

## **OUTSIDER OR FRONTRUNNER? RECENT DEVELOPMENTS UNDER INTERNATIONAL AND EUROPEAN LAW ON THE STATUS OF THE EUROPEAN UNION IN INTERNATIONAL ORGANIZATIONS AND TREATY BODIES**

FRANK HOFFMEISTER\*

### **1. Introduction**

Much of the European Union's foreign policy *credo* focuses on the promotion of effective multilateralism. The Council of the European Union put this notion at the heart of the European Security Strategy (2002),<sup>1</sup> and the European Commission referred to the EU as a "frontrunner" in the UN system in its communication on EU-UN relations (2003).<sup>2</sup> Whereas the world organization with its wide net of specialized agencies offers a most important platform for multilateral diplomacy for EU Member States, it is less flexible as regards the participation of the European Union<sup>3</sup> itself. Membership in the main organization is still confined to States only (Art. 4(1) of the UN Charter). True, in 1991, the first UN specialized agency, the Food and Agricultural Organization (FAO), adopted the necessary constitutional modifications to allow membership of the European Community.<sup>4</sup> However, since then no major UN specialized agency has welcomed the EC as a member.<sup>5</sup>

\* Dr. iur., Member of the Commission Legal Service. Professor of Law (part-time) at the Free University of Brussels. The views expressed in the article are personal.

1. European Security Strategy: A Secure Europe in a Better World, Annex to the Presidency conclusions of December 2003.

2. COM(2003)526 final, The European Union and the United Nations: The choice of multilateralism.

3. In this article the term "European Union" denotes the European Community as supplemented by the Common Foreign and Security Policy and the cooperation on police and criminal matters, as defined in Art. 1(3) TEU. If the entity acts only in the area of the second pillar, the term "second-pillar EU" will be used. Action in the first pillar will be attributed to the European Community (EC).

4. Arts. II (8)–(11) FAO Constitution. See in detail Frid, "The European Economic Community: A member of a Specialized Agency of the United Nations", 4 EJIL (1993), 239 et seq.

5. For an overview see Hoffmeister and Kuijper, "The status of the EU at the United Nations: institutional ambiguities and political realities", in Wouters, Hoffmeister and Ruys (Eds.), *The UN and the EU – an ever stronger partnership* (The Hague, 2006), pp. 9–34 (pp. 16 et seq.).

Against this background, one may easily get the impression that the legal status of the European Union in international organizations is still limited. However, to complete an analysis of the EU's institutional standing in the multilateral arena, one should also take account of three related issues: First, there are important international organizations outside the UN context, where the EU's status is more advanced. Second, other means of active EU participation in an international organization reducing to a large degree the differences between members and non-members can be taken into account. Third, despite lacking membership in the organization itself, the EC may play an important role in multilateral bodies set up by a convention negotiated under the auspices of the organization.

These issues raise a number of legal questions. What are the legal rules for granting an enhanced status below membership? Which is the appropriate institution within an international organization to grant such status? Under what conditions does the Community have access to the treaty bodies of a multilateral convention? In addition to these international law inquiries, some uncertainties also exist under European law. What is the division of powers between the European institutions as regards acquisition of a specific EU status at an international organization? What are the specific legal obligations as to the coordination between the Member States and the Community?

This article will first review important factual developments as regards the EU's legal status in multilateral *fora*, focusing roughly on the last ten years.<sup>6</sup> The related issues of international and European law will then be analysed, with particular attention paid to the European Parliament's role when the Community becomes a member of an international organisation or a multilateral convention establishing treaty bodies. The main findings will be summarized in a conclusion.

## 2. Recent developments

### 2.1. *EU-US discussions*

From a legal perspective, the case for a formal status of the European Union in multilateral *fora* is strongest in policy areas subject to exclusive competence of the European Community. Nevertheless, also in areas of shared

6. For a presentation of the practice in previous decades see Groux and Manin, *The European Communities in the international order* (Luxembourg, 1984), pp. 41–55 and Sack, "The European Community's membership of international organizations", 32 CML Rev. (1995), 1237–1252.

competence the EC's presence is desirable to enable effective coordination of Community positions and common positions of the Member States. In addition, one may point to the economic and political support the Community offers to an international organization or body.

