

## INTRODUCTION: PRINCIPLES AND PRACTICES OF EU EXTERNAL REPRESENTATION

Steven Blockmans and Ramses A. Wessel

Since the entry into force of the Treaty of Lisbon, the Centre for the Law of EU External Relations (CLEER) has paid attention to the changing nature of the EU's institutional legal frameworks pertaining to external action,<sup>1</sup> with a specific focus on the recalibration of the Union's international objectives,<sup>2</sup> the chief organising principles of EU external relations,<sup>3</sup> the role played by the Member States, EU institutions and High Representative in the negotiation process leading up to the creation of the Union's new diplomatic service,<sup>4</sup> the legal nature and scope of the European External Action Service,<sup>5</sup> and the mechanisms that allow for the participation of the European Union in the work of the United Nations.<sup>6</sup> In terms of the substantive development of the EU's role in the world, the first signs of operational strengths and weaknesses of EU external action post-Lisbon have been studied,<sup>7</sup> as well as the international role played by the European Union in fields like human rights,<sup>8</sup> military crisis management,<sup>9</sup> the environment,<sup>10</sup> and international taxation.<sup>11</sup> The Lisbon Treaty's aim to raise the EU's international profile by strengthening the coherence, visibility and effectiveness of external relations policy has indeed triggered many new legal questions.

With this working paper, CLEER aims to offer a better insight into selected legal aspects concerning the European Union's redefined diplomatic persona.

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<sup>1</sup> See the contributions to P. Koutrakos (ed.), 'The European Union's external relations a year after Lisbon', *CLEER Working Paper* 2011/3.

<sup>2</sup> See J. Larik, 'Shaping the international order as a Union objective and the dynamic internationalisation of constitutional law', *CLEER Working Paper* 2011/5.

<sup>3</sup> See C. Hillion, 'Mixity and coherence in EU external relations: the significance of the 'duty of cooperation'', *CLEER Working Paper* 2009/2.

<sup>4</sup> See L. Erkelens and S. Blockmans, 'Setting Up the European External Action Service: an act of institutional balance', *CLEER Working Paper* 2012/1.

<sup>5</sup> See B. Van Vooren, 'A legal-institutional perspective on the European External Action Service', *CLEER Working Paper* 2010/7.

<sup>6</sup> See P. A. Serrano de Haro, 'Participation of the European Union in the work of the United Nations: General Assembly resolution 65/276', *CLEER Working Paper* 2012/4.

<sup>7</sup> See S. Blockmans, 'The European External Action Service One Year On: First signs of strengths and weaknesses', *CLEER Working Paper* 2012/2.

<sup>8</sup> See A. Rosas, 'Is the EU a human rights organisation?', *CLEER Working Paper* 2011/1.

<sup>9</sup> See S. Blockmans and R. A. Wessel, 'The European Union and crisis management: will the Lisbon Treaty make the EU more effective?', *CLEER Working Paper* 2009/1.

<sup>10</sup> See M. Klamert, 'New conferral or old confusion? The perils of making implied competences explicit and the example of the external competence for environmental policy', *CLEER Working Paper* 2011/6.

<sup>11</sup> See B. Van Vooren, 'The EU as a global Robin Hood: Proposal for a multilateral convention on a global financial transaction tax', *CLEER Working Paper* 2011/4.

In particular, the working paper will address issues pertaining to the Lisbon Treaty's organising principles of EU external action, both under EU law and international law, and the growing practice of external representation of the European Union, especially in the context of other international organisations and bodies. Many questions remain unanswered in this respect, for instance: how can we best understand the relationship between the way the EU decides upon international positions and organises its external representation on the one hand, and its influence, performance and/or effectiveness on the other hand? Does the European Union's formal status as a subject of international law justify an upgraded observer status within international organisations, a seat additional to that of the EU Member States, or should the EU replace them? Does it matter who speaks for the EU, and in what way? How should we square the emergence of the European External Action Service (EEAS), a hybrid organ consisting of EU civil servants and seconded diplomats from the Member States, with the traditionally state-centred body of international diplomatic law? And what can be expected from the High Representative, the EEAS and its vast network of diplomatic representations in third countries and multi-lateral settings in the pursuit of the Treaty's external objectives?

