Trade, Security and Defence: Holding Cecilia Malmström and Federica Mogherini Accountable

Joris Larik

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The shift away from a technocratic, apolitical European Commission towards a politicized one is a momentous development of the European Union. A crucial manifestation of this process is the *Spitzenkandidaten* model introduced at the 2014 European Parliament (EP) elections, which linked the outcome of the latter to the appointment of the European Commission President. As part of the symposium on "Holding the Political Commission Accountable", the present contribution delves into the field of EU external relations. More precisely, it juxtaposes political accountability mechanisms in the Common Commercial Policy (CCP) and the Common Foreign and Security Policy (CFSP) as they have been applied since the Lisbon reform. Firstly, it outlines the process of politicization of EU external relations. Secondly, it explains the diverging standards of political scrutiny in the EU depending on the external policy area. Thirdly and lastly, this "double standard" is put in a comparative light by looking at "exceptionalism" in U.S. foreign affairs, concluding that what makes the EU special is not that it maintains its own version of "foreign affairs exceptionalism", but that it constitutionalizes and institutionalizes it so neatly.

The Politicization of EU External Relations

Looking at the past decades of developing and consolidating EU external relations, a partial de-politicization at the Member State level has taken place, followed by a partial re-politicization at the EU-level. It is only partial because the Member States have not been fully replaced by the EU on the international stage. By contrast, they often appear alongside it in negotiations and within international organizations (see, for instance, the TTIP and CETA negotiations and their joint membership of the WTO). At times, they are at the forefront while the EU is – literally – no more than an "observer" (e.g., at the United Nations).

Nevertheless, the Court of Justice of the EU (CJEU) has made clear that references to foreign policy cannot serve as a blanket excuse for Member States to disregard obligations under EU law (see the *Centro-Com*case). Moreover, legal principles such as exclusive competence, pre-emption (the *ERTA* effect), and the duty of sincere cooperation have contributed to reign in the Member States to the benefit of more coherent and effective EU positions. Nevertheless, it would be too simplistic to say that this has led to a "de-politicization" of many foreign policy issues just because Member States cannot avail themselves of the "foreign policy" argument in order to remove an issue from the EU agenda. Rather, we should speak of "re-politicization" at the EU level.

In the area of trade, this process can be observed both at the WTO and in bilateral negotiations. At the WTO, the EU is represented by the European Commission, including in the area of dispute settlement and trade sanctions. The decision to launch complaints or to defend the EU's laws and policies (rather than changing them) are deeply political matters. For instance, when the EU chooses to face sanctions from others for upholding its ban on hormone-treated beef or adopts punitive tariffs against Harley-Davidson motorcycles and Levi's jeans to retaliate against American steel tariffs, this is not done according to purely technical considerations. Instead, these are based on strategies that take into account business interests and public opinion, and specifically target the political process in other countries.

In the bilateral realm, civil society protests against trade agreements such as TTIP and CETA have – probably irrevocably – brought these matters to a

wider public attention and contributed further to the politicization of EU trade policy. The signing of CETA, which became deadlocked due to resistance from the Belgian region of Wallonia, became a public spectacle. More recently, tensions between the EU and U.S. were not resolved quietly through a backroom deal between technocrats. Rather, the President of the European Commission deliberately sought the limelight by traveling to Washington D.C. and announcing a compromise in a televised press conference alongside President Trump. While effective in preventing further escalation, the "deal" that was reached was arguably mostly show and hardly substance.

In the area of security and defence, by contrast, a trend towards relocating policy leadership and political responsibility to the European level is less clear. First of all, the European Commission plays a much more limited role in this domain. The Council, consisting of Member State government representatives, remains in the driving seat. The Member States can choose to either act through the EU if consensus can be achieved or to act on their own where this is not the case. The Iraq and Libya interventions are examples for the latter category. Nevertheless, in the past decades, the CFSP, including the Common Security and Defence Policy (CSDP), has been developed and used extensively, as exemplified by over thirty completed and ongoing missions. Even though the EU stresses how they are embedded in multilateral processes and cater to humanitarian goals, they nonetheless remain political exercises as well. This can be seen from the choice of the location and setup of the missions. The EU's fight against piracy off the coast of Somalia is covered by UN Security Council resolutions and helps escort World Food Programme vessels. At the same time, it protects EU interests such as secure shipping lanes and provides opportunities for positive publicity at home.

Diverging Standards of Political Scrutiny

Regarding the political accountability mechanisms in the area of EU external relations, due to what Alan Dashwood has aptly termed "bipolarity", one needs to distinguish between trade (and other foreign policy areas) on the one hand and the CFSP on the other.

In the area of EU trade policy, currently led by Trade Commissioner Cecilia Malmström, there are three main political accountability mechanisms. Firstly, there is the Council, with its democratically legitimated Member State representatives. It provides the Commission with a mandate for trade negotiations and then monitors the progress of these negotiations by virtue of a special Trade Policy Committee. Moreover, trade agreements need the approval of the Council in order to be concluded (Articles 218 and 207 TFEU).

