

**ASSER**  
INSTITUTE



*Centre for International & European Law*



# Global Europe

Planning 2019-2020



## Description

The main idea underpinning the project of 'Global Europe' is the creation of a visible focal point within the broader research strand of 'Advancing Public Interests in International and European Law' of the TMC Asser Institute. This focal point aspires to bring together Asser's researchers and external stakeholders with a view to exploring the EU's identity as a global actor, the global effects of EU law as well as the external and internal challenges that may affect the Union's aspirations as a global actor and the reach of its regulatory power outside its territory – thereby, ultimately answering questions of trust pertaining to the EU as an international legal actor.

The EU's identity as a global actor is firmly anchored in a distinct normative and political agenda. Apart from an economic power, the Union has consistently portrayed itself as a virtuous, normative power committed to the ethos of international law, democracy, human rights and multilateralism. The global aspiration of the EU to shape the world stage in accordance with its values is reflected in numerous policy documents including the 2001 Laeken Declaration.

*What is Europe's role in this changed world? Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilizing role worldwide and to point the way ahead*

*for many countries and peoples? Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions. The European Union's one boundary is democracy and human rights.<sup>1</sup>*

With the entry into force of the Lisbon Treaty, the self-portrayal of the EU as a 'Union of values' both internally and externally has become part of its normative DNA. The language of Art. 3(5) and 21 TEU attests to the idea that EU values are both part and parcel of the Union's identity and key to achieving its objectives 'in its relations with the wider world'. The Treaties reflect the EU's commitment "to uphold and promote its values and interests and contribute to the protection of its citizens"<sup>2</sup> while clarifying that its action at the international stage "shall be guided by the principles which have inspired its own creation"<sup>3</sup> including democracy, the rule of law, human rights, respect for human dignity, the principles of equality and solidarity as well as respect for international law.

In terms of procedure for achieving its foreign policy objectives, the Union's external mandate requires the EU to conduct its relations with the outside world within

<sup>1</sup> Laeken Declaration on the Future of the European Union, European Council, 14-15 December 2001.

<sup>2</sup> Art. 3(5) TEU.

<sup>3</sup> Art. 21(1) TEU.



the legal environment of international law and in a spirit of multilateralism by pledging that the Union shall contribute to the “strict observance and development of international law”<sup>4</sup> and that it shall seek “multilateral solutions to common problems, in particular in the framework of the United Nations”<sup>5</sup> in order to “promote an international system based on stronger multilateral cooperation and good global governance.”<sup>6</sup>

The coming of age of the EU as a global actor has been also accompanied by an unprecedented expansion of its regulatory influence beyond its borders. A wide range of mechanisms and tools enable the EU to influence conduct, policy and law beyond its territorial borders. In the literature, concepts such as the extraterritorial application of EU law, territorial extension, the Brussels effect, and extra-territorialisation have been developed in order to describe the mechanisms used by the EU to facilitate its global reach.<sup>7</sup> It is in this context that the link between value rhetoric and active engagement with the world becomes more visible.

A case in point is the EU’s conditionality policy. The requirement that acceding States adopt the *acquis* and conform to EU standards relating to the protection of the rule of law, democracy and human rights has become a powerful tool for achieving external effects

of the EU’s rules and values. The external diffusion of EU rules and values is not limited to accession but also permeates other policies such as the European Neighbourhood Policy and Development Cooperation.

The EU’s trade relations are also used as a vehicle for the promotion of Union values. The EU has actively promoted human rights (as well as other values such democracy and the rule of law) by including dedicated clauses in its trade agreements with third States (essential elements clauses).<sup>8</sup>

In an increasingly interdependent world, the success of the EU as an international actor largely depends on its credibility and the extent to which it can generate support for and trust in its global role. As the ICJ stated in the Nuclear Tests case: “Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.”<sup>9</sup> The EU’s credibility as a global actor (and thus, by extension, the extent to which it can inspire trust) is directly linked to the question of compatibility of its external action with the values integral to its identity. The 2016 Global Strategy underscores the nexus between credibility and adherence to values: “The EU’s credibility hinges on our unity, on our many achievements, our enduring power of attraction, the effectiveness and consistency of our policies, and *adherence to*

<sup>4</sup> Art. 3(5) TEU.

