without requiring specific recognition. However, direct practical effect, eg of the decisions of international expert bodies, is different from claiming ultimate authority.

External claims of authority multiply in the pluricontextual setting. Across an ever-wider range of policy areas, an ever-wider range of actors engages in cross-border activities. These cross-border activities produce an increasingly dense net of rules with an ever greater impact not only on national legal orders and on the EU, but also on individuals.<sup>11</sup> Multiple claims of authority over the same factual situation exist that somehow recognise each other and that find expression in multiple norms potentially applicable to that situation. 'Somehow recognise' means that an internal actor has confirmed the relevance of the external claim of authority, including in the past. Continuous recognition can result in an expectation to recognise and in an interlocking of legal spheres. While these interlocking

<sup>9</sup> See eg: M Moore, 'The Semantics of Judging' (1981) 54 *Southern California Law Review* 151. This does not exclude that a coherence approach to legal reasoning will sometimes result in morally arbitrary decisions: see KK Kress, 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity and the Linear Order of Decisions' (1984) 72 *California Law Review* 369.

<sup>10</sup> See on this point, A Sen, *The Idea of Justice* (Cambridge, MA, The Belknap Press of Harvard University Press, 2009) ch 1.

<sup>11</sup> See for literature on decisions of international organisations, JE Alvarez, *International Organizations as Law-Makers* (Oxford, Oxford University Press, 2006). On the regulatory impact of international law, see S Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 37 *International Law and Politics* 663.

processes of different legal spheres aspiring to exercise ultimate authority can be witnessed internationally, they are particularly strong in the EU. As Anne-Marie Slaughter puts it: 'The world is not likely to replicate [the European] experience in terms of actual political and economic integration monitored by coercive supranational institutions. But to the extent that the European way of law uses international law to transform and buttress domestic political institutions, it is a model for how international law can function, and in our view, will and must function to address twenty-first century international challenges'.<sup>12</sup> Classic contemporary examples under international law are: the standards of the *Codex Alimentarius* Commission, which have gained formal weight through the Sanitary and Phytosanitary Measures (SPS) Agreement;<sup>13</sup> the rulemaking, both formal and informal, in international organisations such as the World Health Organization (WHO)<sup>14</sup> or the International Civil Aviation Organization (ICAO); sanctions of the UN Security Council;<sup>15</sup> and standards of international regulatory associations such as the Basel Committee for Banking Supervision<sup>16</sup> or the Financial Action Task Force on Money Laundering (FATF).<sup>17</sup> Furthermore, there is a growing amount and intensity of rulemaking by private actors that directly impacts on domestic law.<sup>18</sup> Examples that came to fame more recently are debt security rating agencies, such as Moody's and Standard & Poor's (S&P).<sup>19</sup> Additionally, international law becomes increasingly judicialised and domestic courts are increasingly and actively referring to each other's judicial decisions, as well as to international law.<sup>20</sup> However, most international examples are claims of authority and even

<sup>12</sup> AM Slaughter and W Burke-White, 'The Future of International Law is Domestic (or, the European Way of Law)' (2006) 47 *Harvard International Law Journal* 327, 352.

<sup>13</sup> T Bütte, 'The Law and Politics of International Delegation: The Globalization of Health and Safety Standards: Delegation of Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization' (2008) 71 *Law & Contemporary Problems* 219.

<sup>14</sup> F Snyder, *The EU, the WTO and China: Legal Pluralism and International Trade Regulation* (Oxford, Hart Publishing, 2010) 22.

<sup>15</sup> Counter-terrorist sanctions against individuals resemble individual decisions rather than 'rules' but they certainly have a great and direct impact on the rights of individuals and domestic legal orders: C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights—The Case of Individual Sanctions* (Oxford, Oxford University Press, 2009).

<sup>16</sup> GRD Underhill and X Zhang, 'Setting the Rules: Private Power, Political Underpinnings, and Legitimacy in Global Monetary and Financial Governance' (2008) 84 *International Affairs* 535.

<sup>17</sup> JT Gathii, 'The Financial Action Task Force and Global Administrative Law' (2010) *Journal of the Professional Lawyer* 197 (see for a draft version: Albany Law School Research Paper no 10-10, available on the SSRN website, at <http://www.ssrn.com/en/>).

<sup>18</sup> For examples and analysis of this phenomenon, see T Bütte and W Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton, Princeton University Press, 2011).

<sup>19</sup> Other examples are ICANN—Internet Cooperation of Assigned Names and Numbers; the International Standards Organization (ISO); and the International Accounting Standards Committee (IASC).

<sup>20</sup> AM Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191 and AM Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99. See similarly, E Benvenisti and GW Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 *European Journal of International Law* 59.

ultimate expertise, but they do not claim to govern in the internal legal context without further recognition.<sup>21</sup> Yet, the practical effect can at times be very similar. The WHO for instance determines the existence of public emergencies and makes specific recommendations for appropriate measures that states comply with without further implementing legislation. The developments are far from homogeneous but one general tendency is that international claims of authority shift from considering the will of sovereign state subjects as the ultimate benchmark of legality to focussing on the impact on individuals.<sup>22</sup>

Pluricontextuality makes it necessary to consider the applicability of authority external to the domestic legal setting. Typically, it is the task of the judiciary to discover and determine the internal relevance of external authoritative claims. The judiciary does so by relying on internal constitutional principles and norms; however, these are often far from narrowly prescriptive and do not clearly determine the relevance of any particular international claim.<sup>23</sup> The judiciary from different constitutional orders is required to make sense of the interlocking, the same norms (with different grounds for recognition), and de facto interdependence between legal contexts. This does not entail that the different judiciaries come to the same conclusions. Justice that can be achieved through judicial review is necessarily system bound. It is the just outcome within an artificially limited normative structure that serves as a practical tool to determine justice. The justice delivered by domestic courts necessarily does not at all times approach a standard of universal justice.<sup>24</sup> Where the frame of reference includes external claims of authority the normative structure can change through sustained recognition by courts, political players and citizens. Courts are creatures of their system, be it a state or be it the EU: changes in the domestic system and the frame of reference influence the exercise of their powers and potentially even their entire role within this system. Both legal reasoning and judicial discourse are tools to achieve coherence with accepted, albeit limited, standards of justice and to make some standard of justice possible in practice. Judicial discourse is a tool to allow for limited interaction between judiciaries rooted in different system. While it does not necessarily lead to harmonisation, it extends normative claims beyond the domestic legal context and can contribute to controlling the external exercise of political power, as well as to a cross-border exchange on the legitimacy of specific claims of authority.<sup>25</sup>

<sup>21</sup> See, however, how voluntary standards can become internationally binding and develop normativity that can make them part of the frame of reference: R Howse, 'A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards"' in C Joerges and EU Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Oxford, Hart Publishing, 2011).

<sup>22</sup> R Teitle and R Howse, 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order' (2009) *International Law and Politics* 959.

<sup>23</sup> The German Constitution (Grundgesetz (GG)) did introduce a provision on EU law only after the Treaty of Maastricht, see Art 23 GG. See also Art 59 II GG for the status of international law.

<sup>24</sup> T Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs* 113.

<sup>25</sup> Teitle and Howse, 'Cross-Judging' (n 22).

In the pluricontextual setting, recognition of external claims by courts is unavoidably part of the legal reasoning since it includes determining the frame of reference in which a decision must be coherently placed. Judicial discourse is then the necessary next step to contribute to coherence in a compound pluricontextual setting where the global, the regional, and the local directly interlink. Under the separation of powers doctrine, the judiciary has a duty towards the individual to counterbalance the other powers and to maintain the authority necessary to settle disputes that are brought before it. A network of mutually recognised judicial claims could contribute to counterbalancing the emerging network of executive power. Limits could emerge in a discursive fashion. As states lose part of their autonomy as a result of the growing network of external norms and factual constraints, their actions cannot be judged coherently without taking into account these external norms. Under these circumstances, courts are no longer able to effectively and coherently fulfil their task in the state structure without taking account of the claims of external judicial bodies. Only the latter can effectively control the validity of the claims made by the political actors of their own legal order, including in the international context. Indeed in the pluricontextual setting, the monolithic state is subdivided into its different bodies and entities which then cooperate outside and, some would argue, above the state structure.<sup>26</sup> Judicial discourse offers a combination of domestically rooted and constitutionally legitimised jurisprudence with an external reach. A ‘network of judges’ could make a contribution to construe and control the pluricontextual legal reality.<sup>27</sup>

### III. JUDICIAL DISCOURSE AND THE COURT OF JUSTICE

#### A. Inside the EU Legal Order: Discourse Practice in a Pluricontextual Setting

Cross-jurisdictional judicial discourse is long established within the EU. The focus here is the communicative and restraining function of judicial discourse through judgments. The underlying question is what lessons, if any, could be learned from the internal EU discourse for a broader international judicial discourse.

