

LEGAL DIPLOMACY IN AN AGE OF AUTHORITARIANISM

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In an age of authoritarianism, when autocratic governments are weakening the foundations of constitutional democracies or turning them into illiberal ones, the role of the judicial branch is paramount to entrench a liberal version of the rule of law that will inevitably come under attack for being politically motivated. By using its legal diplomatic skills, the Court of Justice of the EU (CJEU) has carefully asserted its role in denouncing the lack of an effective judicial protection in international and domestic contexts. Legal diplomacy is a form of legal reasoning that enables courts to balance conflicting considerations when the law “runs out” seeking to weigh solutions in foreign relations against their institutional self-preservation. A comparison of the legal diplomacy of the Supreme Court of the United States (SCOTUS) since the late eighteenth-century with its post-WWII European counterpart, the CJEU, shows how the judicialization of foreign relations entails similar doctrinal tools and policy arguments with opposite ideological values. Against that backdrop, this Article shows that the SCOTUS and the CJEU have relied on similar balancing tools using separation of powers and federalism doctrines in foreign relations for more liberal or conservative outcomes while preserving their authoritative roles. The recent jurisprudence on judicial independence provides a powerful example of how the CJEU has translated its balancing from foreign to internal affairs to curb authoritarian practices in Poland and Hungary. Through formalism and deference, the CJEU is cautiously laying out a liberal rule of law jurisprudence that will be of use to the political branches to more effectively sanction rule of law violations but will

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inevitably trigger suspicion and backlash towards the Court's supranational law making power.

INTRODUCTION.....	153
PART I. COMPARING LEGAL DIPLOMACY.....	159
A. Legal Diplomacy in the ECtHR and the CJEU	159
B. From Judicial to Legal Diplomacy in the CJEU	161
C. From Legal Diplomacy to Exceptionalism in U.S. Foreign Relations.....	163
PART II. COMPARING SEPARATION OF POWERS IN FOREIGN RELATIONS	166
A. Political Questions in Foreign Relations	168
1. Act of State as Judicial Avoidance.....	168
2. Political Questions as Judicial Deference.....	170
3. Balancing International Law	174
B. Democratizing EU Foreign Relations	175
1. Judicial Empowerment of the European Parliament	176
2. The European Parliament's Struggle in Foreign Relations.....	177
3. Expanding Judicial Review in Common Foreign Security Policy	178
PART III. FEDERALISM IN FOREIGN RELATIONS	181
A. Federalism in U.S. Foreign Relations	181
1. Treaty Enforcement as Self-Executing Power	181
2. Creating the distinction between Self-Executing and Non-Self Executing Treaties	182
3. <i>Medellin</i> and its legacy on Human Rights Treaties.....	183
B. The Mixed Agreements Jurisprudence of the CJEU	185
1. The Judicial Creation of <i>Mixity</i> in International Agreements	185
2. Expanding the EU Competence and Mixity in Opinion 2/15	186
C. From International Investment Law to the Autonomy of EU Law ..	188
1. <i>Achmea</i> from a Rule of Law Perspective	188
PART IV. POLITICIZATION OF JUDICIAL INDEPENDENCE IN THE AGE OF AUTHORITARIANISM.....	192
A. Constitutional Backsliding as a Global Phenomenon.....	193
B. The Polish Constitutional Breakdown.....	195
C. Can the CJEU Make a Difference?	198
CONCLUSION.....	200

INTRODUCTION

The notion of judicializing foreign relations can sound paradoxical, since within sovereign states diplomacy has typically been a prerogative of the executive branch. However, scholars of international courts note that the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR) played a diplomatic role in the Cold War era by resolving disputes, both between sovereign states and between individuals and states. In so doing, these courts helped avoid wars and other

fundamental conflicts.² In recent years, national and supranational courts have begun to intervene in foreign relations issues more regularly due to a confluence of factors: the de-funding of diplomatic services, the increased executive control of military and development aid,³ and the strategic use of trade wars and international agreements by governments aiming to advantage domestic political interests.⁴

Against this backdrop, this Article shows how the Supreme Court of the United States (SCOTUS) and the Court of Justice of the European Union (CJEU), have deployed similar legal reasoning in foreign relations, using separation of powers and federalism doctrines to balance conflicting considerations.⁵ Rather than questioning the expansion of judicial power in foreign relations or the “infant disease of autonomy of EU law,”⁶ this comparison of the legal diplomacy demonstrates that through its balancing the SCOTUS asserted its role as the arbiter in conflicts between the political branches, while the CJEU similarly stabilized a supranational architecture designed to maintain peace and trust among its Member States.

Scholars working on international courts often argue that legal diplomacy is one of the constitutive features enabling international courts to navigate law and politics while conserving their institutional authority.⁷ The initial balancing of European Court of Human Rights was between “giving life” to the European Convention on Human Rights and “ensuring its viability” through Member States’ acceptance by developing a legal rationality that would ensure the self-preservation of the Court. Legal diplomacy is not a concept foreign to EU scholars in particular either, since from the 1970s onwards the European Court of Justice (ECJ) balanced questions of competences both internally and externally,⁸ which required similar legal reasoning accommodating EU rights with domestic mandatory interests while ensuring the self-preservation of a supranational constitutional court.⁹ In expanding its jurisdiction over foreign relations law, the CJEU carefully interpreted the Union’s competences and

² See Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 L. & SOC. INQUIRY 137, 139 (2007).

³ See RONAN FARROW, *WAR ON PEACE: THE END OF DIPLOMACY AND THE DECLINE OF AMERICAN INFLUENCE* (2018).

⁴ See Michael Pettis, *Why Trade Wars are Inevitable*, FOREIGN POL’Y (Oct. 19, 2019, 12:01 AM), <https://foreignpolicy.com/2019/10/19/trade-wars-inevitable-us-china-economic-imbalances/>.

⁵ See Duncan Kennedy, *Political Ideology and Comparative Law*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 35 (Mauro Bussani & Ugo Mattei eds., 2012).

⁶ See Jed Odermatt, *The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?* in STRUCTURAL PRINCIPLES IN EU EXTERNAL RELATIONS LAW 291 (Marise Cremona ed., 2018).

⁷ See Mikael Rask Madsen, *The Narrowing of the European Court of Human Rights: Legal Diplomacy, Situational Self-Restraint and the New Vision of the Court*, EUR. CONVENTION ON HUM. RTS. L. REV. (forthcoming 2021) (manuscript at 1); Henrik Palmer Olsen, *International Courts and the Doctrinal Channels of Legal Diplomacy* (iCourts Working Paper Series, Paper No. 25, 2015), <https://ssrn.com/abstract=2607925> (“[I]t is precisely the sensitivity to politics per se that allows ICs to transcend the political and build their own specific interpretations of what international law requires. This means that ICs – through their case law – construe specific legal understandings of what international law means and how it should be applied. They become, in a sense, masters of international law, by navigating through political resistance with the only tool available to them: interpretation of the law.”).

⁸ See KAREN ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001); EU FOREIGN RELATIONS LAW – CONSTITUTIONAL FUNDAMENTALS (Marise Cremona & Bruno de Witte eds., 2008).

⁹ See Madsen, *supra* note 7 (manuscript at 2).

navigated the changing global role of the EU after the Cold War.¹⁰ Recent judgements at the intersection of EU external relations laws, namely Common Foreign and Security Policy (“CFSP”) and Common Commercial Policy (“CCP”),¹¹ exemplify how in each case the court filled gaps in the EU Treaty while expanding or refraining from asserting its jurisdiction in foreign relations.¹²

This CJEU jurisprudence allows new repeat players, such as the European Parliament (EP), to promote the democratization of CFSP, while making sure that the EU decisions in this area fully take into account basic fundamental rights guarantees in the Area of Freedom, Security and Justice (AFSJ).¹³ In addition, new litigants seek to bring their cases to Luxembourg as part of their international litigation strategies. Those include unusual applicants such as the lawyers of the Polisario Front¹⁴—a liberation movement of Western Sahara—or Rosneft¹⁵—a Russian oil company that most likely would be unable to find a remedy to such wrongs before domestic courts—and Achmea—a Dutch insurance company investing in Slovakia claiming a remedy under an intra-EU Bilateral Investment Treaty.¹⁶

The EU is facing unprecedented external and internal challenges to its legal and political-economic structure. This includes the need to rethink its global trade and investment agenda that is inevitably tied to migration fluxes and a lack of economic development and political stability in Northern Africa.¹⁷ The EU is also facing an internal rule of law crisis with the rise of authoritarian governments calling themselves “illiberal democracies.”¹⁸ In these instances, the legal diplomacy of the CJEU initially aimed at strengthening its authority to enforce the rule of law in EU foreign relations is now re-focused to maintain democratic and political stability inside the Union.

However, legal diplomacy is not exclusive to supranational Courts. Supreme and constitutional courts, as part of an independent judiciary, also engage in legal diplomacy when intervening in foreign relations crises prompted by military or trade wars. Take for instance the SCOTUS, when soon after the ratification of the United

¹⁰ See Marise Cremona, *The Union as Global Actor: Models and Identity*, 41 *COMMON MKT. L. REV.* 553 (2004).

¹¹ See *Opinion of Advocate General Sharpston, Conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore — Allocation of competences between the European Union and the Member States*, *Opinion 2/15*, EU:C:2016:992.

¹² See *NF v. Eur. Council*, Case T-192/16, EU:T:2017:128 (rejecting the jurisdiction of the General Court on the EU-Turkey deal).

¹³ See *Treaty on the Functioning of the European Union*, art. 82-86, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter *TFEU*] (“The Areas of freedom, security and justice is a collection of home affairs and justice policies addressing security, judicial cooperation in criminal matters.”).

¹⁴ See *Council v. Front Polisario*, Case C-104/16P, EU:C:2016:973.

¹⁵ See *PJSC Rosneft Oil Co. v. Her Majesty*, Case C72/15, EU:C:2017:236 [hereinafter *Rosneft*].

¹⁶ *Slovak Republic v. Achmea BV*, Case C-284/16, EU:C:2018:158.

¹⁷ See PEO HANSEN & STEFAN JONSSON, *EURAFRICA: THE UNTOLD HISTORY OF EUROPEAN INTEGRATION AND COLONIALISM* (2014); Daniela Caruso & Joanna Geneve, *Melki in Context: Algeria and European Legal Integration*, in *EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE* (Bill Davies & Fernanda Nicola eds., 2017); *European Commission’s Trade for All. Towards a More Responsible Trade Strategy* (2015), https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.

¹⁸ See Kim Lane Scheppele, *Understanding Hungary’s Constitutional Revolution*, in *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA* 111, 111–12 (Armin von Bogdandy & Pál Sonnevend eds., 2015); Miklós Bánkúti et al., *Hungary’s Illiberal Turn: Disabling the Constitution* 23 *J. DEMOCRACY* 138 (2012).

States Constitution, it played a crucial role in foreign policy by preserving the country's neutrality in the war between Britain and France while giving life to the US Constitution.¹⁹ Since then, however, the SCOTUS only indirectly exercised its legal diplomacy as its self-preservation was based its "mythical neutrality."²⁰ But the renewed focus of the Rehnquist Court on national security and foreign affairs, particularly through the national combatant cases, prompted a return to a legal diplomatic role of the Court that some viewed as a questionable expansion of the judiciary's role in such issues.²¹

The judicial evolution in foreign relations doctrines looks fairly similar in both the SCOTUS and the CJEU. This is despite the very different timeframe and institutional constraints that the two courts operate under, such as the EU's lack of a strong President or national army, and the nomination of the CJEU's twenty-seven judges by the executives of the Member States confirmed by a panel of experts, rather than nine Justices nominated by the President and confirmed by the U.S. Senate. But much like its SCOTUS counterpart, over the past fifty years the CJEU exercised legal diplomacy through activism or judicial restraint in EU foreign relations to establish its own authority in this realm.²² Overall, the CJEU shaped important aspects of EU foreign policy²³ by re-defining the nature of its internal and international obligations regarding human rights,²⁴ international trade,²⁵ investment agreements,²⁶ and rule of law from the perspective of judicial independence and effective remedies.²⁷

Through a functional comparison of legal diplomacy, namely the foreign relations jurisprudence of the SCOTUS and the CJEU, this Article highlights similarities in the use of legal doctrines, policy arguments and legal processes that enhance or discourage the judicialization of foreign relations through judicial activism of deference. In deploying doctrines concerning political questions, separation of powers, and federalism in treaty-making authority, both courts are exerting or retraining their legal diplomatic skills by walking the fine line of law and politics. Even though critics of the CJEU's legal diplomacy call this jurisprudence an inappropriate expansion of judicial power,²⁸ courts inevitably embed foreign relations into rule of law reasoning

¹⁹ See David Sloss, *Judicial Foreign Policy: Lessons From the 1790s*, 53 ST. LOUIS L. J. 145, 153–58 (2008).

²⁰ See J. H. H. Weiler, *The Transformation of Europe* 100 YALE L. J., 2403, 2426–30 (1991).

²¹ See John Hoo, *National Security and the Rehnquist Court*, 74 GEO. WASH. L. REV. 1144, 1160–64 (2006).

²² For activism, see *Commission v. Council*, Case 22-70, EU:C:1971:32 [hereinafter ERTA] and *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property*, Opinion 1/94, EU:C:1994:384, and for restraint, see Jed Odermatt, *Patterns of Avoidance: Political Questions Before International Courts*, 14, INT'L J. L. CONTEXT 221 (2018).

²³ See THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW (Marise Cremona & Anne Thies eds., 2014); see also PIET ECKHOUT, *EU EXTERNAL RELATIONS LAW* (2d ed. 2011).

²⁴ Opinion Pursuant to Article 218(11) TFEU—Draft International Agreement—Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms—Compatibility of the Draft Agreement with the EU and FEU Treaties, Opinion 2/13, EU:C:2014:2454.

²⁵ Opinion 1/94, EU:C:1994:384 (discussing the competence of the EC to conclude WTO agreements on GATS and TRIPs).

²⁶ Slovak Republic, EU:C:2018:158; Opinion 1/17 on CETA, EU:C:2019:341.

²⁷ See *Rosneft*, EU:C:2017:236, ¶¶ 62–63.

²⁸ See Perry Anderson, *The European Coup*, 42 LONDON REV. BOOKS (2020).

and open the debate to a multiplicity of legal and civil society actors to increase their legitimacy. With the rising wave of autocratic leaders and populist political parties advocating for more Brexit, NATO withdrawal, and with tensions rising inside the Union over the entrenchment of a liberal rule of law, the legal diplomacy of the CJEU ought to be reappraised as another legal barrier against the authoritarianism alongside its increasing need of institutional self-preservation evident in the formalism and deference arising from its own reasoning.²⁹

Part I of this Article addresses literature on the increasing judicialization of politics by focusing on the judicial empowerment of the SCOTUS and the CJEU *vis-à-vis* foreign relations.³⁰ A functional comparison between the SCOTUS and the CJEU elucidates how, despite different historical contexts and federal or supranational constitutional constraints, these two courts use similar doctrinal, interpretative, and legal process tools to engage in or refrain from exercising legal diplomacy “without putting the authority of the concerned court in peril.”³¹ While in the US the notion of foreign relation exceptionalism has displaced the legal diplomacy exercised by the SCOTUS through the prerogative of the executive branch in international relations, in the EU, due to its supranational features including a less rigid separation of powers and federalism doctrines, the CJEU has deployed legal diplomacy not only in its external but increasingly in its internal relations.

In Part II, this Article shows how the judicialization of foreign relations arose before the SCOTUS and the CJEU through doctrinal interpretation of separation of powers doctrines with different ideological visions on the role of the judiciary. While the *Act of State* doctrine constrains the SCOTUS from engaging directly in foreign affairs, the *Political Question* doctrine allows the SCOTUS to judicialize foreign relations indirectly by shaping the powers of the other political branches. In the EU, a similar tension arose between the judicial avoidance of the CJEU,³² and its involvement in foreign relations by crafting its autonomy of EU law as a way to preserve its authority rather than openly exercising judicial diplomacy.³³

Part III engages with federalism in foreign relations by comparing the SCOTUS jurisprudence on non-self-executing treaties to the mixed agreements jurisprudence of the CJEU. In both contexts, the courts engage in legal diplomacy by balancing two conflicting considerations leading to deference or activism in foreign relations. In one consideration, the exceptionalism in foreign relations leads to judicial restraint and

²⁹ See Madsen, *supra* note 7 (manuscript at 27) (showing how the evolution of the legal diplomacy of the ECtHR facing new challenges to its authority has created a new subsidiarity approach granting more deference to the Member States and a differentiated legal rationality with more situated self-restraint by the Court).

³⁰ See Celmer, Case C-216/18 PPU, EU:C:2018:586; Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, Case C-64/16, EU:C:2018:117; Commission v. Poland, Case C-192/18, EU:C:2019:924; Commission v. Poland, Case C-619/18, EU:C:2019:531.

³¹ Mikael Rask Madsen, Bolstering Authority by Enhancing Communication: How Checks and Balances and Feedback Loops Can Strengthen the Authority of the European Court of Human Rights, in ALLOCATING AUTHORITY 13 (Joana Mendes & Ingo Venzke eds., 2018).

³² Odermatt, *supra* note 23.

³³ See Opinion 2/13, EU:C:2014:2454; for a favorable commentary, see Daniel Halberstam, ‘It’s the Autonomy, Stupid!’ A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, 16 GERMAN L.J. 105 (2015) and for a critical view, see Piet Eeckhout, Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky, 38 FORDHAM INT’L L.J. 955 (2015).

greater power to the federal/executive branch in foreign relations. Against this, the courts weigh the judicialization of foreign relations and their greater involvement in balancing states versus federal interests in international investments and commercial policies.

Part IV addresses the increasing relevance of judicial independence in an era of crisis of liberal constitutional democracies around the globe.³⁴ The example of Poland provides a perfect case-study to show how capturing the judiciary was at the center of the Polish governing coalition's strategy.³⁵ However, the intervention of the CJEU slowed authoritarian momentum in Poland where the government is using all means to attempt to run afoul of judicial independence.³⁶ In this struggle the CJEU chose the path of legal diplomacy: rather than engaging politically like the European Parliament or the Commission through art. 7 TEU against Poland and Hungary, it applied new legal doctrines and procedural tools, such as injunctions, to gradually push the government towards compliance with EU standards. The CJEU engaged with the Polish government to entrench the notions of effective judicial remedies and judicial independence in its uniform jurisprudence that constitutes the liberal European rule of law. The increasing tension with the judicial nationalism emerging in the Constitutional Courts of its Member States,³⁷ has led the CJEU to exercise greater caution and deference to preserve its institutional role in the Union.