The first two contributions to this working paper are devoted to two general principles of the EU legal order which ought to work towards the unity and effectiveness of the European Union's external representation: the principle of loyal or sincere cooperation enshrined in Article 4 (3) TEU and the principle of consistency (Article 13 (1) TEU and 7 TFEU). Federico Casolari kicks off the exploratory analysis by asking whether the principle of loyal cooperation is a 'master key' for a more effective external representation of the EU in other international organisations. Tracing the principle's origins and development in the jurisprudence of the European Court of Justice (ECJ), from the inception of international relations of the European Communities to the incorporation of the duty of loyalty into the Lisbon Treaty's new common platform of EU policies (Article 4(3) TEU), he reveals that the unity of the international representation has been conceived as a means to apply the duty of cooperation within the EU legal order. As the principle of sincere cooperation is not an end in itself but is directed at achieving the Union's objectives, its aim is to ensure the coherence and consistency of the external action of the Union. In their contribution, Peter Van Elsuwege and Hans Merket argue that the Treaty of Lisbon has significantly strengthened the principle of sincere cooperation and the Court's authority by adding the principle of consistency to the ECJ's jurisdictional powers. They also contend that those two principles mitigate the potentially negative consequences of the vertical (between the EU institutions and the Member States) and horizontal (between the various EU policy areas) division of competences on the effectiveness of EU external action.

After these reflections on two general principles which ought to better organise the EU legal order so as to render the Union's external representation more visible and effective, the European Union is considered from the outside. In their contribution, Bart Van Vooren and Ramses Wessel analyse a host of issues which flow from the EU's peculiar status as a subject of international

law. The EU is not a state but an international organisation with rather special features: it enjoys international legal personality, which allows it to enter into legal relations with states and other international organisations. At the same time, its external competences are limited by the principle of conferral, and in many cases the EU is far from being exclusively competent and shares its powers with the Member States. The intensified global diplomatic ambitions of the EU since the entry into force of the Lisbon Treaty and its increased diplomatic action since the creation of the EEAS trigger the question to which extent the EU's diplomatic ambitions and activities are compatible with both the EU and international legal frameworks. The authors focus on five distinct aspects of diplomatic relations by the Union: (i) establishing a formal EU presence through its delegations; (ii) representing the Union through the delivery of statements in multilateral fora; (iii) diplomatic relations through visits and missions by top EU officials at political level; (iv) the task of gathering information by the Delegations as 'EU embassies'; and (v) the task of diplomatic protection of 'EU citizens'.

In the three remaining contributions, the external representation of the EU in three different institutional settings is gaged. Scarlett McArdle and Paul James Cardwell examine the European Union's external representation within the International Law Commission (ILC). The ILC is the United Nations body specifically created for the purpose of the codification and progressive development of international law. Traditionally, states are the only significant actors involved in and contributing to the work of the ILC. McArdle and Cardwell examine the extent to which the EU has succeeded in representing itself, i.e. above and beyond the Member States, in the ILC. The authors use the example of the development of international law on the responsibility of international organisations to argue that even in this area of 'pure' international law, the EU is evolving to possess a separate role and identity to exert at the international level. They also contend that this is a role which is progressively being taken more seriously.

At the regional level, Christina Eckes addresses questions that surround the EU's accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR): in what way is the EU's position different from that of the other Contracting Parties? What are the reasons for and consequences of the EU's *primus inter pares* position under the Convention and within the Council of Europe? How will the relationship change between the Court of Justice and the ECtHR? And what does the EU's accession mean for its Member States? After accession, the EU will become subject to legally binding judicial decisions of the European Court of Human Rights. It will also participate in statutory bodies of the Council of Europe when they act under the Convention. Eckes sheds light on all of these issues and also touches upon the new co-respondent mechanism, including the possibility to refer a case pending before the ECtHR to the Court of Justice for a 'preliminary assessment'.

In the final contribution to this working paper, Jan Wouters, Sven Van Kerckhoven and Jed Odermatt consider EU relations with the most intriguing 'global club', the G20, from two perspectives: the EU's representation at the G20

and the G20's impact on the EU and its legal order. First, the authors deal with the EU's unique membership of the G20, as it is the only non-state member of the club. Also, the EU's G20 membership amplifies the voices of the EU Member States already at the table, as they also have the strongest voice in drafting the EU's position for G20 meetings. The question arises to what extent smaller EU Member States, being excluded from direct participation in G20 meetings, have a say on the EU position at the G20. Furthermore, the 'double' representation of four EU Member States enables them to a certain extent to bypass the European decision-making process. In order to solve this, EU Member States increasingly coordinate before a G20 summit, but have no control over the behaviour of their peers during such a summit. The authors answer the question to what extent the EU's basic treaties prescribe such coordination. In the second part of their contribution, the authors address the strong influence of the G20 process on decisions taken at the EU level. The authors show that the Union's good follow-up on G20 decisions allows it to move faster internally and that the EU and the G20 thus have the potential to further each other's agendas.

Whereas the topics covered in the contributions cast a wide net over the new legal questions and challenges with which the European Union's institutional framework and law is currently faced, this working paper does by no means pretend to be exhaustive. Rather, by addressing 'selected legal aspects' of the principles and practice pertaining to the external representation of the European Union, the working paper offers new insights into the rapidly developing field of EU external relations law.

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