During the last decade, the Community actually made an attempt to upgrade its status in many policy fields covered either by exclusive or shared competence. It sometimes faced considerable resistance from other States arising out of a lack of knowledge of the difficult European institutional set-up or of principled objections as to the inter-State set-up of the international body in question. In order to overcome such difficulties, during 2003–2005, the EU and the US, within the High-Level Transatlantic dialogue, set up a working group to discuss EC participation in international organizations. On the European side, the Commission, the Presidency and the Council secretariat were present; the American side was represented by different departments of the US State Department. The discussions focused on principles and specific cases and proved fruitful in many instances.

## 2.2. *EC status*

### 2.2.1. *Trade, agriculture and fisheries policy*

Not surprisingly, the multilateral presence of the European Community in the trade sector is today firmly anchored. The European Communities is a founding member of the WTO (Art. XI para 1 of the 1994 Marrakesh Agreement). Whereas the Member States are WTO members as well, practice in the organization is to a large degree shaped by the Community. In particular, cases brought against Member States under the Dispute Settlement Understanding are taken up by the Community, represented by the Commission.<sup>7</sup> The Community has also become a contracting party to virtually all commodity agreements, sometimes to the exclusion of the Member States,<sup>8</sup> sometimes in parallel with some or all of them.<sup>9</sup> One notable exception is the World Customs Organization (WCO). While being a Party to the Istanbul Convention,<sup>10</sup>

7. For the practice of the Community and its Member States in the WTO see Koutrakos, *EU international relations law* (Hart Publishers, 2006), pp. 175–179.

8. See e.g. the agreements on olive oil (O.J. 2005, L 302/46), grain (O.J. 1996, L 21/49), sugar (O.J. 1992, L 379/15), cocoa (O.J. 2002, L 342/1), jute (O.J. 2002, L 112/34).

9. See e.g. the agreements on food aid (O.J. 1999, L 222/41), tin (O.J. 1976, L 222/3), tropical timber (O.J. 1996, L 208/1), coffee (O.J. 2001, L 326/22), lead and zinc (O.J. 2001, L 82/21), nickel (O.J. 2001, L 293/23), copper (O.J. 2001, L 89/39), rubber (O.J. 2002, L 215/13).

10. Council Decision 93/329/EEC of 15 March 1993, O.J. 1993, L 130/1, concerning the conclusion of the Convention on Temporary Admission and accepting its annexes.

the Harmonized System Convention<sup>11</sup> and the revised Kyoto Convention<sup>12</sup> and therefore participating in the relevant treaty bodies established under WCO auspices, the EC is only an observer at the main organization despite its undisputed competence in the customs area.<sup>13</sup> Backed by negotiating directives of the Council, the Commission presented an application for Community membership in that organization in April 2001. Initially, it was turned down in the WCO Council in June 2002. After a recent US policy change, the WCO Policy Commission will again examine the legal, voting and budgetary issues of a possible Community membership in December 2006.

On agriculture, the Community's membership of FAO since 1991 triggered the subsequent accession to the *Codex Alimentarius* Commission in November 2003.<sup>14</sup> The *Codex* is a subsidiary common body of FAO and WHO, entrusted with setting international standards on food safety with direct relevance under the WTO Agreement on Sanitary and Phytosanitary Standards.<sup>15</sup> Membership rights of the Community follow the FAO pattern with one noteworthy difference. In the *Codex*, the voting power of the Community depends on the presence of Member State delegates.<sup>16</sup> This is a legally unsatisfactory arrangement for the Community because Member States vested competence in the Community by concluding the EC Treaty: they do not grant ad hoc "empowerments" through their presence.<sup>17</sup>