Although the CJEU jurisprudence faced accusations of being too ideological,³⁸ or not doing enough to curb the autocrats,³⁹ the Court is entrenching a liberal rule of law culture both outside and inside the Union. This Article concludes that, through its legal diplomacy, the CJEU worked towards the gradual entrenchment of rule of law doctrines first established in its foreign relations to then deploy them against the authoritarian threats inside the Union. Additionally, the CJEU adjudication against the autocrats created new important evidence of why and how authoritarian governments are violating EU law that gives the Commission the ability to request interim measures⁴⁰ or impose penalties and financial conditionalities to uphold the rule of law

³⁴ See CONSTITUTIONAL DEMOCRACY IN CRISIS? (M. Graber et al. eds., 2018).

³⁵ See WOJCIECH SARDURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019).

³⁶ See Vanessa Gera, *Judges from Across Europe March to Defend Polish Peers*, TIME (Jan. 11, 2020), <https://apnews.com/article/6c1a83759688897999c856d2fb879c9>.

³⁷ Katharina Pistor, *Germany's Constitutional Court Goes Rogue*, PROJECT SYNDICATE (May 8, 2020), <https://www.project-syndicate.org/commentary/german-constitutional-court-ecb-ruling-may-threaten-euro-by-katharina-pistor-2020-05?barrier=accesspaylog>; Gino Scaccia, *The Lesson Learned from the Taricco Saga: Judicial Nationalism and the Constitutional Review of E.U. Law* 35 AM. U. INT'L LAW REV. 821 (2020); Daniele Gallo, *Challenging EU Constitutional Law: The Italian Constitutional Court's New Stance on Direct Effect and the Preliminary Reference Procedure*, 25 EUR. L. J. 434 (2019); Mikael Rask Madsen et al., *Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation*, 23 EUR. L. J. 140 (2017).

³⁸ See Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. & CRITIQUE 91 (2014).

³⁹ Armin von Bogdandy et al., *Protecting EU Values - Reverse Solange and the Rule of Law Framework in THE ENFORCEMENT OF EU LAW AND VALUES, ENSURING MEMBER STATES' COMPLIANCE* 218-33 (András Jakab & Dimitry Kochenov eds., 2017).

⁴⁰ See Laurent Pech, *Protecting Polish Judges from the Ruling Party's "Star Chamber:" The Court of Justice's Interim Relief Order in Commission v Poland (Case C-791/19 R)*, VERFASSUNGSBLOG (Apr. 9, 2020), <https://verfassungsblog.de/protecting-polish-judges-from-the-ruling-party-s-star-chamber/>.

standard.⁴¹ In an age of authoritarianism, the CJEU is cautiously walking a fine line between law and politics with the certainty that its adjudication despite its formalism and deference is likely to trigger the hermeneutics of suspicion by commentators⁴² and political backlash from its Member States.⁴³

PART I. COMPARING LEGAL DIPLOMACY

A. *Legal Diplomacy in the ECtHR and the CJEU*

Legal diplomacy is a term first coined by Mikael Rask Madsen, describing the work of the European Commission of Human Rights (predecessor of the Court, ECtHR) in the Cyprus case as a very first occurrence of such diplomacy.⁴⁴ Greece brought suit against the United Kingdom concerning the rights of Greek insurgents in Cyprus, which ended with a situation where the settlement of the legal dispute happened via diplomatic means.⁴⁵ In 1955, at the beginning of the European Human Rights system, the Commission took a strategic decision not to take its case before the Committee of Ministers, since this would have had severe negative consequences for the human rights system at large, but instead it chose a “diplomatic agreement” that allowed the preservation of the human rights system in Strasbourg.⁴⁶ Legal diplomacy was a legal, rather than political, strategy used by legal and political European experts and soon became a basic premise in the institutional order laid out in the ECtHR.⁴⁷ The legal strategy used by the Strasbourg Court to build its authority during the early years of its existence was a continuous balancing of the preservation of its institutional role, the tensions between different political powers, and the creation of new judicial doctrines giving life to the European Convention of Human Rights. These doctrines and discourses of a transnational court having to balance its jurisprudence against considerations about its legitimacy and authority in an international, regional and domestic setting constituted its legal diplomacy.

This use of law rather than politics to foster diplomatic relations and continue the judicial dialogue among European and national governments constitutes the legal diplomacy of the ECtHR as well as the CJEU in Luxembourg. These transnational courts do not always operate through a pure form of legal reasoning nor as political institutions, but rather these courts use legal diplomacy to walk a fine line between

⁴¹ See *Hungary and Poland Threaten E.U. Stimulus Over Rule of Law Links*, N.Y. TIMES (Nov. 16, 2020); Parliament and Council Regulation 2020/2092, On a General Regime of Conditionality for the Protection of the Union Budget 2020 O.J. L433I 1; see also Daniel Gros, *The European Council's Compromise on the Rule of Law Regulation*, CTR. EUR. POL'Y STUD., <https://www.ceps.eu/the-european-councils-compromise-on-the-rule-of-law-regulation-capitulation-to-the-forces-of-evil-or-misplaced-expectations/>.

⁴² See Duncan Kennedy, *A Political Economy of Contemporary Legality in THE LAW OF POLITICAL ECONOMY: TRANSFORMATIONS OF THE FUNCTION OF LAW* (Poul Fritz Kjaer, ed., 2019).

⁴³ See Mikael Rask Madsen et al., *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. L. CONTEXT 197 (2018).

⁴⁴ Madsen, *supra* note 33.

⁴⁵ *Id.* at 12.

⁴⁶ *Id.*

⁴⁷ Mikael Rask Madsen, *Legal Diplomacy: Law, Politics and the Genesis of Postwar European Human Rights*, in *HUMAN RIGHTS IN THE TWENTIETH CENTURY: A CRITICAL HISTORY* (Stefan-Ludwig Hofmann ed., 2010).

law and politics.⁴⁸ Here, legal, political, and moral reasoning merge into a unique form of international conflict management.⁴⁹ In action, legal diplomacy is a form of self-reflexive legal reasoning for which courts are responsive to inputs from parties subject to their international or supranational jurisdiction.⁵⁰ Because of the gap between the supranational and the domestic legal order, these courts use transnational scaling to leave room for a number of different ways for member states to adapt to international or EU law. For example, leaving a margin of discretion to states for the ECtHR or using proportionality in CJEU judgements on free movement allows these courts to exercise restraint *vis-à-vis* the decisions made by member state authorities in a way that judiciaries in federal systems are well aware of.⁵¹ This shows how legal diplomacy is a careful mix of activism and constraint by courts trying to preserve their authority inside and their legitimacy outside their jurisdiction.

According to Henrik Palmer Olsen, there is a variety of tools through which these actors exercise their legal diplomacy that can be mapped through a plethora of judicial strategies.⁵² For instance, self-restraint allows courts to build confidence between the member state governments and the ECtHR. This concept of legal diplomacy can be extended also to the ECJ in its internal relation to the EU member states and its very early engagement with international law as part of its foreign relations.⁵³ Through autonomous concept formation these courts can assert their legal identity, so that through the well-known cases establishing the supremacy in Costa and the direct effect in Van Gend en Loos of EU law, the CJEU could create a culture of self-identity.⁵⁴ By using legal precedents and *stare decisis*, courts refer to prior decisions to support new legal decisions, building consistency and therefore stability and authority.⁵⁵ Creating greater access for litigants to European courts through rules on standing and third-party intervention, and addressing institutional bottlenecks related to caseload, allows parties who have not previously had standing to bring their cases to court.⁵⁶ By adjudicating questions of individual rights, supranational courts directly impact European citizens' fundamental or mobility rights so that courts' judgements have tangible effects on those who have been mobilized through judicial action.⁵⁷

⁴⁸ Olsen, *supra* note 7.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

⁵² See Olsen, *supra* note 7.

⁵³ See Anne McNaughton, *Acts of Creation: The ERTA Decision as a Foundation Stone of the EU Legal System*, in *EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE* 134 (Fernanda Nicola & Bill Davies eds., 2017).

⁵⁴ See Olsen, *supra* note 7.

⁵⁵ *Id.*

⁵⁶ See Roberto Mastroianni & Andrea Pezza, *Striking the Right Balance: Limits on the Right to Bring an Action under Article 263(4) of the Treaty on the Functioning of the European Union*, 30 AM. U. INT'L L. REV. 743 (2015).

⁵⁷ See R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* (2011).

B. *From Judicial to Legal Diplomacy in the CJEU*

The book by Stephen Breyer, *The Court and the World* revamped the focus on judicial diplomacy⁵⁸ that is the ongoing transnational dialogue among domestic,⁵⁹ international, and supranational courts.⁶⁰ Judicial diplomacy advances the migration of constitutional ideas⁶¹ and shows how judicial comparativism, when judges cite or compare ideas or doctrines in different jurisdictions, can be a powerful form of diplomacy for courts.⁶² Comparative scholars highlight how international or domestic courts are in permanent dialogue with foreign judges to consolidate their courts' national authority within their own internal legal hierarchies,⁶³ or to promote exchanges of ideas that might end up influencing the constant evolution of judicial lawmaking.⁶⁴ An empirical study of the Canadian Supreme Court demonstrated how its constant exchange between foreign courts and individual judges impacted "Canada's global reputation and foreign policy."⁶⁵ This form of judicial diplomacy appears prominently in the work of Supreme Court justices like Stephen Breyer and Ruth Bader Ginsburg, who are committed to using comparative experiences to inform their legal reasoning.⁶⁶ Notably, a 2017 encounter in Washington, D.C. between Associate Justice Stephen Breyer of the SCOTUS and President Koen Lenaerts of the CJEU⁶⁷ prompted a discussion on how to advance a global rule of law through such judicial dialogues.⁶⁸

In addition to judicial diplomacy, these courts also engaged with legal diplomacy that is different yet influenced by this judicial dialogue through which transnational courts develop specific doctrines, discourses, and processes in the realm of foreign relations law. The judgments of the CJEU at the intersection of Common Foreign and Security Policy ("CFSP"), Common Commercial Policy ("CCP"), and human rights conditionality exemplify the distinctive role that the CJEU plays by filling gaps in the EU Treaty while expanding the court's role in EU foreign relations. While the EU is facing unprecedented internal and external challenges, ranging from Brexit to rule of law crises in Hungary and Poland, the revamping of Russian tensions and a migration

⁵⁸ STEPHEN BREYER, *THE COURT AND THE WORLD* (2016).

⁵⁹ See Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court* 34 TULSA L. J. 15, 23–26 (1998).

⁶⁰ See Anne-Marie Slaughter, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L. J. 487 (2005).

⁶¹ See SUJIT CHOUDHRY, *THE MIGRATION OF CONSTITUTIONAL IDEAS* (2008).

⁶² See David Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927 (2015).

⁶³ See BILL DAVIES, *RESISTING THE EUROPEAN COURT OF JUSTICE: WEST GERMANY'S CONFRONTATION WITH EUROPEAN LAW, 1949–79* (2012).

⁶⁴ See RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* (2014). But see Armin von Bogdandy, *Comparative Constitutional Law As a Social Science? A Hegelian Reaction to Ran Hirschl's Comparative Matters*, MAX PLANCK INST. RES. PAPER SERIES 2016-09.

⁶⁵ See Klodian Rado, *The Judicial Diplomacy of the Supreme Court of Canada and Its Impact: An Empirical Overview*, 58 ALTA. L. REV. 1 (2020).

⁶⁶ See THE CONSTITUTIONAL RELEVANCE OF FOREIGN COURT DECISIONS (2005).

⁶⁷ See Keon Lenaerts & Stephen Breyer, *Judges as Diplomats in Advancing the Rule of Law: A Conversation with President Koen Lenaerts and Justice Stephen Breyer*, 66 AM. U. L. REV. 1159 (2017).

⁶⁸ See *id.*; Allan F. Tatham, *Off the Bench But Not Off Duty: The Judicial Diplomacy of the Court of Justice*, 22 EUR. FOREIGN AFF. REV. 303 (2017).

crisis, the CJEU is using legal diplomacy to maintain a legal and political order outside and inside the EU.

Legal diplomacy is one of international courts' constitutive features, described as a self-reflexive form of legal reasoning that is responsive to inputs from those subject to legal regulation.⁶⁹ It is this diplomatic rationale that underpins a strategy that makes it possible for courts to build and sustain the trust that is necessary for the courts to become institutions in their own right, i.e. as institutions with their own will and their own rationality.⁷⁰ Or to put it more emphatically:

“it is precisely the sensitivity of politics per se that allows courts to transcend the political and build their own specific interpretations of what international law requires. This means that—through their case law—international courts construe specific legal understandings of what international law means and how it should be applied. They become, in a sense, masters of international law, by navigating through political resistance with the only tool available to them: interpretation of the law.”⁷¹

In the case of the CJEU, its legal diplomacy in the past fifteen years instantiates three elements, which all trace their origins to Opinion 2/13, one of its most-criticized judgements, on the interplay between EU law and international human rights protections under the European Convention of Human Rights of the Council of Europe.⁷² First, in the aftermath of Opinion 2/13, in which the CJEU denied the accession of the EU to the European Convention of Human Rights, a gap in human rights protection appeared in foreign relation powers that are not subjected to the jurisdiction of the CJEU under Article 24 TFEU.⁷³ If the EU were to accede to the European Convention of Human Rights, this gap would have opened up the possibility for the European Parliament to review the human rights violations in EU law provisions. Opinion 2/13 held that the autonomy of EU law with respect to its Member States and international law was part of its very nature,⁷⁴ while the Court further attempted to close jurisdictional gaps through gradual expansion of its jurisdiction in Common Foreign Security Policy (CFSP) when reviewing the legality of restrictive sanctions against individuals in the implementation of EU policies.

Secondly, there are other actors such as the European Parliament that became adamant promoters of “democratizing” EU international relations by not only making sure that EU decisions in this area fully take into account its advisory or co-decision role after Lisbon,⁷⁵ but, more importantly, some basic fundamental rights guarantees

⁶⁹ See Olsen, *supra* note 7.

⁷⁰ See Madsen, *supra* note 49, at 62–68.

⁷¹ See Olsen, *supra* note 7.

⁷² See Opinion 2/13, EU:C:2014:2454; and for a comment, Piet Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky*, 38 FORDHAM INT'L L. J. 955 (2015).

⁷³ See TFEU, *supra* note 14, art. 24(1-2).

⁷⁴ See Opinion 2/13, EU:C:2014:2454; Editorial, The EU's Accession to the ECHR – A “No” From the ECJ!, 52 COMMON MKT. L. REV. 1 (2015).

⁷⁵ The Lisbon Treaty in 2010 in article 218 TFEU expanded the role of the EP in the approval of international treaties. See JUAN SANTOS VARA & SOLEDAD RODRÍGUEZ SÁNCHEZ-TABERNERO, THE DEMOCRATIZATION OF EU INTERNATIONAL RELATIONS THROUGH EU LAW (2018).

in the area of freedom, security, and justice.⁷⁶ New litigants have sought to bring their cases to Luxembourg as part of their litigation strategies by seeking standing for “unusual applicants” including an annulment action of a Council decision through Article 263 TFEU for the lawyers of the Polisario Front,⁷⁷ a liberation movement of Western Sahara and a preliminary reference through Article 267 TFEU from Rosneft,⁷⁸ a Russian Oil Company that most likely were unable to find a remedy to such wrongs before domestic courts.

Third, legal diplomacy coming from the CJEU is impactful beyond its important role as a gap-filler for EU international agreements. Even more impressive is the role of the Court as the arbiter in exercising scrutiny on the large discretion in foreign relations retained by the Council of Ministers (hereinafter Council).⁷⁹ In particular, the Court adamantly defends its role as the ultimate arbiter in the application of EU constitutional law in foreign relations while at the same time securing the “strict observance” of international law principles and departing from it in its Kadi jurisprudence in tension with international law.⁸⁰

The CJEU has given new interpretative guidance in foreign relations, trade and international investment law⁸¹ as well as the compatibility between EU constitutional and international law.⁸² The legal diplomacy of the CJEU has included in its balancing international law principles, creating an important continuity in the Court’s legal reasoning which consolidates the Court’s authority both outside and inside the Union. In fact, its judgments on the respect to judicial independence in Poland,⁸³ and in Hungary,⁸⁴ the Court has relied on its foreign relations jurisprudence, international law concepts and applied them internally. In doing so, the CJEU exercised some of its legal diplomatic skills through a gradual denunciation of authoritarian regimes inside and outside the EU.

C. *From Legal Diplomacy to Exceptionalism in U.S. Foreign Relations*

Legal historians have shown how in the 1790s, the U.S. Supreme Court served an important diplomatic role adjudicating privateering acts against American ships and impressment of their crews, as was common by the British and French navies.⁸⁵ As

⁷⁶ See TFEU, *supra* note 14, art. 82-86 (addressing judicial cooperation in criminal matters).

⁷⁷ See Council v. Front Polisario, EU:C:2016:973.

⁷⁸ See Rosneft, EU:C:2017:236.

⁷⁹ See *Western Sahara Campaign UK v Commissioners for Her Majesty’s Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, Case C-266/16, EU:C:2018:118.

⁸⁰ See Gráinne De Búrca, *The EU, the European Court of Justice and the International Legal Order After Kadi*, 1 HARV. INT’L L. J. (2009); Joris Larik, *A Line in the Sand: The ‘Strict Observance’ of International Law in the Western Sahara Case*, VERFASSUNGSBLOG (March 2, 2018), <https://verfassungsblog.de/a-line-in-the-sand-the-strict-observance-of-international-law-in-the-western-sahara-case/>.

⁸¹ See Opinion 2/15, EU:C:2016:992.

⁸² See *Western Sahara Campaign UK*, EU:C:2018:118, *supra* note 81.

⁸³ See WOJCIECH SARDURSKI, POLAND’S CONSTITUTIONAL BREAKDOWN (2019).

⁸⁴ See Gabor Halmai, *The Early Retirement Age of the Hungarian Judges*, in EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE (Fernanda Nicola & Bill Davis eds., 2017); *The Coup Against Constitutional Democracy. The Case of Hungary*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? (M. Graber et al. eds., 2018).

⁸⁵ See DAVID L. SLOSS ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* (2011).

