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I. Introduction

Trade and investment have become increasingly subject to controversy within public debate. Sustainability and economic growth are understood to stand in an intrinsic tension.[1] Trade agreements are intended to increase the production and transport of goods, which inevitably produces emissions, and, at least potentially, has other unsustainable consequences, such as intensifying deforestation and lowering animal welfare and labour standards. These are fundamental tensions which go deeper than the past tensions caused by sectorial interests and national prioritisation of certain industries. The mantra of ever freer trade and economic growth as a value per se has found its limits. Critics see the crossing of international boundaries and growing inequalities *also* as a result of globalised trade relations.[2]

[1] L Ankersmit, 'The EU's strategy for more "rules-based" trade and the EU's withdrawal from the Energy Charter Treaty' (2023) 50 *Legal Issues of Economic Integration* 117; M Ossewaarde and R Ossewaarde-Lowtoo, 'The EU's Green Deal: A Third Alternative to Green Growth and Degrowth?' (2020) 12 *Sustainability* 9825; Fundamentally: D Rodrik, 'Has Globalization Gone Too Far?' (1998) 41 *Challenge* 81; On the sustainability of EU trade agreements: D van 't Wout, 'The enforceability of the trade and sustainable development chapters of the European Union's free trade agreements' (2022) 20 *Asia Europe Journal* 81; J Orbie et al, 'Promoting sustainable development or legitimizing free trade? Civil society mechanisms in EU trade agreements' (2016) 1 *Third World Thematics* 526; Specifically on the UK–Australia FTA: MA Young and G Clough, 'Net Zero Emissions and Free Trade Agreements: Efforts at Integrating Climate Goals by the United Kingdom and Australia' (2023) 72 *International and Comparative Law Quarterly* 393; A Marhold, 'Externalising Europe's energy policy in EU Free Trade Agreements: A cognitive dissonance between promoting sustainable development and ensuring security of supply?' (2019) *Europe and the World: A Law Review*; C Eckes, R Verheyen and P Krajewski, 'Treaty-Making by Afterthought: Can the EU-Mercosur Association Agreement Be Saved by the Joint Instrument?' (2024) *Archiv des Völkerrechts*.

[2] J Hickel, *Less is More – How Degrowth Will Save the World* (Penguin, 2021). See on the planetary boundaries: J Rockström, J Gupta and D Qin, 'Safe and just Earth system boundaries' (2023) 619 *Nature* 102.

Trade and investment play an important role in the EU's relations with the rest of the world. The EU's main tool in organising its trade and investment relations is the conclusion of international agreements. However, the negotiation and conclusion of trade agreements has become more difficult.[3] Also, with an eye to the international paralysis in the World Trade Organization (WTO), one can safely conclude that international trade is in crisis.

Positions both in favour and against free trade and investment protection can often be traced to the different EU institutions, with the Parliament generally more willing to push for the inclusion of other (non-trade) values and the Commission, above all Directorate-General (DG) Trade, committed to the logic that economic exchange is a value as such.[4] The Council, as the institution representing the Member States, is often politically split on issues of trade and investment. This level of controversy requires democratic decision-making procedures that, on the one hand, allow will-formation that is free of domination by one actor and, on the other, ensure that the different views are not sidelined.

In the context of EU treaty-making, the European Court of Justice (ECJ) is vested with exceptional judicial powers that allow it to review prospectively the compatibility of envisaged international agreements with the EU Treaties. The opinion procedure pursuant to Article 218(11) TFEU differs from other mechanisms of judicial review in that it invites the court to offer a general and abstract *ex ante* assessment rather than deciding ex post an individual case. The opinion procedure can only be triggered by privileged applicants, ie, the EU institutions and the Member States. Hence, the ECJ – as any court – cannot exercise its exceptional review powers out of its own volition. In other words, the ECJ depends in the opinion procedure on the other branches to request an opinion, including in trade and investment.[5] The assessment of the Court comprises both procedural and substantive compliance with EU law.

Historically, the Court of Justice has played an important role in establishing the legal framework for the EU and its Member States' international treaty-making.[6] The relevance of judicial interpretation for EU treaty-making has not been diminished after the entry into force of the Lisbon Treaty. On the contrary, changed provisions required judicial interpretation and the Member States have brought many legal challenges to the Court, aiming to protect their role as international actors. In response, the Court has interpreted and further developed the post-Lisbon arrangements in Articles 207 and 218 TFEU. It has protected the prerogatives of the different EU institutions, from each other, from the Member States, and from international law.[7] Judicial challenges by privileged applicants demonstrate a move from the political to the judicial, ie, 'politics

[3] See eg CETA and EU–Mercosur. See also C Eckes, 'The Autonomy of the EU Legal Order: The Case of the Energy Charter Treaty' (2023) *European Papers*, pp 1465–1494.

[4] See eg Eckes (ibid); Ankersmit, ch 5 in this volume.

[5] Opinions 1/13 ECLI:EU:C:2014:2303; 2/15 ECLI:EU:C:2017:376; 2/13 ECLI:EU:C:2019:341; 1/17 ECLI:EU:C:2019:72; and 1/20 ECLI:EU:C:2022:485.

[6] J Wouters, F Hoffmeister, G De Baere and T Ramopoulos, *Law of EU External Relations: Cases, Materials, and Commentary on the Eu as an International Legal Actor* (Oxford University Press, 2021).

[7] C-399/12, *Germany v Council*, ECLI:EU:C:2014:2258; Opinion 2/15 (n 5); Case 284/16 *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158; Case 626/15 *Commission v Council* ECLI:EU:C:2018:925; Opinion 1/17 (n 5); Case 741/19 *Republique de Moldovie v Komstroy LLC* ECLI:EU:C:2021:655; Opinion 1/19 ECLI:EU:C:2021:198; Opinion 1/20 (n 5).

with legal means' conducted by those that did not achieve their political objectives in the political decision-making process.[8] This illustrates the agonistic dimension of separation of powers. When accepting the justiciability of these inter-institutional disputes the Court paves the way to an even greater recourse to legal means.

This chapter examines the Court's role against a relational understanding of separation of powers, pursuant to which the three branches of government interact in mutual control and collaboration to facilitate will-formation.[9] The independence of the judiciary forms part and parcel of any concept of separation of powers. The judiciary generally rests its claims to legitimacy on consistency of its decisions with standards of law that have been adopted and developed in a democratic (inclusive?) fashion. Its powers are also legitimised by multiple constraints, eg, by the fact that it can only act if prompted to do so by other actors and the ex post perspective (that stands in the way of prospective law-making). Separation of powers is here understood as a procedural principle that does not impose any substantive limitations on what courts can or cannot rule.[10] It does not offer or demand a clean division between law (application) and politics, but aims at perpetuating and containing law and politics' continuous attempts to dominate each other.[11] To achieve its purpose, separation of powers requires that powers and responsibilities are reasonably clearly allocated.[12] This allows cooperation as well as conflict. Importantly, it also allows the tracing of positions to national and European actors, who find their legitimacy claims endorsed by citizens as national or European citizens (two-pronged structure of legitimation).[13]

When the other branches turn to the Court they invite it to impose legal constraints on each other's powers. Under the rule of law, when a court in last instance declares a certain action to be legally required or prohibited in an individual case, this should end the political debate for that case. This is required by legal certainty. Political institutions are expected to comply. Judicial decisions can limit the space for politics in this way. However, the courts can also widen the wiggle room for democratic decision-making within the framework of the law. They may reopen the debate on the limits to political discretion – ie, by establishing distinguishing factors or a context in which an earlier ruling is not applicable. They may decide that an action is neither prohibited nor required by law. They may explicitly carve out prerogatives of the legislature or discretion of the executive. All this is an expression of judicial self-restraint and contributes to limiting the Court's role for the future because parties will refrain from bringing these questions to court. In this way, the Court protects the political autonomy of the institutions or the Member States.