##### (i) *Under the Preliminary Ruling Procedure*

The internal discourse between the CJEU and national courts has a direct institutionalised dimension: the preliminary ruling procedure (Article 267 TFEU). National courts ask questions and enforce the CJEU’s replies in the national legal order. A recent example of a broad judicial discourse, where a number of the

<sup>26</sup> J Habermas, *Zur Verfassung Europas—Ein Essay* (Berlin, Suhrkamp, 2011).

<sup>27</sup> AM Slaughter, *A New World Order* (Princeton, Princeton University Press, 2004) ch 2 describes both the existing judicial discourse with a focus on the US and the Commonwealth and speaks of ‘judicial networks’.

highest national courts and the CJEU are considering the same factual situations and legal norms, is the judicial consideration of legal instruments adopted to mitigate the Eurocrisis. In 2012, the German Constitutional Court (GCC) gave two rulings concerning the Treaty Establishing the European Stability Mechanism (ESM): first in an intergovernmental dispute (June 2012)<sup>28</sup> and then in a challenge of its compliance with German constitutional law (September 2012).<sup>29</sup> The Estonian and Irish Supreme Courts ruled on the constitutionality of the ESM under their respective law.<sup>30</sup> Furthermore, while the Irish High Court had earlier declined to refer to the CJEU,<sup>31</sup> the Irish Supreme Court made a reference to the CJEU. The questions raised before the different national courts and the CJEU concern the same legal instrument and raise parallel issues, including whether the agreed Treaty amendments entailed an increase in Union competences (since in this case the simplified amendment procedure cannot be used); whether it involved the treaties or the general principles of Union law, such as the Union's exclusive competences in monetary policy, the functions of the Union institutions, and the principle of sincere cooperation;<sup>32</sup> whether the budget autonomy of national parliaments was infringed, whether the ESM limited unduly the autonomy of the constitutional legislator, and whether the ESM undermined the democracy principle and crossed the line to a federal state.<sup>33</sup> It is artificial to hide behind a strict dualist reading and argue that each court only considers domestic law (ratification and implementation measures in the case of national courts or the ESM Treaty in the case of the CJEU) and unrealistic to assume that the courts do not take notice of each other's decisions. It was the Irish Supreme Court that framed the preliminary questions on the legality of the ESM and that influenced in this way the debate. The GCC by contrast had for more than 50 years avoided entering into this very direct discourse that would necessarily entail formal recognition of a relationship with the CJEU, in which the latter gives guidance to the former in questions of EU law. The UK House of Lords, now the Supreme Court, has entered into a direct discourse with CJEU many times. Recently, even the Italian Constitutional Court has started referring preliminary questions

<sup>28</sup> BVerfG, 2 BvE 4/11, ruling of 19 June 2012, Absatz-Nr. (1–172). English Press Release available at <http://www.bundesverfassungsgericht.de/en/press/bvg12-042en.html>.

<sup>29</sup> BVerfG, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, ruling of 12 September 2012, Absatz-Nr. (1–248). Available in English at [http://www.bundesverfassungsgericht.de/en/decisions/rs20120912\\_2bvr139012en.html](http://www.bundesverfassungsgericht.de/en/decisions/rs20120912_2bvr139012en.html).

<sup>30</sup> Supreme Court of Estonia, no 3-4-1-6-12, decision of 12 July 2012, available in English at <http://www.riigikohus.ee/?id=1347>; Irish Supreme Court, *Thomas Pringle v The Government of Ireland, Ireland and the Attorney General* [2012] IESC 47, focused on the lawfulness of using the simplified revision procedure in Art 48(6) TFEU to add a paragraph 3 to Art 136 TFEU and on the lawfulness of the alleged 'vague and open-ended amendment that enables the granting of financial assistance without limitations or restrictions as provided for in the Union Treaties' (argument of the appellant).

<sup>31</sup> See summary in *Pringle v Ireland* (ibid).

<sup>32</sup> See questions referred under the expedited reference procedure (Art 104a of the Court's Rules of Procedure) in *Pringle v Ireland* (n 30).

<sup>33</sup> BVerfG (n 29).



to the CJEU.<sup>34</sup> The Polish Constitutional Tribunal has at least accepted direct communication with the CJEU through the preliminary reference procedure as a possibility.<sup>35</sup> Only as recently as February 2014, the GCC also changed its increasingly isolated stand and made a reference to the CJEU (*OMT* case).<sup>36</sup> Prima facie, this may have made constitutional complaints to the GCC more attractive from the perspective of the individual who wants to rely on their rights under EU law. Yet the *OMT* case should not necessarily be read as the beginning of a broader practice. It is a very particular case concerning the ECB's announced Outright Monetary Transactions (OMT) bond buying scheme. Firstly, any decision in this case entails direct and exceptionally far-reaching economic consequences for the Eurozone. Secondly in the *OMT* case, the GCC is confronted for the first time with a direct challenge of an act of a EU institution. The closest so far has been the case of *Honeywell* in 2010,<sup>37</sup> where the GCC was in essence asked to rule on the constitutionality of a decision of the CJEU. In this case, the GCC in principle accepted that it would check whether the CJEU had overstepped its mandate. However, it showed great deference to the EU judiciary and reduced that control to whether there was a manifest violation. And highly relevant for the present discussion, the GCC also made clear in *Honeywell* that it would not rule on whether an act of the (other) EU institutions goes beyond their mandate without giving the CJEU the opportunity, in a preliminary ruling, to give its interpretation of the matter. This is precisely what it did in the *OMT* case four years later.

The GCC enjoys a unique position as a constitutional court that is exceptionally powerful<sup>38</sup> and popular<sup>39</sup> within a big and influential Member State. If one understands EU law and German law as two juxtaposed legal contexts, rather than as interlocked in a way that excludes taking an exclusively national perspective, one could argue that a reference would limit the GCC's near-absolute judicial powers within the national legal context. Hence, from an internal perspective, based on an artificial conceptual separation of the two legal contexts, the GCC's choice of refusing for more than 50 years to refer to the CJEU was a strategy to preserve its own powers. In the 'Euro Bailout case', an earlier high-profile missed opportunity of the GCC to refer a question to the CJEU,<sup>40</sup> the Court faced a great

<sup>34</sup> Italian Constitutional Court, decision no. 103 of 2008, available at [www.corteconstituzionale.it](http://www.corteconstituzionale.it).

<sup>35</sup> Polish Constitutional Tribunal, decision of 11 May 2005, K 18/04, para 18.

<sup>36</sup> BVerfG, *OMT*, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, ruling of 14 January 2014, nyr.

<sup>37</sup> BVerfG, *Honeywell*, 2 BvR 2661/06, ruling of 6 July 2010, Absatz-Nr. (1–116).

<sup>38</sup> Its decisions take the exceptional force of ordinary laws in the national legal hierarchy, see Art 93 and 94 GG, in particular Art 94(2).

<sup>39</sup> See a Frankfurter Allgemeine Zeitung article on an opinion poll conducted by the respected Allensbach Institute finding inter alia that 80 percent of interviewees welcomed Karlsruhe's ability to overrule parliamentary decisions. Available at <http://www.faz.net/aktuell/politik/inland/bundesverfassungsgericht-das-bollwerk-11863396.html>. See also comments by Armin von Bogdandy, stating: '(The GCC) give[s] a voice to those parts of the population that don't have an influence [...] It is largely successful. The court enjoys very high public reputation'. Available at <http://www.ft.com/cms/s/0/78df7420-dfa5-11e1-9bb7-00144feab49a.html#axzz2HIhzmibt>.