David Sloss explains, privateering under foreign colors was not criminal, so consequently owners of ships sought restitution damages in U.S. courts so that these disputes were litigated judicially rather than diplomatically.⁸⁶ Although Congress did not explicitly grant federal courts jurisdiction to handle private claims between aggrieved Americans and foreign ships or crewmembers,⁸⁷ U.S. citizens routinely brought suits on two grounds: that the foreign privateer vessels were illegally “outfitted” or that the captain or crew of these ships were American.⁸⁸ As a result, Sloss shows how a strict separation of powers in foreign relations was not what the Founders had in mind and federal courts worked together with the national government to “promote US foreign policy objectives.”⁸⁹

For instance in *Betsey* (1794), the SCOTUS decided a case concerning a Swedish ship captured by French privateers.⁹⁰ Although treaty law prohibited U.S. court jurisdiction in cases involving French respondents, the owner of the ship brought suit before a federal district court to determine his rights.⁹¹ The French state protested this act, recommending that the owner turn to a French consulate-operated prize court to determine restitution.⁹² The Supreme Court held that such prize courts could not operate on American soil, leaving that jurisdiction exclusively to U.S. federal courts.⁹³ The French saw this sort of claim as one between states, thereby being subject to treaties and diplomacy.⁹⁴ The SCOTUS held, however, that these are actually private suits brought between citizens; therefore, the courts were the best avenue for legal recourse.⁹⁵ After *Betsey*, the federal executive acquiesced to this notion, rejecting French protests against U.S. jurisdiction.⁹⁶

A few years later in *Perseverance* (1797), a British ship was captured by the *Sans Pareil*, a French privateer vessel.⁹⁷ Following capture, with a new crew (placed by the *Sans Pareil*), the *Perseverance* docked in Rhode Island, at which point the British Consul of Rhode Island wrote a letter to the state’s governor asking the ship to be returned to its owner.⁹⁸ The governor seized the ship until the dispute’s settlement.⁹⁹ After learning of the situation, the French ambassador to the United States wrote a letter to the Secretary of State, complaining about frivolous lawsuits filed against legally captured vessels.¹⁰⁰ Ultimately, at the urging of the Secretary of State, the Governor of Rhode Island ordered the release of the *Perseverance* to its French captors.¹⁰¹ However, federal marshals again seized the *Perseverance* after the federal

⁸⁶ Sloss, *supra* note 20, at 149.

⁸⁷ *Id.* at 184.

⁸⁸ *Id.*

⁸⁹ *Id.* at 151.

⁹⁰ *Glass v. The Betsey*, 3 U.S. 6 (1794).

⁹¹ *Id.*

⁹² Sloss, *supra* note 20, at 160 (2008).

⁹³ *Id.*

⁹⁴ *Id.* at 161.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 188.

⁹⁸ *Id.*

⁹⁹ *Id.* at 189.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 190.

judiciary became involved to avoid a separation of powers crisis with the executive branch.¹⁰²

Through these cases, the Supreme Court sought to limit U.S. jurisdiction by applying international treaties, however, federal courts could not be held back from deciding whether the terms of the treaty purporting to bar jurisdiction was applicable. To avoid war with Britain and France, the federal executive branch supported French claims of prize ships privateered in the Atlantic and Caribbean. The Supreme Court limited authority originally intended under treaties, not by challenging their content, but by emphasizing that the judiciary could decide whether those contents apply to the particular case at hand, a technique central to the legal diplomatic role of the SCOTUS.

Today, this legal diplomatic role of the SCOTUS has almost disappeared especially due to a common understanding of foreign affairs exceptionalism or the notion that “the federal government’s foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers.”¹⁰³ In other words, the traditional view of separation of powers that apply in the domestic field is different when foreign affairs are implicated, and consequently the judiciary is even more constrained by separation of powers as “immovable walls”¹⁰⁴ in foreign affairs cases than in domestic cases.

The Supreme Court decision setting forth this concept of exceptionalism is *United States v. Curtiss-Wright Export Corporation*.¹⁰⁵ In a controversy involving a presidential embargo on selling weapons to Bolivia and Paraguay following a Congressional resolution, the defendant, an arms dealer, argued the statute under which they were being prosecuted was invalid because it delegated too much “unfettered” discretion to the President.¹⁰⁶ The Court answered by describing the “fundamental” differences between “the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs.”¹⁰⁷ The Court heavily emphasized “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”¹⁰⁸ and that, as a result, Congress should grant to the President “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”¹⁰⁹ Here lies the general idea of foreign affairs exceptionalism where, in contrast to internal matters, the President has independent power in foreign affairs until derogated by Congress. And while courts should defer to political branches, the SCOTUS has the power to interpret the boundaries between these branches.

To some scholars, the idea of foreign affairs exceptionalism goes back to the Framers, who valued both the knowledge and the ability to speak in one voice in

¹⁰² *Id.*

¹⁰³ What is foreign relations law?, OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW (Curtis A. Bradley ed., 2018).

¹⁰⁴ *But see* David Sloss, *supra* note 20, at 150–51.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 315.

¹⁰⁸ *Id.* at 320.

¹⁰⁹ *Id.*

foreign affairs.¹¹⁰ As Curtis Bradley put it, “the executive branch has more expertise and access to relevant information relating to foreign affairs than the other branches of government and that it is desirable for the United States to speak with “one voice” in foreign affairs where possible.”¹¹¹ This approach has been supported by the fact that historically foreign affairs were non-parliamentary affairs in which the role of Congress should be limited and the courts should defer to the political branches.¹¹² Even if the involvement of Congress in international treaty-making is constitutionally required,¹¹³ the extent to which the legislative branch should be involved in foreign relations remains a contested question with some scholars asking for more Congressional involvement.¹¹⁴ In either scenario, the legal diplomatic role exercised by SCOTUS since the eighteenth century until today has changed radically. In fact, from having an active role in shaping US foreign relations, the SCOTUS has become a less obvious, yet still relevant actor in foreign affairs by defining the powers and drawing the boundaries between the political branches.

PART II. COMPARING SEPARATION OF POWERS IN FOREIGN RELATIONS

This Part draws on the literature on the judicialization of international relations to conceptualize the different elements of legal diplomacy in the reasoning of the SCOTUS and CJEU.¹¹⁵ By borrowing the methodology from political scientists, this Article maps the legal doctrines, processes and policy arguments that enable or contain the judicialization of foreign relations in the SCOTUS and the CJEU by favoring judicial deference or intervention in foreign affairs.

Despite the different timeframe and institutional constraints, the comparison of the legal diplomacy of the SCOTUS and the CJEU allows for an analytical understanding of judicial trends and reasoning of the two courts in interpreting similar doctrines with opposite ideological orientations. This part shows how the SCOTUS and the CJEU have interpreted the doctrine of separation of powers in the context of

¹¹⁰ See Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away From “Exceptionalism”*, 128 HARV. L. REV. F. 294 (2015); For the origin of the definition, see Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096 (1999); see also THE FEDERALIST NO. 75 (Alexander Hamilton) (“Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, secrecy, and dispatch, are incompatible with the genius of a body so variable and so numerous. The very complication of the business, by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be a source of so great inconvenience and expense as alone ought to condemn the project.”).

¹¹¹ Curtis Bradley, *What is foreign relations law?*, in OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 14 (Curtis A. Bradley ed., 2018).

¹¹² See G. Edward White, *The Transformation of the Constitutional Regime in Foreign Relations* 85 VA. L. REV. 1 (1999); Restatement (Second) of the Foreign Relations Law of the United States (1965).

¹¹³ Louis Henkin, *The Treaty-Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959).

¹¹⁴ See Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 177 YALE L. J. 1236 (2008); see also Daniel Bessner & Stephen Wertheim, *Democratizing U.S. Foreign Policy*, FOREIGN AFF. (Apr. 5, 2017, 5:37 PM), <https://www.foreignaffairs.com/articles/united-states/2017-04-05/democratizing-us-foreign-policy>.

¹¹⁵ See Karen J. Alter et al., *Theorizing the Judicialization of International Relations*, 63 COURTS WORKING PAPER SERIES; INTERNATIONAL STUDIES QUARTERLY 449–63 (2019).

foreign relations in two opposite ways. While the first column traces the doctrines, processes and policy arguments according to a Right (R) ideology favoring the non-judicial involvement of courts as neutral umpires, the second one traces the Left (L) trend, namely the judicial intervention by redefining the roles of the political branches. In either column, courts balance conflicting policy arguments in foreign relations, which involve their internal authority and their external legitimacy. In doing so courts exercise legal diplomacy, by advancing the judicialization of foreign relations law, albeit through different ideological and legal strategies.

Each column offers an opposite vision of what legal diplomacy should entail with respect to the legal reasoning the SCOTUS and the CJEU. In the first column, courts should refrain from becoming active or visible players in the foreign relations disputes. In contrast, they should stay in the background and police the boundaries of foreign affairs intervention of other political branches. In the second column, courts become active participants in foreign affairs, so that their judicial deference shapes the outcomes of foreign relations disputes by assessing and balancing the roles of the other political branches.

Table 1. Comparing Legal Diplomacy: Separation of Powers

	Non-Judicial Involvement in Foreign Relations (R)	Judicialization of Foreign Relations (L)
<u>Separation of Powers</u>	<i>US Act of State</i> <i>EU Judicial Avoidance</i> <i>Separation of Powers</i>	<i>US Political Questions</i> <i>EU Judicial Deference</i> <i>Institutional Balance</i>
Policy Arguments	<ul style="list-style-type: none">• Exceptionalism in FR• Different Judicial Treatment of Internal vs. External Affairs• Relaxed Judicial Scrutiny for Executive Prerogative in External Affairs• Expertise of Executive Branch• Timeliness, efficiency in FR• Neutrality of Judicial Branch• Autonomy of EU law towards International Law	<ul style="list-style-type: none">• Non-Exceptionalism in FR• Same Treatment of Internal vs. External Affairs• Expanding Parliamentary Involvement in External Affairs• Transparency• Accountability• Democratization of FR

		<ul style="list-style-type: none"> • Political Nature of Judicial Branch • Unity of EU law towards International Law
Legal Process	<ul style="list-style-type: none"> • Judicial Restraint • Lack of Standing • Lack of Jurisdiction • Limiting Third Party Intervention • No Legal Opinions for SCOTUS • Judicial Avoidance 	<ul style="list-style-type: none"> • Judicial Activism • Standing for New litigants • Expanding Jurisdiction • Expanding Third Party Intervention • CJEU Legal Opinions • Deference to political branches

A. Political Questions in Foreign Relations

This Part describes two alternative interpretations of separation of powers doctrines by the SCOTUS and the CJEU in their foreign relations jurisprudence according to opposite political ideologies: Right (R) and Left (L). The first section compares the U.S. doctrine of Acts of State with the judicial avoidance of the CJEU as they both point to non-judicial involvement in foreign relations. The second section addresses the judicialization of foreign relations in U.S. political questions and EU legal standing doctrines as an instance of deference through which the Courts have the last say on the role and powers of other political branches.

1. Act of State as Judicial Avoidance

Federal courts in the United States apply the Act of State doctrine, a common-law principle that prevents courts from questioning the validity of a foreign country's sovereign acts that take place within its own territory.¹¹⁶ The SCOTUS first developed this doctrine in *Underhill v. Hernandez*, holding that "every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."¹¹⁷ At first thought, it seemed that the doctrine was embedded in international concord and mutual consideration. The Supreme Court then rebutted this basis in the notorious *Sabbatino* decision, where an American citizen argued that an expropriation ordered by the Cuban government was in violation of customary

¹¹⁶ Bradley, *supra* note 105.

¹¹⁷ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

international law. The Cuban government bank that recovered the product of the expropriation, argued that the Act of State doctrine compelled the Court to assume the validity of the expropriation because it was a foreign government act taken within its own territory. The Court confirmed that view, and in his majority opinion, Justice Harlan held that the doctrine was not in fact a matter of international sovereignty, but that it was rather based on “constitutional underpinnings” in the concept of separation of powers.¹¹⁸ The Court’s rationale was that since the executive has broad power to conduct foreign affairs with other nations, disputes arising from official acts of sovereign countries could not be settled by the judiciary because it would interfere with the executive’s conduct of foreign affairs.¹¹⁹ In other words, the Act of State doctrine is “in part about avoiding judicial interference with the executive branch’s management of foreign relations.”¹²⁰

The Act of State doctrine lies at the crossroads of two rationales, namely separation of powers and judicial avoidance. The latter is a significant tool of legal diplomacy. Similar to the aforementioned judicial self-restraint put forward by Palmer Olsen, avoidance is a technique that allows courts to shun from dealing with issues that could interfere with foreign policy and remain within the court’s scope of authority.¹²¹ In the context of foreign relations, it enables the courts to avoid interfering with the prerogatives of the executive and to abstain from influencing foreign affairs.

In EU constitutionalism, a similar doctrine to the Act of State emerged when the CJEU developed the practice of avoidance to shun influencing EU foreign policy. The most relevant example is the challenge of the EU-Turkey Statement before the General Court. In October 2015, Turkey and the EU agreed on a joint action plan designed to strengthen their cooperation on the flow management of Syrian nationals who enjoyed temporary international protection due to the war in Syria. In the following months, the governments of the EU Member States and of Turkey activated the plan. In March 2016, the European Council issued a press release stating the measures taken. The next April, a Pakistani national claiming asylum in Greece sought an order of annulment of the statement, arguing that that “the EU-Turkey statement was an act attributable to the European Council establishing an international agreement.”¹²² The European Council argued that the statement was not an agreement or treaty in the sense of Article 218 TFEU or Article 2(1) of the Vienna Convention on the Law of Treaties. The EU and Turkey published statement was rather “the fruit of an international dialogue between the Member States and Turkey and was not intended to produce legally binding effects nor constitute an agreement or a treaty.”¹²³

In taking the views of the European Council and relying on a textual interpretation, the General Court held that the statement in question was not a negotiated document by the EU as an international organization, but the product of negotiations between Turkey and the EU Member States (MS) in their individual

¹¹⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

¹¹⁹ *Id.*

¹²⁰ CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 29 (6th ed. 2017).

¹²¹ Jed Odermatt, *Patterns of Avoidance: Political Questions Before International Courts*, 14 *INT’L J.L. IN CONTEXT* 221 (2018).

¹²² See *NF v. European Council*, Case T-192/16, ECLI:EU:T:2017:128, ¶ 14.

¹²³ *Id.* ¶ 27.

capacity as actors under international law.¹²⁴ Similar to the Act of State reasoning, the CJEU considered the statement an act among sovereign countries in which judicial interference would encroach upon the executive prerogatives of the MS in conducting their foreign relations. The Court refused to hear the challenge as it “[did] not have jurisdiction to rule on the lawfulness of an international agreement concluded by the Member States.”¹²⁵ In doing so, the Court replicated an abstention rationale analogous to the Act of State doctrine. Scholars criticize the Court for not diving into the right analysis,¹²⁶ as it should have reviewed the conclusion supported by AG Jacobs in a 1992 opinion focusing on the content and effects of judicial review.¹²⁷ But in abstaining from adopting this analysis and deciding that it could not hear the case, the General Court “used the avoidance technique, hiding the real issue at stake namely the dubious consistency of the Statement with international and EU law.”¹²⁸ As Enzo Cannizzaro noted, “along this line, the General Court has bent the authority of the European judicial system to the demands of *realpolitik*.”¹²⁹ In other words, the General Court used the avoidance technique to prevent influencing EU foreign relations and contradicting the executives of the Member States represented in the Council, displaying a strong example of judicial balancing or legal diplomacy.

2. Political Questions as Judicial Deference

Eight years after the Sabbatino ruling, and relying upon its rationale, Justice Brennan wrote an opinion in which the Court held “that the validity of a foreign act of state in certain circumstances is a ‘political question’ not cognizable in our courts.”¹³⁰ The political question doctrine is a doctrine under which a court will exercise judicial deference for a question that is more properly resolved by the other branches of government because of its inherently political nature.¹³¹ The SCOTUS is no stranger to this practice of judicial deference that has become a potent antidote to the charge that judicial balancing is usurping legislative power.¹³² Since its creation, SCOTUS encountered limits regarding disputes on constitutional assignment between branches of government, especially in adjudicating cases involving foreign relations.¹³³

¹²⁴ Id. ¶¶ 70–72.

¹²⁵ Id. ¶ 73. The Court upheld the rule laid down in *Spain v. Parliament and Council*, Case C-146/13, ECLI:EU:C:2015:298, ¶ 101.

¹²⁶ See Enzo Cannizzaro, *Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council*, 2 EUR. PAPERS 251 (2017).

¹²⁷ Opinion of Mr. Advocate General Jacobs delivered on 16 December 1992, *European Parliament v Council of the European Communities and Commission of the European Communities*, Joined Cases C-181/91 & C-248/91, ECLI:EU:C:1993:271, ¶ 17 (“[T]he question whether the contested act constitutes an act susceptible to judicial review depends on its content and effects and not on the description of it given in the press release and in the draft minutes of the meeting at which it was adopted.”).

¹²⁸ See Enzo Cannizzaro, *supra* note 87.

¹²⁹ Id.

¹³⁰ See *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 787 (1972).

¹³¹ Curtis A. Bradley & Jack L. Goldsmith, *Courts and Foreign Relations*, in *FOREIGN RELATIONS LAW: CASES AND MATERIALS* (6th ed. 2017).

¹³² See Duncan Kennedy, *Proportionality and ‘Deference’ in Contemporary Constitutional Thought*, in *THE TRANSFORMATION OR RECONSTITUTION OF EUROPE: THE CRITICAL LEGAL STUDIES PERSPECTIVE ON THE ROLE OF THE COURTS IN THE EUROPEAN UNION* 29–38, 42 (Siniša Rodin & Tamara Perisins eds., 2018).