[8] For an inspiring account, see Joanna Kusiak, *Radically legal politics*; see summary at: ninedotsprize.org/extracts-from-joanna-kusiaks-winning-entry.

[9] C Eckes, P Leino-Sandberg and A Wallerman Ghavanini, 'Conceptual Framework for the Project Separation of Powers for 21st Century Europe' (SepaRope, 2021) No 2021-06, Amsterdam Centre for European law and Governance Research Paper, 1–2.

[10] C Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press, 2013) 95.

[11] Eckes, Leino-Sandberg and Wallerman Ghavanini (n 9).

[12] See also Chamon, ch 7 in this volume.

[13] C Eckes, 'The Paradox of EU External Relations: Taking Back Control', inaugural lecture 601 of 9 November 2018, at dare.uva.nl/search?identifier=583073d2-e0a1-42ba-b10e-4ae112ad6394.

Separation of powers is important in a controversial and contested context. At least potentially, separation of powers with an independent judiciary can contribute to making dissensus productive, allowing for justification, and achieving reasonable outcomes. At a time in which the EU commits to deep socio-economic changes in the Green Deal, the controversies surrounding the EU trade and investment deals are unlikely to calm down. On the contrary, it may be expected that the Court will find itself ever more often in the position that actors request it to oppose the conclusion of trade and investment agreements.

The chapter briefly considers all opinions of the Court and then focuses on those post-Lisbon opinions that have the potential to shape the institutional interaction in EU treaty-making in trade for the future. These are Opinions 1/13, 2/15, 1/17, 1/19 and 1/20. In addition, the chapter considers several post-Lisbon inter-institutional challenges (actions for annulment) where they are relevant to understand the powers of the institutions in the negotiation and conclusion of trade agreements.

This chapter argues that the Court, while acting as the guardian of the internal power relations, demonstrated judicial restraint to protect the autonomy of the EU institutions. It carved out *political* space that is not subject to legal assessment. At the same time, the Court allowed Member States to continue to remain at the table, for example when agreements include highly controversial Investor–State Dispute Settlement (ISDS) mechanisms. In light of the growing controversy about the desirability of (certain contents of) trade agreements and investment protection, the Court is walking a tightrope of ringfencing the EU's autonomous decision-making capacities while protecting the Member States' visibility and influence. Separation of powers requires allocating reasonably concretely responsibilities between the different actors, while at the same time avoiding political *paralysis* and complete judicialisation. In principle, this allocation should be established in law, ie in the European Treaties, but often the Treaty provisions require further judicial interpretation, and that interpretation should also keep the requirement of concretely identified responsibilities in mind. Where the multilayered polycentric EU acts under the state-centric rules of international law, this is an increasingly tall order for the Court.

Section II outlines the role of the Court in determining the power relations in EU treaty-making. It examines the boundaries of the opinion procedure and sketches the particularities of EU treaty-making. Section III examines the case law of the Court with particular attention to the powers of the different branches. It identifies the Court's commitment to carve out greater political autonomy for the Council while protecting Member States' involvement. Section IV reflects on the implications of the Court's case law for the separation of powers within the EU. Section V concludes.

II. Creating a Legal Framework for International Treaty-Making

With every amendment of the EU's founding treaties the EU has obtained greater external competences and extended its ability to conclude international agreements. Article 218 TFEU is a general procedure for the negotiation and conclusion of

international agreements by the EU.[14] For trade agreements in particular, Article 207 TFEU on the Common Commercial Policy (CCP) is *lex specialis*. The internal rules have significantly changed under the Lisbon Treaty. The exclusive competence of the EU for CCP has been extended to cover all trade aspects (beyond trade in goods)[15] and more trade-related issues, including foreign direct investment (FDI). This directly affects the power relations between the EU and the Member States. In addition, every amendment of the EU's founding treaties, including the Lisbon Treaty, has strengthened the role of the European Parliament (EP).[16] The EP now holds veto powers for the conclusion of trade and investment agreements, as well as a more powerful position in their negotiation and ratification. The Court's exceptional review powers over envisaged agreements under Article 218(11) TFEU form part and parcel of the conception of separation of powers that the EU adheres to in trade relations.

The following subsections explain relevant particularities of EU treaty-making that flow from its peculiar multilayered and polycentric nature (section A) and the law and practice of the Court's exceptional powers under the Article 218(11) TFEU procedure (section B).

A. Constitutional Particularities of EU Treaty-making Practices

The EU legal framework for international treaty-making is complex and dynamic. The Commission, the Council and, regularly, the Member States represent the top-level split executive that concludes international treaties for the territory of the Member States, in the name of the EU and, regularly, the Member States. Together, the Commission and the Member States individually and jointly as Council share, in trade and investment, the task to negotiate and enter into international obligations, as well as to implement them.

Tension arises from the fact that the Member States remain under international law the only primary and sovereign actor while the EU, with its exclusive CCP competence, is the recognised international trading partner. Formally, the EU institutions are autonomous in their ability to pursue trade policy. In practice, the Commission, as the Council's top-level executive counterpart, is *exceptionally* autonomous when negotiating trade agreements.[17] At the same time, the EU depends on the Member States, certainly for implementation of agreements, but also often for the conclusion of the agreements when these agreements are mixed.

These autonomous actors, from an international law perspective, represent one territory and therefore need to act as one party to international treaties, while they participate individually and in their own right. To do so, they are necessarily intricately interconnected. This explains why the EU's treaty-making practices are characterised

[14] See Krajewski, ch 6 in this volume.

[15] As confirmed by the Court in Case 414/11, *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon* ECLI:EU:C:2013:520 and Case 137/12, *European Commission v Council of the European Union* ECLI:EU:C:2013:675.

[16] See for more details on the expanded powers of the European Parliament: Chamon, ch 7 in this volume, III.B.

[17] Krajewski, ch 6 in this volume.

by several particularities that do not find their counterparts in state practices. These particularities are procedural attempts to accommodate the complex power divisions within the EU. Mixed agreements are the most prominent and still not fully explored example.

Mixity is seen as 'a creature of pragmatic forces – a means of resolving the problems posed by the need for international agreements in a multilayered system'.[18] Mixity offers a political and legal construction that allows the Union and the Member States to act jointly as one party when they conclude international agreements. This results under international and EU law in a – seemingly permanent – suspension of the question of who is competent. It obscures who is in charge and responsible for which part of the agreement, ie, the EU or the Member States. By extension, it also obscures whether the European Parliament or national parliaments are responsible for any particular part.[19] Seemingly, this permanent suspension can only be brought to an end when one of the involved parties seeks a judicial decision on the competence division in a specific case.

