
Jan Scheffler, Die Europäische Union als rechtlich-institutioneller Akteur im System der Vereinten Nationen

Summary

The European Union as a legal and institutional actor in the United Nations system

At the interface of law and political science, this book deals with the legal and institutional framework for the participation of the European Union (EU) in the organs and bodies of the United Nations (UN) system from an interdisciplinary perspective. The study examines (a) the conditions set by EU law and (b) the institutional provisions in international law that have been established in the traditionally state-centred UN system in order to allow for participation of a novel entity such as the EU.

The concept of actorness, borrowed from international relations theory, serves as the central theoretical and methodological tool. The legal rules are analysed against this background. Therefore the key purpose of the study is to highlight the extent to which the EU has legal and institutional actorness in the UN system and to examine in how far the interplay of the legal and institutional framework and contextual political factors results in a coherent overall system.

The analysis is based on the situation on the eve of the entry into force of the Lisbon Treaty; this is to say that for those aspects touching upon the EU legal framework, it primarily relies on those rules that came into force with the Nice Treaty in 2003 (and with the subsequent treaties of accession of the new EU member states). However, the study also assesses the impact of the new „Lisbon rules“ on the EU's legal and institutional participation in the UN system. Thereby, it makes a contribution to the discussion of the future role of the EU in multilateral fora, especially the UN system.

The book is divided into four parts. The first part introduces the concept of actorness as the central tool of analysis and adapts it to the specific needs of the subject-matter. The second part discusses the legal and institutional conditions at the EU level that are crucial for its capacity to be an actor in the UN system. The focus of the third part is on the participation of the EU in different UN bodies and organs and on the evaluation of EU actorness in the UN system as a whole. The fourth part, finally, deals with the consequences for the EU as a legal and insti-

tutional actor in the UN system arising from the entry into force of the Lisbon Treaty.

I. Theoretical and methodological framework: the concept of actorness

The concept of actorness has been developed in international relations theory since the 1960s when former state-centred schools of thought became less popular. Its basic assumption is that there may be actors other than states in international relations and tries to identify criteria to define those actors and to characterize their role in international interaction. Being open enough to integrate different theoretical and metatheoretical approaches, the concept of actorness is nevertheless rooted in one specific school of thought, namely constructivism. In fact, the EU as a completely novel entity has challenged traditional ideas of the structure of international relations. Bearing this in mind, constructivism with its focus on ideas, values, norms and their intersubjective perception can contribute a lot to the understanding of the genesis and nature of the EU.

The concept of actorness (or more precisely its elaboration by Charlotte Bretherton and John Vogler that serves as a starting point for the development of the specific analytical tool in this study) operates with two levels – the internal conditions of the agent/actor on the one hand and its whole environment (structure) on the other – both being treated in an ontologically neutral manner: a priori, agent(s) and structure are seen as mutually constitutive.

This basic scheme is then applied to the subject-matter of the study. The key choice is the definition of the internal and the external level. While the conditions in EU law for participation in the UN context are defined as the internal level (this is also called actor *capacity*), the external level covers the conditions in the UN system deciding on the EU's participation. The whole system and the interaction of both levels determine the degree of EU legal and institutional actorness.

In order to conduct the analysis in detail, several criteria for evaluation have been defined on each level. On the internal level, the EU's actor capacity is measured by assessing its legal competence to act, its autonomous procedural and decision-making mechanisms, the legal and institutional conditions for policy coherence and the availability of diplomatic resources. On the external level, the decisive criteria are recog-

dition and acceptance by others (states, secretariats of UN bodies, other international partners) which reflect, in a constructivist sense, perceptions of and expectations towards the EU.

The evaluation of the different criteria allows, in a further step, to see how they interact and to determine whether or not the internal and the external level constitute a coherent overall system.

II. Legal and institutional conditions on the EU level

This part provides an in-depth analysis of the internal EU rules for participation in the UN system. In this context, special attention is drawn to the particular status of the European Community (EC) within the complex construction of the EU because the EC is an autonomous legal person which the Treaty on European Union shall not affect (art. 47 TEU). More concretely, the following structural elements and legal instruments of the EC with regard to its participation in the UN system are examined closely: the character of its legal personality; its power to establish relations with international organizations; its general competences in external relations; the instrument of mixed agreements concluded by the EC and some or all of its member states with third parties; the principles of loyalty and of close co-operation; special rules for certain policies (external monetary policy, trade policy); procedures to conclude international treaties including decision-making procedures (unanimity versus majority voting).

