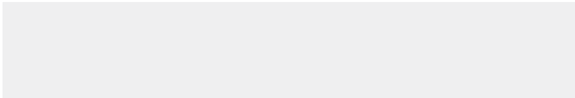
UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

School of Law
Scoil an Dlí

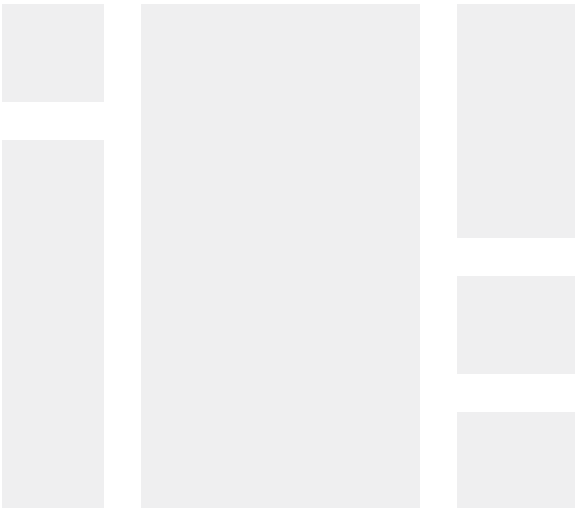
SHAPING A **JUST SOCIETY**
SINCE 1849

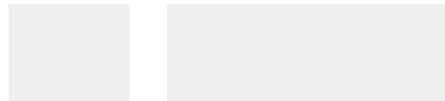
Legal Research Series

Working Paper No. 26



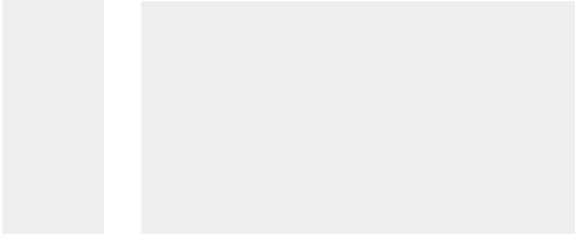
Rights, Interests, and Values in EU External Relations Law





Dr Luigi Lonardo

October 2024



Centre for Criminal Justice & Human Rights

Copyright © Luigi Lonardo 2024

Centre for Criminal Justice & Human Rights (CCJHR)
School of Law
University College Cork
Cork, Ireland
www.ucc.ie/en/ccjhr

The views expressed in this work are solely those of the author, and do not represent the views of the CCJHR or the School of Law, UCC.

CCJHR Working Papers Series: Recent Publications

- ‘Ecocide and International Criminal Court Procedural Issues: Additional Amendments to the “Stop Ecocide Foundation” Proposal’, Giovanni Chiarini, *CCJHR Working Paper No.15* (November 2021)
- ‘Early Legal Advice and Assistance for International Protection Applicants in Ireland’, Victoria Oluwatobi Isa Daniel, *CCJHR Working Paper No.16* (February 2022)
- ‘Sex Work Law in Ireland: The State’s Failure to Protect Sex Workers’ Human Rights under the Swedish Model’, Holly O’Callaghan, *CCJHR Working Paper No.17* (February 2022)
- ‘Legislating Hate: The Growing Need for Specific Protection Against Hate Crimes and Hate Speech’, Katie Fowler, *CCJHR Working Paper No.18* (February 2022)
- ‘Climate Engineering and International Law: Ignis Fatuus or Last Resort?’, Johannes Mathias Schwaighofer, *CCJHR Working Paper No.19* (March 2023)
- ‘The Impact of Deforestation on Indigenous People: A Case Study of Brazil and Indonesia’, Katie Place, *CCJHR Working Paper No.20* (March 2023)
- ‘An Analysis of the International, Regional and National Laws for the Substantive Rights of Internally Displaced Persons in Kenya’, Bilhah Ikani Omulama, *CCJHR Working Paper No.21* (April 2023)
- ‘The Exclusionary Rule & Rights: Reforming Our Exclusionary Rule – A Comparative Analysis of the Laws of Ireland, Canada and New Zealand’, Dara James Clooney, *CCJHR Working Paper No.22* (June 2023)
- ‘Child Soldiers and Juvenile Justice: Analysing the Post-Conflict Reintegration Processes for Former Child Soldiers in Sierra Leone’, Estelle-Marie Casadesús Switzer, *CCJHR Working Paper No.23* (August 2023)
- ‘Leaving No One Behind: Assessing the Role of UNESCO in Promoting Adoption and Implementation of the Right to Information in Africa’, Susan Juliet Agwang, *CCJHR Working Paper No.24* (July 2024)
- ‘Irregular Migrants and National Populism: The Legality of International Pushbacks by States Experiencing a Public Emergency’, Anna Labadie Weeks, *CCJHR Working Paper No.25* (September 2024)