To what extent does mixity retain its relevance for trade and investment agreements in light of the extended EU competences under CCP and after Opinion 2/15? Article 207 TFEU establishes encompassing exclusive competences of the EU for CCP. This provision has further been interpreted very widely by the Court, holding that 'an EU act falls within [CCP] if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it'.[20] The debate is ongoing about what this encompassing EU competence for CCP means for whether EU trade agreements should be 'EU-only' or 'mixed'.[21] Mixity used to be the default for deep and comprehensive trade agreements. Examples are Comprehensive Economic and Trade Agreement (CETA) and the EU–Mercosur Agreement. However, a new trend of EU-only agreements appears to be emerging: Singapore, Japan, Vietnam, and the UK TCA. The Commission, with a tacit acceptance of the Council, appears to pursue a strategy whereby investment protection is excluded from negotiation directives and the rest can be concluded as an EU-only agreement.[22] In other words, the future of mandatory (ie, legally required) mixity has come under pressure by the Court's wide interpretation of CCP. Yet, the increasing controversy surrounding trade and investment has also triggered a trend of including more and more norms relating to non-trade value into these agreements, which in turn justify involvement of the Member States.[23]

[18] Case 243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín* ECLI: EU:C:2016:491 Opinion AG Kokott [56].

[19] C Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford University Press, 2019) ch 5. Because of the dynamic development of EU powers, this is the case even if at the moment of conclusion for example the Finnish Parliament insists on a list of issues of national competence.

[20] Opinion 2/15 (n 5) [36] ff, referring inter alia to C 414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* ECLI: EU:C:2013:520 [51].

[21] P Conconi, C Herghelegiu and L Puccio, 'EU Trade Agreements: To Mix or Not to Mix, That Is the Question', (2021) 55 *Journal of World Trade* 231.

[22] eg agreements with New Zealand, Chile an Australia; see data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf.

[23] Eckes, Verheyen, and Krajewski (n 1).

Few aspects of the EU's trade and investment relations are as controversial as ISDS mechanisms – both in terms of substance and competence. They have also been the focus of a growing body of case law.[24] This case law is not necessarily focussed on substance, but often challenges institutional or procedural aspects. Yet, it is motivated by a widening conviction that ISDS protects unsustainable extractive business interests.[25] In terms of competence division, Opinion 2/15 on the competence division in the EU–Singapore agreement demonstrates that the ECJ draws some lines around the EU's exclusive competence for CCP. It establishes that ISDS provisions are a 'shared competence'.[26] The EU cannot simply occupy the field by regulating ISDS, as would be the case under Article 2 TFEU. Opinion 2/15 explicates that Member States must *consent* to ISDS because it removes disputes from national judiciaries and, by extension, from the preliminary ruling procedure under Article 267 TFEU, which has been called the 'keystone' of European integration.[27] Opinion 2/15 hence requires involvement and consent of the Member States for each and every international agreement that sets up an ISDS mechanism. In other words, trade agreements that contain ISDS mechanisms cannot be concluded by the EU alone, as ISDS requires the Member States' consent via mixity.

Another example of an EU particularity that recently became subject of a judicial dispute is hybrid acts. Hybrid acts are the result of bringing 'together in a single decision' or adopting 'under a single procedure two different acts, one of which entails a consensus of the representatives of the Member States, and therefore their unanimous agreement, whereas the other must be adopted' by a qualified majority in the Council.[28] The Member States act alongside the Council in their capacity as sovereign actors under international law, not as part of the Council. The Court prohibited hybrid acts in one of the post-Lisbon interinstitutional disputes concerning external relations, because it undermines the decision-making procedures under the EU Treaties and interferes with the institutional autonomy of the EU institutions.[29]

The third example of an EU particularity in treaty-making is the 'common accord'. Concluding an agreement only with 'common accord' refers to the situation that the Council does not take a decision that it is formally able to take until and unless all Member States have indicated that they agree. This is a practice followed in areas of shared competence, which is not reflected in Articles 207 and 218 TFEU. In Opinion 1/19, the CJEU clarified that Article 218(2) (6) TFEU, on the role of the Council in authorising the opening of the negotiations, adopting the negotiating directive, authorising the signing of

[24] Opinion 2/15 (n 5); Case 284/16 *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158; Opinion 1/17 (n 5); Case 741/19 *Republique de Moldovie v Komstroy LLC* ECLI:EU:C:2021:655; Opinion 1/19 (n 7); Opinion 1/20 (n 5).

[25] DR Boyd, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: 'Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights'(A/78/168), at www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluters-catastrophic-consequences-investor-state-dispute.

[26] Opinion 2/15 (n 5), [36].

[27] Opinion 2/15 (n 5); L Ankersmit, 'Regulatory autonomy and regulatory chill in Opinion 1/17' (2020) 4 *Europe and the World: A Law Review* 1; Eckes (n 3).

[28] Opinion 1/19 (n 7) [243]. See: Case 28/12 *European Commission v Council of the European Union* ECLI:EU:C:2015:282.

[29] Case 28/12 *European Commission v Council of the European Union* ECLI:EU:C:2015:282.

agreements, and adopting the decision concluding the agreement, *do not accord any role to the Member States*.[30] Hence, common accord cannot be a legal requirement (but only a political option).

Article 218 TFEU sketches the conclusion of an international agreement by the Union as 'an autonomous act'.[31] This is also the case for mixed agreements for the part that falls within EU competences and for which the Council, rather than the Member States, must agree. Prohibiting hybrid acts and declaring that 'common accord' is not a legal requirement ensures the autonomous capacity of the Union to act externally without allowing a minority of (or even individual) Member States to hinder its actions. The limits of the EU's autonomous capacity to conclude trade and investment agreements lie in the division of competences as established by the EU Treaties, procedurally and substantively by Articles 207 and 218 TFEU.

The ideal of separation of powers requires that powers are *reasonably concretely allocated*, ie, that it is possible to identify who exercises which powers.[32] While all constitutional frameworks aim to lay down rules on the exercise of public powers, they can only give limited guidance that requires filling in and enacting through institutional practices. A certain level of ambiguity is not only unavoidable to ensure the needed flexibility of the institutional actors; it also arises from the healthy relational and collaborative practices of mutually reinforcing, challenging and demanding further justification for each other's acts. However, the three examples of particular procedural practices that arose in the EU's external relations go beyond the usual level of ambiguity. These particularities allow the EU to act internationally without being debilitated by its own complex constitutional set-up as a non-state actor with state-like external powers. They are hence an intrinsic feature of the EU as an international legal actor. However, they are *designed to intertwine powers* in a way that does not permit tracing them to the individual entity or actor. An illustrative example is mixity and pre-emption. Merijn Chamon argued that when the EU and MS conclude a mixed international agreement covering matters of shared competence, mixity allows them to 'suspend' the field pre-emption that would otherwise kick in if the agreement was concluded as EU-only.[33] This is problematic in terms of separation of powers, and the Court holds the constitutional mandate to develop and apply the legal standards in the Treaties in order to ensure reasonably clearly allocated responsibilities.