<sup>40</sup> BVerfG, 2 BvR 987/10, ruling of 7 September 2011, Absatz-Nr. (1–142).

amount of international criticism. Some argued that it might face marginalisation as a consequence of its continuous boycott of the preliminary ruling procedure.<sup>41</sup> Furthermore in the *OMT* case, the GCC did not make a reference to the CJEU without making a clear statement how it sees the case—clearer than what is usual in this context. Indeed, it gave a number of reasons why it assumed that the *OMT* scheme exceeded the ECB's monetary policy mandate and thus infringed the sovereignty of the Member States, as well as that it violates the prohibition of monetary financing, which is one of the key pillars of the architecture of the European Monetary Union (EMU). However, the GCC pointed the CJEU at the same time to a back door by indicating that a restrictive interpretation of the scheme could potentially achieve conformity with EU law. The GCC hence entered into a direct conversation with the CJEU but with a clear stand and a demand to be treated as an equal. The preliminary ruling procedure only works as part of a relationship of trust and cooperation between the judiciaries of the different legal contexts. The CJEU 'for the most part, has been careful to understand its position as a *Primus Inter Pares*—as playing its role in a cooperative, non-hierarchical, judicial process involving "European" courts [...].'<sup>42</sup> Lower national courts may by requesting preliminary rulings 'be good Europeans, extend the reach of the rule-of-law to cover the obligations their states have assumed within the European Union and, last but certainly not least, enjoy a huge judicial empowerment boost'.<sup>43</sup> The preliminary ruling procedure thereby creates a win-win situation. It empowers (lower) national courts, extends the reach of their control and has the great advantage of the 'compliance pull associated with domestic courts'.<sup>44</sup> This has allowed the CJEU to give influential constitutional rulings under a procedure, which is meant to ensure that the application and enforcement in detail is left to the national court and is part of a system that is aimed to ensure cultural and legal diversity. Indeed, the CJEU's case law distilling general principles of EU law from the 'constitutional traditions common to the Member States'<sup>45</sup> presupposes that the traditions of the Member States are different from the outset and that they remain diverse. It does not impose one set of uniform European values. The costs of breaking with the legal recognition of claims of EU law are extraordinarily high and for lower national courts this would also mean breaking with the broader continuous recognition of EU law by national law. This gives the CJEU extraordinary compliance pull. Perhaps originally there was no 'compelling reason' to subscribe to the CJEU's vision of the EU as an integration organisation<sup>46</sup>—neither for national

<sup>41</sup> Cartabia, 'Europe and Rights' (n 8) at 29. See also: JHH Weiler, 'Judicial Ego' (2011) 9 *International Journal of Constitutional Law* 1, arguing that 'on matters of European law its [the GCC's] reputation has gone from bad to worse and at present its credibility on Europe is in the dog house'.

<sup>42</sup> Weiler, 'Judicial Ego' (ibid).

<sup>43</sup> ibid (n 41).

<sup>44</sup> ibid (n 41) at 1.

<sup>45</sup> Later codified, see Art 6(3) TEU.

<sup>46</sup> N MacCormick, *Questioning Sovereignty* (Oxford, Oxford University Press, 1999) 104.

courts nor for national Governments. The interlocking of legal spheres, furthered by the CJEU's case law, has created this compelling reason.

(ii) *Without a Formal Mechanism*

As is well explored in literature, national courts and the CJEU have also entered long ago into a judicial discourse outside of the preliminary ruling procedure. The most articulate discourse has taken place between the CJEU and the GCC, including the early rulings in *Solange I*, *Solange II*, and the *Maastricht Treaty* ruling, as well as the more recent rulings in *Lisbon Treaty* (2009) and *Honeywell* (2010).<sup>47</sup> The relationship between the two courts is characterised by a mix of exercising judicial pressure and respect for political reality.

The GCC has flagged up different issues of concern, including human rights protection (*Solange I* and *II*), ultra vires control (*Maastricht Treaty*), and an identity review (*Lisbon Treaty*). Additionally in the above-mentioned case of *Honeywell*, the GCC accepted to rule on whether the CJEU had acted ultra vires. Yet, it took a 'remarkably restrictive approach to ultra vires review' and followed in this 'a similar path as in its famous *Solange* jurisprudence with regard to fundamental rights review'.<sup>48</sup> The GCC explained its decision to reject the constitutional complaint against the CJEU's decision by stating that the CJEU is 'not precluded from refining the law by means of methodically bound case-law'.<sup>49</sup> This might be a surprise in light of the poor reasoning that the CJEU offered in the contested case, *Mangold*,<sup>50</sup> for introducing a general principle of non-discrimination on the grounds of age, which came to many as a surprise.<sup>51</sup> Nonetheless, the case demonstrates national courts' respect for methodologically sound legal reasoning in principle. While legal reasoning of course is not free of the political, legal

<sup>47</sup> *Solange I*, BVerfGE 37, 271, 2 BvL 52/71, ruling of 29 May 1974; *Solange II*, BVerfGE 73, 339, 2 BvR 197/83, ruling of 22 October 1986; *Maastricht Treaty*, BVerfGE 89, 155, 2 BvR 2134, 2159/92, ruling of 12 October 1993; *Lisbon Treaty*, 2 BvE 2/08, ruling of 30 June 2009. *Honeywell* (n 37).

<sup>48</sup> M Payandeh, 'Constitutional Review of EU law after *Honeywell*: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 *CML Rev* 9. See similarly, M Kumm, 'Constitutionalism and the Moral Point of Constitutional Pluralism: Institutional Civil Disobedience and Conscientious Objection' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford, Oxford University Press, 2012).

<sup>49</sup> BVerfG, *Honeywell* (n 37), at para 62: 'Dem Gerichtshof ist auch Rechtsfortbildung im Wege methodisch gebundener Rechtsprechung nicht verwehrt'. Similarly the GCC ruled that national courts had an obligation to consider the ECHR and rulings of the ECtHR in a methodologically sound manner. See BVerfG, 2 BvR 2307/06, ruling of 4 February 2010, Absatz-Nr. (1–27)), nyr, available at [http://www.bverfg.de/entscheidungen/rk20100204\\_2bvr230706.html](http://www.bverfg.de/entscheidungen/rk20100204_2bvr230706.html).

<sup>50</sup> *Mangold*, BVerfGE 126, 286, 2 BvR 2661/06, ruling of 6 July 2010.

<sup>51</sup> See eg: R Herzog, 'Stoppt den Europäischen Gerichtshof', *Frankfurter Allgemeine Zeitung*, 8 September 2008; S Krebbert, 'The Social Rights Approach of the European Court of Justice to Enforce European Employment Law' (2006) 27 *Comparative Labor Law & Policy Journal* 377, 382–92; K Riesenhuber, 'Annotation on Mangold Judgment' (2007) 3 *European Review of Contract Law* 62, 67–68. On the weak methodology, see U Preis, 'Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht' (2006) 23 *Neue Zeitschrift für Arbeitsrecht* 401, 405 which notes: 'The ECJ is walking on thin ice. [...] A legal argument can hardly be weaker'.

reasoning can allow stepping away from immediate political pressures and give courts an authority different from policy makers (see above). Legal reasoning has allowed for a parallel discussion that complements and restrains the political debate in the specific compound context of EU law. Indeed, what the internal EU discourse demonstrates is that courts can draw lines for the political, but that they must be sufficiently aware of political realities. At the same time, if law is used to disguise the political it loses its independent judgment and ultimately credibility.

This is the background of Joseph Weiler's accusation that the GCC has 'cried Wolf too many times to be taken seriously',<sup>52</sup> which continues to be very relevant in the context of the judicial review of instruments adopted to mitigate the Eurocrises. In 2009, the GCC indicated specifically that 'fundamental fiscal decisions on revenue and expenditure' must be taken in the national context. In 2011, the GCC ruled that 'the amount of the guarantees given' in the Greece aid and Euro rescue package did not exceed 'the limit of budget capacity to such an extent that budget autonomy would virtually be rendered completely ineffective'<sup>53</sup> and that it cannot step into the shoes of the national legislator. The 'lines drawn in the sand'<sup>54</sup> that the *Lisbon Treaty* judgment placed around the national expenditure, appear to have been erased by the tides of the financial markets. In 2012, the heads of states and governments of 25 Member States took a further step of interlocking by signing a Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact) that requires its signatories to introduce the agreed budget deficit rules in national law through 'provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'.<sup>55</sup> As a result the authority of the EU and of the national (constitutional) legislator are so closely interlocked that they blur from the perspective of the individual. The Fiscal Compact was concluded by national governments, ratified by national parliaments. It is an intergovernmental treaty adopted outside the EU legal context but so closely interwoven with the EU law, in particular the fiscal provisions of the EU treaties, that it can easily be mistaken for EU law. In light of the complex political and economic situation, the GCC understandably demonstrated great respect for the political powers (internal legislator). It may also have recognised that rulings on EU issues are no longer a matter of EU power versus national sovereignty but that the two contexts are so closely interlocked that they set together the background for an ongoing struggle between law and politics.