The European Community has ratified the UN Convention on the Law of the Sea (UNCLOS)<sup>18</sup> next to its Member States and the Framework Convention on Straddling Stocks<sup>19</sup> in 1998. As a Party, it participates in the respective annual conferences held under these agreements. Nevertheless, as of 2000, important policy discussions are rather held in informal bodies, such

11. Council Decision 87/367/EEC of 7 April 1987, O.J. 1987, L 198/1.

12. Council Decision 2003/231/EC of 17 March 2003 concerning the accession of the European Community to the Protocol of Amendment to the International Convention on the simplification and harmonization of Customs procedures (Kyoto Convention), O.J. 2003, L 86/21–45.

13. Case 38/75, *Douaneagent der NV Nederlands Spoorwegen v. Inspecteur der invoerrechten en accijnzen*, [1975] ECR 1439, para 21.

14. Council Decision 2003/822/EC of 17 Nov. 2003, O.J. 2003, L 309/14, Annex II and III of that decision contain the declaration of competence and the relevant intra-Community rules on coordination.

15. See Art. 3(4) of the SPS Agreement.

16. See Art. II.8 of the Rules of Procedure of the Codex Alimentarius Commission, available at [ftp.fao.org/codex/Publications/ProcManuals/Manual\\_15.pdf](http://ftp.fao.org/codex/Publications/ProcManuals/Manual_15.pdf). For further details of the EC's membership in the Codex see Pedersen, "FAO-EU cooperation: an ever stronger partnership", in Wouters, Hoffmeister and Ruys, op. cit. *supra* note 5, pp. 63–92, at p. 82 et seq.

17. See the critique by Sack, op. cit. *supra* note 6, 1241, with respect to similar arrangements in certain commodity agreements.

18. O.J. 1998, L 179/1.

19. O.J. 1998, L 189/14.

as the “UN Informal Consultative Process on the Law of the Sea” (UNICPOLOS). This process has been established by a General Assembly resolution<sup>20</sup> to inter-relate all aspects of oceans and seas. In particular, non-UNCLOS parties have thereby gained access to the relevant multilateral discussions. For the Community, however, this parallel track to the Conferences of Parties proved to be a dangerous institutional path. At the sixth UNICPOLOS meeting in June 2005, the United States (which has not ratified UNCLOS) insisted that the European Community should be treated as an observer only, consistent with the status it enjoys at the General Assembly since 1974.<sup>21</sup> After intensive discussions in New York and in the EU-US working group, the final compromise consisted of treating the Community as “participant” in UNICPOLOS. With the exception of the right to vote, the Community would not face any procedural restrictions and be able to act like States in that meeting. As UNICPOLOS does not resort to voting in practice, this difference to its status under UNCLOS was deemed to be acceptable in Brussels.

Beyond UNCLOS, the Community has further increased its presence in regional fisheries organizations in recent years. Going beyond the Atlantic,<sup>22</sup> it is by now a member of the Indian Ocean Tuna Commission (1995),<sup>23</sup> the General Fisheries Commission for the Mediterranean (1998),<sup>24</sup> and the respective Commissions in the Western and Central Pacific Ocean (2004).<sup>25</sup>

### 2.2.2. *Environment, transport and energy policy*

In the environmental sector, the Community became a party to all major international instruments concluded in the last decade.<sup>26</sup> Accordingly, it has its

20. A/RES/60/30.

21. UNGA Resolution 3208 (XXIX), 11 Oct. 1974: “The General Assembly, wishing to promote co-operation between the United Nations and the European Economic Community, requests the Secretary-General to invite the European Economic Community to participate in the sessions and work of the General Assembly in the capacity of observer”.

22. The Community is party to the North-West Atlantic Fisheries Organization (O.J. 1978, L 378/2), the North-East Atlantic Fisheries Organization (O.J. 1981, L 277/22); the North Atlantic Salmon Conservation Organization (O.J. 1982, L378. p. 28), the International Convention on the Conservation of Atlantic Tuna (O.J. 1986, L 162/32) and the South East Atlantic Fisheries Organization (O.J. 2002, L 234/39).