B. Opinion Procedure under Article 218(11) TFEU

The first decade after the entry into force of the Lisbon Treaty has been characterised by an increasing number of judicial disputes about the Union's exercise of external powers.[34] The tone and intensity of these legal battles was pointedly criticised by AG

[30] Opinion 1/19 (n 7) [237], emphasis added.
[31] Opinion 1/19 (n 7) [246].
[32] See ch 1 of this volume.
[33] M Chamon, 'Provisional Application's Novel Rationale: Facilitating Mixity in the EU's Treaty Practice' in W Douma, C Eckes, P Elsuwege, E Kassoti, A Ott and RA Wessels (eds), *The Evolving Nature of EU External Relations Law* (Springer, 2021).
[34] eg Eckes (n 19), Intro.

Kokott, stating that legal actions are fought with 'astonishing passion' and 'allegation [s are made] that the Commission wished to do everything possible to prevent international action by the Member States', as well as that 'the Council [was] compulsively looking for legal bases that always permit participation by the Member States'.[35] In many of these cases, large numbers of Member States intervened.[36] The increased number of legal challenges is also the result of leaving choices open in the negotiation of the Lisbon Treaty. Textual ambiguities necessarily vest the judiciary with the powers to clarify, detail and interpret.[37] At the same time, when the Court develops more detailed rules from the Treaties' text, it reduces the scope for political manoeuvre of the EU institutions. Notably, relevant for the context of trade, the Court widened the substantive (CCP) and procedural (treaty-making in general) autonomy of the EU on several occasions, arguably in the most far-reaching manner under the opinion procedure.[38]

The EU Treaties give the Court the exceptional power to review envisaged international agreements (Article 218(11) TFEU) to avoid external (entrenched) commitments that run counter to EU law. This 'removes the pressure of subsequent costs from courts, which the *ex post* review of international commitments otherwise entails. It represents a workable mechanism for channelling foreign commitments back into a system of separated powers.'[39] The timing of *ex ante* opinions on the compatibility of the envisaged legal commitments should allow the institutions to negotiate substantive amendments or procedurally comply with internal rules *before* making legally binding commitments. Incompatibility with EU law often also affects the division of powers, eg, because the EU commits to something that goes beyond its substantive competence or one EU institution infringes the prerogatives of another institution. The timing of the Court's involvement *during* the decision-making also requires thinking about who wins and who loses powers and influence when the opinion procedure is triggered. To do this, we should first reflect on *who* uses this procedure and *why* through a lens of separation of powers.

Marise Cremona sketched in 2020 the development of the opinion procedure over time.[40] Building on Cremona's analysis and updating it to December 2023, we count 23 opinions in total,[41] including Opinion 1/20, in which the Court rejected the request to examine the compatibility of the EU text proposal for the Energy Charter Treaty (ECT) reform for its compatibility with EU law. Nine of these opinions were given post-Lisbon. Seven of the opinions directly concern trade or investment agreements.[42] The general trend is that the Court's opinions become longer and longer.[43] In addition, the Court

[35] Opinion of AG Kokott, Joined Cases C-626/15 and C-659/16 *Commission v Council* ECLI:EU:C:2018:362 [75].
[36] Opinions 1/19 (n 7), 1/17 (n 5), 2/15 (n 5) but also references from Eckes (n 19).
[37] Arnull et al, *The European Union and its Court of Justice* (Oxford University Press, 2006) 89.
[38] Opinions 2/15 (n 5) and 1/19 (n 7).
[39] Möllers (n 10) 164.
[40] M Cremona, 'The Opinion procedure under Article 218 (11) TFEU: Reflections in the light of Opinion 1/17.' (2020) 4 *Europe and the World – A Law Review* 1.
[41] Excluding proceedings under the Treaty establishing the European Coal and Steel Community.
[42] EU–Singapore FTA Opinion 2/15 (n 5); CETA Opinion 1/17 (n 5); ECT Opinion 1/20 (n 5); Opinion 1/94 ECLI:EU:C:1994:384; Opinions 2/91 ECLI:EU:C:1991:490 and 1/92 ECLI:EU:C:1992:189; Opinion 3/94 ECLI:EU:C:1995:436.
[43] Opinion 1/19 (n 7) is 338 paragraphs; Opinion 1/17 (n 5) is 245 paragraphs; Opinion 2/13 (n 5) was 258 paragraphs; Opinion 2/15 (n 5) was 305 paragraphs. This is not counting the rejection of the request in Opinion 1/20 (n 5).

has moved from considering matters of competence to also engaging with substantive issues.[44] In other words, the role of the Court under the opinion procedure has quantitatively and qualitatively increased over time.

Another still nascent development appears to be requests by the European Parliament. While it does not have the same influence in treaty-making as the Commission and the Council,[45] in the opinion procedure it is a privileged applicant on a par with the other institutions and the Member States. One could hence argue that a move from the political to the judicial realm comparatively empowers the EP. So far, the EP has (only) twice triggered the Opinion procedure: once in 2015 (Opinion 1/15), which was the first substantive engagement; and once in 2019 (Opinion 1/19), which had great implications for the role of the Court, the Council and the Member States in international treaty-making.

In other words, it is mainly the Commission that involves the Court via the opinion procedure. The opinion procedure appears to be a tool used by the Commission to prevent the Council from taking decisions on division of powers that are not in line with its own interpretation of that division – for example, when the Council claims political autonomy to decide that an agreement requires mixity. It appears that the existence and practice of this powerful review procedure during decision-making empowers the Commission (as the EU part of the split-level top executive) vis-à-vis the Council and the Member States' Governments, when it protects the autonomy of the Union.

The two most recent opinions concern highly politicised international agreements: the Istanbul Convention (Opinion 1/19) and the ECT (Opinion 1/20). In both cases, the Court took a stand that may contribute to reducing the judicializsation of political power struggles. The Court paraphrased the preventive purpose of the Article 218(11) TFEU procedure as 'forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements that are binding on the European Union'.[46] 'Complications' refers specifically both to the 'internal EU context' and 'international relations'.[47] The potential seriousness of such 'complications' justifies that 'the *mere risk* of an invalidation [of the envisaged agreement] suffices'.[48] At the same time, the Court does not assess the *compatibility* of the decision on conclusion *with international law*.[49] The scope of the opinion procedure is compatibility with EU law only.

The Court can only find incompatibility with the Treaties *before* an international agreement becomes legally binding on the EU. In the most recent Opinion 1/20 on what is probably the most controversial (mixed) investment agreement, ECT, the Court offered a restrictive interpretation of 'envisaged agreement', which excludes the judicial involvement of the ECJ in the early stage of negotiations. The Court's interpretation protects the political space of the negotiating parties by excluding judicial engagement before an actional text is politically agreed. The 'preventive intent' of the opinion

[44] In Opinion 1/15 ECLI:EU:C:2017:592, the Court examined the substantive compatibility of envisaged agreements with amongst other things fundamental rights.

[45] C Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures' (2004) 12 *International Journal of Constitutional Law (ICON)* 904.

[46] Opinion 1/19 (n 7) [193].

[47] ibid.

[48] ibid [194], emphasis added.