This review of relevant EC external relations law shows that the EC possesses actor capacity with regard to the aforementioned criteria (legal competence to act, autonomous procedural and decision-making mechanisms, legal and institutional conditions for policy coherence; the availability of diplomatic resources is not assessed at this stage, but in part III.). As a supranational organization, the EC is able, in principle, to act independently of its member states in the UN system in various ways. But the EC legal framework is far from being without problems. As there is no comprehensive chapter on participation in international organizations in the EC Treaty, many rules have to be deduced from other contexts and are open to interpretation. In particular, the division of competences between the EC and its member states which determines the degree to which the EC can act on its own in UN bodies is highly complex and subject of a great amount of ever more sophisticated jurisprudence.

In fact, the picture is getting even more complex when extending the analysis to the other „pillars“ of the European Union, namely the Common Foreign and Security Policy (CFSP) and (the external dimension of) the Police and Judicial Co-operation in Criminal Matters. Both pillars provide for certain instruments and procedures which allow the EU to speak with one voice in UN bodies. However, there is only little scope for the EU to behave as an autonomous legal and institutional actor in foreign, security, police and judicial co-operation matters because these policy areas underlie the logic of intergovernmental co-operation.

A different approach needs to be taken analysing the EU's actor capacity as a whole because the EU's overall structure is rather fuzzy. The EU (contrary to the EC) does not have uncontested international legal personality even if there are provisions in the TEU (art. 24 and 38) regulating the conclusion of international treaties. Moreover, the exact position of the EC within the overarching EU structure gives rise to many doubts, and the obligations concerning policy coherence beyond the pillars are not clear enough to strengthen the EU's actor capacity considerably. Therefore, as a first result, it can be held that the EU certainly possesses legal and institutional capacity for being an actor in the UN system. But this actor capacity is mainly limited to its central founding element, the EC, and somehow shadowed by the structural deficiencies of the EU as a whole.

III. Participation of the EU in the UN system

The opportunities for participation of the EU are elucidated in four steps. Firstly, there is a horizontal overview of the different modes of participation (1). Secondly, the EU's way to use its rights in practice (namely its practical internal mechanisms of organization and coordination as a means for acting in UN bodies) is examined (2). Thirdly, seven case studies shed light on the legal and institutional participation of the EU in selected UN bodies in more detail (3). Finally, the general evaluation of the EU's actorness puts into perspective the results of this part against the background of those of part II (4).

(1) In the horizontal chapter, different types of participation (membership, observer status, full participation, no official status) are discussed, and their development is traced. Those types of participation differ from one another according to the availability (and the characteristics) of several rights and duties such as the right to participate, the right to make oral or written statements, the right to receive documents and in-

formation, the right to make proposals and amendments, the right to choose candidates for official posts and to be eligible for those posts, the right to vote and the duty to make financial contributions. It has to be emphasized that the classic form of EU (or EC) participation has been a more or less passive observer status (right to participate, a limited right to speak, but generally no right to make proposals and amendments and certainly no right to vote). But in a number of bodies, the EU/EC status has been strengthened. For example, the EC has become a member of the FAO, the Codex Alimentarius Commission and the International Seabed Authority as well as a full participant of the Commission of Sustainable Development or the Peacebuilding Commission. This shows a certain (but not unconditional) openness on the external level (recognition and acceptance) towards increased legal and institutional participation of the EU.

(2) The EU's way to make use of its rights is characterized by a great effort to coordinate positions internally. At the UN sites as well as in Brussels, representatives of EU member states and EU institutions meet regularly in a highly institutionalized setting. They have gone far in constructing the actor „European Union“ by regular practice and cooperation. In this context, specific diplomatic resources, such as the delegations of the European Commission and the Liaison Offices of the Council Secretariat, are deployed. With regard to the actorness criteria, the coordination mechanisms reveal nevertheless certain restrictions. They are intergovernmental in nature and strictly maintain the consensus principle which risks to paralyse the EU with its now 27 members. What is more, the rotating presidency which often takes the lead in representing the Union at the expense of the European Commission lacks continuity and sometimes also neutrality. For the participation in some bodies, the European Commission and EU member states (or rather the Council of the European Union) set up interinstitutional agreements or guidelines in order to prevent interinstitutional conflicts. But the results are not fully convincing.

(3) The seven case studies concern EU participation in selected UN bodies (General Assembly, Security Council, FAO, ILO, IMF, WHO, Commission on Sustainable Development). Each case study is structured in the same way, assessing the aforementioned criteria for legal and institutional actorness as well as their interplay. All examples have their own special features. Altogether, they illustrate the enormous variety of models being currently in use for EU participation in the UN system.