23. O.J. 1995, L 236/24.

24. O.J. 1998, L 190/34.

25. O.J. 2005, L 32/1.

26. Council Decision 81/462/EEC, O.J. 1981, L 171/11 (1979 Geneva Convention on trans-boundary air pollution); Council Decision 88/540/EEC, O.J. 1988, L 297/8 (Vienna Convention on the Ozone Layer 1985 and Montreal Protocol 1987); Council decision 94/69/EC, O.J. 1994, L 33/11 (Climate Change Convention 1992); Council Decision 2002/358/EC, O.J. 2002, L 130/1 (Kyoto-Protocol 1999); Council Decision 93/98/EEC, O.J. 1993, L 39, p 1 (Basel Convention 1989); Council Decision 93/98/EEC, O.J. 1993, L 39/1 (Convention on Combating Desertifica-

seat in a variety of monitoring bodies covering areas ranging from desertification to climate change. In addition, the EU strongly supported the foundation of an international environmental organization (IEO) at the UN reform summit of September 2005.<sup>27</sup> That could make the plea for Community membership politically easier once the new organization is established.

In contrast, the Community status in universal transport organizations is rather limited. Notwithstanding considerable Community legislation in the field of maritime transport, the Council has not as yet authorized the Commission to negotiate about Community accession to the International Maritime Organization (IMO).<sup>28</sup> As regards Community membership in the International Civil Aviation Organization (ICAO), Member States moved the dossier forward a bit in January 2004 in the follow-up to the *Open skies* judgments of the European Court of Justice.<sup>29</sup> As an intermediate step, the Irish Council Presidency wrote a letter to the President of the ICAO Council, asking for a means of ensuring more effective Community participation in the meetings of the ICAO Council.<sup>30</sup> Details of this participant status without a right to vote were then laid down in an exchange of letter between the President of the ICAO Council and the Commission.<sup>31</sup> Accordingly, the ICAO Council now regularly invites the European Community, represented by a Commission delegate in Ottawa, before each session to participate in its meetings.

A comparable reluctant attitude on the part of some EU Member States can also be witnessed at the regional transport level. Until now, the Council has not authorized the Commission to negotiate Community membership in the two European River Commissions, despite a recommendation to that effect dating back to August 2003. Whereas Member States usually “protect” the Rhine Commission against a “Community take-over” by underlining the satisfactory functioning of that organization, the same cannot be said of

tion); Council Decision 93/626/EC, O.J. 1993, L 309/1 (Biodiversity Convention 1992); Council Decision 2002/628/EC, O.J. 2002, L 201/48 (Cartagena Protocol 2001).

27. See Smadja, “The European Union and the reform of the United Nations”, in Wouters, Hoffmeister and Ruys, op. cit. *supra* note 5, pp. 363–372, at p. 369.

28. SEC(2002)381 final of 9 April 2002.

29. Case C-476/98, *Commission v. Germany*, [2002] ECR I-9855, paras. 103–113 with annotation by Hoffmeister, 98 AJIL (2004), 567–572.

30. Letter from Seamus Brennan, Minister for Transport of Ireland, in his capacity as President of the Council of the European Union to Dr. Assad Kotaite, President of the ICAO Council of 22 April 2004 (unpublished).