¹³³ CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* (2d ed. 2015) (explaining that in *Marbury*, Justice Marshall declared “The province of the court is, solely, to decide on the rights of

In *Baker v. Carr*, Justice Brennan, writing the majority opinion, created a new political question standard based on the notion that “the non-justiciability of a political question is primarily a function of the separation of power.”¹³⁴ Similar to the Act of State doctrine, the political question doctrine was also justified on separation of powers grounds. The use of this doctrine by U.S. courts throughout its existence is viewed by constitutional law scholars as a means for the courts to maintain the discretion over what should be adjudicated by them.¹³⁵ There are two different views in such an assumption. On one hand, courts use the political question doctrine as an avoidance technique when they choose not to adjudicate.¹³⁶ On the other, courts use the political question doctrine to decide whether judicial review should apply to foreign affairs.¹³⁷ Regarding the first view, similar to the Act of State doctrine, it appears that the political question doctrine enables the judges to decide on the appropriateness or inability of certain types of questions and controversies.¹³⁸ Exercising self-restraint or deference when they decide not to adjudicate is itself an important instance of legal diplomacy due to the fact courts balance questions of democratic accountability, external legitimacy and internal authority.¹³⁹ Concerning the second view, by deciding that judicial review should not occur in foreign affairs cases, the SCOTUS not only restrains itself, but also reasserts its legitimacy—and consequently its authority—vis-à-vis the other branches of government by not interfering with their actions on foreign relations.¹⁴⁰ In doing so, courts are enabling the executive branch to conduct its foreign policies without direct interference but mere judicial review, resulting in the resolution of conflicts between political branches that are democratically accountable.¹⁴¹

Despite the fact that the CJEU never created a political question doctrine, there are cases where analogous doctrines emerged.¹⁴² The most relevant is the *Frente Polisario* case,¹⁴³ brought by a group of transnational lawyers and human rights activists representing the liberation movement for Western Sahara created in 1973.¹⁴⁴ Despite several UN resolutions recognizing the “inalienable right of the people in Western Sahara to self-determination and independence”¹⁴⁵ and a peace agreement in

individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court.” *Marbury v. Madison*, 5 U.S. 137, 170 (1803)).

¹³⁴ *Baker v. Carr*, 369 U.S. 186 (1962).

¹³⁵ Stephen Ansolabchere & Samuel Issacharoff, *The Story of Baker v. Carr*, in *CONSTITUTIONAL LAW STORIES* (Michael C. Dorf ed., 2004).

¹³⁶ See Odermatt, *supra* note 123.

¹³⁷ THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992).

¹³⁸ See Odermatt, *supra* note 123.

¹³⁹ See Olsen, *supra* note 7.

¹⁴⁰ See Odermatt, *supra* note 123.

¹⁴¹ See Karl Klare, *Critical Perspectives on Social and Economic Rights, Democracy, and Separation of Powers*, in *SOCIAL & ECONOMIC RIGHTS IN THEORY & PRACTICE: CRITICAL INQUIRIES* (Helena Alviar García et al. eds., 2014).

¹⁴² Graham Butler, *In Search of the Political Question Doctrine in EU Law*, 45 *LEGAL ISSUES ECON. INTEGRATION* 329, 329–54 (2018).

¹⁴³ *Frente Polisario v. Council*, Case T-512/12, EU:T:2015:953 [hereinafter *Frente Polisario*].

¹⁴⁴ *Id.*

¹⁴⁵ See THE EU APPROACH TOWARDS WESTERN SAHARA 11–31 (Marco Balboni & Giuliana Laschi eds., 2017). The history of the Polisario Front is linked to the saga of the Sahrawi people who had to bear

1976 between Morocco, Mauritania and Front Polisario, Morocco extended its occupation to the territory which lead to an armed conflict ending in 1988.¹⁴⁶

The Polisario Front brought an annulment action based on Article 263–64 TFEU before the General Court to challenge the Council Decision 2012/497/EU liberalizing agricultural products, fish, and fishery products and replacing some of the Annexes to the Euro-Mediterranean agreement that established a trade agreement between the EU and the Kingdom of Morocco.¹⁴⁷ This challenge was successful because the decision of the General Court in December 2015 recognized standing to a rather unusual applicant, the Frente Polisario, and partially annulled the Council decision in question.¹⁴⁸

The question of standing was the first hurdle for the Polisario Front in challenging the Council Decision.¹⁴⁹ With respect to whether the Polisario Front had standing in EU law, the claimant needs to be ‘directly and individually concerned’ under TFEU 263–64.¹⁵⁰ Both the Council and the Commission argued that the Polisario Front had no standing since the Decision only concerned the Kingdom of Morocco and the EU. Furthermore, the Council argued that the Decision did not have any control over what happened with respect to the human rights situation in Western Sahara.¹⁵¹ The Commission asserted that the Agreement only applied to products originating from Morocco, which under international law does not include Western Sahara.¹⁵² The Polisario Front counterclaimed that the Kingdom of Morocco de facto applied the

the consequences of a “rushed decolonization” by Spain, since subjected to Moroccan occupation, with a large part of the population now forced to live in refugee camps in Algeria.

¹⁴⁶ Through UN diplomacy, the Kingdom of Morocco and the Polisario Front reached a cease-fire, but a referendum for the self-determination of the Sahrawi population has never taken place and Morocco still controls most of the territory in Western Sahara. *Id.* at ¶ 16.

¹⁴⁷ See Geraldo Vidigal, *Trade Agreements, EU Law, and Occupied Territories – A Report on Polisario v Council*, EUR. J. INT’L L. BLOG (July 1, 2015) (evaluating the 2010 EU-Morocco Agreement on agricultural, processed and fisheries products that is a development of the 2000 EU-Morocco Association Agreement to Western Sahara stating “if applied the same way, the 2010 Agreement will facilitate the export to the EU of Agricultural products grown in Sahrawi land and fish caught in Sahrawi waters”).

¹⁴⁸ The question of the standing of the Polisario Front as a natural or legal person under ¶ 4 of Article 264 TFEU is a central question because the claimants argue that its legal personality derives from public international law as recognized by the UN General Assembly Resolution in 1979. The General Court explains that even though an entity does not have a legal personality according to the legal order of a Member State or a third country, due to its own constituting document, it has a fixed internal structure that “enables it to act as a responsible body in legal relations” that has participated in UN negotiations and signed an internationally recognized peace agreement with the Islamic Republic of Mauritania. *Frente Polisario*, EU:T:2015:953, ¶ 44. In contrast, the Council argues that the personality of the liberation movement cannot be equated to the one of the State and that even if it did have a legal personality this would not automatically confer locus standi before the General Court to the Polisario Front. Even though the Commission supports the status of the Polisario Front as representative of the Sahrawi people yet it argues that as far of its legal personality should only be “functional and transitional.” *Id.* ¶ 46.

¹⁴⁹ See Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, 2000 O.J. (L 70) 2 [hereinafter “The Agreement”].

¹⁵⁰ Art. 263 ¶ 4 states that “Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.” *Id.*

¹⁵¹ *Frente Polisario*, EU:T:2015:953, ¶ 74.

¹⁵² *Id.* ¶ 75.

agreements concluded with the EU to Western Sahara where it exploited its natural resources and thus violated the fundamental rights of its population.¹⁵³

Even though the General Court held that there was not an absolute prohibition under international law preventing the EU from entering into an agreement with a third country when the Agreement might be applied to an occupied territory,¹⁵⁴ the Court showed how there was a crucial gap in the Agreement. Namely, if the EU wished to preemptively:

“[...]oppose the application to Western Sahara of the Association Agreement, as amended by the contested decision, they could have insisted on including a clause excluding such application into the text of the agreement approved by that decision. The failure to do so shows that they accept, at least implicitly, the interpretation of the Association Agreement with Morocco and the agreement approved by the contested decision, according to which those agreements also apply to the part of Western Sahara controlled by the kingdom of Morocco.”¹⁵⁵

In examining the wide discretion of the Council to enter in the Agreement, the General Court held that with respect to a trade agreement allowing the export of product originating from the disputed territory:

“[the] Council must examine carefully and impartially, all the relevant facts in order to ensure that the production of the goods for export is not conducted to the detriment of the population of the territory or entails infringement of fundamental rights.”¹⁵⁶ In doing so the Court established a limit for the discretion of the Council in entering International Agreements that ought to carry out an impact assessment to assess whether these would exploit the resources of the territory at the detriments of the inhabitants of Western Sahara.¹⁵⁷

In holding that the Council failed to “examine all the elements of the case before the adoption of the contested decision,” the General Court annulled the contested decision. In doing so it relied on international law obligations by addressing the impact of the agreement in Western Sahara. As argued by the claimant, this could result in an “economic spoliation with the aim of altering the structure of the Sahari society”¹⁵⁸ and by, for instance, extracting water from non-renewable underground reservoirs.¹⁵⁹

¹⁵³ Id. ¶¶ 77–80.

¹⁵⁴ See Ricardo Passos, *Legal Aspects of the European Union’s Approach to Western Sahara*, in Balboni & Laschi, *supra* note 147, at 139 (2017). (explaining that this is a possible approach taken by some scholars, whereas the EU has followed a different approach which recognizes both the status of Western Sahara as a Non-Self-Governing Territory as de facto under the Moroccan administration but for which a distinction ought to be made between detrimental versus beneficial foreign economic investments following the latest UN Resolution 50/33 of December 6, 1995).

¹⁵⁵ Id. ¶ 102.

¹⁵⁶ Id. ¶ 228.

¹⁵⁷ Id. ¶ 241.

¹⁵⁸ Id. ¶ 242.

¹⁵⁹ Id. ¶ 241.

Even further along this international law logic, according to the General Court, the EU-Morocco Association and Liberalization Agreements in facilitating the export of agricultural products coming from Western Sahara should also consider the “potential” violation of international obligations¹⁶⁰ and human rights protections under the Charter of Fundamental Rights for the third parties affected by such agreement.¹⁶¹ This ruling triggered a diplomatic crisis between Morocco and the EU leading to the interruption of their trade relations.

The Council appealed the General Court judgement before the CJEU, which reversed it and denied the annulment action sought by the Polisario Front.¹⁶² Soon after the CJEU judgement reinstating the validity of the Council decision, Morocco reestablished diplomatic relations with the EU. By neither entering the substance of the case but in following the reasoning of the Advocate General (“AG”) opinion,¹⁶³ the CJEU made sure that the EU was not complicit in the de facto application of the Agreement to Western Sahara to which it recognized an independent status according to the principle of self-determination of international law.¹⁶⁴ At the same time, the CJEU followed the Commission’s reasoning that if the Decision at stake was to apply to Western Sahara this should have been explicitly mentioned in the text as a ‘third party’ to an international agreement.¹⁶⁵ By the same token, the CJEU did not deny that if the EU was aware that an international trade agreement had a de facto impact on third countries from which goods are traded these could not be in violation of human rights conditionalities,¹⁶⁶ however the Court only addresses the normative rather than the factual context of the Decision.¹⁶⁷

3. Balancing International Law

The legal diplomacy of the CJEU resulted in what on the surface seemed a mere strict adherence to rules and principles of international law, while the Court expanded its legal standing doctrine to the Polisario Front that claimed a partial victory in having its legal personality recognized in Luxembourg. According to the AG opinion, the Council had to perform impact assessments on trade agreements, especially when they

¹⁶⁰ See Carlos Ruiz Miguel, *The Principle, The Right of Self-Determination and the People of Western Sahara*, in *THE EUROPEAN UNION APPROACH TOWARDS WESTERN SAHARA* 61 (2017).

¹⁶¹ See Eyal Benvenisti, *The E.U. Must Consider Threats to Fundamental Rights of Non-E.U. Nationals by Its Potential Trading Partners*, TEL AVIV U.: GLOBAL TR. BLOG (Dec. 3, 2015), <http://globaltrust.tau.ac.il/the-e-u-must-consider-threats-to-fundamental-rights-of-non-eu-nationals-by-its-potential-trading-partners/> (citing ¶¶ 227–28 of the Frente Polisario case).

¹⁶² See Frente Polisario, EU:T:2015:953; Sam Edwards, *Are Morocco and EU Heading Towards a Political Impasse?*, AL JAZEERA (Mar. 13, 2017), <http://www.aljazeera.com/indepth/features/2017/03/morocco-eu-heading-political-impasse-170301102342685.html> (quoting Markus Gehring—lecturer of law at the University Cambridge—“[t]he European Court of Justice decision was kind of a pyrrhic victory for Morocco”).

¹⁶³ Opinion of Advocate General Wathelet, *Council v. Front Polisario*, Case C-104/16 P, EU:C:2016:677.

¹⁶⁴ See Frente Polisario EU:T:2015:953, ¶ 86.

¹⁶⁵ *Id.* ¶ 103.

¹⁶⁶ See Päivi Leino *European Universalism? The EU and Human Rights Conditionality*, 24 Y.B. EUR. L. 329 (2005).

¹⁶⁷ See Enzo Cannizzaro, *In Defence of Front Polisario: The ECJ as a Global Jus Cogens Maker*, 55 COMMON MKT. L. REV. 569, 578 (2008).

have the knowledge that these are de facto coming from occupied territories.¹⁶⁸ The AG's opinion in referring to the Ombudsman's decision in the Vietnam case goes even to the point that nothing in the Council's hearing had good arguments for why they should not take into account human rights implications of international trade agreements vis-à-vis third parties.¹⁶⁹ The CJEU walked a fine line to create only a slight obligation towards third parties not included in the international agreement.¹⁷⁰ In mentioning the decision of the General Court, the CJEU narrowed the necessity to carry out human rights assessments and recognized that the Council failed to fulfill that obligation in what it defines as "disputed territories" only.¹⁷¹

In 2018, a second round of a similar set of claims arrived before the CJEU through a preliminary reference from the UK High Court. The Western Sahara Campaign in support of the rights of the people of Western Sahara to self-determination opposed the inclusion of the waters adjacent to Western Sahara in the EU-Morocco Fisheries Partnership Agreement.¹⁷² In this case, the CJEU held that, unlike the Council, it had the jurisdiction to examine the substance of the international law agreement to make sure that the Council was in compliance with EU constitutional law. However, in applying the Montego Bay convention on the Law of the Sea and the principles of international law, the Court found the agreement valid as the EU agreement excluded the waters adjacent to Western Sahara.¹⁷³ As Alessandro Petti noticed, although the CJEU relied on a formalist interpretation of international law, its change of posture towards this body of law has shifted from a dualist notion centered on the "autonomy" of EU law to a monistic notion of "unity" of EU law with international law.¹⁷⁴ These dualist and monist interpretations have acquired a political salience in the reasoning of the CJEU for which international law norms and principles have become conflicting policy arguments in the balancing of the Luxembourg Court.

B. Democratizing EU Foreign Relations

The European Parliament ("EP"), over time, has asserted a growing role in EU foreign relations by initially claiming its standing, lacking in the Treaties, to raise annulment actions before the ECJ and against the Council. As a result of this growing role of the EP as a co-equal political branch to the Council, the Lisbon Treaty, through Article 218 TFEU, has created an enhanced role for the Parliament in the conduct of foreign affairs. The democratization of EU law and eventually of EU foreign relations

¹⁶⁸ Opinion of Advocate General Wathelet, Council v. Front Polisario, Case C-104/16 P, EU:C:2016:677, ¶¶ 261–62.

¹⁶⁹ *Id.*

¹⁷⁰ See Daniela Caruso, *Non-Parties: The Negative Externalities of Regional Trade Agreements in a Private Law Perspective*, 59 *HARV. INT'L. L. J.* 389 (2018).

¹⁷¹ Frente Polisario, EU:T:2015:953, ¶ 47. As Geraldo Vidal claims, this obligation for the disputed territory could become either a 'weak' duty through which an impact assessment will become merely a rubber stamp for the EU to make sure that the agreements are not a source of a fundamental right violation or a 'strong' duty whereby it could limit the discretion of the EU negotiating some international agreements. Clearly the AG and the General Court seem to go in the latter direction than the one sought by the Council and the commission in their appeal.

¹⁷² See *Western Sahara Campaign UK*, EU:C:2018:118.

¹⁷³ *Id.* ¶¶ 75–81.

¹⁷⁴ Alessandro Petti, *The Polisario and WS Campaign Saga: An Evolution in the EU's Attitude Towards International Law?*, paper presented at the Joint ESIL IG 'EU as a Global Actor' – CLEER Conference, the Asser Institute, The Hague (Dec. 11, 2019) (on file with the author).

law has allowed the Court to exercise its activism in interpreting the doctrine of separations of powers that in EU law translates as the principle of “institutional balance” as intended by the Treaties.¹⁷⁵

1. Judicial Empowerment of the European Parliament

The most meaningful decisions that interpreted the text of Article 218 TFEU in the Treaty of Lisbon are *Roquette Frères*¹⁷⁶ and *European Parliament v. Council (Chernobyl)*.¹⁷⁷ In the *Roquette Frères* case, the Council sent a regulation proposal to Parliament and awaited its opinion. Parliament issued its opinion one month past than the expected deadline and expressed its rejection of the regulation. By that time, the Council adopted the regulation and a company subsequently brought an action against the Council arguing that the regulation was void on the grounds that Council did not consult Parliament. The Court held that the Council failed to properly consult Parliament and that, although not binding, consultation of the Parliament was mandatory. This ruling, given immediately after the first European elections in 1979, ensured the important role of the elected institution in the legislative process and opened the way for the enhancement of its role in foreign affairs decision making.

Eight years later, in the wake of the Chernobyl catastrophe, the European Parliament sought the annulment of a Council regulation laying down maximum levels of radioactive contamination of food products. Prior to that case, the EP had no standing to bring annulment actions that created an obvious gap in the Treaty.¹⁷⁸ In *Chernobyl*, the EP argued that although it was consulted by the Council, it did not agree with the legal basis adopted by the Commission, and asked the Commission to submit a new legal basis entailing the cooperation between the EP and Council.¹⁷⁹ The Commission subsequently disregarded that opinion and the Council adopted the regulation. The CJEU ruled that Parliament could bring proceedings for annulment if limited to the purpose of protecting its prerogatives. In doing so, the CJEU recognized the EP’s right of action to challenge Council decisions based on separations of powers arguments, namely that the institutions’ prerogatives are “one of the elements of the institutional balance created by the Treaties”, and proceeded with a discussion about the fundamental balance and distribution of powers between the different Community institutions.¹⁸⁰ The Court ultimately found that notwithstanding any procedural gap contemplated by the Treaties in granting the Parliament the affirmative power of annulment, the “fundamental interest in the maintenance and observance of the institutional balance” must be preserved by the judicial review of the Court.¹⁸¹ This case has become one of the prime examples of judicial activism in EU law in which the Court has allowed the EP to sue the Council while enabling the Court to exercise

¹⁷⁵ See GEORGE BERMAN ET AL., *CASES AND MATERIALS ON EU LAW* 159 (4th ed. 2015).

¹⁷⁶ *SA Roquette Frères v. Council of the European Communities (Isoglucose)*, Case C-138/79, EU:C:1980:249.

¹⁷⁷ *European Parliament v. Council of the European Communities*, Case C-70/88, EU:C:1990:217.

¹⁷⁸ *European Parliament v. Council of the European Communities*, Case C-302/87, EU:C:1988:461.

¹⁷⁹ See *European Parliament v. Council of the European Communities (Chernobyl)*, Case C-70/88, EU:C:1990:217.

