Report on the academic seminar "Activating EU rights globally – Legal Mobilization in third countries".

14th of April 2023, online event

Author: Romane Lieber, LLM; Peer review: Project operation team

Contents

Executive Summary 3
Overall results and future action 3
Panel contributors 3
Context and Opening of the Seminar 5
Introduction of the event and link to JMCE EUICR 5
Panel one: "Setting the stage" 5
Contribution of Dr Luigi Lonardo: "Rights, interests, and values in EU external relations law" 6
The role of rights in EU external relations 7
Contribution of Mark Konstantinidis: "My rights keeper? EU enforcement of fundamental rights compliance in third countries" 7
EU-concluded International Economic Agreements 7
EU-UK Trade and Cooperation Agreement 8
Magnitsky regime 8
Discussion lead by Professor Enzo Cannizzaro 9
Questions 9
Answer by the speaker(s) 10
Panel two: "Activation through litigation" 11
Contribution of Francesca Finelli: "EU sanctions – the litigation in third countries" 11
Who can challenge EU sanctions? 11
What can be challenged? 12
Contribution of Professor Reingard Zimmer: "Activation of social chapters in EU trade agreements" 12
Social chapters in trade agreement: Content and Evolution 12
The success of civil society mechanisms? 14
Discussion led by Dr Virginia Passalacqua 15

Questions 15
Answer by the speakers 15
Panel three: “Activation not through litigation” 16
Contribution of Dr Benedetta Voltolini: “Activation of EU rights abroad: lobbying and boycott campaigns” 16
Contribution of Dr Yuliya Kaspiarovich: “How the Swiss system of direct democracy affects ‘activation of rights’”. 17
Discussion led by Professor Simon Schunz 18
Questions 18
Speakers answer. 19
Closing of the Seminar 19
Literature and further reading 20

Executive Summary

This seminar, organized under the auspices of the Jean Monnet Centre of Excellence for European Integration and Citizen's Rights (JMCE EUIR) by one of the co-principal investigators of WP4, Dr Luigi Lonardo, had the primary objective of exploring the potential to conceptualise the significance of rights within the realm of EU foreign policy. Thus, aiming at contributing from a legal standpoint to political science literature. The focal point of this seminar revolved around non-EU countries situated beyond the scope of the European Neighbourhood Policy. The seminar was aligned with the objectives of Work Package 4 (WP4), which seeks to investigate the potential for the diffusion of rights through the EU's economic influence and geographic autonomy, and the subsequent indirect promotion of citizens' rights within its international trade agreements.

Overall results and future action

The seminar focused on the theme of the JMCE by showing how "right activation in EU foreign policy" can be examined through the interplay between internal (judicial protection in EU courts, EU external relations law) and external (motivations of actors in third countries) perspectives. The contributions helped providing a robust analytical framework for the examination of empirical case studies. In particular, the significance of legal opportunity structures in driving rights-based actions was established. This is to be completed by a micro-sociology of the behaviour of relevant actors in third countries, which can only be provided by the observation of significant quantities of empirical material. There is also a need to strike a complex balance between promoting and protecting values without imposing them on other nations, albeit how to do so remains to be explored.

The seminar showed the crucial role of empirical research in providing concrete insights to inform and enrich the emerging analytical framework. The incorporation of empirical data will not only validate the theoretical constructs but also enhance the practical applicability of the discussions, fostering a more holistic understanding of the complexities involved in the activation of rights in the context of EU external relations. The event convenor, co-PI of WP 4, Luigi Lonardo, is therefore seeking to add more empirical case studies to the contributions that were aired during the event with a view to publish all the material as part of a special issue in a peer-reviewed academic journal of interdisciplinary nature.

Panel contributors

The seminar was composed of three panels with each a chair and a discussant.

Panel 1

Dr Luigi Lonardo is a lecturer in European Union Law at University College Cork (UCC) and Acting Director of the Centre for European Integration. His main research interests are the European Union's foreign affairs, from a legal, historical, and political perspective, as well as the judicial protection of fundamental rights in the European Union.

Mark Konstantinidis (Kings College London) is a doctoral candidate and Visiting Lecturer in Law at King's College London. Mark is currently serving as Senior Editor of the European Federation of Investment Law and Arbitration (EFILA) Blog.

Professor Dagmar Schiek acted as chair of this panel. She has been a professor of EU law at UCC since 2020 and starting the 1st of November she will be a full professor of EU law at University College Dublin. Her principal research interest is in EU law and its socio-economic impact in and beyond the EU.

Professor Enzo Cannizzaro acted as a discussant in this panel. He is a full professor of International Law and European Union Law at the University of Rome "La Sapienza". His academic work has mainly focused on general aspects of international Law and European Union law, and he has written extensively in both fields.

Panel 2

Francesca Finelli is a PhD Candidate at the University of Luxembourg and the University of Pisa. Her research focuses on international and EU sanctions.

Professor Reingard Zimmer is a professor of European and international law at the Berlin School of Economics and Law. Her research interests lie in anti-discrimination law, collective employment law, law of international labour organisation and transnational collective bargaining.

Professor Peter Van Elsuwege acted as chair of this panel. He is a professor of EU law and Jean Monnet Chair at Ghent University. His research activities essentially focus on the law of EU external relations and EU citizenship.

Dr Virginia Passalacqua acted as the discussant of this panel. She is an Assistant Professor of EU law at the University of Turin. Her research interests are EU law, migration law and legal mobilisation.