The CJEU's rulings also frequently contain statements of principle that are in practice highly flexibly interpreted, including by the CJEU itself. Illustrative

<sup>52</sup> Weiler, 'Judicial Ego,' (n 41).

<sup>53</sup> BVerfG (n 40).

<sup>54</sup> MacCormick, *Questioning Sovereignty* (n 46) at 100 with regard to the Maastricht decision.

<sup>55</sup> Art 3(2). The German Constitution does already contain a clause on budgetary discipline, see Art 109 GG.

examples are the CJEU's flexible approach to finding a legal basis<sup>56</sup> and its broad human rights approach without paying much attention to the specific boundaries of EU law in its rulings on rights of transsexuals<sup>57</sup> and citizenship.<sup>58</sup> Hence, both the GCC and the CJEU can at times be accused of making constitutional assertions but finding practical solutions that later undermine these vocal assertions. This is part of their discourse: both make principled statements about existing *legal* limits of EU competences but when it comes to the test of political reality they are willing to extend these limits. Even before the German Constitution introduced a special provision on EU law in 1992, the GCC accepted that EU law ranks higher than later adopted ordinary national laws—arguably without any basis in the national constitution but rather influenced by the (constitutional character of) EU law itself and of the decisions of the CJEU.<sup>59</sup> Similarly, the GCC's *Solange* doctrine recognised the authority of EU law and accepted it as different from international law—again before the special position of EU law was codified in the German Constitution.

The disagreement about how tensions between international, national and EU law should be reconciled is not new. Nor are situations where different courts rule on identical or at least very similar factual situations that involve the same norms. However, in certain policy fields a new intensity of overlapping judicial review has been reached, including beyond the boundaries of the EU. An example is counter-terrorist sanctions against individuals implementing UN Security Council Resolutions. A large number of judicial bodies have been called on to rule on the legality of these measures, including the CJEU, the Court of First Instance/the General Court, the European Court of Human Rights (ECtHR), the UK Supreme Court, the Swiss Supreme Court, and the Canadian Federal Court.<sup>60</sup> The different

<sup>56</sup> See on the pre-Lisbon legal basis for counter-terrorist sanctions, C Eckes, 'Judicial Review of European Anti-Terrorism Measures—The Yusuf and Kadi judgments of the Court of First Instance' (2008) 14 *European Law Journal* 74. See also on the EU tobacco legislation, M Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12 *European Law Journal* 503, 516–17. For a wider survey of the CJEU's case law after *Tobacco Advertising I*, see S Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a 'Drafting Guide'' (2011) 12 *German Law Journal* 828.

<sup>57</sup> Case C-117/01 *KB v National Health Service Pensions Agency and Others* [2004] ECR I-541; Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585.

<sup>58</sup> Eg Case C-256/11 *Dereci et al v Bundesministerium für Inneres*, judgment of 15 November 2011, nyr.

<sup>59</sup> BVerfGE 22, 293 (1967) and BVerfGE 31, 145 (1971).

<sup>60</sup> ECtHR, *Case of Nada v Switzerland* Application no 10593/08 (2012); UK Supreme Court, *Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaie Youssef) (Respondent) v Her Majesty's Treasury (Appellant)* [2010] UKSC 2; on appeal from: [2008] EWCA Civ 1187. Views of the Human Rights Committee, *Nabil Sayadi and Patricia Vinck against Belgium* [2008], concerning communication no 1472/2006; Court of Justice, Joined Cases C-584, 593 & 595/10 P, *Kadi II*, judgment of 18 July 2013, nyr; General Court, Case T-85/09 *Yassin Abdullah Kadi v Commission (Kadi II)* [2010] ECR I-5177; Court of Justice, Case C-402/05 P and C-415/05 P *Kadi v Council (Kadi I)* [2008] ECR I-6351; CFI, T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649; Federal Court of Canada, *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada* [2009] FC 580.

courts have considered each other's decisions to different degrees. In its high-profile ruling on sanctions in the case of *Nada*,<sup>61</sup> the ECtHR engaged intensively with the previous sanctions decision of other courts.<sup>62</sup> In its *Ahmed* ruling of 2010, the UK Supreme Court by contrast largely ignored the previous *Kadi* ruling of the CJEU and also disregarded the existing EU law governing the legal situations of the applicants—ignoring in fact the 'legal limits on the sovereignty of the UK Parliament [...] entailed by membership of the EU'.<sup>63</sup> The judicial discourse will continue: the CJEU is now asked to rule for the second time on the legality of UN counter-terrorist sanctions.<sup>64</sup> And even from the 'internal perspective' of the same legal order, there is no longer normative agreement on how the different claims of authority relate to each other.<sup>65</sup> In truly interlocked legal contexts, the *one* correct solution can no longer be found by simply looking harder. The internal legal context has been modified and the validity of internal norms depends (at least de facto) on external norms and vice versa.

In the past, both national courts and the CJEU have regularly argued from a systemic perspective of national law versus EU law and vice versa. However, the understanding might be growing that in legal contexts that are so deeply interlocked this systemic juxtaposition is misrepresenting not only political but also legal reality. This is to some extent also a result of judicial interaction. The internal European judicial discourse, including the judicial discourse outside of the preliminary ruling procedure, has contributed as much to the enforcement of the principle of supremacy as it has contributed to the delimitation of EU powers. The latter is often the focus of the analysis of the discourse between the CJEU and the GCC. The GCC has not only threatened to impose limits, but also vested EU law with authority by giving it a special position not recognised by the German Constitution at the time and by adapting its own principled statements to politics. It would be wrong to conclude that the GCC has not been listened to, only because it entered into the direct institutionalised discourse only in 2014. Its rulings concerning EU law extensively engage with the existence and nature of EU law. They aim to establish an intellectual authority and attract much attention beyond the national legal context. It is questionable whether the UK Supreme

<sup>61</sup> ECtHR, *Case of Nada* (ibid).

<sup>62</sup> See for a detailed analysis, C Eckes and S Hollenberg, 'Reconciling Different Legal Spheres in Theory and Practice: Pluralism and Constitutionalism in the Cases of Al-Jedda, Ahmed and Nada', (2013) 20 *Maastricht Journal of European and Comparative Law* 220.

<sup>63</sup> F Jacobs, *The Sovereignty of Law—The European Way* (Cambridge, Cambridge University Press, 2007) 7.

<sup>64</sup> The hearing in the appeal against the *Kadi II* decision of the General Court took place on 16 October 2012.

<sup>65</sup> The most prominent example is the diametrically opposed decisions of the CJEU and the CFI in the *Kadi* case (n 59). However, equally interesting on this point is a comparison of the attitude of the First and the Second senate of the GCC. While the former appears more open towards EU law, the latter is in principle responsible for European affairs. In its data retention decision, the First Senate barely mentions the Lisbon Treaty decision of the Second Senate. See BVerfG, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, ruling of 2 March 2010, Absatz-Nr. (1–345).

Court's choice to ignore EU law has placed it in a more credible position in the internal European discourse.

## **B. The Court of Justice Taking Part in the External Discourse**

Besides the judicial discourse within the EU, the CJEU is also increasingly involved in an external discourse. It takes account of and refers to the decisions of external judicial bodies, most prominently the ECtHR. It further gives rulings in cases concerning issues that are overlapping with the issues raised in other judicial bodies, such as the European Free Trade Association States (EFTA) Court and the WTO Dispute Mechanism.