<sup>5</sup> Art. 21(1)(2) TEU.

<sup>6</sup> Art. 21(1)(2) (h) TEU.

<sup>7</sup> See for example, J. Scott, Extraterritoriality and Territorial Extension in EU Law, 62 AJIL 87 (2014). E. Fahey, *The Global Reach of EU Law*, (Routledge: London, 2017).

<sup>8</sup> See L. Bartels, A Model Human Rights Clause for the EU’s International Trade Agreements, German Institute for Human Rights and Misereor, 2012, available at [https://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Studie\\_A\\_Model\\_Human\\_Rights\\_Clause.pdf](https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf).

<sup>9</sup> *Nuclear Tests* case, ICJ Reports 1974, p. 457, para. 49.



our values.”<sup>10</sup>

The credibility of the EU as a global actor and the expectation that it lives up to its global aspirations by acting in accordance with its values is also relevant in enhancing trust internally. The internal capacity of the EU to reconcile different interests and to provide solutions to common problems is closely intertwined with its capacity to pursue multilateral and value-driven solutions to global problems. In this respect, it has been stressed that: “[M]any of the ways in which the EU has projected itself as an international actor reflect the modes of transnational governance it has developed in its internal domain.”<sup>11</sup> Thus, the ability of the EU to adhere to its values in its external action affects its legitimacy – and the ensuing trust in the European project – both externally and internally.

At the same time, shifts in the geopolitical balance of powers and the weakening of the multilateral world order pose new challenges for the EU’s ambitions as a global power. The ‘America first’ approach adopted by the current US administration coupled with its willingness to withdraw from international agreements and institutions implies that the EU is increasingly faced with a world where compliance with commitments undertaken cannot be taken for granted.<sup>12</sup>

The EU is also faced with numerous other challenges stemming from outside its territory. The rise of protectionism and State-led economies, such as China, the challenge of managing migration flows, digitalisation as well as climate change mean that the EU’s credibility as a global actor largely depends upon its ability to build upon its internal experience of solving common problems and to show global leadership by developing integrated and value-based responses to global problems. Internally, the EU is also confronted with challenges that may frustrate its ambition to shape the international legal order in accordance with its values. Brexit, as well as the current rule of law crisis in new EU member States raise questions about the identity of the EU both internally and externally. How can the Union inspire trust externally when one of its own Member States is about to depart and how can it convincingly portray itself as a ‘Union of values’ in the outside world when there are lingering issues pertaining to these very values at home?

Finally, one should also not lose sight of the idiosyncrasies of the EU as a legal order that may point towards a gap between value rhetoric and the reality on the ground. The rise of autonomy as a ‘structural principle of EU external relations’<sup>13</sup> and its invocation by the CJEU as a ‘rhetorical shield’ to protect the Court’s own judicial monopoly may in

<sup>10</sup> A Global Strategy for the European Union’s Foreign and Security Policy, June 2016, p. 10, available at [http://eeas.europa.eu/archives/docs/top\\_stories/pdf/eugs\\_review\\_web.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf). (Emph. added)

<sup>11</sup> G. De Búrca, *Europe’s Raison D’Etre*, New York University Public Law and Legal Theory Working Papers, No. 385, (2013) p. 11, available at <https://core.ac.uk/download/pdf/13581706.pdf>.

<sup>12</sup> The Guardian, ‘Whimsical, uninformed’: The French ambassador’s parting verdict on Trump, 19/04/2019, available at <https://www.theguardian.com/us-news/2019/apr/19/whimsical-uninformed-french-ambassadors-parting-verdict-on-trump>.