¹⁸⁰ *Id.* ¶¶ 16–25.

¹⁸¹ *Id.* ¶ 26.

judicial review on EU law based on the respect of the rule of law and the principle of institutional balance.

2. The European Parliament's Struggle in Foreign Relations

Post-Lisbon, CJEU-induced democratization mainly concerned the Common Foreign and Security Policy (CFSP). In the EU-Mauritius controversy, the CJEU was rather skeptical in engaging with international law and the role of the UN rather than grounding its legal analysis in EU law.¹⁸² However, it overcame such skepticism in the second case addressing the EU-Tanzania Agreement, in which both the Advocate General and the CJEU showed much more confidence in interpreting international law and in expanding the Court's jurisdiction in the realm of CFSP.¹⁸³

In 2011, the European parliament brought a first action of annulment under Article 263 TFEU against the Council of the European Union. This action disputed Council Decisions 2011/620/CFSP on the Agreement between the EU and the Republic of Mauritius concerning the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force (EUNVFOR, part of the Atalanta operation).¹⁸⁴

The EP argued that the Council Decisions should have involved the EP in its adoption through either ordinary legislative procedure or by requiring the consent of the EP according to Article 218 TFEU,¹⁸⁵ because the EU-Mauritius Agreement not only related to CFSP, but also judicial cooperation in criminal matters, police cooperation, and development cooperation falling under the Area of Freedom, Security and Justice (AFSJ). Therefore, according to the EP the decisions fell under Article 82 TFEU, including the support and the training of judiciary and judicial staff.¹⁸⁶ In addition, the Parliament argued that Article 87 TFEU should be a relevant legal basis due to the police cooperation activities set up by the Agreement falling under the task carried out by police forces.¹⁸⁷ Finally, in light of assistance and the development cooperation goal of the EU and the Republic of Mauritius, the Parliament claimed that the ordinary legislative procedure should be applied under Article 218, 6 (a) (v) TFEU requiring the consent of the Parliament.¹⁸⁸

In contrast, the Council, supported by a number of intervening member States, argued that the scope of the Agreement was mainly to strengthen international security in the framework of CFSP and that the actions undertaken by the "Atalanta constitute police" cannot therefore be considered judicial cooperation within the meaning of Title V falling within the area of freedom, security and justice (AFSJ).¹⁸⁹ In countering the Parliament's argument that the aim and the content of the Agreement did not fall

¹⁸² Parliament v. Council, Case C-658/11, EU:C:2014:2025.

¹⁸³ Parliament v. Council, Case C-263/14, EU:C:2016:435.

¹⁸⁴ Parliament v. Council, EU:C:2014:2025.

¹⁸⁵ Id. ¶ 24.

¹⁸⁶ Id. ¶ 26 (citing article 7(3) of the EU-Mauritius agreement).

¹⁸⁷ Id. ¶ 26.

¹⁸⁸ Id. ¶ 29.

¹⁸⁹ Id. ¶ 31–32.

under AFSJ or development cooperation, the Council also reinstated that “the promotion of human rights in third countries is an objective that falls within CFSP.”¹⁹⁰

The Opinion of Advocate General Bot followed the argument made by the Council and some of the intervening Member States. He argued that the Agreement fell primarily under CFSP and is “therefore of little importance, contrary to the claims made by the Parliament, that the agreement in question also relates, in a secondary manner, to fields other than CFSP [...]”¹⁹¹ The AG predicted that many Agreements concluded under CFSP due to the “well-recognized interrelationship between security, development, and human rights” would have some relationship with some Union policies and thus, require the consent of the Parliament at large.¹⁹² According to the AG, whether AFSJ has a purely internal objective or an external dimension, “must be taken with the aim to further freedom, security and justice inside the Union.”¹⁹³ Even though the AG could not explain when AFSJ had an internal or external dimension, he reassured that even an Agreement about the training of prosecutors “to ensure the protection of human rights and the consolidation of rule of law” are among the objectives of CFSP.¹⁹⁴

In a rather succinct judgment by the Grand Chamber under President Skouris, the Court annulled the Council decision for a procedural reason. Initially, the Court rejected the EP’s argument that CFSP is not the exclusive legal basis due to other incidental goals that are beyond the main aim of the Agreement.¹⁹⁵ However, in departing from the Opinion of AG Bot, who argued against the annulment,¹⁹⁶ the Court found that the Council infringed the procedural requirement of Article 218(10) TFEU whereby the Parliament ought to be timely informed by the Council about the Conclusion of the Agreement. The Court restated that the procedural requirement is essential to allow the Parliament to exercise fully its right of “democratic scrutiny on the European Union external action.”¹⁹⁷ In citing its well-known jurisprudence on the democratic principles in *Roquette Frères*, the CJEU asserted its authority of judicial review in foreign relations in respect of the democratic principle of political representation of the European Parliament and its meaningful consultation in the making of CFSP.¹⁹⁸

3. Expanding Judicial Review in Common Foreign Security Policy

In a subsequent case, the EP brought an annulment action before the CJEU challenging Decision 2014/198/ CFSP on the conclusion of the agreement between the EU and Tanzania. This agreement defined the conditions of transfer of suspected pirates and associated seized property from the EU-led naval force to the United Republic of Tanzania.¹⁹⁹ In this ruling, the CJEU once again relied on the relevance

¹⁹⁰ *Id.* ¶ 33.

¹⁹¹ Opinion of Advocate General Bot, *Parliament v. Council*, Case C-658/11, EU:C:2014:41, ¶ 21.

¹⁹² *Id.* ¶ 23.

¹⁹³ *Id.* ¶ 109.

¹⁹⁴ *Id.* ¶ 119.

¹⁹⁵ *Parliament v. Council*, EU:C:2014:2025, ¶¶ 46–50.

¹⁹⁶ *Op. Advoc. Gen.*, *Parliament v. Council*, EU:C:2014:41, ¶ 154.

¹⁹⁷ *Parliament v. Council*, EU:C:2014:2025, ¶ 79.

¹⁹⁸ *Id.* ¶ 81.

¹⁹⁹ Opinion of Advocate General Kokott, *Parliament v. Council*, Case C263/14, EU:C:2015:729.

of international law and in particular the U.N. Security Council resolutions inviting all States to fight piracy off the coast of Somalia and supported the custody and prosecution of the pirates by local officers.²⁰⁰

The European Parliament brought this action against the Council, with the support of the Commission, to annul the decision while maintaining its effects until its replacement. The EP started from the premise that Article 37 TFEU was not the exclusive legal basis of the decision that did not fall only within the CFSP competence. The EP alleged instead that since Articles 82 and 83 TFEU were additional legal bases from the area of freedom, security and justice (AFSJ) these required under TFEU 218(6) the consent of the EP in international agreements.²⁰¹ In the EU-Tanzania agreement, the EP was not only ensuring peace and international security but also facilitating:

[...] cooperation between the authorities of those Member States and those of the United Republic of Tanzania by establishing a legal framework for the surrender of suspects to that third State in order that it can take responsibility for investigations and prosecutions. Further, that agreement contains provisions directly relating to judicial cooperation in criminal matters and police cooperation and, in particular, on the treatment, prosecution and trial of persons transferred.²⁰²

Based on this type of action the Parliament argued that the EU-Tanzania Agreement was “closely linked” to Title V of the TFEU Treaty on AFSJ because the persons arrested and detained, suspected of acts of piracy, and property seized, are subject to the jurisdictions of the Member States participating in the EU NAVFOR.²⁰³ In addition, the Parliament suggested that in the previous EU-Mauritius Agreement, the CJEU did not clarify whether CFSP was the only center of gravity, as AG Bot calls it, of the directive with Article 37 TEU, or whether it should have been based on other Treaty provisions.²⁰⁴

On the other hand, the Council, supported by a number of Member States including the Czech Republic, Sweden, and UK, counterclaimed that such annulment action was unfounded because Article 37 TEU was the sole substantive legal basis and Article 218 (5) and (6) was the procedural legal basis excluding consent of the Parliament.²⁰⁵

Advocate General Kokott was adamant in her Opinion that, despite the precedent, the CJEU decision on the EU-Mauritius agreement deserved “autonomous examination.”²⁰⁶ In doing so, the AG opened up the possibility to seriously re-consider the substantive claim of the parliament of a possible dual substantive legal basis “by exercising additional competences.”²⁰⁷ The AG recognized that the Agreement

²⁰⁰ Id. ¶ 17.

²⁰¹ Id. ¶ 25.

²⁰² Id. ¶ 28.

²⁰³ Id. ¶ 31; see EU NAVAL FORCE – SOMALIA, <https://eunavfor.eu/> (last visited Sept. 11, 2021).

²⁰⁴ Id. ¶ 38.

²⁰⁵ Id. ¶ 33.

²⁰⁶ See *Parliament v. Council*, EU:C:2015:729.

²⁰⁷ Id. ¶ 57.

contains a number of provisions that are typical of cross-border judicial cooperation, but noted that it also bears a certain “affinity with the subject matter regulated in the AFSJ,”²⁰⁸ as it held that this is insufficient “to recognize Article 82 and 87 TFEU as additional legal basis since these provide as the Council has argued for cooperation within the Union.”²⁰⁹

AG Kokott stated that the cooperation between Tanzania and the Union seeks to achieve international security outside the EU territory.²¹⁰ However, there is not a specific connection with security within the European Union and the national security of its Member States.²¹¹ As Kokott explained, when suspected pirates are to be transferred by the EUNAVFOR, these are temporarily detainees and subject to the sovereignty of the EU Member States and the protections afforded by the EU Charter of Fundamental Rights.²¹² She highlighted that even though EU action falls under CFSP competence, there must be “humane treatment of detained persons and certain principles connected with the rule of law as basic conditions for the cooperation with Tanzania.”²¹³

The CJEU followed the AG in her assessment of the substance of the centrality of CFSP as the legal basis of the EU-Tanzania agreement, as well as on the existence of an infringement of the procedural requirement of timely and fully informing the EP under Article 218(4) TFEU. In expanding the legal standing of the CJEU and the role of the EP in foreign relations, the legal diplomacy exercised by the Court rested on guaranteeing democratic control beyond formal requirements but also fundamental principles ensuring citizens’ participation in EU policies.²¹⁴

The Court annulled the decision based on the fact that the EP was not immediately and fully informed at all stages of the procedure leading to the signing of the Agreement and thus prevented from exercising its right of democratic scrutiny in CFSP.²¹⁵ The Court held that the information requirement of the Parliament was not only a fundamental democratic principle, but that it allowed the EP to exercise democratic control over the EU’s external action. In justifying its expansion of judicial review in CFSP and limiting the power of the executive, the Court justified its decision through a democratization rationale by giving full information of the Parliament, thus ensuring coherence and consistency of EU external action.²¹⁶

²⁰⁸ Id. ¶ 61.

²⁰⁹ Id. ¶ 63.

²¹⁰ Id. ¶ 66.

²¹¹ Id. ¶ 67.

²¹² Id. ¶ 68.

²¹³ Id. ¶ 72.

²¹⁴ Id. ¶¶ 77–78.

²¹⁵ Id. ¶ 84. In doing so the Court cites its previous judgment aiming to show a progression from its previous position rather than a more bold interpretation of CFSP now under the democratic scrutiny of the parliament and increasingly scrutinized by the CJEU with respect to the application of the Charter of Fundamental Rights as indicated by Advocate General Kokott’s opinion.

²¹⁶ *Parliament v. Council*, EU:C:2015:729, ¶¶ 71–73.

PART III. FEDERALISM IN FOREIGN RELATIONS

A. Federalism in U.S. Foreign Relations

After World War II and during the Cold War, commentators described the U.S. constitutional legal order as fostering a regime that was executive in terms of separations of powers, nationalist as a matter of federalism, and internationalist in general orientation.²¹⁷ Formalist doctrines, in which some matters might be categorically excluded from foreign affairs power, were replaced by balancing tests that gave the government what seemed to be the appropriate degree of flexibility. Once the Soviet Union collapsed, “parochial doctrines” reemerged.²¹⁸ That is, domestic states’ rights were no longer segregated but were part of the constitutional doctrine. Traditional international law involved the direct creation of binding rules in bilateral or multilateral treaties, while modern international law established free-standing law-making institutions to generate norms.²¹⁹ One doctrine that was associated with the New Deal-Great Society Order was a strong presumption that the national power over foreign affairs preempted state legislation, even when Congress had not in fact directly exercised its power and even when the state legislation was not obviously incompatible with what Congress had actually done.²²⁰

1. Treaty Enforcement as Self-Executing Power

By altering the British Rule for which international treaties did not have the force of ordinary law, the Framers of the Constitution adopted the Supremacy Clause, which declared treaties to be the “supreme law of the land” and directed the courts to give them effect without awaiting action by the legislatures of either the states or the federal Government.²²¹ This effectuated a wholesale incorporation of U.S. treaties into domestic law by Congress. The purpose of the Supremacy Clause was to avoid violations of treaties attributable to the United States by making treaties enforceable in the courts for individuals relying on the Treaty without the need for additional legislative action.²²²

An early example of such enforcement arose in *U.S. v. Schooner Peggy*, where the U.S. and France signed a treaty that provided for the restoration of ships captured during the two states’ undeclared naval conflict.²²³ Because the terms of the treaty altered the legal status of the vessel at issue after the claims had already been brought

²¹⁷ Mark V. Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 WAYNE L. REV. 841, 844 (2001).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ U.S. CONST. art. VI; see also Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 698 (1995) (“the Framers considered two alternative mechanisms: the Virginia plan would have given Congress the power to ‘negate’ state laws that contravened the Constitution, federal statutes or treaties. As applied to treaties, this plan would apparently have retained the need for an act of the legislature transforming each treaty obligation into domestic law (although it would have empowered the federal legislature to act in place of the state legislatures). The New Jersey plan, on the other hand, included a version of the Supremacy Clause, which declared the Constitution, federal laws and treaties to have automatic domestic legal force and instructed the courts to give them effect directly”).

²²² See Vázquez, *supra* note 223, at 698–99.

²²³ *U.S. v. Schooner Peggy*, 5 U.S. 103, 107 (1801).

before the lower courts, the Supreme Court had to determine whether the treaty had legal effect.²²⁴ Despite the lack of any domestic legislation accompanying the treaty, the court held that the treaty did govern the legal status of the vessel.²²⁵

2. Creating the distinction between Self-Executing and Non-Self Executing Treaties

The distinction between self-executing and non-self-executing treaties first emerged in *Foster v. Nielson*, in which the U.S. Supreme Court recognized that some treaties require legislative implementation before they may be enforced by the courts.²²⁶ The Court in *Foster* recognized that non-self-executing treaties do not themselves purport to affect the rights and individuals before the court, but instead those particular rights and liabilities will be affected by future acts of domestic lawmaking.²²⁷

A self-executing treaty is a treaty that may be enforced in the courts without prior legislation by Congress; non-self-executing treaties, by contrast, are those treaties that do not align with domestic law, and therefore require subsequent federal or state laws, commonly referred to as “implementing legislation” to be enforced.²²⁸ A recent Supreme Court case, *U.S. v. Bond*,²²⁹ provides a vivid illustration of implementing legislation and its limitations under SCOTUS review. In *Bond*, a woman was charged with two counts of possessing and using a chemical weapon in violation of Section 229 of the Chemical Weapons Convention Implementation Act, which gave domestic effect to the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction.²³⁰ The woman’s actions precipitating these charges consisted of spreading arsenic and other chemicals on another woman’s doorknob and mailbox in retaliation for an affair.²³¹ The court, in rejecting the Section 229 charges, held that a plain reading of the Convention and Congress’s implementing legislation evinced an intention by the drafters to address global chemical weapons proliferation and not the limited issues in the instant case.²³² Further, the Court limited the Convention’s domestic effect under a federalism theory, holding that the Convention and implementing legislation could not be construed so broadly that it upset the balance between states and the federal government by infringing on the states’ traditional role in adjudicating issues of criminal law.²³³ Although the court acknowledged the case was “unusual”, the SCOTUS in *Bond*

²²⁴ *Id.* at 108.

²²⁵ *Id.* at 109–10.

²²⁶ 27 U.S. 253, 314 (1829); Duncan B. Hollis & Carlos M. Vázquez, *Treaty Self-Execution as “Foreign” Foreign Relations Law*, in THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 468 (Curtis A. Bradley ed., 2019).

²²⁷ See Vazquez, *supra* note 223, at 700–4.

²²⁸ *Id.* (explaining that self-executing treaties have a status equal to federal statute, superior to U.S. state law, and inferior to the Constitution. Self-executing executive agreements have a status that is superior to U.S. state law and inferior to the Constitution.).

²²⁹ 572 U.S. 844 (2014).

²³⁰ *Id.* at 848–53.

²³¹ *Id.* at 852.

²³² *Id.* at 856–57.

²³³ *Id.* at 862–66.

nonetheless found multiple grounds on which to limit the domestic legal effect of an international convention and its implementing legislation.

3. *Medellin* and its legacy on Human Rights Treaties

Although the Supreme Court in *Bond* cemented its role as arbiter of the scope of treaties' domestic legal effect, the indications of this power were revealed in the *Medellin* case decided several years earlier. The Supreme Court granted certiorari in the *Medellin* case to determine whether the President had the authority to implement the *Avena* decision into federal law, preempting criminal procedural rules.²³⁴ In *Avena*, the International Court of Justice found that the United States breached its Vienna Convention treaty obligations. As a result, the ICJ ordered the United States to "review and reconsider" the cases that Mexico had identified.²³⁵ Review and reconsider "guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention."²³⁶ The *Medellin* Court held that, pursuant to the Supremacy Clause, *Avena* was not automatically enforceable domestic federal law—the Court not only rejected the defendant's argument that the treaties obligating the United States to abide by the decisions of the ICJ are self-executing, but also rejected the defendant's subsequent argument that any ICJ judgment issued according to those treaties must also be self-executing.²³⁷ SCOTUS further held that the *Avena* decision in the ICJ and the president's memorandum did not preempt petitioners from filing habeas petitions because ICJ opinions are not automatically enforceable on state courts.²³⁸ Ultimately, the *Medellin* case and the cases that rely on this precedent show how the U.S. government's objections and non-party status to the ICJ's international law jurisdiction result in an unenforceable claim in domestic U.S. state courts.²³⁹ Additionally, as comparative law scholars have pointed out, the approach of *Medellin* resonates with the one of the CJEU in *Kadi* in which both courts highlighted the 'separateness' of international law from the domestic constitutional order.²⁴⁰

Medellin centers on the requirements of Article 36(1) of the Vienna Convention on Consular Rights. Article 36(1) has been the source of increasing tension between

²³⁴ See generally *Medellin v. Texas*, 552 U.S. 491 (2008). The defendant was convicted of murder in Texas. He appealed on violation of habeas corpus claiming that he was not made aware of his right to access the Mexican consulate as required by Article 36 of the VCCL. The state of Mexico brought cases to the ICJ claiming that the U.S. violated article 36. Mexico did not bring the claim directly under the Vienna Convention on Consular Relations, (VCCR) because of the ruling in *Breard* which established domestic law that trumps the VCCR. The court relies on its ruling in *Avena* instead, where the court found that the U.S. was in violation under the VCCR.