### *(i) European Court of Human Rights*

The Strasbourg and the Luxembourg Court take note of each other's rulings—this has already been observed 20 years ago.<sup>66</sup> A significant ruling in the early years was the *Marckx* case.<sup>67</sup> The ECtHR relied on a completely new doctrine of temporary limitation of the effects of judicial ruling by referring to the CJEU's ruling in the *Defrenne* case,<sup>68</sup> in which the CJEU for the first time limited the retroactive effect of its own ruling. The CJEU did not rely on the 'common traditions of the Member States' in this case since the retroactive limitation of the effect of judicial rulings was largely unknown.<sup>69</sup>

In the other direction, as is well known, the Lisbon Treaty has made EU accession to the European Convention on Human Rights (ECHR) a legal obligation.<sup>70</sup> Pre-accession, the EU is not itself directly bound by the Convention, either under international law or EU law. However, the ECHR and its interpretation by the ECtHR have played a great role in the EU's constitutionalisation. In many landmark cases, the CJEU uses both general principles of EU law and the ECHR and the ECtHR's case law to support its argument<sup>71</sup> and the EU treaties and the EU Charter of Fundamental Rights all include references to the ECHR.<sup>72</sup> In more recent years,

<sup>66</sup> J Polakiewicz and V Jacob-Foltzer, 'The European Human Rights Convention in Domestic Law: The Impact of the Strasbourg Case-Law in States Where Direct Effect is Given to the Convention—Part 2' (1991) 12 *Human Rights Law Journal* 125, 142.

<sup>67</sup> *Marckx v Belgium* (1979) Series A no 31.

<sup>68</sup> Case C-43/75 *Defrenne v Sabena* [1979] ECR 455.

<sup>69</sup> F Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: the European Court of Justice' (2003) 38 *Texas International Law Journal* 547: Austria, which was not a Member State until 20 years later, applied this doctrine.

<sup>70</sup> Art 218(8) TFEU.

<sup>71</sup> Case C-60/00 *Carpenter* [2002] ECR I-6279; Case C-112/00 *Schmidberger* [2003] ECR I-5659.

<sup>72</sup> See Art 6(2) and (3) TEU, Art 218(6)(a)(ii) and (8) TFEU; Arts 1 and 2 of Protocol 8 and Protocol 24. Arts 52(3) and 53 of the Charter of Fundamental Rights.

the EU Charter of Fundamental Rights has grown in importance<sup>73</sup> and the CJEU has dropped its earlier 'general principles' or 'source of inspiration' approach, and has started to refer directly to ECHR provisions.<sup>74</sup> The EU Charter—after much discussion<sup>75</sup>—also specifically refers to the case law of the ECtHR, albeit in its Preamble, not in the main text.<sup>76</sup> The CJEU has ruled in *JMcB v LE* that where rights in the Charter correspond to rights in the ECHR, the CJEU should follow the case law of the ECtHR.<sup>77</sup> The CJEU has made significantly more references to the ECHR in the years 2010, 2011 and 2012 than in the previous three years.<sup>78</sup> By contrast with the internal discourse discussed above, the CJEU has not taken a systemic perspective in the interaction with the ECHR and the case law of the ECtHR, but rather considered individuals the ultimate point of reference. This becomes apparent in recent cases on citizenship and migration, in which the CJEU relies particularly often on Convention rights.<sup>79</sup> Furthermore, EU law is regularly used in the arguments before the ECtHR<sup>80</sup> and the ECtHR has repeatedly given judgments that are directly relevant for the EU.<sup>81</sup> In line with its mandate, the ECtHR does so by relating all considered law to the position of the individual. In light of Article 6(3) TEU in particular, it would be contrary to EU law to disregard the Convention. At the same time, there is an important legal difference between 'giving due account to' and being legally bound by the provisions of the ECHR, as authoritatively interpreted by the ECtHR. This was demonstrated most impressively by the CJEU's *Kadi* ruling.<sup>82</sup> Even though before 2008 the Court had in settled case law given due account to UN Security Council

<sup>73</sup> See eg: Joined Cases C-92/09 *Volker and Markus Schecke GbR* and C-93/09 *Hartmut Eifert v Land Essen* [2010] ECR I-000. See also, N O'Meara, "A More Secure Europe of Rights?" The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR' (2011) 12 *German Law Journal* 10, 1813–32 at 1819.

<sup>74</sup> Case C-413/99 *Baumbast* [2002] ECR I-7091, 72; Case C-60/00 *Carpenter* (n 70) at 41–42; Case C-200/02 *Kunqian Catherine Zhu Chen* [2004] ECR I-9925, 16.

<sup>75</sup> L Scheek, 'Diplomatic Intrusions, Dialogues, and Fragile Equilibria: The European Court as a Constitutional Actor of the EU' in J Christoffersen and MR Madsen (eds), *The European court of Human Rights between Law and Politics* (Oxford, Oxford University Press, 2011) 172.

<sup>76</sup> Art 52(3) of the Charter of Fundamental Rights.

<sup>77</sup> Case C-400/10 PPU *JMcB v LE* [2010] ECR I-8965, 53. S Douglas-Scott interprets 'correspond' as 'the same' or 'identical', see: S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 4, 655–66. This seems to be an overly strict reading. Indeed, the explanations to the Charter offer a list of 'corresponding rights'. This appears to offer a good interpretation of the scope of the CJEU's ruling.

<sup>78</sup> In 2010, 2011 and 2012, 90 judgments of the CJEU and AG opinions refer to the ECHR. In the three previous years (2007–09), 68 judgments and opinions made a reference to the Convention.

<sup>79</sup> In the years 2010 to 2012, the Court referred to the ECHR in nine judgments concerning Area of Freedom, Security and Justice (AFSJ) matters and in four judgments concerning citizenship, including landmark cases such as Case C-34/09 *Ruiz Zambrano*, judgment of 8 March 2011, nyr. In the same period, the ECHR was used in 13 Advocate General Opinions on cases concerning AFSJ matters, nine opinions concerning citizenship and three opinions concerning equal treatment. See also: Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (n 1).

<sup>80</sup> In 2012 only, the EU was brought up 51 times in rulings of the ECtHR, including 15 times by the parties and 18 times by the court (including separate opinions).

<sup>81</sup> See Eckes, 'EU Accession' (n 78) 254–85.

<sup>82</sup> Cases C-402/05 P and C-415/05 P *Kadi* (n 59).



Resolutions,<sup>83</sup> it chose to rely on the fact that the EU is not a member of the UN and is therefore not directly bound by its Charter or its Security Council Resolutions.<sup>84</sup>

After the EU's accession to the ECHR,<sup>85</sup> the ECHR will be directly binding on the EU and judicial discourse between the CJEU and the ECtHR will become institutionalised with the establishment of the prior involvement option under the co-respondent mechanism.<sup>86</sup> The co-respondent mechanism will 'allow the EU to become a co-respondent to proceedings instituted against one or more of its Member States and, similarly, to allow the EU Member States to become co-respondents to proceedings instituted against the EU'.<sup>87</sup> If the CJEU was not previously involved in a case, in which the EU becomes a co-respondent, the ECtHR may stay the proceedings and give the CJEU the opportunity to scrutinise compliance with the Convention. Similar arrangements have earlier been made under the second Agreement on the European Economic Area<sup>88</sup> and under the Agreements Establishing the European Common Aviation Area.<sup>89</sup> It places the CJEU in the privileged position of being asked for an interpretation before the ECtHR gives its ruling. The Court's opinion is likely to have an impact on the legal discourse in Strasbourg. It might even frame the further discussion, since parties are invited to submit their observations after the CJEU has given its opinion on the case.<sup>90</sup> They will most likely engage with the CJEU's views. At present, the CJEU does so by holding the case law of the ECtHR at arm's length. This might no longer be possible after accession. The CJEU would for the first time be at the receiving end of a formalised judicial discourse.

<sup>83</sup> See eg: Case C-84/95 *Bosphorus* [1996] ECR I-3953 and Case C-124/95 *Centro-Com* [1997] ECR I-81.

<sup>84</sup> Cases C-402/05 P and C-415/05 P *Kadi* (n 59) at 294: 'special importance' not 'binding force'.

<sup>85</sup> See on the EU's accession also, J Heliskoski, 'The Arrangement Governing the Relationship between the ECtHR and the CJEU in the Draft Treaty on the Accession to the ECHR' in this volume (ch 12).

<sup>86</sup> This is what has been agreed in the Draft Agreement on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)16.

<sup>87</sup> *ibid*, para 29.

<sup>88</sup> Accepted by the Court of Justice in Opinion 1/92 *Re Second Draft EEA Agreement* [1992] ECR I-2821. See Arts 105(3) and 111(3) of the EEA Agreement.

Art 105(3): 'If the EEA Joint Committee within two months after a difference in the case law of the two Courts has been brought before it, has not succeeded to preserve the homogeneous interpretation of the Agreement, the procedures laid down in Article 111 may be applied.'