Rights, Interests, and Values in EU External Relations Law

Dr Luigi Lonardo, University College Cork[1]

Abstract

The paper examines the complex balance between rights, interests, and values in the EU's external relations, particularly in relation to third countries. A key focus is on rights activation, both within EU institutions and in third countries, exploring how EU-derived rights are mobilized through legal or non-legal avenues, such as boycotts or litigation.

The research also analyzes the EU's external relations law, where fundamental rights, especially those of third-country nationals, must be balanced against the EU's broader interests and values. Key areas discussed include trade agreements, sanctions, and other instruments of secondary law. The paper emphasizes the role of legal mobilization, offering a conceptual framework for understanding the activation of rights in EU foreign policy and how it intersects with political and legal strategies.

Keywords: EU external relations law – EU fundamental rights – right activism – legal mobilization

Funding statement

Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or University College Cork. Neither the European Union nor the granting authority can be held responsible for them.

[1] I am grateful to Romane Lieber for the research assistance. This paper was first presented at the conference Activating EU rights globally – legal mobilization in third countries - 14 April 2023, organised as part of the work of the Jean Monnet Centre of Excellence 'EU Integration and Citizens' Rights' (EUICR). More information is available at: https://www.ucc.ie/en/eu-integration-citizens-rights/

1. Introduction

In the United States, foreign policy is political. This means that choices in this domain are meant to be the result of public, inclusive, democratic deliberation. Elections are won or lost on foreign policy issues. This does not happen for the EU, largely due to the way EU elections and institutions work, as well as to the legal nature of the EU's competence to conduct a foreign policy. While there is a field of scholarship called 'EU external relations law', it would not make sense for a *Spitzenkandidat* to run for elections on a platform dedicated to foreign policy in the way in which, for example, a candidate to the US presidency could: the Commission simply does not have power in certain domains (because the Member States do). In fact, the EU competence in diplomatic matters is split between supposedly more technical aspects (trade, investment, development cooperation) and more political ones (security and defense), although this bipartition of the competence is highly arbitrary, and it has forced EU institutions to very capricious distinctions.

Since US foreign policy is political, one could expect a somewhat minor role for law and legal technicalities. This is confirmed by a quick survey of the Constitution: 'foreign policy' is a concept that does not exist as a distinct legal category therein. Foreign affairs are not treated in a different section than any other power allocated and governed by the Constitution, as a prominent American scholar of foreign affairs law has remarked[2] (unlike what happens for the EU fundamental treaties). In a punchy sentence, in the US 'foreign affairs have imposed themselves on the Constitutions and not vice versa'.[3] This contrasts with the role that right activism has played in the US, from Dr King and the civil rights movements to the strategic litigation to abolish the abortion ban in Texas[4] and, more recently, for homosexual marriage.[5]

There are important exceptions that rather confirm the rule that US foreign policy is not shaped by right activism and litigation: the Vietnam war, as detailed by Snyder in her account of US foreign policy through the lens of human rights activism;[6] or the post 9-11 treatment of suspected terrorists also became a legal-political battleground between the US administration and human rights activists.[7]

And what about EU foreign policy? If in the US it is the politics that makes the law, to a large extent in the EU it is the law that makes the policy. EU foreign affairs have a very high degree of legal technicality and a sizeable bureaucratic apparatus, subtracting them perhaps from the arena of democratic politics (again with some important exceptions: trade agreements with the US, the position of the EU on the war in Ukraine, Brexit). Some of this law confers rights; but some of the rights can 'activated' also outside traditional legal avenues, for example by way of boycott campaigns for products originating in occupied areas, in order to attract attention on violations of the right to self-determination.[8] This

[2] Louis Henkin, *Foreign Affairs and the US Constitution* (OUP, 2nd ed, 1996): 'What we characterize as foreign affairs is not a discrete constitutional category'. However, in *US v Curtiss-Wright Export*, Justice Sutherland considered that there are fundamental differences, in origin and nature, between powers in internal and foreign affairs.