<sup>13</sup> See generally M. Cremona (ed.), *Structural Principles in EU External Relations*, (Oxford: Hart Publishing, 2018).





the long run hinder the ability of the EU to participate effectively at the international level, thereby undermining its commitment to multilateralism and respect for international law.<sup>14</sup> Furthermore, in the literature, it has been noted that in its more recent case-law the Court has taken a distinctly more cautious approach to international law – by way of contrast to its earlier openness thereto.<sup>15</sup>

In this context, it has been further highlighted that autonomy – either expressly or implicitly – underpins this increasingly restrictive approach towards international law – as evidenced by the Court's reasoning.<sup>16</sup> As

De Búrca notes: “The CJEU has undeniably become more concerned with the internal constitutional unity of the EU and the external autonomy of its legal order from the international legal order.”<sup>17</sup> On the other hand, respect for international law, and thus by extension for the international rule of law, has become a core constitutional norm of the EU<sup>18</sup> – something acknowledged by the CJEU itself.<sup>19</sup> This reveals an intrinsic tension lying at the heart of the EU's identity as an international actor: to what extent can the principle of autonomy be reconciled with the EU's constitutional commitment to respect international law?

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In this light, the ‘Global Europe’ project is geared towards exploring the internal and external factors that may challenge the EU's capacity to exercise value-based global leadership on a number of crucial issues that affect both European citizens and others; to critically reflect on whether the external projection of the EU as a virtuous normative power comports with its practice on the ground as well as to address the descriptive, conceptual and normative challenges that complement the ever-expanding global reach of EU law.

<sup>14</sup> B. De Witte, *European Union Law: How Autonomous is Its Legal Order?*, 65 *Zeitschrift für öffentliches Recht* 141 (2010), p. 141, at p. 150.

<sup>15</sup> C. Eckes, *International Law as Law of the EU: The Role of the European Court of Justice*, in E. Cannizzaro, P. Palchetti, R. Wessel (eds.), *International Law as Law of the European Union*, (Leiden: Martinus Nijhoff, 2012), p. 353, at p. 368. K. Ziegler, *Beyond Pluralism and Autonomy: Systemic Harmonization as a Paradigm for the Interaction of EU Law and International Law*, 35 *Yearbook of International Law* 667 (2011), p. 681. G. De Búrca, *Internalization of International Law by the CJEU and the US Supreme Court*, 13 *Int'l J. Const. L.* 987 (2015), p. 1002.

<sup>16</sup> Apart from *Kadi*, (joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:461), there is a series of other cases where the Court has limited the invocability and enforceability of international law norms. Some textbooks examples include case C-308/06, *The Queen, on the application of International Association of Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, EU:C:2008:312, case C-366/10, *Air Transport Association of America and others v Secretary of State for Energy and Climate Change*, EU:C:20011:864.

<sup>17</sup> G. De Búrca, *supra* note 15, p. 1003. According to Klabbers: “[T]he EU has a much less friendly disposition towards international law than is commonly assumed.” J. Klabbers, *The Validity of EU Norms Conflicting with International Obligations*, in E. Cannizzaro, P. Palchetti, R. Wessel (eds.), *supra* note 15, p. 111, at p. 112.

<sup>18</sup> Art. 3(5), 21(1) TEU.

<sup>19</sup> Case C-366/10, *supra* note 16, para. 101 and joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v. Kadi*, EU:C:2013:518, para. 103.



## Examples

One example of the type of difficulties encountered in this context relates to the question of the EU's human rights obligations in relation to policies with extraterritorial effects. Overall, extraterritoriality remains essentially a contested concept under international law; in particular, in the context of human rights law, there is lack of clarity regarding the criteria under which States are required to protect against human rights abuses occurring outside their territory. The lack of clarity of the relevant international legal framework also creates difficulties at the EU law level: does the EU have a duty to protect human rights extraterritorially? If this is the case, what is the legal basis for this duty and what are the limits thereof?