In the General Assembly, the EC enjoys a rather classic observer status. However, practice is dominated by coordinated statements delivered by the EU presidency – an exercise which has in fact little to do with the formal EC observer status.

In the Security Council, the EU has no status at all. This is not only due to the particular structure of this organ, but also to the intergovernmental nature of the CFSP. In a very limited way, the EU may nevertheless show signs of actorship in the Security Council when, for example, its High Representative for the CFSP is invited to speak before it.

The FAO is the only specialized organization of the UN system in which the EC has become a member. But the EU member states have remained members of the FAO, too, so that a complex model of alternative membership – membership rights are exercised by the EC or its member states alternatively according to the internal division of competences – has been deemed necessary.

Within ILO, the EC only enjoys observer status although its competences are far-reaching with regard to ILO's core activities (social and employment policy). However, the particular tripartite structure of the ILO (representatives of governments, employers and workers) prevents the EC from getting a more accurate status.

In the IMF, the EC also lacks a status that is in conformity with its exclusive competence in monetary policy. Only the European Central Bank enjoys observer status at the IMF. The EC itself suffers from the IMF governance structure based on quotas and voting constituencies – and also from the reluctance of its own member states which are concerned about losing their privileges at the IMF.

Within the WHO, the EC once again enjoys observer status, but this status has been enhanced in some institutional settings of the WHO. For example, the EC could fully participate in the negotiations which led to the adoption of the „WHO Framework Convention on Tobacco Control“ and it finally became a party of that convention.

In the Commission on Sustainable Development, finally, the EC is a full participant. Generally speaking, this form of participation comprises all rights of a member except the right to vote. The prototype of the full participation model was developed for the Rio Summit in 1992. It served as a reference point not only for EC participation in the Commission on Sustainable Development, but also in many UN conferences subsequent to the Rio Summit.

(4) Assessing EU actorship in the UN system as a whole, it can be concluded that the EU clearly possesses such actorship which has been suc-

cessively constructed through the interplay of factors at the internal and the external level. All criteria of the actorness model are fulfilled in a sufficient way to identify the EU as a legal and institutional actor in the UN system. But the shape of this actorness is not uniform and shows evident contradictions and unresolved problems: foremost the heterogeneous institutional structure of the EU itself; the state-centred institutional rules of some UN bodies which seem to be virtually unchangeable and prevent the EU from exercising its legal competences itself; and finally the reluctance of third states (and sometimes also of EU member states) worrying that the EU could become too powerful an actor. Consequently, the whole system (internal and external level) of EU actorness in the UN system is only partially coherent.

IV. Impact on the EU's actor capacity through the Lisbon Treaty

The changes introduced by this latest reform of EU primary law are considerable and concern directly the legal setting for the EU's external relations in general and the conditions for its participation in the bodies and organs of the UN system in particular. The most relevant modifications are the abolition of the so-called pillar structure (including the attribution of a single legal personality to the EU as a whole); the creation of a uniform catalogue of values and objectives for all areas of external relations; the introduction of a quasi 'competence catalogue'; the codification and the cautious enlargement of EU competences in some areas relevant in the UN context (e.g. humanitarian assistance); the introduction of a uniform procedure for the conclusion of international treaties (while at the same time maintaining some exceptions for the CFSP); the extension of qualified majority voting; the reform of the formula for qualified majorities; the establishment of a new key post of „High Representative of the Union for Foreign Affairs and Security Policy“ (which corresponds exactly to the „Foreign Minister“ provided for by the Constitutional Treaty of 2004) who should, inter alia, take over those tasks concerning the external representation of the EU, including in the Security Council; the strengthening of institutional and policy coherence through an overall structural reform; and finally the creation of a genuine diplomatic representation of the EU, the European External Action Service.

This list seems to be impressive and a sign of considerable strengthening of EU actor capacity. However, two objections need to be raised: Firstly, the effectiveness of the reforms will very much depend on their

concrete implementation. This is especially true because the Lisbon Treaty, being the result of compromise, remains vague in some areas. For example, the shape of the European External Action Service is not detailed in the Treaty, but subject to a decision of the Council of the European Union. Secondly, some serious problems under the Nice regime have not been resolved at all by the new Treaty – for example, the persistence of the main difficulties of the internal division of competences despite the codification of competence categories; the factual „conservation“ of the pillar structure by separating the CFSP from the other external relations policy areas; the continuous lack of a comprehensive chapter on EU participation in international organizations; the maintenance of the principle of unanimity in CFSP matters.

In conclusion, the position of the EU as a legal and institutional actor in the UN system will certainly be strengthened by the Lisbon reforms, but it will not undergo complete metamorphosis.