[3] Francis Plimpton, 'Reviewed Work: *Foreign Affairs and the Constitution* by Louis Henkin' (1974)74(4) Columbia Law Review 777.

[4] Joshua Prager, *The Family Roe: An American Story* (First edition, WW Norton & Company 2021).

[5] Deborah Friedell, 'A Piece of Pizza and a Beer' (2022) 44 *London Review of Books* <https://www.lrb.co.uk/the-paper/v44/n12/deborah-friedell/a-piece-of-pizza-and-a-beer> accessed 11 April 2023.

[6] Sarah B Snyder, *From Selma to Moscow: How Human Rights Activists Transformed U.S. Foreign Policy* (Columbia University Press 2018).

[7] Wayne A Santoro and Marian Azab, 'Arab American Protest in the Terror Decade: Macro- and Micro-Level Response to Post-9/11 Repression' (2015) 62 Social Problems 219; Shirin Sinnar, 'Human Rights, National Security, and the Role of Lawyers in the Resistance' (2017) XIII Stanford Journal of Civil Rights and Civil Liberties 37; David Cole, *Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law* (First trade paperback edition, revised edition, Basic Books, an imprint of Perseus Books, LLC, a subsidiary of Hachette Book Group, Inc 2017).

[8] See for example the Boycott, Divestment and Sanctions Campaign 'aimed at delegitimizing and pressuring Israel, through the diplomatic, financial, professional, academic and cultural isolation of Israel, Israeli individuals, Israeli institutions, and,

paper is dedicated precisely to the role of rights' activation (defined in the next section) in EU foreign policy. This means two (interlinked) things. The first is rights activism in *third countries*: who, where, under what circumstances relies on EU-derived rights (we can call this 'the outside')? The second is the role of rights (of third countries natural or legal persons) *in litigation in EU Courts*: who are the third country natural or legal person, when, why, and with what arguments do they activate EU-derived rights in EU courts (we can call this 'the inside')? Some presentation focus on the former, some of the latter.

The purpose of this paper is to offer an introductory overview of both the inside and the outside, trying to bring into the conversation the literature on EU external relations law for the former, and the one on right activism for the latter. To that aim, Section 2 introduces the notion of right activation and the research agenda for the conference. Section 3 focuses on the role that rights play in EU external relations law, and in particular how these are only one aspect of it, which must be protected by EU institutions, but which must nonetheless be balanced, in case of conflict, with the EU's interests and other values. The protection of fundamental rights, including the rights of third country nationals when there is an element of connection with EU law,[9] is a general principle of EU law, and foreign policy is no exception. But EU external relations law is not all about rights: these have to be balanced with the pursuit of the EU's interests, which appears as an objective of the EU in several places in the Treaties (Article 3(5) TEU;[10] Article 21(2)(a) TEU;[11] Article 23;[12] Article 32 TEU[13]), and occasionally with other EU values (listed in Article 2 TEU;[14] and other provisions, usually grouped together with interests as if the two were always harmonious). The section maps three main areas of EU external relations law where rights for third country nationals – or with a link to third countries: trade agreements, sanctions, and other instruments of secondary law.

What we hope to achieve is a conceptualisation of the role that rights play in EU foreign policy. We put together scholars of law and of political science/international relations in order to build, from the small bricks of the law, a theoretical construction that can speak not only to law but also to other fields. We aim to do so by drawing together the literature on EU external relations law on the one hand, and on legal mobilization in the EU and right activation on the other hand. The originality of the project lies not only in its ambitious goal but also in taking as a starting point of the analysis the notion of rights activation. What is at stake is not only a theorisation of rights in EU foreign policy, but also an analysis of the way the EU is perceived.[15]

2. Activation of rights and EU foreign policy: an exciting research agenda

increasingly, Jews who support Israel's right to exist'. The position of the EU was that 'The EU rejects the BDS campaign's attempts to isolate Israel and is opposed to any boycott of Israel' Parliamentary question - E-005122/2016(ASW).