[49] ibid [272].

procedure can also 'no longer be achieved' with regard to a signature decision that has already entered into force.[50] This temporal limitation stands in open contrast with the Court's willingness three decades ago to examine 'the system of judicial supervision which it is proposed to set up under the [European Economic Area] agreement'.[51]

The Court's recent position highlights the strict boundaries of Article 218(11) TFEU: the Court's extensive general and prospective powers are strictly confined to the short timeframe between the moment where there is sufficiently clear and explicit political agreement between the parties on the 'envisaged agreement' and the moment that the agreement is concluded. In the past, the Court has once rejected an opinion request as inadmissible, ie 'devoid of purpose', after conclusion, and once a request has been withdrawn after conclusion.[52] Furthermore, the opinion procedure is *not* intended to avoid difficulties associated with implementation.[53] The latter point is a considerable limitation of the reach of the opinion procedure as many *internal* difficulties may directly relate to implementation.[54]

The opinion procedure, different from the other judicial routes, is aimed to protect the *interest of the EU* rather than the particular party requesting the procedure.[55] The requesting party is not required to identify a 'harmful conduct' by the other actors.[56] At the same time, the Court of Justice always accepted and confirmed the potential agonistic nature of the procedure by emphasising that the power to involve the Court 'can be exercised individually' and does not require 'any coordinated action', nor does it require the requesting party to wait 'for the final outcome of any related legislative procedure'.[57] In other words, the opinion procedure offers the different branches and layers a channel to translate their disagreement between the negotiation and the conclusion of international agreements into the language of law and try to convince the Court that their concern is a legal concern.

Because of the rigid and cumbersome context of bilateral and even more so multilateral treaty-making, the EU cannot easily renegotiate core aspects of international agreements. In other words, the Court is de facto in the position to determine whether the EU can become a party to a treaty in an often semi-permanent way.[58] As such, the opinion procedure is exceptional in light of the most common task of Courts to rule on individual cases from an ex post perspective, ie, 'adjudicat[ing] individualized cases on external initiative, retrospectively.'[59] This exceptional nature of the opinion procedure explains the strict procedural limits to the window of opportunity during which parties can bring requests, to the nature of the analysis, and to the potential group of applicants, which is confined to privileged applicants.

[50] ibid [218].
[51] Opinion 1/91 (n 42).
[52] Opinion 3/94 (n 42) [22] and Opinion 1/04 (withdrawn), respectively. In both cases, follow-up procedures were brought to challenge the *legality* of the agreement: Case 122/95 *Germany v Council* ECLI:EU:C:1998:94 and Joined Cases C-317/04 and C-318/04 *European Parliament v Council* ECLI:EU:C:2006:346.
[53] Opinion 1/19 (n 7) [196].
[54] See for examples: Eckes, Leino-Sandberg and Wallerman Ghavanini (n 9).
[55] Opinion 1/19 (n 7) [195].
[56] ibid [221].
[57] ibid [204].
[58] See Opinion 2/14 ECLI:EU:C:2014:2454 on the accession of the EU to the ECHR.
[59] Möllers (n 10) 89.

As in all courts, the ECJ draws its 'legitimacy' from its 'commitment to legal standards'[60] and exercises its powers highly formally proceduralised. The reasoning in the language of law and the formality of its procedure are what distinguishes the judiciary from the other branches. In that sense, the opinion procedure is no exception. It presupposes that reasoning founded in legal standards can generate a distinct logic beyond the political process before this process has led to a legally binding decision. It also confirms the EU's sincere commitment to abide by international law, ie by avoiding entering into international legal obligations with which it cannot comply, unless it accepts a breach of its own law. The strict limits outlined above ensure that from a procedural understanding of separation of powers the Court acts in line with the 'desideratum of distinctiveness'[61] and within the boundaries of its mandate.

III. Vesting the Council with Greater Political Autonomy

When deciding disputes on boundaries of public powers, courts must decide what is and what is not a legal issue. In the EU, the issue of which authority, ie, which EU institution or the Member States, may exercise political discretion, is legally circumscribed. Opinions 2/15 offers a broad interpretation of the boundaries of the EU's exclusive competence for matters of trade but ringfences Member States' responsibility for ISDS. Opinion 1/19 protects the EU's political autonomy in the conclusion of mixed agreements. Together, they establish the complex legal framework that governs how the different branches and layers collaborate and control each other in trade and investment policy.

Section A below demonstrates how the Court has empowered the Council with autonomous decision-making capacity, and section B considers the potential international law consequences of ringfencing the powers of the different actors of the top-level split executive.

A. Political Discretion and its Procedural Limits

The ECJ bolstered the Council's capacity to act autonomously on the international plane and protected its internal decision-making procedures from external influences.[62] This is in line with and reflects the EU's ambition to shape the world in its image.[63] The Commission is a powerful autonomous actor in the negotiation and conclusion of EU trade and investment agreements.[64] However, the Council's autonomy as an institution from its national parts is central to the EU's particularity of having – different

[60] Möllers (n 10) 90.

[61] A Kavanagh, *The Collaborative Constitution Cambridge* (Cambridge University Press, 2023) ch 3.

[62] eg Opinions 1/17 (n 5) and 1/19 (n 7); see on the former Eckes (n 3). See also Case 280/93 *Germany v Council* ECLI:EU:C:1994:367.

[63] Art 3(5) TFEU; see also J Borrell, 'Why European Strategic Autonomy Matters' (2020) *HR/VP Blog*, at www.eeas.europa.eu/eeas/why-european-strategic-autonomy-matters_en.

[64] See Krajewski, ch 6 in this volume.

from the usual arrangements in federations – a top-level split executive, where the Commission, the Council and the Member States are charged to collaborate with and control each other.

On the boundaries between the Commission and the Council's executive powers, the Court held that 'both the decision [of] whether or not to act on the proposal to conclude an international agreement, and, if so, to what extent, and the choice of the appropriate time to adopt such a decision fall within the Council's political discretion'.[65] In other words, the law does not require the Council to act upon the Commission proposal to conclude an international agreement.

Further bolstering the Council's political discretion, the ECJ showed judicial self-restraint by delegalising certain issues and excluding certain grounds for the future.[66] Opinion 1/19 is illustrative in this respect. It concerned the conclusion of the Council of Europe Convention on preventing and combating violence against women and domestic violence ('the Istanbul Convention'). One question raised was whether the Council must wait for the Member States' common accord, ie, agreement of all Member States that the Convention should be concluded, before taking that step. The Court held that the issue of whether the Council waits for the common accord of all the Member States is *not prescribed by law*. Such practice is neither prohibited nor required by Article 218 TFEU. Consequently, the Council is allowed but not required to either wait or go ahead, irrespective of the intentional difficulties that may potentially emerge from the decision to go ahead. However, this distinction between 'allow' and 'require' common accord is less clear than it may appear at first glance. The Council has the discretion to wait and build a bigger majority in a continuous scale to consensus (common accord) – in principle, indefinitely. Waiting also serves a justified objective and is not just a strategy for delay. Securing Member States' commitments to as many ratifications as possible of an international agreement strengthens the international position of the EU, its credibility, and its political weight as composite actor, speaking with one voice.