31. Letter from ICAO President Dr Assad Kotaite, to Commissioner de Palacio of 27 Oct. 2004 (unpublished); Letter from Commission Vice President Jacques Barrot to ICAO President Dr Assad Kotaite of 7 Feb. 2005 (unpublished).

the Danube Commission. Nevertheless, the review process of the 1948 Belgrade Convention is only negotiated by the Danube States among themselves relegating the Commission to the observer table. A noteworthy opening of Member States in this policy field occurred *vis-à-vis* the Organization on International Carriage by Rail (OTIF). Since Article 38 of the revised Convention establishing that Organization (the 1999 Vilnius Protocol) allows, as of July 2006 (date of entry force of the Protocol), for membership by regional economic organizations,<sup>32</sup> the Council authorized the Commission to negotiate the accession treaty for the Community with the OTIF secretariat. In view of the progressive adoption of security-related *acquis* in the air transport sector, the Community became a member of Eurocontrol in 2004.<sup>33</sup>

In relation to energy policy, the Commission recently made an attempt to convince the Council that the present observer status for the Community of 1975 in the International Energy Agency<sup>34</sup> is outdated. Backed by the European Court of Justice's finding on the scope of Euratom's powers in the area of peaceful research and use of nuclear energy,<sup>35</sup> full membership in that specialized UN agency is warranted from the Commission's perspective.<sup>36</sup> On the regional level, the Community became a party to the Energy Charter Treaty, setting out important investment rules in the energy charter, supported by a strong dispute settlement system.<sup>37</sup> A noteworthy development occurred since then as regards gas and electricity, where the Community had adopted two liberalization directives in 2003.<sup>38</sup> Driven by a strong demand on the part of the World Bank and also by the Stability Pact for South-Eastern Europe, the States of this region established recently an "Energy Community".<sup>39</sup> This is a fully-fledged international organization, where the European Community

32. The text of the Vilnius Protocol of 1999 is available at [www.otif.org](http://www.otif.org).

33. Council Decision 2004/636/EC of 29 April 2004, O.J. 2004, L 304/209.

34. See the cooperation agreement between Euratom and IAEA of 23 Dec. 1975, O.J. 1975, L 329/1.

35. Case C-29/99, *Commission v. Council*, [2002] ECR, I-11221.

36. See Communication from the Commission to the Council of 16 March 2006 on enhancing the status of the European Atomic Energy Community at the International Atomic Energy Community, COM(2006)121 final.

37. Council Decision 98/181/EC, O.J. 1998, L 69/1.

38. Directive 2003/54/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in electricity, O.J. 2003, L 176/37; Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in natural gas, O.J. 2003, L 176/57.

39. For more details on the historical background of this organization see its website [www.energy-community.org](http://www.energy-community.org) and Hoffmeister, "Die Beziehungen der Europäischen Union zu den Staaten des Westbalkans", in Kadelbach (Ed.), *Die Außenbeziehungen der Europäischen Union* (Frankfurt, 2006), pp. 132–138.

is a founding member next to Bulgaria, Romania, Croatia, Serbia, Montenegro, Bosnia and Hercegovina, the former Yugoslav Republic of Macedonia, Albania and the UN Interim Administration for Kosovo (UNMIK).<sup>40</sup> Turkey, Norway, the Ukraine and Moldova became observers to the organization in November 2006. As the scope of the treaty was fully covered by Community competence,<sup>41</sup> there was no need for EU Member States to become parties to that treaty as well. However, the geographically most concerned Member States are admitted to the institutions of the Energy Community as “participants” with no voting rights.<sup>42</sup>

### 2.2.3. *Economic and development policy*

When the EC became exclusively competent for monetary policy as regards the Euro Member States, the IMF Executive Board granted observer status to the European Central Bank.<sup>43</sup> Accordingly, the ECB is invited for discussions on Article IV consultations,<sup>44</sup> fund surveillance over the policy of individual euro-area members, the role of the Euro in the international monetary system, the world economic outlook, global financial stability reports and world economic and market developments. In other areas, the EC view is presented by the Executive Director of the Member State holding the Euro 12 Presidency, assisted by a representative from the Commission;<sup>45</sup> furthermore, the European Commissioner for Finance may address the bi-annual meetings of the Governing Council. The observer status of the EC in the World Bank Group seems to be more effective, given that the EC is an important donor of development aid. Accordingly, the Commissioner for Development seems to have more influence in the strategic discussions of the World Bank’s Governing Council.<sup>46</sup>

40. Council Decision of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty, O.J. 2006, L 198/15.

41. Arts. 43 (2), 55, 83, 89, 95, 133, 175 EC.

42. Art. 95 of the Treaty establishing the Energy Community.

43. Decision No. 11875 (99/1) adopted by the IMF Executive Board on 21 Dec. 1998 granting observer status to the European Central Bank, reviewed by IMF Executive Board Decision of 27 Dec. 2002 (Decision No. 12925).