[9] Note however that third country nationals do not enjoy protection, under EU law, against discrimination on the grounds of nationality. Article 45 EU Charter of Fundamental Rights.

[10] 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens.'

[11] 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity'

[12] 'The Union's action on the international scene, pursuant to this Chapter, shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1'

[13] 'Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach.'

[14] 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

[15] See for background the concept paper by Dagmar Schiek of October 2022 for the Jean Monnet Centre of Excellence « EU Integration and Citizens' Rights », University College Cork.

It was noted in the introduction that the US has a history of (civil) right activism, and in the EU studies on right activism mostly concentrate on strategic litigation (so-called legal mobilization), because a broader right activism literature has not emerged in the context of EU foreign policy.

When we talk about rights, we mean a claim that is supported by positive law (*in casu*: the fundamental treaties or secondary law). We group together fundamental rights and economic freedoms, because the Court has elevated both to the rank of constitutional rights. We also assume that EU-derived rights (based on EU Treaties or EU legislation) enable direct interaction of citizens with the EU or with each other, but we are open as to the desirability of using rights (as opposed to other political strategies) as instruments for the 'oppressed'.[16]

So, what is right activation? Vanhala distinguishes a narrow and a broader sense of the phrase: 'In its narrowest applications, the term refers to high-profile litigation efforts for (or, arguably, against) social change. More broadly, it has been used to describe any type of process by which individual or collective actors invoke legal norms, discourse, or symbols to influence policy, culture, or behaviour'.[17] We are interested in the broad meaning. Litigation is a "perfect interdisciplinary laboratory" on the "interface between social complaints, interest groups and legal support structure".[18] But, as Schiek notes, '[our project] goes beyond the focus on litigation in that its exploration covers ways to activate and conceptualise rights derived from EU law including, but not limited to litigation. This links to the concept of opportunity structures, first developed in relation to how social movements influence politics, an idea that has recently been expanded to EU environmental law and politics.'

When investigating under which circumstances social actors (either collective or individual) turn to litigation, many scholars have used a political process in their studies. Following paradigms of social movement research, they look at resource mobilization and legal and political opportunities.
Legal opportunity structures[19] refers to tools within the legal system that increase actors' likelihood of using litigation.[20] Many scholars have argued that the law is more likely to be mobilised when legal opportunity structures are strong and favourable to strategies of legal mobilization:[21] the greater the opportunity, the greater the will of the relevant actor. This is only one possible way of explaining the phenomenon, because the equal but opposite is also documented: in structural adversity, the will to mobilise increases.[22] What this brief discussion shows is that the literature has not identified all-

[16] A classic critique is Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (2nd ed, University of Chicago Press 2008).
[17] Lisa Vanhala, 'Legal Mobilization', *Oxford Bibliographies* (Oxford University Press 2011) <https://oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0031.xml> accessed 11 April 2023.
[18] Antoine Vauchez, 'The map and the territory: Re-assessing EU law's embeddedness in European societies' (editorial) (2020) 27(2) Maastricht Journal of European and Comparative Law 133-136.
[19] Chris Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9 Journal of European Public Policy 238; Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK: The Paradox of Legal Mobilization by the UK Environmental Movement' (2012) 46 Law & Society Review 523.
[20] Emilio Lehoucq and Whitney K Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?' (2020) 45 Law & Social Inquiry 166.
[21] Rhonda Evans Case and Terri E Givens, 'Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive' (2010) 48 JCMS: Journal of Common Market Studies 221.Gesine Fuchs, 'Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries*' (2013) 28 Canadian Journal of Law and Society / La Revue Canadienne Droit et Société 189; Lisa Vanhala, 'Fighting Discrimination through Litigation in the UK: The Social Model of Disability and the EU Anti-discrimination Directive' (2006) 21 Disability & Society 551.
[22] Vanhala, n 19.

encompassing and durable 'laws' of the kind that a theoretical physicist could find, but rather 'mechanisms' (to use the definition by Tilly[23]), that is, frequently occurring patterns of behaviour.[24]

Turning now to the question of who, where, and under what circumstances activates rights in third countries, the literature on legal mobilization in the EU provides lessons of methods and of substance that may be a useful starting point (do they apply for rights activation in third countries?).