Panel 3

Dr Benedetta Voltolini is a lecturer in European Foreign Policy at King's College London. Her research focuses on lobbying in EU foreign policy, the EU and the Arab-Israeli conflict and processes of framing and knowledge construction in EU foreign policy.

Dr Yuliya Kaspiarovich is an Assistant professor at IE University (Madrid, Spain). Her research interests cover the interaction between EU and International Law, International Investment Law, European institutional and constitutional Law and EU external relations Law.

Professor Andrew Cottey acted as chair. He is a professor at the Department of Government and Politics at University College Cork. His research is in the areas of international relations and international security.

Professor Simon Schunz acted as discussant. He is a Professor in the EU International Relations and Diplomacy Studies (IRD) Department of the College of Europe. His research interests focus on the European Union's external action and environmental sustainability.

Context and Opening of the Seminar

Introduction of the event and link to JMCE EUICR

Professor Schiek introduced the seminar within the broader framework of the JMCE EUIR. In light of several EU crises, the centre's research delves into the potential of EU-derived rights to enhance the legitimacy of the European Union, emphasizing a citizen's approach. She highlighted that the research primarily centres on three key pillars: rights, activation, and legitimacy. Additionally, the centre's scope encompasses an innovative selection of geographical regions, exploring rights not just within the EU but also in the EU's western and eastern neighbouring regions, as well as on a global scale. Professor Schiek emphasised that the seminar is part of WP4 which focuses on the global scale.

She presented the different events of the JMCE.

Panel one: "Setting the stage"

The first panel of the seminar focused on "Setting the stage" and introduced legal mobilisation of EU-derived rights in third countries. Professor Dagmar Schiek chaired the panel that constituted contributions from Dr Luigi Lonardo and Mark Konstantinidis. Finally, Professor Enzo Cannizzaro led the discussion following the contributions.

Contribution of Dr Luigi Lonardo: "Rights, interests, and values in EU external relations law"

Dr Lonardo introduced his presentation which followed the purpose of framing the main themes and the main questions of the seminar. The seminar revolves around the theme of "right activism in EU foreign policy" and examines the role of rights in driving global actions.

Dr Lonardo emphasized the differentiation between an "inside" and an "outside" perspective. He elaborated that the outside perspective focuses on rights activism in third countries, delving into the "who," "where," and "under what circumstances" of such activism. Conversely, the inside perspective scrutinizes the role of rights within litigation in EU courts, exploring questions like "who are the third country natural or legal persons," "when," "why," and "with what arguments" they engage EU-derived rights in EU courts.

Dr Lonardo underscored that the concept of rights, traditionally, encompasses all claims that are upheld by positive law and can be legally enforced. This definition is comprehensive and encompasses human rights. He then referenced Lisa Vanhala's perspective on the activation of rights, which transcends the conventional positivist understanding of law.

Dr Lonardo proceeded to elaborate on the concept of legal opportunity structures, emphasizing that the activation of rights initiates through various processes. Two particular mechanisms hold significant importance: firstly, when the legal system offers more opportunities, it tends to foster increased activism. Conversely, the opposite mechanism has also been observed – when the legal system presents more obstacles, it tends to spur greater activism.

He proceeded to outline takeaways from legal Mobilization in EU Law that he divided between "lessons on methodology" and "lessons on substantive matters". Relating to methodology, he argued that an external perspective coupled with an internal legal standpoint should be adopted. As for substantive matters, he argued that while the focus has been on EU internal policies, the insights

acquired can be applied to external policies as well. Notably, lobbying efforts or the influence of companies advocating for specific interpretations of EU law (mobilization through litigation) have played a substantial role.

Dr Lonardo emphasizes the distinction between rights activism and rights activation, acknowledging that these concepts partly overlap, yet not all rights activation requires activism. In other words, social movements are not always a prerequisite for rights activation. This seminar offers two perspectives on exploring this issue.

The first perspective is internal, which delves into the role of third-country natural and legal persons in initiating litigation in EU courts. It seeks to answer questions like: Who are these individuals or entities activating EU rights in EU courts? When do they do so, and why? What are the grounds for their actions?

The second perspective is external, focusing on legal mobilization in EU foreign policy. This involves examining the activation of rights in third countries, exploring who engages in such actions, where and under what circumstances, and why they choose to rely on EU-derived rights.

Both of these perspectives are essential, as rights activism in third countries is a multifaceted concept, encompassing two interconnected dimensions.

The role of rights in EU external relations

Dr Lonardo underscored that the issue at hand goes beyond mere consideration of rights; it necessitates a delicate equilibrium with the core values of the European Union, as outlined in Article 2 TEU, Article 5 TFEU, and Article 21 TEU. This equilibrium is actively maintained by EU institutions during the adoption of secondary instruments. For instance, in the context of trade agreements, when the EU may impose restrictions on the liberties and rights of third-country nationals, these limitations must conform to the fundamental rights, which are the cornerstone of EU principles. Failure to comply with these fundamental rights can trigger countermeasures.

The EU institutions are also bound by the non-negotiable jus cogens rules of international law. In cases concerning trade agreements, the European Parliament is responsible for establishing the threshold of protection for the public interest, effectively striking a balance between the rights and values of the EU and its overarching interests. In other scenarios, this intricate balancing act is delegated to either the Commission or the Council, posing potential challenges in terms of democratic oversight. When it comes to imposing sanctions, the Council faces the intricate task of harmonizing interests and rights, adding complexity to the equation.

Conclusion?