44. Under Art. IV (3) of the IMF Articles of Agreement, the IMF consults on the exchange rate policies of its members.

45. See Art. 113(4) EC and the conclusions of the Vienna European Council of December 1998. For a detailed discussion of the specificities of EC external representation in the area of monetary policy see Martenczuk, “Die Außenvertretung der Europäischen Gemeinschaft auf dem Gebiet der Währungspolitik”(1999) ZaöRV, 93 et seq. For the practical difficulties of this arrangement see Garnier, Daco and di Mauro, “UN-EU cooperation on financial matters: the role of the European Union at the International Monetary Fund and the World Bank”, in Wouters, Hoffmeister and Ruys, op. cit. *supra* note 5, pp. 115–129.

46. Under Art. V Section 8 of the IBRD Articles of Agreement (amended 1989) the IBRD

In contrast, the OECD granted the Community a particular status since its establishment. According to Article 13 of the Paris Convention of 1960 in conjunction with Protocol 1, the Commission, representing the then three Communities, “shall take part in the work” of the organization. In practice, the Commission is actively participating in all OECD committees (except the budgetary committee) next to OECD Member States. The Commission may even exercise a right to vote in the OECD development committee, where the Community acts as an additional donor of development aid backed by an independent Community budget. Furthermore, there is no impediment for the Commission (in agreement with the Council) to declare within the OECD the Community’s readiness to implement OECD decisions in the Community legal order.<sup>47</sup> Whereas these structures have been in place for a long time, some new developments can be reported as regards the OECD monitoring activities *vis-à-vis* its Members and participants. The OECD “Economic Development Review Committee” (ERDC) analyses the monetary and exchange rate policies and other macroeconomic and structural policies of States, followed by policy recommendations in these areas. Since 2001, the ERDC also writes reports about the monetary and exchange rate policies of the Euro zone, thereby covering an important part of its usual surveys on States. In 2003, the Ambassadors of Australia, Canada, Japan, Korea, Mexico, New Zealand and Mexico requested to broaden the scope of this review. In the view of the APEC countries, “all EC policies and EU-wide policies in general” should be at the heart of the EDRC review. Upon a recommendation from the Commission to respond positively to the request,<sup>48</sup> the Council agreed that a first “EU-25” review will be carried out in 2006–2007. Following a fact-finding mission from the OECD secretariat to Brussels on the impact of the Community-wide structural and sectoral policies on the EU’s macroeconomic and growth performance, the EDRC is likely to adopt its first report in spring 2007. Those EU members that are not admitted to the OECD<sup>49</sup> have requested to participate in the relevant meetings of the EDRC as observer. From a broader perspective, the ERDC review recalls the WTO’s trade policy review mechanism<sup>50</sup> where the Community’s trade policy is under regular scrutiny from Geneva.

shall cooperate with other public international organizations. Section 4 (b) of the Rules of Procedure of the Governing Council (as of 1980) allows the invitation of observers to its meetings. Similar arrangements apply in the International Development Agency, the International Finance Corporation and the Multilateral Investment Guarantee Agency.