Lessons of methods are the following three: there is a need for a perspective external to law in order to understand the development of the law itself; that perspective is best understood from what is called 'methodological individualism', or sometimes referred to as microhistories; scholars should not underestimate the power of contingencies.

The first lesson of method of the studies on legal mobilization is that it is necessary to take a step out from traditional legal science. The study needs to draw together a mixture of history, psychology, sociology (and a dose of storytelling). It is usual to use methods, such as interviews, that do not belong to the 'arsenal' of the traditional legal scholar.[25]

Methodological individualism posits that all explanation in social science should refer, in principle, to the choice of individuals. And it is on individuals, or micro-histories, that accounts usually focus. Many works on EU legal mobilization show the role of one person (his desires and beliefs) in shaping, influencing, or creating the circumstances for a judgment. This 'one person' could be a lawyer (such as Stendardi in Amedeo Arena's account of *Costa*[26]) or a judge such as the incumber at the European Court of Justice, as the work of judicial biography by Fritz[27] or Phelan[28] show).

It is by now sufficiently well-documented also in European law studies that contingency plays a bigger role than a simplified, teleologically oriented grand narrative would tolerate. To make one obvious but not trivial example, who is sitting on the bench of a court makes a difference for the outcome of the case,[29] and this is not the result of any grand design. Scholarship on legal mobilisation is particularly promising because it looks for the microfoundations of macrobehaviour, to use the happy formulation by Nobel prize winner Schelling.[30] The quest for 'mechanisms' rather than for all-encompassing laws suggests that it is important not to look for the 'big picture' at all costs.

Lessons of substance are the following two: legal mobilization has shaped EU law owing to the work of advocates who used strategic litigation to favor certain interests; for that process, the context, and in particular national law, is important.

If the architecture of the Treaties was shaped by influential individuals (the likes of Jean Monnet, for example), the constitutional bargain between member states was and remains 'incomplete, vigorously dynamic, and unstable'.[31] This is when judges, lawyers, private companies as litigants have influenced

[23] Charles Tilly, 'Mechanisms in Political Processes' (2001) 4 Annual Review of Political Science 21.
[24] Jon Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* (2nd edn, Cambridge University Press 2015) 2 <https://doi.org/10.1017/CBO9781107763111> accessed 22 April 2022.
[25] Michal Ovádek, 'The Making of Landmark Rulings in the European Union: The Case of National Judicial Independence' [2022] Journal of European Public Policy 1.
[26] Amedeo Arena, 'From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL' (2019) 30 European Journal of International Law 1017.
[27] Vera Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952-1972): une approche biographique de l'histoire d'une révolution juridique* (Vittorio Klostermann 2018).
[28] William Phelan, 'The Promise of Judicial Biography for the Study of the European Court of Justice' in Rossana Deplano and others, *Interdisciplinary Studies of European Union Law: A Research Handbook* (Edward Elgar Publishing forthcoming).
[29] Arena n 26.
[30] Thomas C Schelling, *Micromotives and Macrobehavior* ([New ed] with a new preface and the Nobel Lecture, Norton 2006).
[31] Tridimas, 'Wreaking the wrongs: Balancing rights and the public interest the EU way' (Columbia Journal of European Law, forthcoming).

the evolution of EU law. A rich and vibrant scholarship is engaged in showing how exactly this happened.

Historical research has shown that the Dutch legal system (and recent changes in it) as well as the legal culture provided the perfect ground for courts to refer preliminary questions that resulted in landmark judgments by the ECJ.[32]

3. Balancing interests, rights, and values in EU external relations law

Since EU primary law does not provide a rule on how to balance rights with interests and values – if anything, sometimes it merges, sometimes it distinguishes some of the categories – reference may be had to selective examples of acts adopted by EU institutions: trade agreements, other acts of secondary law, and sanctions.