However, a vote can be forced under its own rules of procedure.[67] In matters subject to qualified majority vote, qualified majority is sufficient for the formal decision in favour of moving forward. In other words, the possibility (rather than requirement) of waiting for a common accord does not affect the voting requirements in the Council and does not make the Council hostage to each and every dissenting state. Opinion 1/19 firmly links political discretion to *qualified majority in the Council*. This addresses the European Parliament's concern that requiring common accord would 'amount … to applying, in practice, an unanimity rule within the Council despite the fact … only qualified majority rule applies'.[68] Ultimately, it ensures that the qualified majority of the Council can act on eye-level with the other parts of the EU's split top-level executive, ie the Commission and national governments.

By way of conclusion, the Council may autonomously exercise its prerogatives under Article 218 TFEU, irrespective of the fact that the Member States are the primary actors under international law and the EU may have to rely on them for the implementation

[65] Opinion 1/19 (n 5) [252].
[66] ibid.
[67] ibid [253]–[255].
[68] ibid [60].

of the agreement. The Court was willing to protect that autonomous space of decision-making of the Council, emphasising that the procedural rules of will-formation require qualified majority. It also limited the relevance of the law and its own influence by firmly placing the decision within the discretion of the qualified majority of the Council. In other words, it protects the autonomy of the EU institutions vis-à-vis the Member States and, by doing so, it ensures the continuous need for political collaboration between the different parts of the top-level split executive in order to work towards a mutually acceptable and viable position.

B. International Law Consequences of Vesting the Split Executive with Autonomous Powers

The Court assesses the legality of EU international agreements exclusively in light of EU law, both procedurally and substantively. International law and the potential consequences from a breach of international law *are not the yardstick* of its assessment. This position is in line with the ECJ's understanding of the (jurisdictional) autonomy of EU law.[69] It protects and promotes, not only the autonomy of the EU legal order from international law but also the ECJ's room for manoeuvre to prioritise the political autonomy of the EU institutions. If the Court were also willing to review compliance of envisaged agreements with international law, this would – at least potentially – create a conflict by allowing the EU and its institutions to act independently from the Member States.

Excluding international law as a yardstick allows for the end result of 'incomplete mixity'. Incomplete mixity refers to the rare case when an international agreement is concluded by one or more but not all of the Member States alongside the Union.[70] It raises complex legal questions concerning for example the application of the international agreement by virtue of EU law within those Member States that are not party to the agreement or international responsibility of the Union for non-compliance.[71] In absence of a detailed declaration of competences explaining which parts fall within the powers of the Union and the Member States, respectively, incomplete mixity creates legal uncertainty.

The practical consequences of impending incomplete mixity in the context of trade and investment relations can currently be witnessed in the context of the withdrawal from the ECT.[72] After a long period of deliberation, in July 2023, the Commission tabled a proposal for coordinated withdrawal.[73] 'Coordinated withdrawal' refers to the legally clearest situation that the EU and all 27 Member States withdraw together from the

[69] C Eckes, 'The autonomy of the EU legal order' (2020) 4 *Europe and the World: A law review*; C Eckes, 'EU Autonomy: Jurisdictional Sovereignty by a Different Name?' (2020) 5 *European Papers* 319.

[70] J Heliskoski, and G Kübek, 'A Typology of EU Mixed Agreements Revisited' in N Levrat, Y Kaspiarovich, C Kaddous and RA Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing, 2022) 23–42, 34.

[71] ibid.

[72] See also on the Energy Charter Treaty, including the difficulties of withdrawal: Eckes and Ankersmit, report Client Earth; Eckes (n 3); and Ankersmit, ch 5 in this volume.

[73] Commission proposal for a Council decision on the withdrawal of the Union from the Energy Charter Treaty of 7 July 2023, available at eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0447.

ECT, to which they have been (with the exception of Italy) a party since the 1990s.[74] However, at the time of writing, Member States have widely signalled that they want to leave the decision to withdraw to the individual Member State. This is likely to result in a situation that the EU and a large number of Member States, certainly representing the majority of the EU population(s) and territory/ies, will withdraw, while some Member States remain party to the ECT. While arguably possible under EU law, the uncoordinated withdrawal has highly undesirable consequences for all involved parties under international law.[75] What is more, the lack of clarity about responsibilities and powers to take autonomous decisions is further obscured by the unwillingness of the EU institutions to share with the public their understanding of the *legal* allocation and boundaries of responsibilities and powers between the EU and the Member States.[76]

In Opinion 1/19, the Court gave the Council the political discretion to opt for incomplete mixity and accept at the time of signature and conclusion by the Union that one or more Member States have no intention to ratify the Istanbul Convention.[77] The political possibility of partial rather than coordinated withdrawal appears to be the flipside of this coin. While this approach offers political space and autonomy to all parties, ie, the EU and the Member States, it places the burden of understanding the boundaries between the Union and the Member States of the application of and responsibility for the international agreement on the other (non-EU) contracting parties to the agreement. The ECJ's position arguably prioritises the political autonomy of the Council, as well as the sovereignty of those Member States that do not wish to ratify the Istanbul Convention or withdraw from the ECT, above the interests of the other (non-EU) contracting parties and legal certainty.

The Council and – by analogy – the Member States remain free to knowingly accept that their own autonomous choice breaks up the collective of the EU and its Member States as one party to international agreements, creating legal uncertainty about who is in charge of and, more importantly, whether anyone is responsible for, compliance and implementation. Irrespective of the occurrence or a breach of international law, the externalisation of the internal competence complexities weakens the rule of law and democratic legitimacy, simply by creating grey zones of uncertainty on the fundamental issue of who does what and in whose name. Such lack of reasonably clear allocation of responsibilities undermines the two-pronged democratic legitimation of the EU. It blurs responsibility between and shifts the burden of mutual control to the partially competing actors of the top-level split executive. At least potentially, this comes at the expense of non-EU parties for whom the division of responsibility remains obscure or at the expense of the credibility of the EU as a unitary actor.

[74] At the time of writing (November 2023), Poland, Germany and Luxembourg have unilaterally notified their withdrawal to the Secretariat of the Energy Charter Treaty.

[75] L Ankersmit, 'Withdrawal from mixed agreements under EU law: the case of the Energy Charter Treaty' (2023) 7 *Europe and the World: A Law Review* 1.

[76] P Leino-Sandberg and C Eckes, 'The European Commission's Assessment of EU Withdrawal from the Energy Charter Treaty: Legal analysis or confidential strategy?', Blogpost 41/2022, 28 SEPTEMBER 2022, at europeanlawblog.eu/2022/09/28/the-european-commissions-assessment-of-eu-withdrawal-from-the-energy-charter-treaty-legal-analysis-or-confidential-strategy.

[77] See more broadly: P Koutrakos and V Soneca, 'The Future of the Istanbul Convention before the CJEU' in N Levrat, Y Kaspiarovich, C Kaddous and RA Wessel (eds) *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing, 2022).

