JUDICIALIZATION OF FOREIGN RELATIONS: LEGAL DIPLOMACY FOR A COLD WAR DEJA-VU

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Abstract — The notion of judicializing foreign relations can sound paradoxical, since within sovereign states diplomacy has typically been a prerogative of the executive branch. And yet, as scholars of international courts have noted, the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR), played a diplomatic role in the Cold War era by resolving disputes between sovereign states, or between individuals and states. In so doing, they helped avoid wars and other conflicts.[2] And in recent years, national and supranational courts have begun intervening in foreign relations issues more regularly due to a confluence of factors: the de-funding of diplomatic services, the rise of militarization and the increased use of trade wars by governments aiming to advantage domestic economies.[3]

Against this backdrop this article argues that, despite their different institutional constraints, the Supreme Court of the United States (SCOTUS) and the Court of Justice of the EU (CJEU), have deployed similar doctrinal strategies in their legal diplomacy. Rather than questioning the expansion of judicial power in foreign relations or the "infant disease of autonomy of EU law,"[4] this paper argues that, through such efforts, the CJEU has stabilized a supranational architecture designed to maintain peace and solidarity among its Member States. More generally, it suggests that at a moment when autocratic leaders and populist governments are revamping military conflicts and trade wars, judicial assertion of some foreign relations powers *vis à vis* the executive branch might have salutary effects on the rule of law.

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

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

[4] See Jed Odermatt, *The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?* In Structural Principles in EU External Relations Law (2018)

INTRODUCTION

Scholars working on international courts (ICs) have often argued that legal diplomacy is one of those courts' constitutive features. As Henrik Palmer Olsen has put it:

> [I]t is precisely the sensitivity to politics per se that allows ICs to transcend the political and build their own specific interpretations of what international law requires. This means that ICs – through their case law – construe specific legal understandings of what international law means and how it should be applied. They become, in a sense, masters of international law, by navigating through political resistance with the only tool available to them: interpretation of the law.[5]

This understanding of legal diplomacy is not foreign to EU scholars. Since the 1970s the European Court of Justice has navigated questions of competences both internally and externally despite its limited jurisdiction over such matters under the Rome Treaty.[6] Recent judgements at the intersection of Common Foreign and Security Policy (CFSP), Common Commercial Policy (CCP)[7] and human rights conditionality exemplify the legal diplomacy of the CJEU: in each case the court has filled gaps in the EU Treaty while expanding or refraining from asserting jurisdiction in foreign relations.[8] This jurisprudence has allowed new repeated players such as the European Parliament to promote the democratization of CFSP, while making sure that the EU decisions in this area fully take into account basic fundamental rights guarantees in the area of Freedom, Security and Justice.[9] In addition, new litigants have sought to bring their cases to Luxembourg as part of their international litigation strategies. Those have included "unusual applicants" such as the lawyers of the *Polisario Front*,[10] a liberation

[5] *See* Henrik Palmer Olsen, *International Courts and the Doctrinal Channels of Legal Diplomacy*, ICOURTS WORKING PAPER SERIES, NO. 25. (May 19, 2015) available at https://ssrn.com/abstract=2607925.

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

[7] *See* Advocate General Sharpston of Opinion procedure 2/15 of 21 Dec. 2016 (concluding that the Free Trade Agreement between the European Union and the Republic of Singapore — Allocation of competences between the European Union and the Member States).

[8] *See NF v. Eur. Council*, E.C.R. T-192/16 (Apr. 22, 2016) (rejecting the jurisdiction of the General Court on the EU-Turkey deal)

[9] *See* TFEU art. 82-86 (addressing judicial cooperation in criminal matters).

[10] *See Council v. Front Polisario*, E.C.R. C-104/16P (Dec. 21, 2016).

movement of Western Sahara or *Rosneft,*[11] a Russian oil company that most likely were unable to find a remedy to such wrongs before domestic courts. While the EU is facing unprecedented internal and external challenges, including the need to rethink its global trade and migration strategies and an internal rule of law crisis, the CJEU's legal diplomacy aims to maintain social and political stability inside and outside the Union.

However, legal diplomacy is not exclusive to supranational Courts. Supreme or constitutional courts also engage in legal diplomacy when intervening in foreign relations crises prompted by military or trade wars. In the early 1790s, soon after the Constitution's ratification, the Supreme Court of the United States (SCOTUS) played a crucial role in foreign policy by preserving U.S. neutrality in the war between Britain and France.[12] During the New Deal, in *United States v. Curtiss-Wright Export Corporation,* the SCOTUS held that federal government's foreign affairs powers were "subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers."[13] In other words, per SCOTUS, the executive branch has greater freedom to act in the foreign affairs context than in the domestic context. Since the Rehnquist Court, however, the renewed focus of the SCOTUS on national security and foreign affairs, particularly through the national combatant cases, prompted what some viewed as a questionable expansion of the judiciary's role in such issues.[14]

Indeed, the judicial evolution in foreign relations has been fairly similar in both the US and the EU. This despite the very different institutional constraints that those Courts operate under: as compared to the US, the EU lacks a strong President and has no army. But much like its SCOTUS counterpart, over the past fifty years CJEU has stepped in or exercised judicial restraint in areas such as EU common and foreign security policy or common commercial policy.[15] Overall the CJEU has shaped important

[11] *See , PJSC Rosneft Oil Co. v. Her Majesty*, E.C.R. C72/15 (Mar., 28, 2017) (hereinafter Rosneft).
[12] *See* David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS L. J. 145, 153-158 (2008).
[13], OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW : WHAT IS FOREIGN RELATIONS LAW? (Curtis A. Bradley ed., 2018)
[14] *See* John Hoo, *National Security and the Rehnquist Court*, 74 GEO. WASH. L. REV. 1144, 1160-1164 (2006).
[15] *See* ERTA and Opinion 1/94.

aspects of EU foreign policy[16] by re-defining the nature of its internal and international obligations regarding human rights,[17] international trade[18] and investment agreements.[19]

This functional comparison of the judicial diplomacy of the SCOTUS and the CJEU shows restraints or expansion of the judicialization of foreign relations through the changing legal understanding of foreign relations exceptionalism. By using doctrines such as political questions, separation of powers and federalism, both courts are exerting legal diplomatic skills by walking the fine line of law and politics. Even though critics of this evolution have called this jurisprudence an inappropriate expansion of judicial power, the SCOTUS and the CJEU have embedded foreign relations into rule of law reasoning and they have opened up the debate over foreign and trade policy to a multiplicity of legal and civil society actors. With the rising wave of autocratic leaders and populist political parties advocating for more Brexit and NATO withdrawal, and with tensions rising between Europe and the US, the legal diplomacy of the CJEU ought to be reappraised against what appears as a cold war déjà vu.

[16] *See* THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW, (Marise Cremona and Anne Thies eds., Hart Publishing 2014); *see also* PIET EECKHOUT**,** EU EXTERNAL RELATIONS LAW **(**2nd ed. 2011).
[17] Opinion Pursuant to Article 218(11) TFEU-Draft International Agreement-Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms-Compatibility of the Draft Agreement with the EU and FEU Treaties, E.C.R. C-2/13 (Dec. 18, 2014).
[18] E.C.R. Opinion 1/94(Nov. 151994) (discussing the competence of the EC to conclude WTO agreements on GATS and TRIPs).
[19] *Slovak Republic v. Achmea*, E.C.R. C-284/16 (Mar. 6 2018); Opinion 1/17 on CETA, E.C.J. (2018).