Art 109(5): 'In case of disagreement between these two bodies [EFTA Surveillance Authority and EU Commission] with regard to the action to be taken in relation to a complaint or with regard to the result of the examination, either of the bodies may refer the matter to the EEA Joint Committee which shall deal with it in accordance with Article 111.'

Art 111(3): 'If a dispute concerns the interpretation of provisions of this Agreement, which are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee, the Contracting Parties to the dispute may agree to request the Court of Justice of the European Communities to give a ruling on the interpretation of the relevant rules.'

<sup>89</sup> Opinion 1/00 *Proposed Agreement between the European Commission and non-Member States on the Establishment of a European Common Aviation Area* [2002] ECR I-3493.

<sup>90</sup> Art 3(6) of the Accession Agreement.

(ii) *EFTA Court*

Less frequently discussed is the discourse between the EFTA Court and the CJEU. The European Economic Area (EEA) Agreement sets out that the interpretation and application of EU law and EEA law must be carried out 'in full deference to the independence of courts'.<sup>91</sup> Yet, it is an unequal institutionalised judicial discourse. The EFTA Court is bound by the case law of the CJEU preceding the conclusion of the EEA Agreement<sup>92</sup> and must take account of the CJEU's case law subsequent to 2 May 1992.<sup>93</sup> In practice, this has not made a difference.<sup>94</sup> The EFTA Court refers to the CJEU's case law in all its advisory opinions and in all its judgments.<sup>95</sup> It has further frequently adopted both the CJEU's reasoning and principles of EU law. The CJEU is not bound by the interpretation of the EFTA Court but has referred to and been influenced by its case law.<sup>96</sup> This is a rare honour in light of the fact that otherwise the Court only refers to the ECtHR. It even remains controversial whether it may be justified to interpret the EEA and the EU law differently.<sup>97</sup> Daniele Galo argues that the EEA Agreement should be construed as aiming to ensure at all times uniform interpretation between the two legal regimes.<sup>98</sup> The argument is that homogeneity is the purpose of the EEA Agreement, notwithstanding constitutional differences between EU law and the EEA Agreement. Francis Jacobs argues that differences in context and objectives of EU law and the EEA Agreement could justify a different interpretation. This finds support in the case law of the CJEU.<sup>99</sup>

It is fair to conclude that the relationship between the CJEU and the EFTA Court is very particular, because of its institutionalisation and also because of the choice to make it unequal—not only because of political importance but also as a matter of law. This has allowed the CJEU to recognise the authority of the EFTA Court without being threatened.

(iii) *WTO Dispute Mechanism*

The WTO has an exceptionally well-developed dispute settlement mechanism and produces (quasi-)judicial decisions that do not require consent and that are subject to an enforcement mechanism (trade sanctions). As is well known

<sup>91</sup> Recital 15 of the Preamble and Art 106 of the EEA Agreement.

<sup>92</sup> Art 6 EEA Agreement.

<sup>93</sup> Art 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/Court Agreement).

<sup>94</sup> Baudenbacher (n 5) at 204–13.

<sup>95</sup> D Galo, 'From Autonomy to Full Deference in the Relationship between the EFTA Court and the ECJ: The Case of the International Exhaustion of the Rights Conferred by a Trademark', *EUI Working Papers* RSCAS 2010/78.

<sup>96</sup> Jacobs, 'Judicial Dialogue' (n 68); Galo (ibid).

<sup>97</sup> In favour: Jacobs, 'Judicial Dialogue' (n 68) 552–53. Against: Galo (n 94).

<sup>98</sup> Galo (n 94) at 2 referring to: Preamble, paras 4 and 15; Arts 1, 6, 106, 107 and 111 of the EEA Agreement, as well as Art 3 of the ESA/Court Agreement.

<sup>99</sup> See in particular Opinion 1/91 *EEA Agreement* [1991] ECR I-6079.

and possibly discussed too extensively,<sup>100</sup> the CJEU does not give direct effect to decisions of the WTO dispute mechanism. This means that these decisions cannot directly be used as yardstick against which acts of the EU institutions can be reviewed. On appeal in the case of *Biret*,<sup>101</sup> the CJEU indicated in passing that the question of whether WTO dispute decisions enjoyed direct effect could be examined separately from general WTO law. This gave rise to speculation of whether the WTO dispute decision could enjoy direct effect. However, in the case of *Van Parys*,<sup>102</sup> the Court closed this avenue and made clear that the nature of the dispute settlement mechanism did not justify conferring direct effect on WTO dispute decisions. It later confirmed this line in the case of *FIAMM*.<sup>103</sup>

The Court's rejection of direct effect of decisions of the WTO dispute settlement mechanism is based on several strands of argument. The first focuses on the nature of the WTO dispute settlement mechanism. Both in *Van Parys* and in *FIAMM* the Court emphasised the fact that WTO dispute resolution relied on negotiation between the parties. It focused on the temporary measures of compensation and suspension of concessions. The second strand traces the effect of the WTO dispute decision back to the effect of WTO law as such. In *FIAMM*, the Court explained that WTO dispute decisions do not have direct effect because they apply WTO law which does not have direct effect either.<sup>104</sup> Thirdly and this is a motivation that the Court does not make explicit, the Court might want to avoid acting in the place of or even against the legislator.<sup>105</sup> It should be added that this is not to say that WTO law does not play a role in disputes before the CJEU. The Court routinely interprets secondary EU law consistently with WTO law<sup>106</sup> and with rulings of the WTO Appellate Body.<sup>107</sup> It might even have entered into what Marco Bronckers called 'a muted dialogue'.<sup>108</sup> Decisions exist in which

<sup>100</sup> See eg E Paasivirta and PJ Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations' (2005) 36 *Netherlands Yearbook of International Law* 169. They emphasise that WTO law and decisions of the dispute settlement bodies are the exception that confirm the rule that international agreements do form part of the EU legal order and can have direct effect. More recently also decisions of the UN Convention on the Law of the Sea (UNCLOS) Tribunal, see Case C-308/06 *Intertanko* [2008] ECR I-4057.

<sup>101</sup> Case C-93/02 P *Biret International v Council* [2003] ECR I-10497.

<sup>102</sup> Case C-377/02 *Van Parys* [2005] ECR I-1465. See on the same issue and with the same outcome in more detail, Opinion of Advocate General Léger in Case C-351/04 *IKEA Wholesale* [2007] ECR I-7723, para 77 f.

<sup>103</sup> Cases C-120/06 P and C-121/06 P *FIAMM v Council and Commission* [2008] ECR I-6513.

<sup>104</sup> *ibid.*

<sup>105</sup> See PJ Kuijper and F Hoffmeister, 'WTO Influence on EU Law—Too Close for Comfort?' in R Wessel and S Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organizations* (The Hague, TMC Asser Press, 2013)

<sup>106</sup> See eg Case C-70/94 *Werner v Germany* [1995] ECR I-3189, para 23 and Case C-83/94 *Leifer and Others* [1995] ECR I-3231, para 24; but see also for an example where the Court did not take recourse to the technique of consistent interpretation: *Ikea Wholesale* (n 101). See in more detail about the attitude of the CJEU to giving effect to WTO dispute decisions, Kuijper and Hoffmeister, 'WTO Influence on EU Law' (*ibid.*).

<sup>107</sup> See eg Case C-310/06 *FTS International v Belastingdienst—Duane West* [2007] ECR I-6749.

<sup>108</sup> M Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO And Beyond' in M Bulterman, L Hancher, A McDonnell

the panel or Appellate Body took a position on the allocation of responsibility on the basis of the division of competences or tasks between the EU and its Member States under EU law.<sup>109</sup> In cases that could have been problematic, the Appellate Body has displayed considerable deference towards the EU. In the case of *Selected Customs Matters*, for instance, the Appellate Body was essentially invited to declare that the entire EU customs system was not sufficiently coherent.<sup>110</sup> However, it chose not to enter into this argument.

The concept of 'direct effect' and its understanding both with regard to EU law and with regard to international law should be seen in the light of the relations and discourse between different judicial bodies. By not giving direct effect to the decisions of the WTO dispute mechanism, the CJEU equally found a way to hold these decisions at arm's length. It can give effect to them and consider them without having to submit to their authority.