In trade, the power division is reasonably clear: the EU holds exclusive competence. Yet, concluding and ending participation in ISDS mechanisms requires consent by the Member States. Similarly, the powers to agree on non-trade issues are usually shared and dynamic. In light of the fact that international agreements are negotiated and concluded as one whole, third parties and citizens are left guessing who is responsible for which substantive part of the agreement. An illustrative example of this is the scope of provisional application of comprehensive trade agreements. In principle, provisional application should be limited to matters covered by the CCP, but the institutional practice has been more confusing and inconsistent.[78]

IV. Political Autonomy Amongst Separated Powers

Article 218(11) TFEU empowers the Court to review and, if need be, delimitate the EU's ability to commit to international obligations, based on general, prospective and sometimes even hypothetical considerations of where conflicts with EU law could arise.[79] Exercising this power, the ECJ has assumed a central and powerful role in shaping the EU legal order and in protecting the legal and political autonomy of that order and its actors.

The following sections examine the role of the Court and the political institutions in facilitating constructive will-formation (section A), as well as the case law's capacity to channel disagreement and dissent into the decision-making (section B).

A. Counter-balancing Political Autonomy

With the increased powers of the EU, the widening and deepening of trade agreements, and the strengthening of the European Parliament, the constitutional and institutional conditions have never been more conducive for a greater claim to political autonomy of the EU and its institutions. At the same time, the EU is constructed as a multilayered, polycentric legal order and the issue of trade has become fundamentally contested. This entails that the three branches are present not only within the 'EU layer' but also within the national layer. Particularly, in international treaty-making this brings multiple, partially overlapping executive actors to the table that do not stand in a hierarchical relationship. This lack of hierarchy raises on the one hand the demand for judicial solutions, while on the other it makes the solution of conflict by the judiciary more difficult. The decentralised enforcement of the preliminary ruling procedure is not available. Opinions and rulings given by the Court on the power division between the EU and the Member States depend on the compliance of the national and European political actors.

[78] P Krajewski, *Separation of Powers and the EU Treaty-Making: The Case of Trade Agreements*, ch 3 (unpublished thesis, to be defended in 2024); J Heliskoski, 'Provisional Application of EU Free Trade Agreements' in M Hahn and G Van der Loo (eds), *Law and Practice of the Common Commercial Policy* (Brill, 2020) ch 25.

[79] Opinion 2/13 (n 5), see also C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 *Modern Law Review* 254.

Opponents of the EU's trade and investment policy challenge the EU's exercise of powers in Court to stop the adoption of international agreements that they consider substantively harmful, eg, for non-trade values.[80] This empowers the Court but can the Court offer a counterbalance to the powerful multi-actor executive in international treaty-making?

While the Court has demonstrated its willingness to substantively review politically salient agreements, e. in the area of data protection, it has also throughout emphasised the political autonomy of the EU institutions. The permission to wait for common accord, the obligatory consent of the Member States' in the conclusion of ISDS mechanisms, and the Court's restraint in refusing to rule on a treaty-text before it is 'envisaged' require the different actors to work together towards political solutions. At the same time, the prohibition of hybrid acts and the rejection of a legal requirement to wait for common accord aim to ensure that responsibilities can be traced back to individual actors. From a separation of powers perspective, the Court is in a difficult position to strike the balance between concretising the legal standards to ensure reasonable clarity of responsibility and protecting a political space in which all actors can participate in their role of will-formation in the EU. Arguably, the Court seems to leave the counter-balancing executive power to the other executive actors, ie, it seems to rely on the multilayered system, assuming that national executive powers counterbalance EU executive powers and vice versa. While this raises questions from a separation of powers perspective, the Court can also only step in if it can rely on sufficient support and legitimation by the other actors, including not only the judicial but also the executive branches of the Member States. The Court can only resolve political conflicts between the different layers and autonomous executive actors if it can rally up support that the conflict concerns a legally resolvable matter.[81]

Externally, only the Member States are primary actors under international law. In recognition of the Member States' position as primary actors and in order to ensure their full commitment and support, the EU had developed the general practice of common accord for mixed agreements. However, this practice renders the requirement and hence possibility of taking a Council decision by qualified majority de facto void. Member States obtain additional powers to postpone, veto, and – as a result also – to exercise pressure on the content of the whole agreement, ie beyond the areas of national competence.[82] The political autonomy of the Council is internationally compromised.

Moreover, it is questionable what legal consequences may flow from the formless expression of agreement, ie common accord, by the government of a Member State. From the perspective of separation of powers, it appears difficult to argue that a formless statement of government can bind parliament to adopt a formal decision pursuant to a

[80] See eg the lobby activities leading to the submission of the request in Opinion 1/17 (n 5). See also Opinion 1/20 (n 5).

[81] See similarly on the rule of law: Möllers, ch 3 in this volume.

[82] Internally, a parallel could be drawn to the same situation when legal bases with different decision-making procedures are combined and as a result the roles of institutions are strengthened. However, internally both the EU institutions and the Member States are bound by the decisions of the Court and the primacy of EU law. Externally, international commitments with third parties that are not bound by EU law create a different dynamic.

procedure that is specifically intended to give parliament a veto power. National parliaments, whose positive vote is required in the national ratification of a mixed agreement, do still have the power to vote no.

In principle, protecting Council's political autonomy affirms its role as the EU institution representing the Member States. The Council, different from the Commission and the Parliament, is the EU institution in which the national interests are directly represented. However, the focus of the Council as the politically autonomous actor, representing the voices of the Member States, potentially sidelines national parliaments. This is 'potentially' the case because the influence of national parliaments then fully depends on their ability to give their national representative in the Council a mandate and control its execution. It is far from obvious that the different executive layers constrain each other. Quite to the contrary, when taking concerted action they may be even more overpowering for the legislature. Amongst many reasons, this may be why the European Parliament has started turning to the Court under the opinion procedure.

B. Capturing Dissenting Voices

Legally required mixity and common accord rely on the ability to achieve political consensus. These constructions have therefore the potential to paralyse EU treaty-making. Post-Lisbon, the Court has confirmed that for shared competences, whether previously exercised or not, the choice for facultative mixity or EU-only conclusion of an agreement is a *political* choice, and neither of the two is legally required.[83] The legal constraints on the political decision on mixity or EU-only conclusion have been discussed both in general and with regard to individual agreements.[84] Opting for mixity has far-reaching practical consequences that illustrate the risk of political paralysis: large numbers of Commission proposals to conclude mixed agreements are blocked in the Council.[85] In other words, in a climate of controversy, the legal requirement of consensus in decision-making may practically paralyse EU action. When the different top executive actors are in a stalemate the EU and its Member States are paralysed. We can witness this in the great difficulties of the EU and its Member States in dealing with the ECT, which has been found (partially) incompatible with EU law, but coordinated withdrawal remains complicated and uncoordinated withdrawal triggers many undesirable consequences, such as legal uncertainty and potentially international liability. The EU simply lacks a unified executive actor that can decide – limited by procedures and separation of powers – for the EU and its Member States as one party.

Reasonable disagreement about what is a 'good life' and hence the impossibility of identifying an uncontroversial public good lie at the core of why we need separation of

[83] Opinion 2/15 (n 5).

[84] M Chamon, 'Constitutional limits to the political choice for mixity' in E Neframi and M Gatti (eds), *Constitutional issues of EU external relations law* (Nomos, 2018); L Prete, 'The constitutional limits to the choice of mixity after EUSFTA, COTIF I, MPA Antarctic and COTIF II: towards a more constructive discourse?' (2020) 1 *European Law Review* 113; C Eckes and P Leino-Sandberg 'The EU-UK Trade and Cooperation Agreement – Exceptional Circumstances or a new Paradigm for EU External Relations?' (2022) *Modern Law Review*.