Contribution of Mark Konstantinidis: “My rights keeper? EU enforcement of fundamental rights compliance in third countries”

Mark Konstantinidis introduced his contribution by recalling the role of fundamental rights in EU external policy. He recalled the foundational value of the EU expressed in Article 2 TEU, which consists

of the "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights". However, he argued that values including fundamental rights are not policy objectives.

As for the EU 'raison d'être', the EU follow the aim "to promote peace, its values, and the well-being of its people". (Article 3(1) TEU). Mark Konstantinidis argued that it also relates externally, as when looking at Article 3(5) TEU, Article 21(1) and 21 (2)(a)-(b) TEU, the EU must observe and respect international law.

EU-concluded International Economic Agreements

Mark Konstantinidis emphasised that the EU values are part of the project of trade agreements. Fundamental rights have been implemented under the "sustainable development" considerations. The aim is to reconcile increased trade with environmental standards. Thus, in this context, "sustainable development" relates mainly to employment rights. They are international law obligations as they are included in international agreements.

He then went on to illustrate the enforcement of such commitments. We can find sustainable trade obligations in Chapter 13 of the EU-Korea Free Trade Agreement. To implement the said agreement, Korea had to change national legislation. We can see similar mechanisms in the EU-China Comprehensive Agreement on Investment such as labour standards and investment (Section IV) but given the particular human rights concerns in China, these mechanisms were insufficient.

EU-UK Trade and Cooperation Agreement

Mark Konstantinidis then focused on the EU-UK Trade and Cooperation Agreement and fundamental rights in the post-Brexit era.

Part three of the said agreement provides for law enforcement and judicial cooperation, prevention of crimes and combatting terrorism. Article 524 TCA suggests that cooperation is based on the protection of human rights and on the importance of giving effect to the rights and freedoms of the European Convention of Human Rights domestically. The essential elements of the EU-UK partnership are expressed in Article 771 TCA and include "democracy, the rule of law and respect for human rights" including "international human rights treaties to which they are parties" (Article 736 (1) TCA). Termination of the agreement in case of a "serious and substantial failure" (Article 772 TCA). Thus, fundamental rights are part of the essential elements of the agreement and cover the entirety of the relationship, trade and non-trade. However, Mark Konstantinidis argued that it has been designed not to be used but to create an effect of incentive compliance. In the context of the TCA, the mechanisms included are keeping the playing field level. The TCA does not aim at exporting EU fundamental rights.

Magnitsky regime

The EU regime is governed by Council Decision 2020/1999 and Council Regulation 2020/1998 which seek to address serious human rights violations and abuses worldwide. For instance, this includes crimes against humanity, genocide, torture, extrajudicial executions and arbitrary arrests (Article 1(1) (a)-(c) Council Decision). It must be "widespread, systematic" abuses such as civil rights violations.

The measures can target anyone responsible for or providing support relating to abuses or violations and include travel ban (Article 2 decision), assets freeze (Article 3(1) Decision) and prohibition of making funds or economic resources available to targeted individuals (Article 3(2) Decision). The measures are adopted by the council unanimously upon a proposal of Member States.

To conclude, Mark Konstantinidis argued that promoting human rights is enhanced within executive discretion. This recognition of executive discretion seems to be shaken by the EU institutional commitments that promote human rights globally under Article 21. Secondly, by enforcement limitations and lastly, the discretion can be shaken by geopolitical weighing.

To conclude, the EU enforcement of human rights in third countries seems to be subjected to quite a literal triangle.

Discussion lead by Professor Enzo Cannizzaro

Questions

Professor Cannizzaro started the conversation by stressing that despite all efforts of scholarship, problems remain on the following: Where to draw the line between protection and promoting our values? And between imposing our values abroad?

He reminded the focus of the seminar on activation and legal mobilisation. He recalled Dr Lonardo's contribution, to the narrow and broad sense of activation. As a lawyer, he argued, he has adopted the narrow conception of the activation of rights and considers that rights can be activated through legal processes. First, it is important to define which rights are we talking about. The internal rights of the EU such as the Charter or are we talking about international rights and values as article 3(5) TEU includes both.

Therefore, he argued that the lines separating the protection of our rights and imposing rights is a simple line which is difficult to define. On one hand, we have the protection of values, and on the other hand, we have to avoid the imperialism of imposing values. The inclusion of the values in the EU constitutional setting rests not only on a political process, but it is also a legal process which radically changed the EU competencies.

The functional dimension of the EU competencies must be objectives and paradox: objectives are those set by treaties. However, the value enlarged the set of objectives that the EU should pursue. In his view, it is a very broad view of values.

Mark Konstantinidis stressed that the global system (Magnitsky system) is based on international law. He also pointed out that in the conventional system, the EU is very attentive to imposing compliance with international law and conditions of proportionality. Therefore, he believes strongly that the value of the EU only enlarges the functional dimension of the EU competencies but does not allow any permissible extraterritorial application. One thing is to activate, another thing is to activate actions against their will. Promoting values abroad is one of the tasks the EU has, but its activity must be held within the constitutional settings to avoid imperialism and extraterritorial application.

Professor Peter Van Elsuwege wondered about the traditional human rights clauses. Mark argued that it is designed not to be used, thus, he wondered, what is the point of this kind of clause? He wondered if any kind of effectiveness could be derived from it. He also suggested that we distinguish between human rights broadly and sustainable development. What would be the effectiveness outside of sustainable development considerations?

He also wondered about the institutions. Both speakers referred to the institutions and how the parliament plays a crucial role in respect of trade agreements. Thus, he questioned, what kind of role can we expect from institutions?

