

Introduction: The European Union on Its Way to Becoming a Strategic International Actor

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Last year, the Europa-Institut of Saarland University organised an international conference on “The European Union as a Global Actor” with the financial support of the Federal Foreign Office, the German Academic Exchange Service and the Institute’s own EVER Alumni Association. It took place on 9-12 November 2016 in Saarbrücken, on the occasion of the 65th anniversary of the Europa-Institut and the 20th anniversary of EVER. Roughly 700 of our more than 5.000 alumni worldwide are EVER members. 45 of them came to attend our conference, together with 10 participants from our partner universities in the Balkans and 20 lecturers.

The conference programme was comprised of an introductory session and five panels on different aspects of the EU’s manifold global activities: European neighbourhood and enlargement policy; European migration policy; human rights protection in Europe; climate change and environmental protection – energy, climate and natural resources; and EU trade policy.

The conference confirmed the obvious: The EU has long been an important global actor in many areas of international relations, and its importance is growing. It is in the field of international relations that the joining of forces by the small and medium-size European States most obviously creates added value in the form of much greater political clout. On the other hand, in that area the transfer of sovereignty to the Union level is particularly sensitive for the Member States, jealously trying to preserve their individual presence as sovereign States on the international scene.

One consequence of that European attitude of eating the cake and having it at the same time is the difficult relationship between the Common Foreign and Security Policy with its inter-governmental structure and the supranational aspects of the EU’s global activities, for instance in the area of trade, environmental protection and development policy. While Article 40 TEU tries to maintain a wall of separation between the two threads of the Union’s global activities,¹ both are practically tied together with regard to “restrictive measures”. Their adoption takes place in a two-step procedure – first a CFSP decision under Article 29 TEU and then an EU Regulation under Ar-

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1 See below on so-called cross-pillar agreements which may be problematic.

title 215 TFEU. The price is paid by the European Parliament that is simply subsequently informed by the Council on the restrictive measures it has adopted.²

Considering the different areas of international relations, the EU is of course first and foremost a major player in international trade and investment. The WTO Agreement was originally concluded as a mixed agreement in 1995.³ But the entry into force of the Treaty of Lisbon, which gave the Union exclusive competence for an extended common commercial policy,⁴ rendered the formally continuing WTO membership of the EU Member States obsolete for all practical purposes. The EU has thus remained the sole effective WTO member ever since. It has moreover negotiated and is currently negotiating a significant number of important free trade and investment treaties with states around the world.⁵

The EU has moreover become a leading protagonist of international environmental protection, in particular climate protection, being a party to the Paris Agreement that was adopted under the United Nations Framework Convention on Climate Change.⁶

The EU has also concluded numerous association agreements and other agreements in an effort to establish partnerships with numerous countries and thereby contribute to political, legal and economic stability as well as sustainable development worldwide.⁷ The EU has furthermore undertaken many military and civilian missions and operations in Europe, Africa and Asia in an effort to foster peace and stability.⁸

Most striking, however, are recent instances in which the EU has positioned itself as a strategic actor, alongside the Member States. One example is the membership of the EU in the Quartet on the Middle East, where since 2002 it has tried to mediate the Israeli-Palestinian peace process together with the United Nations, the USA and Russia. It is the co-author of the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict of 2003. The Roadmap was quickly endorsed by the UN Security Council⁹ and reconfirmed ever since,¹⁰ but has unfortunately not been implemented.

2 See CJEU, case C-130/10, *Parliament/Council*, EU:C:2012:472.

3 OJ L 336 of 23/12/1994, p. 1. See CJEU, opinion 1/94, *WTO*, EU:C:1994:384.

4 Article 3(1)(e) in conjunction with Article 207(1) TFEU.

5 See, e.g., the Free Trade Agreement of 6/10/2010 with Korea (OJ L 127 of 14/5/2011, p. 6); the Free Trade Agreement with Singapore; CETA with Canada; TTIP with the U.S.A. (still being negotiated); the Free Trade Agreement with Japan (still being negotiated).

6 Council Decision (EU) 2016/1841 of 5/10/2016 on the conclusion, on behalf of the European Union, of the Paris Agreement, OJ L 282 of 19/10/2016, p. 1.

7 See, e.g., the Partnership Agreement between the African, Caribbean and Pacific States, of the one part, and the European Community and its Member States, of the other part, of 23/6/2000, first revised on 25/6/2005 and amended for a second time on 22/6/2010, OJ L 287 of 4/11/2010, p. 3; Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part, of 27/6/2012, OJ L 329 of 3/12/2016, p. 8.

8 See https://eeas.europa.eu/headquarters/headquarters-homepage/430/military-and-civilian-missions-and-operations_en (15/9/2017).

9 UN Security Council Resolution 1515 (2003) of 19/11/2003.

10 See, e.g., UN Security Council Resolution 2334 (2016) of 23/12/2016.

Another example is the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, of 30 October 2016.¹¹ Most of its provisions are being provisionally applied as from 1 April 2017.¹² It is closely related to, but separate from the Comprehensive Economic and Trade Agreement (CETA).¹³ The Strategic Partnership Agreement is a “cross-pillar” agreement based on Article 37 TEU (a CFSP basis) as well as Article 212(1) TFEU (a supranational basis). It remains to be seen whether the CJEU will accept that in view of Article 40 TEU.¹⁴

The Strategic Partnership with Canada extends to preventing the proliferation of weapons of mass destruction and the illicit trade of small arms and light weapons, the International Criminal Court and cooperation in numerous other fields such as combating terrorism and promoting international peace and stability as well as law enforcement.