3.1. The case of trade agreements

In the case of trade agreements, the choice of the level of protection of public interests is left to the EU institutions. This may entail an act of balancing between interests and rights. The determination of a Union's interest may lead to a restriction of a freedom: either an internal market freedom, that is one of the 'fundamental freedoms', or a right that would otherwise be enjoyed by a third country national (as could be a restriction to free movement of capital). There is both an internal (to simplify: for EU citizens) and a global (to simplify: for rights in third countries) dimension in the rights at stake in EU trade agreements. Trade agreements by the EU must also respect (*ius cogens*[33]) norms of international law. In *Front Polisario*, the Court found that EU trade agreements cannot be concluded in violation of the principle of self-determination. For procedural reasons, it did not go as far as to explicitly state that a group of third country nationals has a right (derived from international law and which cannot be ignored by EU law) that is actionable in EU courts, but this would be a very plausible reading of the judgment.[34]

Lenaerts, Gutierrez Fons, and Adams link this power of the EU legislator of 'balancing' to the democratic element in the EU: 'it is without prejudice to the possibility for the EU, within the scope of its competences, to negotiate harmonisation of such levels of protection [of a public interest that led to the introduction by the EU legislator of regulatory restrictions in the sphere of the internal market] with third countries. Such harmonisation by no means undermines the functioning of the EU as a democratic political system because an international commitment of the EU to that effect is subject to the consent of the European Parliament [Art. 218 (6), first subparagraph, a), TFEU].'[35] Those authors mention Opinion 1/17 to be an authority for this proposition.[36] In practice, it means that the level of protection, that is the balancing between rights or between rights and interests, can be done by the EU but cannot be left to an authority situated outside the EU judicial system, as could be, for example, a multilateral investment tribunal.

When the balancing is done by the legislator, then EU courts merely acknowledge as much, unless the validity of the act in question is challenged. But if this deference to the legislator is a reflection of the democratic principle, then it is more difficult to square it with the fact that a similar deference is

[32] Karin van Leeuwen, 'Paving the Road to "Legal Revolution": The Dutch Origins of the First Preliminary References in European Law (1957-1963)' (2018) 24 European Law Journal 408.
[33] Enzo Cannizzaro, 'In Defence of Front Polisario: The ECJ as a Global Jus Cogens Maker' [2018] Common Market Law Review 569.
[34] Case C-104/16 P, Council of the European Union v. Front Polisario, Judgment of the Court (Grand Chamber), of 21 December 2016, EU:C:2016:973.
[35] Koen Lenaerts, José A Gutiérrez-Fons and Stanislas Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) 81 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law 47 fn 85.
[36] The reference is to para. 148 *in limine* of Opinion 1/17.

shown, in the case of restrictive measures, to the balancing made by the Council (see section below on sanctions).

3.2. The case of the anti-coercion instrument, the international procurement regulation, the foreign subsidies regulation

Other instruments of secondary law leave some discretion to the EU institutions to carry out a balancing between rights and interests or values.

The international procurement regulation[37] establishes rights (applying price adjustment measures to certain tenders) for EU operators in third countries, also by enabling the European Commission to monitor the fairness of procurement procedures in those countries. The rationale of the international procurement regulation is to protect the rights of companies established in the EU. The way this is done is by pushing for reciprocity – if your procedures are discriminatory, so will be ours: the opportunity to restrict, in compliance with EU law, the right of third countries' natural or legal companies is built into the very purpose of the international procurement instrument.

The foreign subsidies regulation[38] adopts a similar rationale: EU operators must be defended from the subsidies granted by third countries to the companies, operating in the EU internal market, that those countries control. The regulation does not establish a right for EU operators but rather empowers the Commission to adopt measures (which are restrictions to the freedom of establish or the free movement of services) against the companies who have benefitted from unlawful third country subsidies.

What the international procurement regulation and the foreign subsidies regulation have in common is that they empower the European Commission to adopt measures that confer rights to EU operators and thereby restrict the rights of third country companies. In both instances, the Commission has some discretion in deciding when to activate the protection. The foreign subsidies regulation entrusts the Commission to carry out a balancing exercise between the negative and positive impact on the internal market of a foreign subsidy (Article 6). There are procedural indications on how the Commission ought to carry out the assessment, but the ultimate word is left to this institution.