²³⁵ Taryn Marks, *The Problems of Self-Execution*, 4 DUKE J. CONST. L. & PUB. POL. 191 (2009).

²³⁶ *Id.*

²³⁷ See generally *Medellin*, 552 U.S. 491.

²³⁸ The U.S. Constitution does not require state courts to honor a treaty obligation of the United States by enforcing a decision of the International Court of Justice. The Vienna Convention states that if a person detained by a foreign country asks, the authorities of the detaining national must delay, inform the consular post of the detainee of the detention. The decision in the *Avena* case constitutes an international law obligation on the part of the United States but does not help the defendant in *Medellin* because not all international law obligations automatically constitute binding federal law.

²³⁹ Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 758–9 (2006).

²⁴⁰ Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L. J. 1, 43, 49 (2010).

the United States and the ICJ, particularly because the Supreme Court and the ICJ have reached irreconcilable conclusions about the Article's meaning and its domestic implications.²⁴¹ Under *Medellin* there is a perception that treaties regulating police powers, which are reserved to the states, will most likely be non-self-executing under the interpretation of the Vienna Convention on Consular Relations.²⁴² The legacy of *Medellin* could also eliminate the possibility of courts considering the treaty implementation efforts of other branches. Previously, states and localities had the obligation and mandate to implement ratified treaties, but this space for sub-national innovation disappears if these instruments have no meaning in domestic law absent federal legislation.²⁴³

However, there is a small but significant group of opinions in which state courts use international human rights treaties in the informative but non-binding way that most scholars have envisioned.²⁴⁴ The most prominent are those decided by state appellate and high courts on controversial or challenging issues of state constitutional interpretation.²⁴⁵ These include the California Supreme Court's decision on same-sex marriage which cited to the International Covenant on Civil and Political Rights (ICCPR), the Missouri Supreme Court's reliance on the Convention of the Rights of the Child (CRC) to strike down the juvenile death penalty, and the Oregon Supreme Court's references to the Universal Declaration of Human Rights (UDHR), the ICCPR, and the European Convention to interpret a state constitutional provision governing the treatment of the incarcerated.²⁴⁶

The Supreme Court has been receptive to such approaches on foreign and international norms when analyzing standards under the Eighth Amendment. The most common scenario in which claims based on the ratified international human treaties are introduced in state courts is in challenges to the practice of capital punishment and life without parole.²⁴⁷ The majority of human rights law in Supreme Court opinions striking down some applications of the death penalty has likely led advocates to raise treaty-based claims in more cases, if only for preservation in the event of future changes in the law, but most of the successful treaty-based arguments were not based on their use as binding authority.²⁴⁸

²⁴¹ Marks, *supra* note 237.

²⁴² Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellin*, 115 PENN. ST. L. REV. 1051, 1052 (2011). As a formal matter, not all human rights treaties have equal status in United States law. There are some treaties that the United States has signed, but that have not been adopted by the Senate. Then there are instruments that the United States has signed and ratified, but that have not been implemented through federal legislation. Finally, there are treaties that have been signed, ratified, and implemented through federal legislation.

²⁴³ *Id.* at 1070.

²⁴⁴ *Id.* at 1059.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 1066.

²⁴⁸ *Id.* at 1069.

B. *The Mixed Agreements Jurisprudence of the CJEU*

The functional comparison with the non-self-execution of treaties in the United States lies in what the EU calls “mixed agreement.”²⁴⁹ When these treaties include issues that are of shared competence between the European Community and its Member States, there needs to be a joint ratification of the agreement to make it valid under European law. This concept was first established by the European Court of Justice in Opinion 1/94.

1. The Judicial Creation of *Mixity* in International Agreements

In Opinion 1/94, the Court gave its opinion on the powers of the European Community (EC) to conclude and ratify the *Marrakesh Agreement Establishing the World Trade Organization* (“WTO Agreement”) and its annexes: the *General Agreement on Trade in Services* (“GATS”) and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS”).²⁵⁰ Because the EC gradually enlarged its Member States who were also a party to the GATT 1947, the Commission purported that the WTO Agreement fell within the Community’s exclusive external competence. Instead the Council took the view that no such competence existed in respect of the GATS and the TRIPS and that the competence to conclude the WTO Agreement was shared by the Community and its Member States.²⁵¹

The Court indicated that the fundamental question was not if the Community has the competence to conclude the WTO Agreement in its entirety, but if such competence was exclusive as laid out by the Common Commercial Policy under Article 113 EC Treaty.²⁵² The ECJ stated that there was a common understanding that this provision concerned tariffs and trade agreements, and therefore such agreements fell exclusively within the Community’s competence.²⁵³ Concerning the GATS and the TRIPS, the Court distinguished between the “cross-border supply” and the three other modes of service supply provided for in the GATS (consumption abroad, commercial presence via a subsidiary or branch, and the presence of natural persons

²⁴⁹ See Marise Cremona, *Making Treaties and Other International Agreements: The European Union*, in *THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW* 239 (Curtis Bradley ed., 2019).

²⁵⁰ Opinion 1/94, EU:C:1994:384.

²⁵¹ In accordance with article 228 (6) EC Treaty (the ancestor of 218 (11) TFEU), the MS sought an opinion from the Court of Justice, asking the following questions: “(i) Does the European Community have the competence to conclude all parts of the Agreement establishing the WTO concerning trade in Services (GATS) and the trade-related aspects of intellectual property rights including trade in counterfeit goods (TRIPS) on the basis of the EC Treaty, more particularly on the basis of Article 113 EC alone, or in combination with Article 100a EC and/or Article 235 EC? (ii) Does the European Community have the competence to conclude alone also those parts of the WTO Agreement which concern products and/or services falling exclusively within the scope of application of the ECSC [European Coal and Steel Community] and EAEC [European Atomic Energy Community] Treaties? (iii) If the answer to the above two questions is in the affirmative, does this affect the ability of the Member States to conclude the WTO Agreement, in the light of the agreement already reached that they will be original Members of the WTO?”.

²⁵² TFEU, *supra* note 14, art. 207 (“(1) The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.”).

²⁵³ Since Article 207 of TFEU (ex Article 133 of the EC Treaty) also covers EURATOM products (¶ 24) and ESCC products (¶ 27), it concluded that the EC had the exclusive competence to conclude the WTO Agreement (¶ 34).

enabling a supplier from one member country to supply services within the territory of another).²⁵⁴ It concluded that only the cross-frontier supply of services fell within the concept of the Common Commercial Policy.²⁵⁵ The conclusion regarding the TRIPS is that it fell outside the scope of the EC competence under the Common Commercial Policy, except when concerned with the laying down of provisions aimed at prohibiting the release into free circulation of counterfeit goods.²⁵⁶

The Commission also contended that the EC enjoyed exclusive external competence to conclude the GATS and the TRIPS on the basis of the doctrine of implied powers base on the ERTA judgement.²⁵⁷ The Court rejected this contention. Rather, it held that the EC's exclusive external competence did not automatically flow from its power to lay down rules at an internal level because Member States only lost their right to assume obligations with non-member countries when common EC rules came into being. Since the GATS and the TRIPS were only partially covered by such common rules, the EC could not be regarded as having an exclusive competence for their conclusion.²⁵⁸

The final concern raised by the Commission was whether the EC and its Member States should be regarded as sharing competence in respect of the GATS and the TRIPS, which would undermine the EC's unity of action *vis-à-vis* the rest of the world. The Court pointed out that when the subject matter of an international agreement falls in part within the competence of the EC and in part within that of the Member States, the Community institutions and the Member States are under an obligation to co-operate both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into.²⁵⁹ This collaborative approach highlights the same tension inherent in U.S. conceptions of federalism, in that some legal areas affecting the entire EC are to be addressed by European institutions while appropriate roles for Member States must be preserved.

2. Expanding the EU Competence and Mixity in Opinion 2/15

In 2009, the Council authorized the Commission to negotiate a bilateral trade agreement with the Republic of Singapore ("EUSFTA"). In 2011, the Commission asked the Council to modify the negotiating directives so as to include investment protection.²⁶⁰ The Council decided to supplement the negotiating directives to that effect. In 2015, the Commission informed the Trade Policy Committee of the Council that the negotiations ended and that an agreement has been reached, with a chapter

²⁵⁴ Opinion 1/94, EU:C:1994:384, ¶ 36.

²⁵⁵ *Id.* ¶¶ 44–47.

²⁵⁶ *Id.* ¶ 55.

²⁵⁷ The Commission cited three possible sources for such exclusive competence: First, it was argued that exclusive competence to conclude GATS and TRIPS flows implicitly from the provisions of the EC Treaty establishing the EC's internal competence or, in any event, from the existence of legislative acts giving effect to that competence (following the ERTA

case, Case 22/70 *Commission of the European Communities v Council* [1971]).

²⁵⁸ Opinion 1/94, EU:C:1994:384, ¶¶ 77, 95–97, 102, 103.

²⁵⁹ *Id.* ¶¶ 108, 109.

²⁶⁰ See David Martin, *EU-Singapore Free Trade Agreement*, EUROPARL, <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-singapore-fta> (last updated Nov. 20, 2019).

concerning investment and investment dispute settlement.²⁶¹ Because of the differences of opinion between the Committee and the Commission on the nature of the European Union's competence to conclude the envisaged agreement, the Commission requested an opinion to the CJEU.²⁶²

In Opinion 1/17 on the *Free Trade Agreement between the European Union and the Republic of Singapore*, the CJEU held that the Union had exclusive competence only with respect to direct investment. Referring to Article 207,²⁶³ the Court found that the EU could not be granted the exclusive external competence to conclude agreements relating to indirect investment. It also held that an EU external competence for indirect investment could not be inferred from the necessity to fulfill an internal objective (according to Article 3(2) TFEU).²⁶⁴

However, the CJEU clarified that the exercise of some of the Union's external competence is justified by Article 216 TFEU because of the need to achieve certain goals set out in the treaties.²⁶⁵ The Court affirmed that this provision, in conjunction with Article 63 TFEU, prohibited all barriers to the free circulation of capital and payments between Member States and between Member States and third countries.²⁶⁶ This provision covers both direct and indirect investment and is the only EU fundamental freedom aiming to produce its effects also outside the EU Single Market.²⁶⁷ But since TFEU provisions cannot bind non-EU Members, the external liberalization of capital movements requires the conclusion of international agreements with third countries, such as the EU-Singapore Trade Agreement.²⁶⁸

Concerning the Investor-State Dispute Settlement (ISDS) mechanism, the CJEU observed that the trade agreement conferred on Singaporean investors the power to bring a claim not only against the EU but also against its Member States. As such, it

²⁶¹ *Id.*

²⁶² The request of the Commission was worded as follows: "Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically, 1. which provisions of the agreement fall within the Union's exclusive competence? 2. which provisions of the agreement fall within the Union's shared competence? And 3. is there any provision of the agreement that falls within the exclusive competence of the Member States?"

²⁶³ Ex-article 113 EC Treaty on the Common Commercial Policy.

²⁶⁴ TFEU, *supra* note 14, art. 3(2) ("The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.").

²⁶⁵ *Id.* art. 216 ("The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.").

²⁶⁶ *Id.* art. 63 ("1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.").

²⁶⁷ Francesco Montanaro & Sophia Paulini, *United in Mixity? The Future of the EU Common Commercial Policy in light of the CJEU's recent case law*, in EJIL: TALK! BLOG EUR. J. INT'L L. (Feb. 2, 2018), <https://www.ejiltalk.org/united-in-mixity-the-future-of-the-eu-common-commercial-policy-in-light-of-the-cjeus-recent-case-law/>.

²⁶⁸ *Id.*

removes the disputes away from the jurisdiction of the Member States, and consequently the Union and the Member States must enjoy shared competence with respect to the establishment of the ISDS mechanism. In conclusion, because of the shared nature of the competence over this matter, the CJEU held that the EU-Singapore trade agreement could not be concluded by the Union alone but was a mixed agreement for which the Member States and the Union had to work together.²⁶⁹ The Court found that the EU had exclusive competence over most of the EUSFTA but shared competence over non-direct investment and Investor-State Dispute Settlement. Despite the fact that the EU thus enjoyed competence to conclude the free trade agreement when addressing sustainable development matters, the Court held that the agreement required the involvement of the Member States.²⁷⁰

After the opinion, the Trade Commissioner at the time, Cecilia Malmström, stated:

“About the ECJ opinion on the Singapore trade agreement: This gives us very welcome and much-needed clarity about how to negotiate and interpret EU Treaties. The Opinion should put us on solid footing for the future. I look forward to working with governments [and] European Parliament to define a way forward.”²⁷¹

The European Parliament gave its consent to the agreement with Singapore in February 2019, and that was deemed “a stepping stone to trade agreements with other countries in the region.”²⁷²

C. *From International Investment Law to the Autonomy of EU Law*

A few weeks after a central case for the European rule of law and the protection of judicial independence of domestic courts, *Juizes Portugueses*,²⁷³ in March 2018, the Court of Justice of the European Union ruled in *Slovak Republic v Achmea BV*. *The relation between the two cases is not immediately obvious due to their subject matter, but they are connected by the notion of “effective legal protection”, or the idea that Article 19(1) affects all judicial proceedings before national courts.*²⁷⁴

1. *Achmea* from a Rule of Law Perspective

In *Achmea*, the Court held for the first time that an investor-state arbitration clause in a bilateral investment treaty (BIT) between two EU states was incompatible with

²⁶⁹ *Id.*

²⁷⁰ Opinion 2/15, EU:C:2016:992, ¶¶ 244, 292.

²⁷¹ Cecilia Malmström (@MalmstromEU), TWITTER (May 16, 2017, 6:27 AM), <https://twitter.com/MalmstromEU/status/864427142930735104>.

²⁷² European Parliament Press Release, *Parliament gives green light to EU-Singapore trade and investment protection deals* (Feb. 13, 2019), <https://www.europarl.europa.eu/news/en/press-room/20190207IPR25207/ep-gives-green-light-to-eu-singapore-trade-and-investment-protection-deals>.

²⁷³ See *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117 (establishing that a national court or tribunal can rely on EU law, through article 19 TEU and consequently article 47 of the Charter of fundamental law to protect its independence).

²⁷⁴ *Id.* ¶ 29.

EU law.²⁷⁵ In the aftermath of Opinion 2/15 on the Singapore Free Trade Agreement,²⁷⁶ this case followed the Commission path to reform intra-BITs within the EU.²⁷⁷ Many Eastern and Central European countries concluded about 196 intra-EU BITs with EU Member States after the fall of the Berlin Wall and before their accession to the EU in 2014, creating a sizeable flow of investments from Western to Eastern Europe.²⁷⁸

The *Achmea* dispute originated in Slovakia's reversal of its reformed, liberalized healthcare system.²⁷⁹ In 2004, Slovakia opened its market for private medical insurance services.²⁸⁰ As a result, Dutch insurance company Achmea established a subsidiary in Slovakia, and began selling insurance services there under the terms of a bilateral investment treaty that Netherlands and Slovakia signed in 1991.²⁸¹ In 2006, however, Slovakia partially reversed its 2004 reforms and prohibited distributing profits generated by the insurance sales to shareholders, preventing Achmea from operating in Slovakia.²⁸² This prohibition was ruled as contrary to the Slovak Constitution in 2011 by Slovakia's Constitutional Court, so the distribution of profits was once again allowed by private insurers.²⁸³ However, Achmea had already initiated an UNCITRAL arbitration against Slovakia under the terms of Article 8 of the Netherlands-Slovakia BIT.²⁸⁴ The defendant, Slovakia, objected to the UNCITRAL tribunal's jurisdiction by arguing that the BIT in question was incompatible with EU law and was invalid because Slovakia had joined the EU in 2004.²⁸⁵

During the UNCITRAL arbitration, the European Commission intervened to support Slovakia's claim that the arbitral tribunal was improper under EU law.²⁸⁶ By

²⁷⁵ *Slovak Republic*, Case C-284/16, EU:C:2018:158; Liz Tout & Lionel Nichols, *European Investors Reconsider Their Position Following the ECJ's Decision in Achmea*, DENTONS (June 18, 2018), <https://www.mondaq.com/uk/international-trade-investment/711672/european-investors-reconsider-their-position-following-the-ecj39s-decision-in-achmea>.

²⁷⁶ Sebastian Lukic & Anne-Karin Grill, *Towards a Post-Arbitration Age: The European Commission's Fast-Track Reform of Investment Dispute Settlement*, KLUWER ARB. BLOG 1 (Dec. 11, 2017); see generally Opinion 2/15, EU:C:2016:992.

²⁷⁷ Daniele Gallo & Fernanda G. Nicola, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*, 39 FORDHAM INT'L L.J. 1081 (2016).

²⁷⁸ Fernanda G. Nicola, *Another View of the Cathedral: What Does the Rule of Law Crisis Tell Us About Democratizing the EU?*, 25 MAASTRICHT J. EUR. & COMP. L., 133 (2018).

²⁷⁹ John I. Blanck, *Slovak Republic v. Achmea BV: The Death Knell for Intra-EU BITs?*, AM. SOC'Y INT'L L., <https://asil.org/insights/volume/22/issue/8/slovak-republic-v-achmea-bv-death-knell-intra-eu-bits> (Jun. 19, 2018).

²⁸⁰ *Id.*

²⁸¹ After the dissolution of Czechoslovakia in 1993, Slovakia succeeded to Czechoslovakia's rights and obligations under the original BIT. Szilárd Gáspár-Szilágyi, *It is not Just About Investor-State Arbitration: A Look at Case C-284/16, Achmea BV*, 3 EUR. PAPERS, 357 (2018); see generally Court Press Release No. 26/18, Judgment in Case C-286/16 *Slovak Republic v. Achmea BV* (Mar. 6, 2018).