A third practically more important example of the EU’s strategic ambitions is the Iran Nuclear Deal of 2015, which strives to peacefully resolve the international dispute concerning the Iranian nuclear programme. Its official title is “Joint Comprehensive Plan of Action (JCPOA)”.¹⁵ The deal was negotiated with Iran by the “E3/EU+3 (China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy)” or – in other words by the five Permanent Members of the UN Security Council (two of them EU Member States) and Germany (another EU Member State) – the P5+1 – and the EU. The High Representative of the Union for Foreign Affairs and Security Policy played an important role in coordinating and facilitating the talks between the states.¹⁶ The core of the JCPOA is its reciprocal commitments: Iran reaffirms that under no circumstances will it ever seek, develop or acquire any nuclear weapons. In return, the other participants promise “the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran’s nuclear programme, including steps on access in areas of trade, technology, finance and energy.”

The JCPOA constitutes a political agreement, not an international treaty. As agreed in the JCPOA, it was expressly endorsed by the UN Security Council in Resolution 2231 (2015) of 20 July 2015. But since the Security Council did no more than urge “its full implementation on the timetable established in the JCPOA”, that endorsement did not transform the political commitments into international legal obligations. Pursuant to Article 25 of the UN Charter, only “decisions of the Security Council”

11 OJ L 329 of 3/12/2016, p. 45.

12 OJ L 89 of 1/4/2017, p. 1.

13 OJ L 11 of 14/1/2017, p. 23.

14 See CJEU, case C-91/05, *Commission v. Council*, EU:C:2008:288. See *Giegerich*, in: Pechstein et al. (eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV*, vol. IV, 2017, Art. 216 AEUV, para. 78–80.

15 The JCPOA constitutes Annex A of UN Security Council Resolution 2231 (2015) of 20/7/2015.

16 See the statement by the President of the European Council of 14/7/2015, www.consilium.europa.eu/press-releases-pdf/2015/7/40802200785_en.pdf (15/9/2017).

are able to impose legal obligations on UN Member States. The only decisions taken by the Security Council in Resolution 2231 (2015) on the basis of Article 41 of the UN Charter relate to the sanctions that it had earlier imposed on Iran.¹⁷

Accordingly, the JCPOA was not subject to the ordinary procedures for the ratification of international treaties in any of the participating states. On the EU level, the Council endorsed the JCPOA and committed to abide by its terms and to follow the agreed implementation plan.¹⁸ The Council further requested that the High Representative continue playing a coordinating role during the implementation of the JCPOA. However, there was no formal decision based on Article 218(6) TFEU.

While the EU is an equal partner to the JCPOA, it of course does not have an equal status with the P5+1 under Security Council Resolution 2231 (2015), not being a member of the United Nations. This becomes clear in paragraphs 10-12 of that Resolution concerning the so-called “snap-back” mechanism in case Iran does not fulfil its commitments. According to paragraph 10, the Security Council expresses its intention to address possible complaints by JCPOA participants (including the EU) about significant non-performance by another JCPOA participant. However, according to paragraph 11, which constitutes a decision based on Article 41 of the UN Charter, only a JCPOA participant state can activate the snapback mechanism as such, leading to a revival of all the previous sanctions resolutions of the Security Council, unless the Council positively decides to continue in effect the terminations of those resolutions. This effectively reverses the veto power of each of the P5: None of them can block the revival of the sanctions, but each of them can block the continuation of their termination.

It will be the responsibility of all, not least of the European Union, to ensure that the JCPOA is fully implemented and the snapback mechanism is not activated. This is indeed the Union’s strategic responsibility.

The EU has meanwhile become active in saving the JCPOA in view of the recent decision of US President *Trump* not to certify Iran’s compliance with the JCPOA, a possible first step towards unilaterally activating the “snap-back” mechanism. On 16 October 2017, the Foreign Affairs Council stated that

“[t]he EU is committed to the continued full and effective implementation of all parts of the JCPOA. [...] The EU encourages the US to maintain its commitment to the JCPOA and to consider the implications for the security of the US, its partners and the region before taking further steps. [...] While the EU expresses concerns related to ballistic missiles and increasing tensions in the region, it reiterates the need to address them outside the JCPOA [...] At a time of acute nuclear threat the EU is determined to preserve the JCPOA as a key pillar of the international non-proliferation architecture.”¹⁹

17 See *Joyner*, The Trump Presidency and the Iran Nuclear Deal: Initial Thoughts, EJIL: Talk! of 17/11/2016.

18 Council Conclusions on the agreement on Iran’s nuclear programme of 20/7/2015, <http://data.consilium.europa.eu/doc/document/ST-11084-2015-INIT/en/pdf> (15/9/2017).

19 See www.consilium.europa.eu/press-releases-pdf/2017/10/47244665846_en.pdf (23/10/2017).

In its Conclusions of the meeting of 19 October 2017, the European Council reaffirmed its full commitment to the Iran nuclear deal and expressly endorsed the aforementioned statement by the Foreign Affairs Council.²⁰

It was not only the 65th anniversary of the Europa-Institut and the 20th anniversary of EVER we celebrated, but this month also marks the 20th anniversary of ZEuS. This is the perfect moment to enlarge the editorial board of ZEuS: We welcome *Christian Calliess* and *Michael Hahn*, whom we have invited to act as ZEuS editors together with us in the future. Both – *Christian Calliess* and *Michael Hahn* – have their academic roots in the Europa-Institut, and therefore it is the logical step to invite them to share the editorial responsibility for ZEuS with us in the next couple of years. We are looking forward to a fruitful cooperation!

20 European Council meeting (19 October 2017) – Conclusions, EUCO 14/17, part IV, para. 19.