Dr Virginia Passalacqua questioned the choice of Dr Luigi Lonardo, "Why choose to focus on activation?". She argued that the association between activation and activism is misleading. Activism entails a political aim, bigger than just an individual claim. She then asked whether there exists a broader organisation in third countries that has the goal of activating EU rights abroad. She also wondered about how Dr Luigi Lonardo sees the legal opportunity structure of EU external law as while she can relate to instruments, tools or principles that might help people use the law, those processes are internal.

Professor Dagmar Schiek acclaimed the distinction between promoting and imposing rights from Professor Cannizarro. She asked what the remedy against imperialism is. As rights can be misused by the EU to promote the competencies advantage of their economic actors. If you take this activation and mobilisation agenda, there must be a remedy against the accusation that the EU is only promoting its own power and not in the interest of the people. Professor Schiek emphasised the heavy task of WP4 "How do you get the people, the institutions in the global activation?". She stressed the necessity to consider opportunity structure but also rights in areas of communication as a medium to promote political discourse that would activate rights in a more holistic dimension.

Answer by the speaker(s)

Mark Konstandinis first answered Prof Van Elsuwege's questions relating to human rights clauses. He argued that the termination is due to political reasons rather than economic ones. The main function of the clause is to provide a blueprint of what would happen in certain events but mainly it is incorporated in a political process and used in political discussion governing the parties. The function is political, the law in that regard is to be seen in its larger context.

As for Prof Van Elsuwege's point on sustainable development, Mark Konstandinis argued that there is an economic rationale for this kind of provision. There has been an evolution in terms of language and scope of protection over the last 10 years. The primary aim is to ensure a level playing field in the economic field. It also reflects the general desire of the EU to encourage compliance with human rights per se. Put importantly, through the integration of international law within the agreement by the EU, the EU is encouraging the engagement of third states with international law including in the context of multilateral organisations. It shows the EU's commitment to international law and shows that it is an objective of the EU in its own terms. They seek to reinforce existing international law structures.

As for Prof Cannizzaro and Prof Schiek's remark on imperialism, he argued that the EU take great care in ensuring and claiming legitimacy under international law. He referred to the Magnitsky regime and the decision from the council that makes claims relating to the international community (such as the

UN Convention on the Rights of the Child). He stressed that we could rather argue that the EU is claiming universal standards.

Dr Luigi Lonardo started by stressing that when thinking of this event, he wanted to avoid the discussion on EU imperialism as he wanted to see how law can contribute to external action as a field of study rather than take a normative stand on one approach.

He then answered Dr Passalacqua's first question relating to activation v. activism. He is interested in activism more broadly which also includes individuals activating their rights. He starts by considering the civil rights activism in the US campaign in the 1960s and strategic litigation. He mentioned *Roe v Wade*, which is a built case, as someone looking for a woman who had an abortion. He argued that the two dimensions are interlocked but he is interested in activism more broadly.

On Prof Cannizzaro's point, Dr Luigi Lonardo stressed that the line is very thin. If we look at the constitutional setting, and in particular, Article 3(5), the EU is "strictly observant of international law". This provides for an enormous amount of flexibility in the external action. The problem is how much further can the union grow, how we combat imperialism and how we contribute to this larger goal.

Professor Dagmar Schiek concluded on this panel by making a last remark. She stressed that external action is a way to avoid imperialism. When you look at the JMCE, she argued, it is how activation can enhance legitimacy. How far they can encourage civil society actors and individuals to make use of those broad human rights in international law?

Panel two: "Activation through litigation"

Contribution of Francesca Finelli: "EU sanctions – the litigation in third countries"

Francesca Finelli introduced her presentation which focused on the activation of judicial review from third countries. The focus was on restrictive measures or so-called sanctions. She stressed the relevance of Article 47 of the EU Charter of Fundamental Rights which provides for everyone's right to effective remedy. The charter does not contain geographical limitations as we have seen in the very famous Kadi case.[1]

For her contribution, Francesca Finelli focused on the question: "By whom exactly and under what conditions can the right to effective judicial protection be active from third-country nationals to challenge the validity of restrictive measures before the European Union Court of Justice? She first focused on "who", to then explored "what".

Who can challenge EU sanctions?

In addressing the question of who possesses the capacity to challenge EU sanctions, we must turn to Article 275(2) of the TFEU. This provision essentially enables third-country nationals to seek legal protection, both from their own countries and more broadly, on a global scale.

This concept has received a comprehensive interpretation by the European Court of Justice (ECJ). It's pertinent to consider who has previously contested the validity of EU sanctions before the court and their points of origin. At present, we have over 45 different regimes, which can be categorized as

[1] Kadi, Joined Cases C-402/05 P and C-415/05 P, 3 September 2008 ECLI:EU:C:2008:461

country-based or thematic regimes. There are notable variations between these regimes. The most hotly debated regimes involve nations like Syria, and Iran, and issues related to terrorism. Conversely, certain regimes, such as Mali, Somalia, and Sudan, have never been contested.

To illustrate how the activation of rights can differ from one regime to another, consider the example of Ukraine. Currently, Russian entities targeted by sanctions have challenged the validity of these sanctions before the ECJ. We have witnessed a growing number of such actions filed before the Court. This increase can be attributed to the European Union expanding the criteria for sanctions and designating more individuals. Additionally, Russian entities hold substantial economic and financial interests and share strong business connections with the EU. Therefore, their motivation to bring proceedings before the ECJ is not solely a matter of rights activation but is also driven by concrete economic interests.