²⁸² Nichols & Tout, *supra* note 277; see also Gáspár-Szilágyi, *supra* note 283; Blanck *supra* note 281; see generally Tom Jones, *Germany's Top Court Shows Obedience to Achmea*, GLOBAL ARB. REV., <https://globalarbitrationreview.com/article/1176731/germany%E2%80%99s-top-court-shows-obedience-to-achmea> (Nov. 9, 2018).

²⁸³ Blanck, *supra* note 281.

²⁸⁴ Joerg Risse & Max Oehm, *The Aftermath of Achmea: Germany Requests Dismissal of Vattenfall Case after CJEU's Achmea Decision*, GLOBAL ARB. REV., <https://globalarbitrationnews.com/aftermath-achmea-germany-requests-dismissal-vattenfall-case-cjeus-achmea-decision/> (May 14, 2018).

²⁸⁵ Blanck, *supra* note 281.

²⁸⁶ Nichols & Tout, *supra* note 277.

2010, the UNCITRAL tribunal set aside Slovakia's jurisdictional arguments and the case proceeded to a final award on the merits. In 2012, the UNCITRAL tribunal rendered its final award ordering Slovakia to pay 22.1 million euros plus interest in damages to the Achmea group for breaching the BIT's fair and equitable treatment standard.²⁸⁷

As Frankfurt was the seat of arbitration, Slovakia challenged the arbitral award in the Higher Regional Court of Frankfurt in 2014, arguing again that the arbitral award violated "several provisions of EU law, in particular regarding the Treaty on the Functioning of the European Union (TFEU)" because "the tribunal had lacked jurisdiction due to Article 8's incompatibility with EU law," but its action was dismissed.²⁸⁸

In 2016, the *Bundesgerichtshof* held that "there was no incompatibility between EU law and the BIT," but referred the issue of the co-existence between an arbitral jurisdiction and EU Law to the Court of Justice under a preliminary reference procedure.²⁸⁹ According to the TFEU a question of interpretation before a "court or tribunal of an EU member state," such as the *Bundesgerichtshof* in *Achmea*, can be referred to the CJEU.

The *Achmea* Court diverged from the AG Wathelet opinion that concluded that intra-EU BITs were not in breach of EU law. The arbitral tribunal created in the BIT was according to the AG "a court or tribunal of a Member State" as defined by Article 267 TFEU, and thus could request the CJEU to issue preliminary rulings on questions of EU law if necessary."²⁹⁰ Instead, the CJEU held that the arbitration treaty in *Achmea* was incompatible with EU law. The CJEU began its analysis by noting EU law had "primacy" over the law of the Member States and that an international agreement, such as the Netherlands-Slovakia BIT, "could not affect the allocations of EU powers as set by the Treaty on European Union (TEU)."²⁹¹ In this sense the Court showed that the arbitral tribunal was adjudicating on matters related to EU law rather than international law.

The CJEU then analyzed Articles 267 and 344 together under the principle of autonomy of EU law, as interpreted in its *Opinion 2/13* to be one of the essential characteristics of the EU legal order. The CJEU held that an investment tribunal, in fulfilling its mandate under a BIT, could be required to interpret or apply EU law, was not an integral part of the judicial system of either the Netherlands or Slovakia and, as such, was not a "court" that could refer questions to the ECJ for a preliminary ruling. Furthermore, the CJEU held that "the awards of such a tribunal [were] not subject to

²⁸⁷ *Id.*

²⁸⁸ Risse & Oehm, *supra* note 286; see Gáspár-Szilágyi, *supra* note 276; see also Nichols & Tout, *supra* note 277.

²⁸⁹ Article 267 TFEU authorizes but does not require the court or tribunal to request a ruling on the interpretive question from the CJEU in the form of a preliminary reference.

²⁹⁰ Clement Fouchard & Mark Krestin, *The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!*, KLUWER ARB. BLOG (Mar. 7 2018).

²⁹¹ Blanck, *supra* note 281.

review by Member State courts to an extent that would allow them to refer a question to the CJEU on issues of EU law raised before the arbitral tribunal.”²⁹²

Finally, the CJEU held that the arbitral tribunal’s award according to the Court was not subject to review by an EU Member State court, which is required by TEU Article 19, due to the “finality and one-sidedness” of investor-state arbitration. Accordingly, the Court found that the arbitral tribunal undermines the primacy of EU law because the arbitration clause in the BIT overall “removes disputes involving the interpretation or application of EU law from the mechanism of judicial review provided for by the EU legal framework.”²⁹³ Therefore, the arbitral tribunal was outside the EU judicial system and thus was an attempt to avoid the jurisdiction of the Dutch or Slovak courts.

The violation of EU law by the arbitration clause was related to the fact that the Member States agreed to remove from the jurisdiction of their courts and bestow on the CJEU the sole power to apply and interpret EU law.²⁹⁴ However even more important for the application of the rule of law, *Achmea* should be understood as a clear commitment by the CJEU to strengthen the judicial protections and the mutual trust among judiciaries as preserved by Article 2 of the TEU. This provision, together with Article 19 TEU have become for the Court a central pillar to protect the independence of the national judiciary²⁹⁵ ensuring that citizens have access to a fair trial and effective judicial remedies at the national and supranational level.

The chart below summarizes the functional comparison between the role, the processes, and the legal doctrines developed both in the SCOTUS and the CJEU that have limited or enhanced the judicialization of foreign policy across very different historical periods with respect to judicial federalism.

Table 2. Comparing Legal Diplomacy: Federalism in the SCOTUS and CJEU

	Non-Judicial Involvement in Foreign Relations (R)	Judicialization of Foreign Relations (L)
DOCTRINE: <u>Federalism</u> (Part III)	<i>US Commerce Clause</i> <i>EU Common Commercial Policy</i> <i>US Self-Executing Treaties</i> <i>EU Exclusive Competence</i>	<i>US Police Powers</i> <i>EU Lack of Competence</i> <i>US Non Self-Executing Treaties</i> <i>EU Mixed Agreements</i>

²⁹² Gáspár-Szilágyi, *supra* note 276, at 2; see generally *Slovak Republic*, Case C-284/16, EU:C2018:158, ¶¶ 50–52.

²⁹³ Fouchard & Krestin, *supra* note 292.

²⁹⁴ See *Slovak Republic*, Case C-284/16, EU:C2018:158, ¶ 55.

²⁹⁵ See *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, ¶ 30.

PART IV. POLITICIZATION OF JUDICIAL INDEPENDENCE IN THE AGE OF AUTHORITARIANISM

Judicial independence has become a pillar of democratic constitutional regimes especially in a time when courts have been perceived as tools of last resort to save democratic institutions from authoritarian leaders.²⁹⁶ A well-established literature addresses how courts can protect liberal constitutionalism by working on the “edges” of democracy and preventing democratic backsliding.²⁹⁷ By the same token, some scholars have noticed how autocratic leaders’ practice of “abusive judicial review”²⁹⁸ transformed constitutional courts around the world into powerful weapons in their regimes. In some European Union countries, such as Hungary and Poland, authoritarian regimes seek to use domestic courts to strengthen executive powers by changing the liberal constitutional structures,²⁹⁹ often with the consent of courts that have been packed or curbed by authoritarians.³⁰⁰ In this new transitional scenario, the abstract doctrine of judicial independence became more politicized as a tool of republican resistance against authoritarianism.³⁰¹

The enlisting of domestic courts as a tool of ‘abusive constitutionalism’³⁰² is not only a Central and Eastern European phenomenon. It is now at the core of the struggle undertaken by the EU against the authoritarian regimes of Hungary and Poland. This approach shows that the CJEU has engaged gradually and by crafting formal legal doctrines to entrench the notion of judicial independence and effective judicial remedies from its foreign relations jurisprudence into its internal constitutional doctrine that applies uniformly to all 27 Member States.

The legal diplomacy of the CJEU differs from the political path that the Commission and the EP have undertaken to fight the autocrats through the Article 7.2 TEU procedure. This procedure received worldwide attention, but only shames these governments that have overtly breached basic rule of law guarantees of their citizens, as the legal diplomacy of the CJEU *vis-à-vis* the Hungarian and Polish judicial independence has been easily circumvented by ruling parties. However, in the long term, the legal diplomacy of the CJEU performed three distinct functions. First, in entrenching its rule of law doctrines in its foreign relations and internal jurisprudence alike, the CJEU enriched its conceptual apparatus and legal toolkit by expanding the scope of its judicial balancing and deference. Second, the CJEU created new evidence

²⁹⁶ See TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 1-5 (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 1 (2018).

²⁹⁷ SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015); Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L. J. 961, 1002 (2011).

²⁹⁸ See David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts against Democracy*, UC DAVIS L. REV. 1313 (2020).

²⁹⁹ Kim Lane Scheppele, *Understanding Hungary’s Constitutional Revolution*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN ECONOMIC CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA 111 (Armin von Bogdandy & Pál Sonnevend, eds. 2015).

³⁰⁰ Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 560-62 (2018); Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1676-77 (2015).

³⁰¹ See Duncan Kennedy, *Authoritarian Constitutionalism in Liberal Democracies*, in AUTHORITARIAN CONSTITUTIONALISM: COMPARATIVE ANALYSIS AND CRITIQUE 161, 181 (Helena Alviar García & Günter Frankenberg, eds. 2019).

³⁰² David Landau, *Abusive Constitutionalism*, 47 UC DAVIS L. REV. 189, 191 (2013).

for other EU institutions seeking to create financial penalties against the authoritarians by clarifying why judicial independence is at the core of republican democracies inside the Union.³⁰³ Lastly, the legal diplomacy of the CJEU positioned the Court as the ultimate defender of liberal and republican values against authoritarians, in a way that opens up its jurisprudence to the hermeneutics of suspicion from either conservatives or progressive critics because of the democratic deficit.³⁰⁴

A. *Constitutional Backsliding as a Global Phenomenon*

Several think tanks measuring and tracking the quality of democracy in countries around the world found that the number of “highly defective democracies” doubled between 2006 and 2010.³⁰⁵ From South America to Southeast Asia to Central Europe, support for liberal democratic values is in decline.³⁰⁶ The literature examining the phenomenon of global democratic decline is ever-growing and there appears no shortage of case studies to examine.³⁰⁷

In his book on authoritarianism, Günter Frankenberg analyses the development and rejection, the odium and fascination with autocratic leaders in constitutional democracies by showing how:

Autocrats have seized power and hijacked constitutions. Antidemocratic rhetoric and propagated illiberalism reap considerable electoral benefits even in societies that should know better, from the experience of their own submission and liberation, and that seemed to be well on their way to sustainable democratization, like Hungary and Poland.³⁰⁸

In their analysis of faltering democracies, Aziz Huq and Tom Ginsburg distinguished between two threats to constitutional liberal democracy: “authoritarian reversion” or “constitutional regression.”³⁰⁹ First, authoritarian reversion is characterized by a complete and rapid transition to authoritarianism, with examples including Thailand, Mali, Mauritania, and Chile.³¹⁰ Interestingly, the occurrence of classic coups has generally declined in recent years.³¹¹ The authors argue that there has been an increase in utilization of constitutional tools to dismantle democratic

³⁰³ See Parliament Draft Report 2020/2072(INL), On the Establishment of an EU Mechanism on Democracy, the Rule of Law, and Fundamental Rights.

³⁰⁴ Duncan Kennedy, *Proportionality and ‘Deference’ in Contemporary Constitutional Thought*, in THE TRANSFORMATION OR RECONSTITUTION OF EUROPE: THE CRITICAL LEGAL STUDIES PERSPECTIVE ON THE ROLE OF THE COURTS IN THE EUROPEAN UNION 29, 35 (Tamara Perišin & Siniša Rodin eds., 2018).

³⁰⁵ See *Transformation Index BTI 2016*, BERTELSMANN STIFTUNG (last visited Mar. 15, 2020), <http://perma.cc/TNT9-RHJS>.

³⁰⁶ Tom Ginsburg, Aziz Z. Huq & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism*, 85 U. CHI. L. REV. 239, 243 (2018). See Landau, *supra* note 304, at 200–07 (2013) (discussing similarities between democratic decline in Latin America and Southeast Asia).

³⁰⁷ See, e.g., *Symposium: The Limits of Constitutionalism – A Global Perspective*, 85 U. CHI. L. REV. 239 (2018).

³⁰⁸ GÜNTER FRANKENBERG, *AUTHORITARIANISM: CONSTITUTIONAL PERSPECTIVES* xii (2020).

³⁰⁹ Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 92–94 (2018).

³¹⁰ *Id.* at 93.

³¹¹ *Id.*

institutions and to form “competitive authoritarian or hybrid regimes.”³¹² Consequently, there is a need for a new classification of anti-democratic change which Huq and Ginsburg term “constitutional regression.”³¹³ Second, constitutional retrogression is the process of degradation of three pillars of democracy: competitive elections, liberal rights to speech and association, and the rule of law.³¹⁴ “Backsliding,”³¹⁵ “de-democratization,”³¹⁶ and “autocratic legalism”³¹⁷ all describe some form of political system caught between democracy and autocracy.³¹⁸ Evaluating a particular political situation requires a system-wide approach because retrogression involves many, sometimes minor changes, which standing alone show no cause for concern.³¹⁹ Taken together, however, these changes signify a substantial shift which warrants the reclassification of an entire political system.³²⁰

Finally, Adam S. Chilton and Mila Versteeg hypothesize that courts generally only possess a limited ability to protect constitutional rights.³²¹ The authors show statistical evidence that the mere existence of independent courts does not necessarily lead to an increased likelihood that a government will respect constitutional rights.³²² They find that courts will at times protect themselves by “employing various avoidance canons or deferral techniques.”³²³ Additionally, courts will protect themselves by reaching decisions which are in line with majoritarian preferences.³²⁴

However, a constitutional court’s most pressing limitation likely comes from political actors who impose retaliatory measures against a court in the form of “court-curbing.”³²⁵ Such measures might include jurisdiction stripping, court packing, and other institutional changes through constitutional or statutory reform.³²⁶ The case of Poland illustrates some of these backsliding techniques in the realm of judicial independence as well as strategies of resistance by the Polish judiciary by leveraging supranational institutions in the EU through the CJEU and the Council of Europe through the ECtHR and the Venice Commission.³²⁷

³¹² *Id.* at 94.

³¹³ *Id.*

³¹⁴ *Id.* at 96.

³¹⁵ See *How Democratic Backsliding Happens*, DEMOCRACY DIGEST (Feb. 21, 2017), <https://www.demdigest.org/democratic-backsliding-happens/>.

³¹⁶ Charles Tilly, *Inequality, Democratization, and De-Democratization*, 21 SOC. THEORY 37, 40 (2003).

³¹⁷ Kim Lane Scheppele, *Autocratic Legalism* 85(2) U. CHI. L. REV. 545 (2018).

³¹⁸ Huq & Ginsburg, *supra* note 311, at 95.

³¹⁹ *Id.* at 97.

³²⁰ *Id.*

³²¹ See Adam S. Chilton & Mila Versteeg, *Courts’ Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293, 297 (2018).

³²² *Id.* at 319 (discussing Robert Dahl’s observation that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities”).

³²³ *Id.* at 320.

³²⁴ *Id.* at 321.

³²⁵ *Id.* at 314.

³²⁶ *Id.*

³²⁷ See Allyson K. Duncan & John Macy, *The Collapse of Judicial Independence in Poland: A Cautionary Tale*, 104 JUDICATURE 41 (2020).

B. The Polish Constitutional Breakdown

Poland is a paramount example for the way in which a constitutional liberal democracy can degrade without collapsing. Poland emerged from Communism in the late 1980s and made an exemplary transition into free-market economics, serving as the posterchild for Central Europe.³²⁸ Its economy was strong, navigating the 2008 global financial crisis largely unscathed.³²⁹ Anne Appelbaum has shown how Poland faced the “seductive lure” of authoritarianism that was the need to find a new enemy beyond Communism, where politics of resentment and conspiracy theories created an alternative reality conducive to the creating of an illiberal one-party states led by demagogues.³³⁰ In his account of Poland after 2015, Wojciech Sadurski has shown how the populist Law and Justice (*Prawo i Sprawiedliwość* or PiS) party embraced the theoretical framework of autocratic legalism³³¹ and used it as an instruction guide for its constitutional reforms through statutes restricting the freedom of speech and association and curtailing judicial independence.³³² The Polish constitutional breakdown entailed changing the true *locus* of power from the government to the ruling party³³³ and from the prime minister or the President to the party leader Jarosław Kaczyński.³³⁴

The most widely used tactic by PiS are constitutional amendments by statutes which significantly alter the Constitutional Tribunal.³³⁵ This highlights a crucial characteristic of PiS, which manufactures fundamental constitutional changes without the electoral mandate to do so.³³⁶ Without the super-majority required for constitutional change, PiS proceeds by passing legislation that contravenes constitutional provisions.³³⁷ In addition to court packing, PiS has introduced

³²⁸ See generally Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 372 (2018).

³²⁹ Marcin Piatkowski, *Four ways Poland's state bank helped it avoid recession*, BROOKINGS (June 12, 2015), <https://www.brookings.edu/blog/future-development/2015/06/12/four-ways-polands-state-bank-helped-it-avoid-recession/>.

³³⁰ ANNE APPLEBAUM, *THE TWILIGHT OF DEMOCRACY* 22 (2020).

³³¹ WOJCIECH SADURSKI, *POLAND'S CONSTITUTIONAL BREAKDOWN* 14–16 (Oxford U. Press ed., 2019)(arguing that the “anti-constitutional” element of Poland’s backsliding is characterized by (i) the true center of power in Jarosław Kaczyński, and (ii) actual constitutional violations, which can be distinguished from (iii) statutory amendments to the constitution).

³³² See Scheppele, *supra* note 319, at 552–53 (2018).

³³³ SADURSKI, *supra* note 333, at 15 (Nowogrodzka Street is the location of PiS headquarters and has become synonymous with the place that all political decisions are made as Kaczyński is head of the PiS).

³³⁴ *Id.* (“Power in Poland is held by an individual who is completely “invisible to the constitutional design.”)

³³⁵ *Id.* See also Fryderyk Zoll & Leah Wortham, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, 42 FORDHAM INT’L L. J., 875, 878 (2019).

³³⁶ Joanna Fomina & Jacek Kucharczyk, *The Specter Haunting Europe: Populism and Protest in Poland*, 27 J. DEMOCRACY 58, 62–63 (2016).