The proposed anti-coercion instrument goes one step further, stating that the Commission may choose to take action when it considers it to be 'in the Union's interest',[39] thereby leaving even more discretion to the Commission. This, of course, does not mean that the Commission has the sole power to determine unilaterally the Union's interest, because its decision is still subject to the control by the Court. In particular, in this as in the aforementioned cases of Commission's discretion, it may be envisaged that a third country national may wish to challenge the Commission's decision.

It was mentioned that deference to the balancing made by the legislator is predicated on the democratic character of the institution. The European Commission has democratic credentials (the direct links to the European Parliament) that do not call into question the democratic nature of the decision-making progress, even when these institutions enjoy (significant) discretion in its action.

3.3. The case of sanctions

---

[37] Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries COM(2016) 34 final
2012/0060(COD)

[38] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

[39] Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries COM(2021) 775 final 2021/0406(COD) Article 7(1)(c).

The case law of the Court in the area of measures restricting, in whole or in part, economic relations with third countries or groups of third countries show that it is necessary to engage in a careful balancing of EU interests with EU rights and values. This is because the interests of the EU are as ascertained and pursued by the Council – which enjoys 'a broad discretion in areas which involve the making by that institution of political, economic and social choices, and in which it is called upon to undertake complex assessments'[40] – but they will occasionally clash with the interests of someone else (natural or legal persons, or third countries), or with some EU values. The below provides an overview of this balancing, but one ought to remember that, in the area of sanctions, the *balancing of rights, interests and values is usually done, in first instance, by the Council, and in that case the Court merely monitors that the general principles of EU law are complied with, limiting itself to a rather formal scrutiny, without really calling the balancing into question.*

The Court has clarified that the measures pursuing the EU interests must comply, like any other act of the EU institutions, with the fundamentals of the EU constitutional order. This means that the Council does not enjoy unfettered discretion in the pursuit of EU interests, but its action are firmly limited by the principle of conferral and institutional balance, over which the Court monitors – by the limits of the objectives provided for in Article 3(5) and 21(2) TEU, in other words. In particular, there is no objective or interests, no matter how fundamental, which is capable of subtracting EU ipso an act from judicial review. In Kadi I, the Court clarified that even EU restrictive measures, which are adopted for the safeguard of EU international security interests, are firmly within the EU legal order and their validity is to be assessed by reference to that order, and not to a different system (such as international law). Provided that restrictive measures are adopted 'against natural or legal persons' they must comply with the fundamental rights guarantees of the EU legal order. In this regard, the Court has nonetheless adopted a lenient approach to proportionality, noting that since the maintenance of international security is of vital importance, only 'manifestly inappropriate' measures will be struck down.

This rule is not without (highly contested) exceptions: there are certain EU acts not subject to judicial review. These are CFSP acts, which pursue the EU foreign policy interests but are subtracted from judicial review – provided that they are not restrictive measures against natural or legal persons. Some measures escape judicial review: for example, sectoral measures prohibiting trade between EU nationals and foreign nationals engaged in a certain industry considered to be key to the sanctioned country's economy.

Precisely to ensure that the EU respects its fundamental principles (including the protection of human rights) even when pursuing its security interests, the Court will scrutinize restrictive measures against natural or legal persons to monitor compliance with fundamental rights. Thus, third country nationals are allowed to challenge EU acts and rely, for example, on the Charter when doing so. When it decides cases on the validity of restrictive measures, the Court will balance the fundamental rights of natural or legal persons against the EU security interests. As anticipated, in practice the Court does not substitute itself to the assessment made by the Council, leaving a wide margin of discretion to the institution instead. A form of monitoring compliance with fundamental rights is nonetheless there.

EU institutions are called upon to balance the pursuit of EU interests with the fundamental values of the EU. Thus, in *Venezuela*, the Court was called upon to adjudicate whether a third country constitutes a 'legal person' for the purposes of Article 263 fourth paragraph TFEU, and thus whether a sovereign country can challenge an EU sanction. The Court made it clear that the rule of law is a value which trumps considerations of reciprocity (as the Council had argued that it should). Regardless of whether the EU can challenge Venezuelan act (something which may be objectively in the EU's interests), Venezuela must be able to access effective judicial review in EU courts. The Court in fact recalled that 'the very existence of effective judicial review designed to ensure compliance with

[40] Case C-72/15 *Rosneft* para 113.