In light of the case of Venezuela v. Council,[2] it is worth noting that even third countries can be recognized as legal entities. This development has opened the door for third countries to apply and directly challenge the validity of sanctions. It also extends this opportunity to individuals to challenge the validity of these sanctions.

What can be challenged?

Council Decisions under CFSP (Common Foreign and Security Policy) and Council Regulations, as outlined in Article 215 of the TFEU, are instruments employed by the Council to enact measures deemed necessary to achieve specific objectives. These instruments hold significant power in the realm of judicial scrutiny concerning restrictive measures.

When it comes to Council Decisions, they are subject to very limited judicial review, as stipulated in Article 24 of the TEU and Article 275 of the TFEU. This limitation arises due to their "individual nature" as opposed to "general application."

However, Council Regulations do not face similar restrictions in terms of judicial review. Applicants are required to fulfil the conditions specified in Article 263(4) of the TFEU, but there are no other significant limitations. The case Bank Refah Kargaran v Council underscored the need for coherence and sought to avoid asymmetries in the judicial protection of natural and legal persons.[3]

The Venezuela v. Council case is still pending, and it raises questions about whether Venezuela can activate judicial review and challenge the validity of sanctions. This case has established that third countries can indeed activate EU rights and challenge the validity of sanctions. It serves as a testament to the EU's legal authority extending beyond its borders and its influence in international law.

In essence, third countries have two avenues for engagement: they can challenge EU rights from within, thereby activating EU rights, or they can challenge the EU from the outside, which may trigger political dialogue. For instance, in the case of the EU-China agreement, sanctions have resulted in the freezing of the agreement, showcasing how external actions can influence international dynamics.

[2] Venezuela v. Council, C-872/19 P,22 June 2021, ECLI:EU:C:2021:507
[3] Bank Refah Kargaran v Council, C-134/19 P, 6 October 2020, ECLI:EU:C:2020:793

Contribution of Professor Reingard Zimmer: "Activation of social chapters in EU trade agreements"

Professor Zimmer's contribution focused on workers, trade unions and NGOs as actors to activate EU rights. She first gave an overview of social chapters in trade agreements, and then analysed the potential success of "civil society mechanisms".

Social chapters in trade agreement: Content and Evolution

Professor Zimmer first focused on social standards in labour or sustainability chapters. She stressed that all recent investment protection trade agreement from the EU and the US contains sustainability and social chapters. This includes north-north bilateral agreements but also, between north-south bilateral agreements. However, social chapters are rarely part of a south-south bilateral agreement.

The International Labour Organisation (ILO) counts thirty-five trade and investment agreements with labour provisions today. They refer to ILO core labour standards which only contain four basic principles: the freedom of association and the right to collective bargaining, the elimination of forced labour, the abolition of child labour and the prohibition of discrimination in employment.

As for labour standards in the sustainability agreement, Prof Zimmer stressed the exclusion of the sustainability chapter from normal dispute settlement mechanisms, including mechanisms of sanctions. Sanctions are possible only through a consultation or complaints mechanism. The complaints can be filed by the contracting parties such as the government, and not by representatives of civil society such as trade unions.

In the US Trade Agreement, the regular dispute settlement mechanisms apply to the sustainability chapter. However, Prof Zimmer stressed that dispute-settlement mechanisms are only applied in exceptional cases of the violation of labour standards and need to be linked to trade. The process is thus very long, and we can only find a few cases (cf. the case of Guatemala). To illustrate the prevalence of such chapters, Prof Zimmer referred to recent examples of EU or EFTA Bilateral agreements. She stressed that all EU or EFTA bilateral agreements have social chapters since at least the EU-Moldova in 2014.

As for complaint mechanisms, EU trade agreements do not usually provide a formal complaint mechanism for third parties. Furthermore, cases must be brought to national contact points which examine the case and might initiate further procedures. In consequence, cases can only be brought by institutions. It is also not clear whether a linkage of the social standard to trade issues would be required. In the famous Guatemala case, for instance, the assignation of trade unionists was declared to not have a linkage to trade and so created difficulties in forming a formal complaint.

To illustrate complaints mechanisms, Prof Zimmer took the example of several agreements: CETA, bilateral agreements EU-Peru and EU-Colombia, EU-South Korea, and EU-Singapore Free Trade Agreement.

Prof Zimmer first focused on the mechanism of enforcement of the CETA. The agreement provides for the establishment of the "Committee on Trade and Sustainable Development" for interparty dialogue on labour matters (Article 22.4). Civil society can submit requests to domestic advisory

groups on issues related to labour. (Article 23.8). However, it is unclear how these submissions will be handled. Finally, there are no sanctions for violations of labour sustainability provisions as the regular dispute settlement mechanism is expressly excluded from that chapter (Article 23.11).

As for the agreement between the EU and Colombia and Peru. She examined the chapter on sustainable development (Title IX). In Article 280 of said agreement, we can see that a contact point (280.1) and a "Subcommittee on Trade and Sustainable Development" (280.2), have to be established. They should comprise "high-level representatives from the administration of each party, and responsible for labour, environmental, and trade matters". If such a committee fail to exist, article 281 provides for consultations of domestic labour and environmental groups. While the procedure is not clearly defined, the dialogue with civil society should be once a year and stakeholders can make recommendations.