The external effects of EU law also raise questions regarding the very identity of the EU as a global actor. While the EU has consistently sought to project a distinctive character as a value-driven international actor, its external mandate also expressly requires the Union to promote its own interests. In this respect, the 2016 Global strategy states that: "our interests and values go hand in hand. We have an interest in promoting our values in the world. At the same time, our fundamental values are embedded in our interests."<sup>20</sup>

The assumption that the EU's values and interests coincide raises questions regarding the inherent tension between these two

concepts and the ability of the EU and its institutions to navigate such tension. Recent cases, such as *Front Polisario*,<sup>21</sup> exemplify the intrinsic tension between fundamental rights and trade policy and the need to provide a clear framework for assessing whether trade policies are in compliance with international human rights norms. Ultimately, the increasing global presence of the Union raises questions about its own identity as an international actor; if we examine the ways in which the EU promotes its values and interests in its external action, what does this tell us about its claim to be a Union of values? Furthermore, the EU has been persistently assailed by accusations that it seeks to export to third countries values and standards, which it is less inclined to follow itself – thereby raising doubts regarding the international credibility and legitimacy of its external action.

One area in which the discrepancy between EU's values and action manifests itself is the EU's common asylum and migration policy. It is not only the inability of Member States to agree on quotas for the re-distribution of asylum seekers that brought this discrepancy to the fore, but also their willingness and decisiveness to take action externally - even when that meant cooperating with states like Libya, which are known to be gravely violating the fundamental rights of asylum seekers and migrants.

<sup>20</sup> A Global Strategy for the European Union's Foreign and Security Policy, *supra* note 10, p. 13.

<sup>21</sup> Case C-104/16 P, *Council of the European Union v Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario)* [2016], EU:C:2016:973.



The EU's enlargement policy is also a case in point. While the process seems to have worked for some countries, we witness serious problems with the rule of law in others (e.g. Hungary, Poland, Romania). Hence, it is important to think about how enlargement policy and practice can be fine-tuned in light of the problems that the EU's is experiencing today, with a view of pre-empting the resurgence of similar issues in the aftermath of the future membership of the candidates states in the Western Balkans.

The fundamental difference of EU's Eastern versus its Western Member States on its foundational values, Brexit, the loss of appetite for further enlargement make sure that the debate on differentiated integration (both internal and external), 'multi-speed' Europe or Europe of 'concentric circles' becomes more relevant and important by the day. In the current framework of relations, some outsiders (the EEA) already take part in as many, if not more policy domains than some insiders do. Despite the existence of quite a few models for third countries to integrate and interact with the EU, Brexit revealed that there is need for more. In the same vein, EU needs to develop a sustainable model for relations with some candidate countries, such as Turkey, which do not have realistic prospects for accession. Thus, this internal as well as external need for more variation in relations with the EU will be another topic to

explore under the project 'Global Europe'.

The role of the CJEU in the development of the EU's identity as a global actor is also important. The EU's external projection of itself as an entity firmly committed to the strict observance and development of international law generates the expectation that its Courts also espouse something of this internationalist approach.<sup>22</sup> *However the question of the CJEU's Völkerrechtsfreundlichkeit, namely its open attitude towards international law, is fiercely debated in the literature.*<sup>23</sup> As Klabbers stresses: "the story of the EU and international law as a happy family, is a seductive story, but it does have a few holes in its plot ... [C]loser scrutiny reveals that the openness narrative is not supported by practice, in particular the practice of the courts."<sup>24</sup> The Court's shifting approach to international law has a direct impact on the identity of the EU as a global actor; if the trend of eschewing engagement with international law initiated in Kadi were to be followed, this would severely undermine the conventional narrative of the EU as a global actor with a particular fidelity to international law. In this light, a more in-depth engagement with the content of the international law rules invoked and with the Court's use thereof is required in order to ascertain whether the CJEU's practice undermines the image of the EU as an internationally engaged polity.

<sup>22</sup> G. De Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 Maastricht JECL 168 (2013), at p. 183.

<sup>23</sup> For an overview of the relevant debate, see J. Odermatt, *The Court of Justice of the European Union: International or Domestic Court?*, 3 CJICL 696 (2014), pp. 698-699.

<sup>24</sup> J. Klabbers, *Völkerrechtsfreundlichkeit? International Law and the EU Legal Order*, in P. Koutrakos (ed.), *European Foreign Policy*, (Cheltenham: Edward Elgar Publishing, 2011), p. 95, at p. 97.



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