47. For more details compare ECJ, Opinion 2/92, [1995] ECR I-525.

48. COM(2005)150.

49. Cyprus, Estonia, Malta, Latvia, Lithuania, Slovenia.

50. Compare Art. III(4) of the Marrakesh Agreement establishing the WTO and its Annex 3.

#### 2.2.4. *Justice, liberty and security*

With the entry into force of the Amsterdam Treaty in May 1999, the Community's powers in the area of justice, liberty and security grew considerably. Since then, the external dimension of Part Three, Title IV of the EC Treaty is also felt in the multilateral arena. An EC request for full participation in the executive board of the High Commissioner for Refugees (UNHCR) was brought forward in March 2002 since the existing observer status at the formal meetings<sup>51</sup> was deemed to be inadequate from a European perspective. It met resistance from the United States, arguing that such status would lead to overrepresentation of Europe in a restricted body. That difference could not be alleviated in the EU-US dialogue. The situation is less problematic as regards recent UN conventions in the field of justice, liberty and security. The EC concluded the UN Palermo Convention against transnational organized crime and its protocols<sup>52</sup> and is about to become a party to the UN Convention on the protection of persons with disabilities with the consequence of EC membership in the relevant treaty bodies (2006).

An interesting sub-area concerns judicial cooperation in civil matters. The ECJ has recently underlined the broad scope and exclusive character of Community competence in a wide range of international private law.<sup>53</sup> Against that background it can hardly be surprising that the Community finally managed to accede to the Hague Conference on international law in 2006<sup>54</sup> on the basis of Article 2A of the Statute, as amended in 2005. This revision had been adopted by consensus in the Hague Conference after long negotiations following the membership request from the Community of late 2002.

On the regional level, much of this policy field is dealt with by the Council of Europe. The relations between the two organizations are very intensive and complex. Back in 1959, the Commission was granted access to the CoE Committee of Ministers and expert committees, insofar as the agenda item was "of concern to the Commission".<sup>55</sup> The present cooperation is based

51. Rule 38 of the UNCHR Executive Committee's Rules of procedure, A/AC.96/187/Rev. 5.

52. Council decision 2004/579/EC of 29 April 2004, O.J. 2004, L 261/69 (Convention) and Council decisions 2006/616/EC, 2006/617/EC, 2006/618/EC, 2006/619/EC of 24 July 2006 (Protocols), O.J. 2006, L 262/24–61. On the negotiation history see Rijken and Kronenberger, "The United Nations Convention against transnational crime and the European Union", in Kronenberger (Ed.), *The European Union and the International Legal Order: Discord or Harmony?* (The Hague, 2001), p. 481, at 491 et seq.

53. ECJ, Opinion 1/03, nyr.

54. Council Decision 2006/719/EC of 5 Oct. 2006 relating to the accession of the European Community to the Hague Conference on Private International Law, O.J. 2006, L 297/1.

55. Arrangement between the Committee of Ministers of the Council of Europe and the Commission of the European Economic Community of 18 Aug. 1959; Arrangement between the

on an exchange of letters of 1996,<sup>56</sup> which supplemented the previous one dating from 1987.<sup>57</sup> In the latter it was already foreseen that CoE conventions should systematically use a clause allowing the European Community to become a Contracting Party. Indeed, the Community has in the meanwhile ratified dozens of CoE conventions, which contained such clauses; one well-known exception is the European Convention on Human Rights, due to a lack of general Community powers in the field.<sup>58</sup> As regards the current institutional arrangements, the 1996 exchange of letters provides that the meetings and activities of the Committee of Ministers, Minister's Deputies, rapporteur groups of the deputies and any other working party convened will be open to the Commission at the invitation of the competent Council of Europe authorities. The Commission does not, however, enjoy voting rights and is not involved in the Organization's decision-making process. On this basis, it plays an active role in the entire field of Council of Europe activities. From a legal perspective, participation in the CoE Committee of Legal Advisors (CAHDI) and in the Venice Commission for Democracy through Law is particularly important.