Prof Zimmer then focused on the chapter on sustainable development of the FTA EU and South Korea. Again, a contact point and a panel of experts have to be developed. In case of disagreement, a consultation is opened with the other party for ninety days. The complaint is examined by an ad hoc panel that will determine a potential breach of the FTA's sustainability chapter. The ad hoc panel then produce an interim and a final report. The FTA also provides for the consultation of domestic labour and environmental groups with the establishment of a "Domestic Advisory Group(s)" (Article 13.12.4) and the possibility for the board to consult stakeholders when it is "appropriate". However, there is no indication of what constitutes an "appropriate time" to consult stakeholders.

Lastly, Prof Zimmer mentioned the EU-Singapore Free Trade Agreements that follow the same procedure of monitoring as in the bilateral agreement with South Korea.

The success of civil society mechanisms?

In the second part of her contribution, Prof Zimmer analysed if these chapters represent a success for civil society. These chapters are commonly referred to as "Civil society mechanisms". Prof Zimmer argued that while they give a central role to civil society, civil society is understood broadly and includes labour, environmental but also business groups. Thus, it also contains representatives of the employer side.

These chapters are more important in countries without a tradition of social dialogue. Prof Zimmer stressed that they express the "cooperative" EU approach. However, some actors of civil society are critical to these chapters such as the representative of a Peruvian NGO that sees the EU civil society mechanisms as not designed for civil society to monitor the implementation of labour norms, but rather as an instrument for government to show civil society which actions, they have undertaken in the past months.

Therefore, Prof Zimmer questioned the goal of civil society meetings. First of all, it is not clear if they provide binding recommendations for the government. These mechanisms foster a dialogue between civil society members as some may not have a voice within the domestic political landscape. It is not clear whether these meetings focus primarily on the shortcomings in the government's compliance with the agreement or on providing information and detecting problems.

Lastly, she wondered if these meetings serve to buy off public support for trade agreements. She stressed the lack of clarity, and that role might change with time. We can see this dynamic with the North American Agreement on Labor Cooperation (NAALC). It was first created to gain support for the highly contested NAFTA. Studies showed that the use of the NAALC first started in the transnational advocacy networks and was used for the mobilisation between Mexican-Canadian society members.

In her conclusion, Prof Zimmer stressed that the role of civil society might be strengthened by this mechanism, especially in countries without a tradition of social dialogue. This does not implicate automatically, that the labour provisions are guaranteed in praxis. Furthermore, business groups should not be considered part of civil society as transnational companies take profits from trade and investment agreements, thus they are not on an equal stand with workers and NGOs. As complaints by trade unions or NGOs can only be brought to national contact points (domestic advisory groups), it is a higher hurdle for trade unions and NGOs. Resources are needed to document clear evidence. It remains unclear, whether social chapters could serve as a tool for the protection of the "oppressed".

Discussion led by Dr Virginia Passalacqua

Questions

Dr Virginia Passalacqua initiated the discussion by framing both contributions with the overarching question of how legal structures and procedures empower certain subjects over others.

In analyzing Francesca Finelli's paper, she commended the comprehensive database on sanctions and those challenging them. Dr Passalacqua stressed the need for graphical representations to provide a broader view of EU global action. She also raised questions about why some individuals or entities might be more interested in challenging sanctions than others, citing the example of Russia where financial interests play a role. She questioned whether legal mobilization literature could be used to investigate these dynamics. She noted that while financial means are crucial, other factors such as knowledge of EU law, or lack thereof, can also influence the decision to challenge sanctions. This led to the classic question in legal mobilization literature of why countries choose legal or political means. Dr Passalacqua also questioned the importance of Francesca Finelli's distinction between challenging decisions and challenging restrictions, particularly if successfully challenging restrictions might render the challenge to the council's decision redundant.

Moving on to Prof. Zimmer's presentation, Dr Passalacqua acclaimed the significant impact of social chapters in trade agreements, shaping labour conditions in third countries. She then inquired about the enforcement mechanisms available to civil society and the government's role in utilizing them. Dr Passalacqua also expressed interest in the historical perspective, noting positive changes and the potential for legal mobilization.

Dr Luigi Lonardo inquired to Prof. Zimmer about countries without a tradition of social dialogue, seeking information on these specific nations. He then turned his attention to Francesca Finelli and Dr Virginia Passalacqua, asking for their views on the role of the Court concerning judicial sanctions against Russia and Belarus.

Dr Yuliya Kaspiarovich directed her question to Francesca Finelli, pondering whether sanctions against Russia could stimulate counter-activation of rights, considering that less opportunity often leads to activation through litigation.

Professor Andrew Cottey asked Francesca Finelli whether the identity of those challenging EU sanctions makes a significant legal difference.

Answer by the speakers

Francesca Finelli began her discussion by highlighting the significance of distinguishing between challenging regulations and challenging council decisions, as exemplified in the case of Venezuela. In this case, Venezuela challenged the validity of an EU regulation, not a council decision. The reason for this distinction lies in the lower legal standing requirements for regulations. If Venezuela were to succeed in annulling only the regulation, member states would still be bound by the council's decision, creating further asymmetries. Francesca Finelli argued that this distinction should not exist and questioned whether it was arbitrarily established by the Court, as the treaties do not explicitly address this issue.

Regarding Dr Passalacqua's question about visual representations of the data, Francesca Finelli explained that creating visual presentations would be challenging due to the significant variation in the number of cases before the Court from one-third country to another. For instance, Iran has hundreds of cases before the Court, while Korea has none. She attempted to identify a correlation between the number of sanctions and legal actions but couldn't find concrete evidence.