Secondly, there is political accountability within the multilevel governance structure of the EU. For "mixed" agreements, also the approval of the Member States is required according to their respective constitutional requirements. In the above-mentioned case of CETA, the Belgian federal government was unable to sign CETA in late 2017 without the approval of Wallonia. Only once a compromise solution was found could the agreement be applied provisionally, with the exclusion of the controversial chapter on the investment court system.

Thirdly, an innovation post-Lisbon is that the EP's approval is now required for the conclusion of trade agreements. This introduces an additional, public accountability mechanism at the European level. The EP has made use of its enhanced influence in several instances already.

Hence, the political accountability mechanisms in the area of trade are numerous and effective. One could even speak of an overkill of accountability, which makes it difficult for the EU to ratify new trade agreements. One solution to avoid deadlock has been developed in the context of the EU-Japan Economic Partnership Agreement. Here, the plan is to split the agreement: One agreement will deal with investment protection, which is both politically controversial and institutionally complex as it may require "mixity" (see *Opinion 2/15*). The other agreement will deal with everything else. In contrast to CETA, the second agreement will not be mixed and will hence be easier to

conclude, though political accountability through the Council and EP still applies.

In the area of security and defence, the situation is radically different. Firstly, the protagonist here is not the Commission but the High Representative for Foreign and Security Policy Federica Mogherini. The position is "double hatted". This means that the incumbent is both Vice-President of the Commission and Chair of the Foreign Affairs Council (Article 18(3) and (4) TEU). She is part of the politicized European Commission, but at the same time a representative of the collective of the Member States, which after the failed Treaty Establishing a Constitution for Europe made clear they no longer wanted an EU "foreign minister".

The CFSP is to be "put into effect" by the High Representative and the Member States, not by the Commission (Article 24(1)(2) TEU). It is a non-exclusive area of competence. The Member States cannot become pre-empted from acting due to EU actions. Legislative acts will not be adopted in this area, which limits the involvement of the Commission and the European Parliament even more.

In the CSDP in particular, the EU relies on "capabilities provided by the Member States" (Article 42(1) TEU). Whether these are to be deployed hence remains a question of the constitutional procedures of the respective Member States. This may include parliamentary approval in some countries such as Germany and Austria.

Nevertheless, there is some degree of political accountability at the EU level. The EP, for instance, has the right to "be immediately and fully informed at all stages of the procedure" of negotiating international agreements (Article 218(10) TFEU). The CJEU has confirmed that this includes those in the area of the CFSP (see the *Tanzania* case). However, for agreements which "relate exclusively to the common foreign and security policy" (Article 218(6)(2) TFEU), the EP's consent is not required. The Council concludes these on its own.

More recently, there are some signs of blurring the line between CFSP and other policy areas. These may signify an opportunity for the Commission and the EP to move from the side-lines to playing a more meaningful role. An example for this is the new European Defence Fund, which is to be part of the regular EU budget, over which the Commission and Parliament wield significant influence.

Foreign Affairs Exceptionalism à la EU

Before rushing to either applauding the EU's extensive political checks and balances in the area of trade or to deploring the lack thereof in the area of security and defence, it is worth looking across the Atlantic for some comparative insights. In the U.S., there is a rich tradition of what is called "foreign affairs exceptionalism". Curtis Bradley, the leading authority on this issue, defines it as "the view that the federal government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers." The reasons usually put forward to justifying this "more relaxed" standard include expertise and expediency, as well as the fact that the U.S. President wields democratic legitimacy of his own due to having been elected directly (or in any event through the peculiar Electoral College system) and hence does not have to rely on a parliamentary majority.

Taking this into account also helps to put the assessment of political accountability at the EU level in a more nuanced light. A feature of the EU as a polity that sets it apart from the U.S. (besides obviously not being a federal state) is that there is no directly elected "commander in chief". In fact, the whole point of the *Spitzenkandidaten* model is to connect the Presidency of the Commission to an EP majority. Moreover, a "politicized" Commission President coexists with the President of the European Council, with the two often framing "family pictures" at international summits.

There is thus *a priori* nothing special about treating foreign affairs somewhat differently in the political process. For certain challenges requiring expediency, such as "humanitarian and rescue tasks" (listed as one of the tasks of the CSDP, Article 43(1) TEU) or responding to trade sanctions or dumping, there are good reasons to avoid too many checks and balances that would render common responses ineffective. In other

areas, where important international agreements might shape both the EU's relations with partners and its own legislation for many years to come, it makes sense to scrutinize them thoroughly and make their approval not dependent on a simple majority only, but to ensure they have wide support across populations and stakeholder groups within the Union. What distinguishes the EU from the U.S. is the fact that is has constitutionalized and institutionalized different degrees of "exceptionalism" within the area of external relations.

Both in the EU and the U.S., foreign affairs remain a special domain, which requires a constant reconciliation between domestic interests and values and the demands of external partners. Moreover, in an interdependent world, foreign and internal policy become increasingly linked. Trade, migration, and climate change are prominent examples of that. This is no different for the EU and its multilevel system of governance. Hence, it can only be hoped that foreign affairs do not take a backseat but will take centre stage in the campaigns of the upcoming European elections.

ABOUT THE AUTHOR

Joris Larik
Dr. Joris Larik is Assistant Professor of Comparative, EU and International Law at Leiden University.

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