provisions of EU law is inherent in the existence of the rule of law',[41] which is a value of the EU both internally (Article 2 TEU) and, so to speak, externally (Article 21 and 23 TEU). *RT France* is another case in which EU interests conflict with some EU values. It is in the EU's interests that the war of Russia against Ukraine, which the EU itself considers to be a war of aggression in violation of international law, ends. A way to pursue this interest is to reduce support for the Russian position, including by prohibiting some media companies from sharing Russia's narrative.[42] When it comes to values, the EU is founded on respect for democracy (Article 2 TEU), and it is an association of democracies, and therefore it is based upon (and must protect) freedom of expression.[43] The EU interests and the EU values align, instead, in so far as the EU pursues the value of the promotion of peace (Article 3(1) TEU) as well as the observance of (its interpretation of) international law (Article 3(5) TEU) when it aims to end the war in Ukraine.[44]

The Court also ensures that the EU interests are in line with EU values consisting of norms. For example, the Court monitors that restrictive measures are not adopted in breach of international agreements, including bilateral agreements with the countries of nationality of the person challenging the measures. This is because the principle that *pacta sunt servanda* must be respected even when the EU pursues international security interests. Thus, In *Rosneft, Gazprom* and *Kiselev* the CJEU held that the provision of the EU-Russia agreement permitted the adoption of restrictive measures targeting the Russian energy sector,[45] and the head of a major Russian media outlet respectively,[46] which the EU adopted 2014, with a view to bring Russian action to a stop over the escalating conflict in Ukraine.

4. Conclusion

The purpose of this paper was to examine the relationship between rights, interests, and values in the context of EU external relations law, with particular emphasis on how these elements interact and shape EU foreign policy. By analyzing both the legal and political dimensions, this paper sought to highlight the role that law plays in the EU's foreign affairs, which contrasts sharply with the more politically driven nature of U.S. foreign policy.

In the EU, law shapes policy in ways that often elevate technical legal considerations over political decision-making. This results in a foreign policy where the protection of fundamental rights, especially those of third-country nationals, is balanced against the pursuit of broader EU interests and values. The complexity of this balancing act is evident in areas such as trade agreements and sanctions, where EU institutions must navigate competing geopolitical interests and legal obligations.

The concept of rights activation was the key theme through which the interaction was analysed. The paper explored how EU-derived rights are mobilized by individuals and groups, both within the EU and in third countries. This activation can take various forms, from formal litigation in EU courts to non-legal avenues such as boycotts and advocacy campaigns. This broader understanding of rights

[41] C-872/19 P *Venezuela* para 48.

[42] Recitals 9 and 10 of the contested act: 'Those media outlets are essential and instrumental in bringing forward and supporting the aggression against Ukraine, and for the destabilisation of its neighbouring countries. In view of the gravity of the situation, and in response to Russia's actions destabilising the situation in Ukraine, it is necessary […] to urgently suspend the broadcasting activities of such media outlets in the Union or directed at the Union'. Below I discuss how the prohibition may be self-defeating.

[4343] It shall be recalled that the Court found that the activities of RT France are in fact covered by freedom of expression. The fact that what they do may be propaganda prohibited by international law (Article 20(1) ICCPR) was only considered as weighing in favour of the balancing made by the Council between freedom of expression and the pursuit of international peace and security. T-125/22 RT *France v Council* para 212.

[44] T-125/22 RT *France v Council* para 54: the Council made clear at the hearing that the measure seeks 'to safeguard the values, fundamental interests, security, independence and integrity of the European Union' and 'to preserve peace, prevent conflicts and strengthen international security'.

[45] C-72/15 *Rosneft* EU:C:2017:236 para 110 ; Cases T-735/14 and T-799/14 *Gazprom* para 113.

[46] T-262/15 *Kiselev* Para 34

activation provides new insights into the mechanisms by which EU foreign policy can be influenced by external actors, challenging the view that EU external relations are solely dictated by institutional priorities.

The analysis of legal mobilization in the EU further demonstrated how individual actors, including citizens, organizations, and businesses, can strategically use legal opportunities to shape EU law and policy. The role of courts, particularly the European Court of Justice, in upholding fundamental rights while balancing them against EU interests, underscores the judiciary's influence in shaping the legal landscape of EU foreign relations.