Francesca Finelli also addressed the Court's role in cases involving Russia and Belarus. She noted that EU sanctions were rapidly drafted in response to Russia. She pointed out that the General Court has traditionally taken a more technical or radical approach when it comes to protecting the rule of law or EU values. The General Court has tended to follow previous case law. However, Francesca Finelli believes that the General Court has been more protective when it comes to the legality of sanctions.

In response to Prof. Andrew Cottey's question, Francesca Finelli explained that a distinction is made between designated and non-designated persons. Designated persons can include leaders like Putin or individuals associated with them, such as family members, banks, or legal entities supporting the regime. In cases involving Russia and Belarus, the scope of sanctions is so broad that non-designated persons have challenged their validity. The broader the restrictions, the more challenges are activated before the Court of Justice of the European Union. She mentioned the case Rt v France, which was the first time the issue of media outlets was discussed before the court.

Professor Reingard Zimmer provided clarification on several points. In response to Dr Virginia Passalacqua, she emphasized that international dispute settlement mechanisms apply only to the investment chapter of trade agreements, explicitly excluding the social chapter. She emphasised that EU trade agreements are based on cooperation rather than sanctions. Prof Zimmer noted a historical development where social chapters began appearing in EU trade agreements around 2010, but she questioned whether these chapters effectively enable the activation of rights.

Regarding Dr Luigi Lonardo's question about countries without a tradition of social dialogue, Prof Zimmer clarified that she was referring to social dialogue in the field of labour. She explained that in

some countries, like Germany, statutory provisions mandate consultation with social partners in labour law. However, this practice is not universal, as in the case of Indonesia, where there is neither a consultation mechanism nor a tradition of labour, trade unions, and management representatives sitting down together to discuss issues. Prof Zimmer emphasized the diversity of circumstances, making it difficult to assemble a specific list of countries in the same situation.

Panel three: "Activation not through litigation"

Contribution of Dr Benedetta Voltolini: "Activation of EU rights abroad: lobbying and boycott campaigns"

Dr Benedetta Voltolini emphasized that her presentation was rooted in a political science perspective. Her focus centred on the various strategies employed by non-state actors to activate their rights, building on her previous research regarding lobbying in external policy. With this paper, she primarily analysed how these diverse strategies interplay and intersect. She used the Israel-Palestine case as an example, a situation where global and EU mobilization is particularly noticeable, thus, it offered substantial evidence for examination.

Dr Voltolini pointed out that the literature on interest groups predominantly explores traditional forms of lobbying. They mainly consider whether non-state actors attempt to advocate their causes by working discreetly with policymakers or whether they use more public-facing strategies to influence policymakers by mobilizing public opinion (e.g., media engagement and press releases). Notably, this literature has paid less attention to the dynamics that occur when various lobbying actors operate in the same space.

Her research aimed to comprehend the impact of more radical groups on the overall movement. She sought to understand how different strategies employed by non-state actors influence and interact with one another, ultimately enhancing these groups' ability to influence foreign policy. She stressed the importance of considering a temporal dimension which would allow us to examine an extended period rather than just specific decisions. Furthermore, she emphasised how the effects of these strategies are better observed over time.

Dr Voltolini stressed that radical forms of mobilization, such as boycotts, can have both positive and negative effects. They can initially help certain groups which present themselves as more moderate, but in the long run, these radical approaches can contribute to polarization in the lobbying field and limit the space available for lobbying.

She illustrates her argument with the case of Palestine. In this context, two broad camps can be identified, one advocating for the EU to push for respect of international law and human rights on both sides of the Israeli-Palestinian conflict. Various actors, including NGOs, use diverse approaches, such as conveying messages behind the scenes, employing a mix of inside and outside strategies, and adopting more radical methods like boycotts against Israel. Dr Voltolini also discussed instances like Germany's Bundestag restricting access to actors involved in the BDS (Boycott, Divestment, and Sanctions) movement and legal actions taken against BDS activities in France, which have portrayed BDS as an attack against Israel.

In conclusion, Dr Voltolini proposed that when non-state actors mobilize law to influence EU foreign policy, it's essential to consider not only opposing camps but also the interactions between moderate and radical approaches and their potential for success. These interactions can create a dynamic space that either facilitates legal mobilization or hinders it.

Contribution of Dr Yuliya Kaspiarovich: "How the Swiss system of direct democracy affects 'activation of rights'".

Dr Kaspiarovich's discussion focused on the relationship between the EU and Switzerland, exploring whether this relationship generates rights and the challenges it faces, particularly from the Swiss side. She questioned why Switzerland and the EU have not been able to agree on an institutional agreement.

She first analysed the nature of this relationship, which originated with the first bilateral agreements. Over time, these agreements have grown to over 100, covering a wide range of topics, including trade and the free movement of people. These agreements grant Switzerland limited access to the EU's internal market.

The EU had previously considered Switzerland's accession to the EU, but this idea faced resistance in Swiss referendums. As a result, bilateral agreements emerged as an alternative. The challenge with Switzerland is that it has consistently expressed its disinterest in EU membership. Therefore, the EU sought an institutional agreement that would provide a framework for internal market access. In 2021, an institutional agreement was accepted by both parties, featuring 20 pages that outlined its scope.

The primary legal problem revolves around the link between internal market access and EU law, which sometimes has a direct effect. Both sides-imposed restrictions: Switzerland was concerned about foreign judges influencing its decisions, while the EU insisted on a level playing field and wanted Switzerland to adopt relevant EU secondary legislation related to the internal market. However, this approach could not mirror the automatic application of EU law seen within the EU due to Switzerland's direct democracy system. A proposed solution was for Switzerland to organize consultations and adopt provisions to align with EU law over a few years.