#### IV. WHAT LESSONS CAN BE TAKEN FROM THE INTERNAL EU DISCOURSE?

The Court has gained, during the past 50+ years, considerable experience in interacting with Member States' courts and in giving rulings that translate into different linguistic and conceptual universes. In areas falling within the scope of EU law, the case law of the CJEU serves as a 'co-operation tool' to frame the discussion in a linguistically accessible way. Suggestions have been made that international law could be used to a similar purpose<sup>111</sup> and that the International Court of Justice (ICJ) and the ECtHR should equally be equipped with the possibility of giving preliminary rulings.<sup>112</sup> With regard to the latter the first formalised direct discourse will be introduced between the CJEU and the ECtHR in the prior involvement procedure after EU accession. This raises the broader question: What could be learned from the inner EU experience for a wider judicial discourse?

The first main observation is that differences prevail between the judicial discourse within the EU and the external judicial discourse. In the former the CJEU has expressed a claim of *ultimate* authority for all matters of EU law, which

and H Sevenster (eds), *Views of European Law From the Mountain* (Alphen aan den Rijn, Kluwer Law International, 2009).

<sup>109</sup> See eg *European Communities—Customs Classification of Certain Computer Equipment*, Panel Report (adopted 5 February 1998) WT/DS62/R, WT/DS67/R, WT/DS68/R.

<sup>110</sup> Cases: *European Communities—Selected Customs Matters*, Request for Consultation by the US (21 September 2004) WT/D315/1; *European Communities—Selected Customs Matters*, Panel Report (adopted 16 June 2006) WT/DS 315/R, see paras 2.2–2.31; *European Communities—Selected Customs Matters*, AB Report (adopted 13 November 2006) WT/D315/AB/R, see para 69.

<sup>111</sup> Suggesting that this could also be the role of international law: E Benvenisti and GW Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 *European Journal of International Law* 59, 66.

<sup>112</sup> See two of the past presidents of the ICJ at: R Higgins, 'The ICJ, the ECJ and the Integrity of International Law' (2003) 52 *ICLQ* 1, 17–20 and Opinion of Advocate General Warner in Case C-130/75 *Prais v Council* [1979] ECR 1589.

reaches—in different degrees of intensity—across the full range of policy fields. The effect of EU law within the national legal order does not usually depend on recognition or implementation of the particular EU command. The CJEU is at the centre of a pluricontextual compound legal system that is built through and on internal judicial discourse. It does not stand in a straight hierarchical line at the peak of an appeal system, but is used to being greatly dependent on the support of national courts. Indeed, the internal EU judicial discourse is part and parcel of the systemic purpose of ‘creating an ever closer union among the peoples of Europe’,<sup>113</sup> which has grown into a Union of fate and even if the ultimate threat of disobedience and even withdrawal from the Union continues to exist even after decades of interlocking between the EU and the national legal orders.<sup>114</sup> Furthermore, within the EU the continuous joint decision-taking and ever so close interaction between national players has created an institutionalised European political discourse, which may not be matched by a popular European political discourse, but which contributes nonetheless to the creation and continuation of this community of fate. While withdrawal may remain a *political* option, albeit at high political costs, interlocking through continuous recognition makes disobedience *legally* very difficult to justify for any individual national court. In the interlocked legal context of the EU, disobeying EU law would require lower national courts to also disobey national law and the authority of the higher national courts. For all courts, including the highest national courts, it entails disobeying national practice and disappointing created expectation.

By contrast, the purpose of an external discourse cannot be to work towards an ever closer Union. Indeed, the external discourse does not serve a joint systemic purpose. No external claim of authority is at the same time as comprehensive and ultimate as the claim of EU law within the national legal order. External claims of authority may be ultimate in the sense that they claim to set the highest applicable norm on a particular issue (eg UN Security Council Resolutions), but they do not claim ultimate authority on a broad range of issues immediately determining the lives of individuals, as does EU law. External claims remain limited to particular issues or areas and more often declare an ultimate expert judgment without direct legal authority within the domestic legal order. Hence, even though similarities can be indicated in the way, in which individual claims penetrate and in practice change the national legal context without specific confirmation by national legal authority in the particular case, the nature of the claim of ultimate authority of EU law is different from all phenomena in the international sphere. It is constitutional in nature because it claims ultimate authority over how to govern the political community. This has consequences for the judicial discourse. Externally the CJEU would neither be able to make a claim of ultimate authority. Even in

<sup>113</sup> Art 1(2) TEU.

<sup>114</sup> Great Britain has spoken more frankly about this option in recent years than many years before that (see eg the title story of the *Economist* of 8 December 2012).

the case of the EFTA Court, which follows the CJEU on all occasions, one cannot speak of ultimate authority.

Taking too much inspiration from the CJEU's authoritative participation in the internal discourse would most likely result in an overstretching of the CJEU's external authority. Only in a cooperative and interlocked system, where the distinction between external and internal claims of authority is at times impossible to draw, influence from the outside can be as effective as it is within the EU. Purely external control always entails a danger that the judicial body overstretches its authority and loses support within the other legal and judicial context. The described level of interlocking between the European and the national context, which is a result of both the CJEU's claim of *ultimate* authority and the fact that power is exercised by the same persons in both contexts, does no longer allow neatly juxtaposing the two contexts in legal analysis. Any such juxtaposition is overly conceptually simplified. This is different from the external EU context. EU law is not to any similar degree interwoven with the international legal context. Even in the case of the ECHR, where it is largely assumed that membership is an unwritten requirement for EU accession and from which much inspiration is drawn for the interpretation of EU law, in particular the Charter, the interlocking has been softened by the CJEU's arm's-length approach. Until accession the validity of EU law depends on compliance with the CJEU's interpretation of the ECHR. This is a rejection of the ultimate authority of the ECtHR in matters of human rights. Similarly, the CJEU has kept WTO law and the authority of the WTO dispute mechanism at distance with its decision not to grant direct effect.

A parallel between the judicial discourses within the EU legal order and outside is that they are both characterised by a power struggle between law and politics. Judicial decisions that cannot always be explained in purely legal terms restrain political actors, as well as the judiciary in a different legal context. A fundamental difference is the understanding of sovereignty in practice. States, including both the political actors and the national judiciaries, have accepted the limitation of their autonomy or sovereignty, if you will, in practice. EU law has managed to restrain Member States as a whole, and national actors, including the courts, individually. It attained a level of sovereignty within the national legal context that is not matched outside. To borrow the words of AG Jacobs this constitutes 'sovereignty of [EU] law',<sup>115</sup> which empowers courts in the ongoing struggle between law and politics. The CJEU does not have the same authority over external judicial bodies, nor do they have the same authority over the CJEU as national courts, whose recognition and support is particularly important in a constitutionalised system, with little tolerance for non-compliance. However, there are parallels between the internal and the external. One is the complexity of considerations underlying a decision in the balance between legal reasoning

<sup>115</sup> F Jacobs, *The Sovereignty of Law. The European Way* (Cambridge, Cambridge University Press, 2007).

and political considerations. It is not always possible to make a transparent *legal* argument. It might be simply impossible to legally reconcile different claims of ultimate authority with reference to some consistent legal framework. From the perspective of the individual citizen, both claims of ultimate authority have increasingly come into play alongside each other, usually demanding compliance with the same rules. The EU has installed its own claim of authority inside the national legal orders by evolution rather than revolution. No break has occurred and the old national political powers continue to rule alongside and within the EU sphere. Parallel developments can be witnessed in the international sphere. The test case is when the two claims conflict.

The CJEU is used to reconciling not only the views of different national courts but also to deal with executive power being exercised in the different contexts by either the same actors or at least in close interaction between the different contexts. The CJEU cannot be accused of being partisan for any individual Member State, European integration itself and the effectiveness of EU law has been the single most important concern of the CJEU. This might also explain why the CJEU avoids referring to case law of the Constitutional Courts of the EU Member States. It usually refers to the abstract of ‘constitutional traditions common to the Member States’ without specifically naming any. It does not endorse particular claims of authority more than others. The GCC by contrast, regularly refers to judgments of the CJEU<sup>116</sup>—in 2011 more often than to the case law of the ECtHR.<sup>117</sup> Outside of a constitutionalised framework, inclusion of external claims of authority and recognition of the authority of specific external judicial bodies is necessary to strengthen their relevance and allows extending authority beyond the domestic legal context. Outside, the CJEU rightly takes a discriminative approach towards external claims of authority.