[85] Opinion 1/19 (n 7) [152].

powers to ensure procedures of will-formation that take into account differing views.[86] These procedures also ensure the continuity of democracies. Perpetual consensus would render democracies ultimately futile.[87] Creating scope for political discretion gives room for confrontation and captures dissenting voices within the decision-making process. Both in the current political climate in the Council and because of the increased controversy surrounding trade and investment policies, conflictual exchanges are likely to stay. At the same time, we need some level of consensus between the top level-split executive in order to avoid paralysis or breaking that paralysis at the cost of international liability.

Externally, the Council may, when exercising its political discretion, decide to hazard the consequences of incomplete mixity and potential international liability for being unable to implement part of the agreement, as explained above. Besides international liability, this burden-shifting has the potential to trigger political backlash by non-EU states and controversy about the Union's 'exceptionalism'. The Court's argument in Opinion 1/19 that the Council of Europe 'is aware' of the competence division between the Union and the Member States[88] remains a vague attempt to justify this burden, which is unlikely to legally convince beyond the EU legal order.[89] This creates the possibility of conflicts both of a legal and political nature that reach beyond the EU legal order and that the opinion procedure is intended to avoid.

In the case of the ECT, legal uncertainties of who can stay and who can go, and who must stay and who must go, depending on what the other chooses, have overshadowed the political discussion of whether or not the EU and its Member States should want to be parties to the ECT in the first place.[90] This case, more than anything, demonstrates how uncertainties over who holds power to do what can also be politically held responsible for what stands in the way of open debate and will-formation on substance. While democratic decision-making procedures must allow for reasonable disagreement on substance, they also need a reasonable level of agreement on procedure, including the allocation of responsibilities.[91] Disagreement must have its place in institutional decision-making, but only reasonably concretely allocated powers and responsibilities allow engaging with disagreement or even dissensus without paralysis and confusion. The particular construction of the EU, in which not only the Commission and the Council but also the Member States have (part of the) ultimate executive say under international relations, are more prone to stalemates than the traditional separated powers between the different branches.

The Court has erred rather on the side of creating the legal framework conditions for *collaboration* than in stepping in with strict procedural legal standards. This may allow for more disagreement and dissensus in the political arena, ie, amongst executive actors and potentially at least with the input of the legislature. It does not strengthen the judicial channel for challenging consensus and controlling the collaborating actors. Nor does it empower the European or national parliaments.

[86] E Carolan, *The New Separation of Powers* (Oxford University Press, 2009).
[87] Möllers (n 10) 76.
[88] Opinion 1/19 (n 7) [261].
[89] See also G Kubek, 'Facing and embracing the consequences of mixity: Opinion 1/19 Istanbul Convention' (2022) 59 *Common Market Law Review* 1465, 1482.
[90] Eckes (n 3); Ankersmit (n 75).
[91] Möllers (n 10) 76.

V. Conclusions

Examining the Court's case law, this chapter demonstrates first that the Court relies on the various executive actors to balance themselves. Yet, instead of controlling each other, they could also jointly overpower the legislature. Second, the Court's confirmation of autonomy of the involved actors necessarily opens up new space for political controversy in an already politicised area. This comes with the danger of overcoming paralysis at the cost of international liability.

External actions put the EU's internal power structures under pressure.[92] The joined international commitments of the Union and the Member States are inseparably intertwined as they relate to the same territories and peoples. Within the EU governance structures, the top-level split executive that consists of the Commission, the Council and the Governments of the Member States aims to coordinate the different positions into one. Yet, EU treaty-making regularly requires complicated legal arrangements to allow for joined representation. Complicated and fragile constructions are required to ensure that, on the one hand, the practice complies with the Treaty rules and, on the other, the EU can act autonomously as a unified actor and is not taken hostage by the potentially paralysing positions of individual Member States.

In international treaty-making this becomes particularly apparent because of the EU's weak position under international law as a derivative actor and the complexity of the power division between the EU and its Member States. In trade and investment, the EU enjoys an exceptional level of autonomy, which further complicates the picture. The growing controversies with regard to the desirability of (certain parts of) trade agreements and investment protection add to the complexity. Political struggles surround the negotiation and conclusion of trade and investment agreements. In this context, it is difficult to overestimate the relevance of the Court's powers to frame the EU's treaty-making procedure, and the need for involvement of both the Member States and the different EU institutions in that procedure.

In this complex landscape of institutional collaboration and political controversy, separation of powers is an *ideal* may help the EU and its Member States, on the one hand, to channel disagreement or even dissent into the process of will-formation and, on the other, to balance the political autonomy of EU institutions and the Member States with judicial control of its constitutional principles. The ECJ is a central actor in the legal landscape shared between the EU and the Member States. In the context of international treaty-making, the opinion procedure under Article 218(11) TFEU gives the Court even greater powers and hence responsibility to control the externally empowered executive actors.

The Court has used that power to protect the autonomy of EU will-formation. By exercising judicial restraint and opening up political autonomy of the EU institutions (and the Member States), the Court does not take up the invitation to become the final arbiter of political controversy. It created a situation where the Treaty procedures in Article 218 TFEU establish the legal procedural boundaries of what is possible while protecting the institutional actors within that framework. This also protects the

[92] Eckes (n 19).

positions of the other institutions, ie the European Parliament and the Commission. From a separation of powers perspective, this strengthens the European layer (above all the Council, but also the European Parliament and the Commission) vis-à-vis the national one (both governments and parliaments). However, in the context of mixed agreements, national parliaments continue to hold their direct (national ratification) and indirect (mandate for and control over national representatives in Council) powers of influence and control. Opinion 1/19 leaves the EU institutions and the Member States, both as part of the Council and independently, free to decide politically how to position themselves in the network of partially conflicting powers and obligations under national, EU and international law.

In trade and investment, Opinion 2/15 precisely excludes that the EU can conclude a treaty with an ISDS mechanism on its own. This must logically also exclude partial conclusion by the EU and some Member States. In other words, when international agreements with ISDS clauses are concluded, the Council does not possess the powers to conclude the agreement without the 'consent' of all Member States. At the same time, as has convincingly argued, this cannot prohibit individual Member States from withdrawing from an existing treaty containing an ISDS mechanism.[93] Greater scope for the autonomy of European actors (and the Member States) is likely to create tensions with international law, which treats territories as governed by one uniform sovereign actor.

However, whether the Court can and does offer a counterbalance to the dominance of externalised multi-actor and top-level split-executive powers in EU treaty-making is another question. In the multilayered nature of the EU, the Court rather emphasises that the Council as the European representation of the national executives needs to collaborate not only with the Commission and the European Parliament but also with the Member States. Taking the position that the multilayered nature of the EU offers sufficient constraints amongst executive actors, however, seems problematic from a separation of powers perspective, which emphasises the distinctness of the different branches and insists that not all power can be concentrated in one of them – even if this branch consists of different autonomous actors.

[93] Ankersmit (n 75).