The challenge lies in the interpretation of EU law, as it is crucial for access to the internal market. However, it is worth noting that Switzerland's engagement is primarily economically motivated and may not fully align with the broader rationale of EU law. Interpreting EU law in this context necessitates a dispute settlement mechanism, which poses difficulties due to the different legal systems in place. The EU requires a more homogeneous interpretation of internal market law, limiting the activation of rights.

The key question raised by this relationship is the significance of EU law, which has a direct effect, in a scenario where sovereign nations, particularly those with direct democracy systems like Switzerland, operate within a free trade regime. This raises important issues related to rights and legal mechanisms in a complex international landscape.

Discussion led by Professor Simon Schunz

Questions

Professor Schunz initiated the discussion by expressing his interest in the topic. He emphasized the success of activating EU rights in the field of environmental policy, particularly highlighting the effectiveness of corporate due diligence obligations. He also touched on the concept that citizens from third countries could assert these rights and extend their impact by engaging with private sector actors, an idea he referred to as the "Brussels effect." This concept involves using the EU market and its regulations to influence foreign outcomes, whether intentionally or unintentionally.

In a broader context, Professor Schunz pondered what bridges the two papers under discussion. He raised questions about how to provide a clearer framework for theorizing EU rights in external EU policy. He argued that the connection between these papers lies in their demonstration of different stages of the foreign policy cycle. Dr Voltolini's work focused on policy development, exploring the struggles and roles of rights in that process, as well as the limitations of activating certain rights. On the other hand, Dr Kaspiarovich concentrated on the second stage, implementation. Professor Schunz underscored the importance of understanding how obtaining a foreign policy position allows the EU to examine the external environment, including cases where rights or legal orders clash and the implications of this clash in specific contexts.

Professor Schunz then turned his attention to Dr Voltolini's contribution and noted that her research differed from the typical focus on how the EU collaborates with civil society to promote rights. Instead, Dr Voltolini's work examined how civil society uses the law to influence EU external policy. He stressed the need for clarifying the scope of this approach and questioned whether there might be broader examples of rights activation in foreign policy settings.

As for Dr Kaspiarovich's contribution, it delved into the limitations on activating rights and how the EU safeguards the autonomy of its legal system. Professor Schunz inquired about the factors that obstruct agreements and what these obstacles reveal about the activation of rights. He expressed interest in understanding how Dr Kaspiarovich sees the law as a solution to the challenges described, and whether legal remedies or solely political remedies are relevant, inviting a more extensive discussion on this matter. Additionally, he questioned what insights could be drawn from this case study for other public policy scenarios.

Speakers answer.

Dr. Voltolini initiated the conversation by pointing out how this case provided an opportunity to test her theory. Although lacking empirical evidence presently, she highlighted that the general mechanisms she outlined might be applicable in other scenarios, potentially leading to similar polarization implications. She referred to the Moroccan case, which also involved occupation and polarization in litigation strategies.

Francesca Finneli delved into the EU-Swiss relationship within the context of the Ukraine conflict. She emphasized that the Swiss parliament had aligned its sanctions with those of the EU. She then raised the question: "With Switzerland implementing these sanctions, does it also mean that individuals can now exercise their rights in Switzerland?"

Dr. Lonardo praised Prof. Schunz's observation regarding the foreign policy cycle and suggested that it could be a promising way to frame all these contributions, especially given the cumbersome procedure raised by the uncertain nature of EU's competence in this domain.

Prof. Cottey emphasized that the two contributions were illustrative of "two-level games" and pondered how Dr. Voltolini's research related to the legal dimension.

Dr Kaspiarovich underlined the unprecedented nature of Switzerland's aligning fully with the EU. She pointed out that Swiss sanctions did not cover the comprehensive aspect of sanctions on Russian individuals and stressed the significance of obligations. She noted that it was not solely about specific rights granted but also about the roles and responsibilities at different stages.

Closing of the Seminar

Prof. Schunz wrapped up the discussion by applauding the diverse range of contributions made during the event and how they showcased the various ways in which the EU, as an actor, utilizes rights.

Dr. Lonardo underscored the idea that the EU can influence opportunities and actors through its presence or legal actions at different times. He expressed gratitude to the diverse group of contributors and commended the overall quality of the discussion.

Literature and further reading

- Gerard, C., Lopez Piqueres, S., and Schunz, S., "Opportunity, Presence and Entrepreneurship: Why the EU Acts Externally on Higher Education" (2021) Journal of Common Market Studies DOI: 10.1111/jcms.13154
- Gstöhl, S., and Schunz, S., *The External Action of the European Union: Concepts, Approaches, Theories*, London, Red Globe Press, 2021
- Kaspiarovich, Y., *L'UE et la protection des investissements internationaux: Une complexe articulation entre confiance mutuelle et réciprocité* (Schulthess Editions Romandes 2022)
- Voltolini, B., 'Framing processes and lobbying in EU foreign policy case study and process-tracing methods' (2017)16(3) European Political Science 354-368
- Voltolini, B, 'Non-state actors and framing processes in EU foreign policy The case of EU-Israel relations (2016)23(10) Journal of European Public Policy 1502-1519
- Zimmer, R., 'Implications of CETA and TTIP on Social Standards', in Gött, Henner/ Stoll, Tobias (eds.), *Labour Standards in International Economic Law* (Springer 2018).