³³⁷ See Bojan Bugarcic & Tom Ginsburg, *The Assault on Post-communist Courts*, 27 J. DEMOCRACY 69, 72–75 (2016) (explaining that “Poland’s Law and Justice Party have enacted legal and institutional changes that simultaneously squeezed out electoral competition, undermined liberal rights of democratic participation, and emasculated legal stability and predictability.”).

disciplinary measures for judges³³⁸ lowered the age of retirement,³³⁹ restructured lower courts,³⁴⁰ and granted the president the power to extend a judge's term beyond retirement as seen fit.³⁴¹ These measures have triggered legal battles with the EU, such as through Treaty of the European Union (TEU) Article 7(2) procedure to assess by the Council whether there is a systemic violation of the rule of law.³⁴² Simultaneously, through either infringement proceedings launched by the Commission against Poland or through the judicial dialogue between the European Court and the Polish judiciary, some crucial cases for the survival of judicial independence in Poland have reached the Luxembourg court.

After the *Juized Portuguez* and *Achmea* rulings, the CJEU made clear that since the Polish judiciary is subject to the rule of European intervention, it can no longer ensure effective legal protections and judicial independence guaranteed under TEU Article 19 and 47 of the EU Charter of Fundamental Rights. Ordinary courts are empowered to apply EU law domestically. This principle was accepted by the Tribunal in Decision of 19 December 2006, deciding whether a Polish law that forced passenger cars not registered correctly in Poland to pay an excise duty ran afoul of Article 90.³⁴³ Although Polish courts argued that EU law did not apply, the Tribunal found that Article 90 integrated EU law into Poland.³⁴⁴ Additionally, Article 91(2) gave EU law higher status over national laws.³⁴⁵ Consequently, the Tribunal was the most appropriate mechanism for resolving conflicts between international and State law.³⁴⁶ The Tribunal concluded that Poland could impose an excise duty on non-harmonized products, but only if the duty is "not higher than those imposed on similar domestic products" under Articles 9 and 91(2) of the Polish Constitution and Article 10 of the EC Treaty.³⁴⁷

On April 3, 2018, Poland enacted the "New Law" which lowered the retirement age for judges on the Polish Supreme Court from 70 to 65, required judges who were appointed before the New Law was enacted to retire, and required presidential

³³⁸ Zamira Djabarova & Brittany Benowitz, *A Back Door to Controlling Judges: Poland's Ruling Party Tries Another Ploy*, JUST SECURITY (Mar. 27, 2019), <https://www.justsecurity.org/63381/a-back-door-to-controlling-judges-polands-ruling-party-tries-another-ploy/> (Another PiS "reform" allows judges to be investigated and sanctioned for their court rulings. These disciplinary actions appear to be politically motivated targeting a number of judges, including those who had sent questions to the European Court of Justice concerning the legality of the government's judicial overhaul).

³³⁹ See *id.* (Lowering the age of retirement from sixty-seven to sixty for female judges and sixty-five for male judges. However, the justice minister, who is appointed by PiS, would have the power to extend a judge's term).

³⁴⁰ *Poland pushes controversial court reforms despite EU ruling*, DEUTSCHE WELLE (Nov. 19, 2019) [hereinafter *Deutsche Welle*], <https://www.dw.com/en/poland-pushes-controversial-court-reforms-despite-eu-ruling/a-51312201>.

³⁴¹ *Id.*

³⁴² See SADURSKI, *supra* note 333, at 192-241.

³⁴³ Case P-37/05-CT, Decision of 19 December 2006, 2006, in *Selected Rulings of the Polish Constitutional Tribunal Concerning the Law of the European Union (2003-2014)*, 51 STUDIA I MATERIAŁY TRYBUNALU KONSTYTUCYJNEGO, 80, 80-81 (2014), https://trybunal.gov.pl/uploads/media/SiM_LI_EN_calosc.pdf.

³⁴⁴ *Id.* at 90.

³⁴⁵ *Id.* at 91.

³⁴⁶ *Id.* at 93.

³⁴⁷ *Id.* at 81.

approval for extended terms.³⁴⁸ After a reasoned opinion asking the Polish government to change such legislation because it was incompatible with EU law, the Commission launched an infringement proceeding against Poland under Article 258 TFEU, triggering a number of important cases in Luxembourg attempting to block the Polish democratic backsliding.

First, in June 2019 the CJEU held in *Commission v. Poland* that the New Law was invalid and violated Article 19(1) TEU's requirement for judicial independence and tenure.³⁴⁹ The Court relied on its *Minister for Justice and Equality* precedent, in which it enshrined the principle of judicial independence from the political branch together with the principle of mutual trust among higher principles of EU law.³⁵⁰ In particular, it called the principle of judicial independence as constituent to the fundamental right of a fair trial in Article 47 of the Charter.³⁵¹ When Poland agreed to the common values of human dignity, freedom, democracy, equality and rule of law referred to in Article 2 TEU in joining the EU, these include the right to judicial protection.³⁵² Consequently, Poland had to follow Article 19(1) TEU's requirements of independence and tenure of judges that can only be determined by an express legislation.³⁵³ Because the New Law lowered the retirement age of judges, thus dismissing their guarantees from removal from office and "prematurely ceasing" their terms, it ran afoul of their independence and tenure now controlled by political fiat.³⁵⁴ Additionally, because the President ultimately decided which judges would have extended terms, Poland again violated independence and impartiality of the judiciary.³⁵⁵

The CJEU held that lowering the retirement age of Supreme Court Justices and creating disciplinary measures to control the Polish judiciary was an attempt to pack the courts with loyalists to the PiS. The Court held that this was in violation of the rule of law and the principle of judicial independence protected under Article 19(1) TEU.³⁵⁶ The CJEU also specified that whether the judges' mandate would end by an obligatory retirement age or a fixed-term mandate was the choice made by the Polish constitutional design that under compelling grounds could, by following the appropriate measures and in a proportionate manner, remove a judge from office.³⁵⁷

In a second *Commission v. Poland* case decided on November 5, 2019, the Court held that Poland had a duty to ensure the protection of judicial independence under Article 19(1) of TEU.³⁵⁸ The CJEU now found in applying its proportionality review that the Polish legislation had no legitimate government interest because there was no connection between lowering the age of retirement and the protection of EU law.³⁵⁹

³⁴⁸ *Comm'n v. Poland*, Case C-619/18, EU:C:2019:531.

³⁴⁹ *Id.*

³⁵⁰ See *Minister for Justice and Equality (Deficiencies in the System of Justice)*, Case C-216/18, EU:C:2018:586, ¶ 58.

³⁵¹ *Id.* ¶ 48.

³⁵² *Comm'n v. Poland*, EU:C:2019:531.

³⁵³ *Id.* ¶ 67.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Comm'n v. Poland*, EU:C:2019:531.

³⁵⁷ *Id.* ¶ 76.

³⁵⁸ *Comm'n v. Poland*, Case C-192/18, EU:C:2019:924, ¶ 76.

³⁵⁹ *Id.*

The CJEU specifically pointed to the principles of independent judiciaries as central to the EU Treaty and that procedural rules governing the principle of tenure of judges and its exceptions were not followed in the case of ordinary Polish courts.³⁶⁰

In a third *Commission v. Poland* judgement on November 19, 2019, the CJEU decided in three combined cases by stating that the rights of a fundamental remedy enshrined in Article 47 of the EU Charter of Fundamental Rights could not be precluded by a non-independent court such as the newly-created Disciplinary Chamber within the Polish Supreme Court. The CJEU created a three-factor test to assess judicial independence: first, that the appointed members should be “capable of giving rise to legitimate doubts, in the minds of subjects of the law”; second, that the court should not be influenced by “the direct or indirect influence of the legislature” or the executive; and finally, that the court could assert its “neutrality with respect to the interests before it.”³⁶¹ By deferring the application of these three principles interpreted together to the domestic courts, the CJEU reaffirmed the principle of primacy of EU law to reassert the hierarchy of the European law on domestic law.³⁶²

However, in the aftermath of this judgement a new bill called the “Muzzle Law” was adopted by the Polish government to retaliate against the judges who followed this ruling.³⁶³ As some scholars have powerfully described, the Muzzle law has established powerful proceedings able to break the rule of law in Poland, thus showing how the CJEU rulings can be easily circumvented by the autocratic governments.³⁶⁴

C. Can the CJEU Make a Difference?

“Tucked away in the fairyland Duchy of Luxembourg,”³⁶⁵ the European Court of Justice is enjoying great legitimacy in mobilizing a variety of EU interests through litigation. However, not much political attention is paid to how the CJEU is becoming a coalition builder among the different EU institutions that are seeking to work more closely on limiting access to COVID-19 recovery funds to illiberal democracies in the Union and in the implementation of EU values. In a Union where autocratic legalism is well-entrenched, the CJEU is perceived as an additional safeguard to fight against autocrats. Founded in 1952, the European Court of Justice began its work with seven judges based in Luxembourg. Today the CJEU is composed of twenty-seven judges, each nominated by one Member State and after consultation with an independent panel of experts under TFEU 255, for a renewable term of six years.³⁶⁶ As Mitch Lasser has shown, through his meticulous recollection on the origins of the 255 Panel in the

³⁶⁰ *Id.* ¶¶ 115, 120.

³⁶¹ See Court Press Release No. 145/19, Judgment in Joined Cases C-585/18, C-624/18 and C-625/18 A.K.v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy (Nov. 19, 2019).

³⁶² See A.K. and Others & CP and DP v. Sąd Najwyższy, Joined Cases C-585/18, C-624/18, and C-625/18, EU:C:2019:982, ¶ 172.

³⁶³ See DEUTSCHE WELLE, *supra* note 342.

³⁶⁴ See Katarzyna Gajda-Roszczyńska & Krystian Markiewicz, *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland*, 12 HAGUE J. RULE L. 451 (2020).

³⁶⁵ See Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT’L L. 1, 1 (1981).

³⁶⁶ See FIFTH ACTIVITY REPORT OF THE PANEL PROVIDED FOR BY ARTICLE 255 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (2018), https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/5eme_rapport_dactivite_du_c255_-_en_final_-_public.pdf.

1990s, the urge to create this committee of experts reflected the fear of Western European politicians to the accession of Central and Eastern European Member States to the EU.³⁶⁷ This accession could allow judges who had been trained in a socialist regime with little training in capitalist and liberal constitutional values to sit on the European bench.

This fear was not misplaced since the CJEU constitutes the highest supranational constitutional Court in the Union tasked with the observance and uniform interpretation of EU law. However, there are some civil law features that make the CJEU especially hard to pack with partisan judges. For instance, the Court speaks in unison and its precedents are binding, especially when deliberations happen in its Grand chambers—constituted by fifteen judges—rather than smaller chambers of three or five judges with less power to influence the jurisprudence of the court.³⁶⁸ Dissenting and concurring opinions do not exist and to an extent these are replaced by the opinions of the Advocates General, who serve as legal advisors to the Court.³⁶⁹ Finally, the CJEU lacks the cult of personality that has pervaded the SCOTUS and what some call the idol-like quality of some of its Justices.³⁷⁰ With only a few biographies of the EU judges and advocates general, with the exception of its current President Koen Leenerts, these jurists sit for relatively short terms and rarely make the news. Although long criticized for its formalist, opaque, technical, and indirect style of jurisprudence,³⁷¹ the CJEU has today survived both the attacks by autocrats and the over-politicization of judicial appointments that are undermining the legitimacy of the SCOTUS.³⁷²

If the legal diplomacy of the CJEU makes only a modest blow against the Hungarian government of Victor Orbán, which transformed his country into an illiberal democracy or “mafia state,”³⁷³ this will be due to the powerlessness of the Union *vis-à-vis* the autocrats. Back in 2018, the European Parliament voted to move forward on a preventive procedure enshrined in Art 7(1) TEU in case of “clear risk of a serious breach of the Union’s value” against Orbán’s government. If this political tool received publicity worldwide, in the long term it has proven ineffective—Orbán’s party *Fidesz* remains an active player within the main center-right political party of

³⁶⁷ MITCHEL DE S.-O.-L’E. LASSER, JUDICIAL DIS-APPOINTMENTS: JUDICIAL APPOINTMENTS REFORM AND THE RISE OF EUROPEAN JUDICIAL INDEPENDENCE (2020).

³⁶⁸ See Christoph Krenn, *A Sense of Common Purpose: On the Role of Case Assignment and the Judge-Rapporteur at the European Court of Justice*, in RESEARCHING THE EUROPEAN COURT OF JUSTICE: METHODOLOGICAL SHIFTS AND LAW’S EMBEDDEDNESS (Mikael Rask Madsen, Fernanda G. Nicola & Antoine Vauchez eds., 2021).

³⁶⁹ See THE ADVOCATE GENERAL AND EC LAW, (Noreen Burrows & Rosa Greaves eds., 2007); Iyiola Solanke, *Independence and Diversity in the European Court of Justice*, 15 COLUM. J. EUR. L. 89 (2009); LAURE CLÉMENT-WILZ, LA FONCTION DE L’AVOCAT GÉNÉRAL PRÈS LA COUR DE JUSTICE (2010); Iyiola Solanke, *The Advocate General: Assisting the CJEU of Article 13 TEU to Secure Trust and Democracy*, 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 698 (2012).

³⁷⁰ See IRIN CARMON, NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG (2015).

³⁷¹ Joseph H. H. Weiler, *Epilogue: The Judicial Après Nice*, in THE EUROPEAN COURT OF JUSTICE, 215 (Gráinne de Búrca & J. H. H. Weiler eds., 2001).

³⁷² See Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35 (2012); Scott S. Bodderly & Charles A. Phillips, *A solution to the politicization of the Supreme Court*, THE HILL (Jun. 11, 2020), <https://thehill.com/blogs/congress-blog/judicial/524775-a-solution-to-the-politicization-of-the-supreme-court>.

³⁷³ See BÁLINT MAGYAR, POST-COMMUNIST MAFIA STATE (2016).

the European Parliament and the early retirement of the Hungarian judges was not stopped by the CJEU rulings.³⁷⁴

On October 6, in *Commission v. Hungary* C-66/18,³⁷⁵ the Grand Chamber of the CJEU held that the Hungarian law that singled out and forced the Central European University (CEU), an academic institution located in the U.S., to relocate from Budapest to Vienna violated EU law. This ruling comes at an important time to assess the violation of EU values by autocrats and to limit their access to Union's funds. It also follows the gradualist and formalist jurisprudence of the CJEU against the Hungarian restrictions against civil society organizations³⁷⁶ and in seeking to protect the Polish judiciary from political control.³⁷⁷ Albeit as many have pointed out, both in the case of the CEU that had to leave Budapest or the Polish judiciary that was disciplined by Polish law, these rulings have had only symbolic rather than practical effects.

Yet these cases are exemplary of the legal diplomacy of the CJEU that consolidated the meaning of its separation of powers and federalism doctrines in its foreign relations jurisprudence and now is deploying it *vis-à-vis* the measures taken by the Polish, Hungarian and other governments in their attempts to weaken the liberal rule of law in their respective countries.³⁷⁸ Recently, CJEU President Koen Lenaerts wrote that the motto “in the court we trust” remains paradigmatic to the identity of the European Union, whether about its market integration or individual rights protection for which the national courts are the “gatekeepers” of the rule of law in the Union.³⁷⁹ Just like foreign arbitration tribunals, national judiciaries are an integral part of the administration of justice in the supranational constitutional jurisdiction in which the CJEU has the last say in interpreting EU law. In reaffirming the liberal rule of law and the judicial independence of the Union's domestic courts, the President of the CJEU is reclaiming its authority as trust in the self-preservation of the EU judiciary system.

CONCLUSION

In a “post-post-Cold War,”³⁸⁰ when authoritarian leaders seem to be the global norm rather than the exception,³⁸¹ the strengthening of executive powers and

³⁷⁴ See Gábor Halmai, *The Early Retirement Age of the Hungarian Judges*, in EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE (Fernanda Nicola & Bill Davies eds., 2017).

³⁷⁵ Court Press Release No. 125/20, Judgment in Case C-66/18, *Comm'n v. Hungary* (Oct. 6, 2020).

³⁷⁶ Court Press Release No. 73/20, Judgment in Case C-78/18, *Comm'n v. Hungary* (Jun. 18, 2020).

³⁷⁷ Court Press Release No. 47/20, Order of the Court in Case C-791/19 R, *Comm'n v. Poland* (Apr. 8, 2020).

³⁷⁸ *Miasto Łowicz and others v. Skarb Państwa and others*, Joined Cases C-558/18 & 563/18, EU:C:2020:234; *Asociația “Forumul Judecătorilor Din România” and others v. Inspecția Judiciară and others*, Joined Cases C-83/19, 127/19 & 195/19, EU:C:2021:393; *VQ v. Land Hessen*, Case C-272/19, EU:C:2020:535; *IS (Illégalité de l’ordonnance de renvoi)*, Case C-564/19 IS (pending).

³⁷⁹ See Koen Lenaerts, *New Horizons for the Rule of Law within the EU*, 21 GERMAN L. J. 29, 31 (2020).

³⁸⁰ See Kenneth Anderson, *Who Own the Rules of War in Today's Post-Post-Cold War?* 56 FRANKEL LECTURE SERIES (2019), <https://houstonlawreview.org/article/7950-who-owns-the-rules-of-war-in-today-s-post-post-cold-war>; Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 L. CONTEMP. PROBS. 141 (2016).

³⁸¹ Alviar García & Frankenberg, *supra* note 303, at 1.

constitutional backsliding in the Member States has led the CJEU to carefully reassert its role by expanding the scope of its judicial review and balancing at the same time foreign and internal conflicting considerations to establish a democratic and liberal conception of the rule of law. According to the Court, the judiciary as a whole needs to ensure the respect of the rule of law and the notion of judicial independence of domestic or international tribunals when they interpret EU law. This consists of the protection of fair trial procedures, judicial independence, and effective judicial remedies, without which the equality under the law and the accountability of our governments would be impaired.

The legal diplomacy of the CJEU offers new lenses to imagine courts, not only as neutral umpires or targets for court-curbing measures, but also as strategic and reactive institutions that can create more or less effective barriers to authoritarians through a gradual, formalist and deferential judicial reasoning.³⁸² The CJEU has entrenched a liberal rule of law culture in the Union by working in synergy with other branches of government, national judiciaries and civil society to hold firm the foundations of liberal democracies through activism or deference, pragmatic and formalist legal reasoning that is unescapably vulnerable of “suspicion of ideological corruption.”³⁸³

³⁸² See Madsen, *supra* note 7, at 27.

³⁸³ See Kennedy, *supra* note 303 at 37.