The CJEU is further in a particular position, different from national courts interacting with external legal contexts. *Kadi* exemplifies the first particular difficulty of the CJEU in the external judicial discourse. The internal and the external discourse are connected at a deeper level. On the one hand, the CJEU may have additional difficulties to require obedience from national courts if it does not accept the authority of the UN Security Council (not a court!). On the other, had the CJEU accepted the UN Security Council’s claim for absolute authority within the EU legal order, the GCC might have reconsidered its *de facto* acceptance that fundamental rights are sufficiently protected within the EU.<sup>118</sup> Secondly, the CJEU’s position is different because the political organs of its own constitutional order (the EU institutions) are largely excluded from the decision-making process in most international organisations and under most international conventions by the simple fact that most international organisations and conventions allow only

<sup>116</sup> Sixteen references in 2011.

<sup>117</sup> ECtHR: 11 times in 2011.

<sup>118</sup> C Eckes, ‘Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?’ (2012) 18 *European Law Journal* 230.

states to join. The UN, the Council of Europe, and the International Monetary Fund (IMF) are examples of powerful international organisations that the EU cannot join because of the provisions of their founding treaties.<sup>119</sup> The ECHR is the most prominent example where this is currently changing.<sup>120</sup> The exception is the WTO. This may explain why the CJEU defers to the EU political forces in the case of WTO dispute settlement decisions. At the same time within the EU legal order, Member States, rather than the EU political institutions, are at least in principle in the position to include more specific provisions in the EU treaties on how international law and the decisions of international courts and tribunals should be received.

On a more detailed level, a possible conclusion from the internal judicial discourse may be that there is a difference between influencing the specific substantive content of external claims of authority and reining in the exercise of power by the external institution. Within the informal internal EU discourse, national courts have exercised pressure and plausibly threatened disobedience not only to the EU actors but also to national political actors, who cannot control their own judiciaries. They mainly aimed to reign in the exercise of power and exclude *ultra vires* acts. To cooperate in a strictly organised constitutional structure, such as the preliminary ruling procedure, is a strong form of recognition. It allows debate on substance,<sup>121</sup> while interaction and mutual influence are institutionalised, usually with clear consequences for the exercise of power. The GCC's reference may optimistically be read as a recognition that trench warfare, ie pushing integration (CJEU) and defending national sovereignty (GCC), is ill suited to control the exercise of executive power in the context of the financial and economic crisis. It may be a step towards the next level of maturity of the European judicial network, in which institutionalised recognition trickles down through the domestic system and influences formal political acceptance and ultimately acceptance by individuals. Depending on the institutionalised interaction courts are in a stronger position to influence the substantive focus of the discussion.

## V. CONCLUSION

The times of self-contained jurisdictions are over. Legal spheres interlock with no reasonably articulated theoretical framework. This entails new configurations of compound executive power stretching across jurisdictions. It evokes a Schmittian view in several respects. Carl Schmitt's analysis of the general debility

<sup>119</sup> Art 4(1) of the UN Charter: 'peace-loving states'; Art 4 of the Council of Europe Statute: 'European state'; Art II s 2 of the Agreement of the International Monetary Fund: 'other countries'.

<sup>120</sup> Protocol 14.

<sup>121</sup> Specific legal concepts, such as proportionality and legal certainty have been introduced into English law: F Jacobs, 'Judicial Dialogue' (n 68) at 549.



of legislatures and judges in the modern administrative state<sup>122</sup> applies not only to the exceptional times of war but may become a permanent phenomenon in a pluricontextual setting. It is most visible in the current economic and financial crises in the EU context. The practices of a 'strong' executive are unprecedented: instruments, practices and (even) institutions have emerged in Europe with extensive powers over national constitutions and institutions, particularly on national budgets, banking supervision and financial stability.<sup>123</sup> When introduced into the national constitution, they are recognised by the domestic legal system. Yet, these external rules are not stable but develop separately from the domestic legal order and are rooted in their separate claim of ultimate authority. At the same time, European and international executive power is composed of (components of) national executive power and thus they are inextricably linked in a manner that at times defies attempts to hold individual or collective actors to account separately, either legally or politically.

Judicial discourse can make a contribution to counterbalancing and controlling the executive in the increasingly pluricontextual setting, where norms interlock in a non-hierarchical manner. To formulate the issue within the state-centric linguistic framework of international law: judicial discourse is necessary to address problems resulting from the inter-state origin of intra-state norms of international and European law. This chapter concluded that the internal EU discourse can only contribute to reflections on the external discourse at an abstract level. Fundamental differences will continue to require a very different approach of the CJEU to the internal and the external. This is an indirect confirmation of the fact that the legal spheres within the EU are more closely interlocked than the EU legal sphere with any of the discussed external ones.

What can be learned from the internal EU discourse is that in a struggle of power in the space between law and politics legal ambiguity can be a conscious choice to avoid political confrontation. The CJEU, as well as the Member States' courts, have long experience in respecting the political while at the same time exercising judicial pressure. While many criticise the CJEU and also the GCC for ultimately bowing to politics, both have had great influence on reigning in the political forces in the EU context. At the same time in the external sphere, law is necessarily in a weaker position in relation to politics. Lower constitutionalisation requires more cautious legal attempts to exercise any control of the external context. External control largely depends on recognition, and within the EU national recognition by courts, political actors and individuals of the EU's claim of authority has led to an autonomous sovereignty of EU law within the national legal order. While all courts, national as well as international, start from a perspective

<sup>122</sup> C Schmitt, *Legalität und Legitimität* 7th edn (Berlin, Duncker & Humblot, 1998); see also: WE Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, MA, MIT Press, 1994).

<sup>123</sup> N Moloney, 'The European Securities and Market Authority and Institutional Design for the EU Financial Markets—a Tale of Two Competences: Part (1) Rule-Making' (2011) 12 *European Business Organization Law Review* 41.

of judicial autarchy and tend to be self-referential,<sup>124</sup> the national courts of the Member States have grown into their role as European courts. The CJEU has successfully convinced national courts to 'include validity-in-E[U]-law as a criterion of validity domestically'.<sup>125</sup>

Conceptual borrowing is a second characteristic of the internal EU discourse that could inspire and arguably has inspired the external discourse in the case of the ECHR. The CJEU has succeeded in translating national constitutional rights into the EU context. These rights, read through the CJEU's filter, have had a great effect on the development of the EU legal order. This has fostered recognition and mutual influence within the EU. Judicial discourse practices are a core element of the development of EU public law. Even though judicial systems deliver justice contingent on their own legal and constitutional context, repeated recognition of external claims of authority can change the conception of justice at a deep level. Legal systems are artificial normative constructions that develop dynamically. External norms can simply become part of the internal legal system, including their practice of claiming of ultimate authority. It becomes part of how citizens (and lawyers) understand the law. The motivation of compliance might become pluricontextual too. Citizens comply with EU law because their state says so, but increasingly citizens, in particular those who rely on their free movement rights, also recognise the Union's authority and respect rules because the Union says so. As long as the two sources of authority point in the same direction, no decision of loyalty needs to be taken. Contradictory claims of ultimate authority do not need to result in contradictory rules for citizens. This is similar in the external sphere. The most illustrative example might be the EFTA Court, which borrows the CJEU's interpretation for identical legal concepts under the EFTA Agreement.

Finally, while the CJEU and national courts have often relied on a systemic legal reasoning, which is unsuited for the external judicial discourse, EU law itself also makes the individual the ultimate point of reference. In an environment where ultimate political authority remains ambiguous, the individual has served as a point of reference for actors from different legal contexts. The direct link between EU law, including rulings of the CJEU, and individuals is one of the particularities of EU law. The Court relies not only on support and recognition by national judges but also on the recognition (use in national disputes) by individuals. For the external discourse this might be more difficult, since by their nature, external relations have less often a direct impact on the rights of individuals. They often concern question of division of power rather than straight forwardly questions of individual justice. One sign of this is the fact that many fundamental decisions in the area of EU external relations were taken as enforcement actions rather than preliminary rulings. However, examples are increasing in which external claims of authority affect individuals. This is a chance for a move away from a systemic approach to an approach that reasons from the position of the individual legal subject.

<sup>124</sup> See for international courts, CPR Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2009) 41 *International Law and Politics* 755, 758.

<sup>125</sup> MacCormick, *Questioning Sovereignty* (n 46) at 115.