#### 2.2.5. *Employment, public health, education and culture*

Finally, the Community's increasing external powers are also exercised in the international organizations dealing with employment, public health and educational and cultural matters. Its relationship with the International Labour Organization already started in 1958<sup>59</sup> and the observer status was formally granted in 1989.<sup>60</sup> After the introduction of new social policy powers under the Amsterdam Treaty, the input of the EC in that organization has been considerably strengthened. However, due to Article 19(5) of the 1919

Committee of Ministers of the Council of Europe and the Commission of the European Atomic Energy Community of 18 Aug. 1959, in Council of Europe (Ed.), *Compendium of Texts governing the relations between the Council of Europe and the European Communities*, 2nd edition, (Strasbourg, 1979), pp. 9 and 17.

56. Exchange of letters between the Secretary-General of the Council of Europe and the President of the Commission of the European Communities on 5 Nov. 1996 supplementing the "Arrangement" between the Council of Europe and the European Community concluded on 16 June 1987, in Council of Europe (Ed.), *Compendium of Texts governing the relations between the Council of Europe and the European Communities*, 4th ed. (Strasbourg, 2001), p. 8.

57. Arrangement between the Council of Europe and the European Community, concluded on 16 June 1987 in: Council of Europe (ed.), *op. cit. supra* note 56, p. 3.

58. ECJ, Opinion 2/94, [1996] ECR I-1759.

59. Exchange of letters of 7 July 1958, O.J. 1959, 027/521.

60. Exchange of letters of 21 Dec. 1989 and 22 Dec. 1989 between the European Commission and the International Labour Organization, O.J. 1989, C 24/8, renewed by an exchange of letters of 14 May 2001, O.J. 2001, C 165/23.

ILO constitution, the Community can still not become a formal party to any ILO convention – it is therefore excluded from a whole sector of law despite its undisputed external competence.<sup>61</sup> Hence, such competence has to be exercised through the medium of the Member States acting jointly in the Community's interest.<sup>62</sup> Despite this handicap, Community coordination on ILO matters is slowly gaining ground both in Brussels and in Geneva and the Community raises its profile in ILO discussions on the political level.<sup>63</sup>

Similarly, the Community is playing a more and more active role in the WHO and the UNESCO. In both organizations it is admitted as an observer on the basis of an exchange of letters<sup>64</sup> and allowed to participate in the relevant meetings of the plenary and executive organs. Having received special invitations from the World Health Assembly, the Community negotiated the Framework Convention on Tobacco Control (1999–2003)<sup>65</sup> and the International Health Regulations (2003–2005)<sup>66</sup> in the WHO.<sup>67</sup> In a similar vein, the Community was invited by the UNESCO Executive Board<sup>68</sup> to participate actively and as fully as appropriate in the negotiations of the Convention on cultural diversity in 2005.<sup>69</sup> It became a party to these conventions alongside its Member States<sup>70</sup> and accepted the International Health Regulations as binding for the Community.<sup>71</sup>

61. Sack, *op. cit. supra* note 6, 1239.

62. ECJ, Opinion 2/91, [1993] ECR I-1061, paras. 36–38.

63. Delarue, "ILO-EU cooperation on employment and financial issues", in Wouters, Hoffmeister and Ruys, *op. cit. supra* note 5, pp. 93–114.

64. WHO: Exchange of letters of 28 April 1982 (O.J. 1982, L 300/20) and of 14 Dec. 2000 (O.J. 2001, C 1/7) between the European Commission and WHO; UNESCO: Exchange of letters of 15 Sept. 1964 between the European Commission and UNESCO.

65. Decision of the World Health Assembly WHA 52.38 of 24 May 1999, para 1 (3).

66. Decision of the World Health Assembly WHA 56.28 of 28 May 2003, para 2.

67. For details of these negotiations see Eggers and Hoffmeister, "UN-EU cooperation on public health: the evolving participation of the European Community at the WHO", in Wouters, Hoffmeister and Ruys, *op. cit. supra* note 5, pp. 155–170, at pp. 162–168.

68. Decision No. 171 EX/47 of the UNESCO Executive Board, 26 April 2005, para 3.

69. For a discussion of the UNESCO legal framework see Cavicchioli, "The European Community at UNESCO: an exceptionally active observer?", in Wouters, Hoffmeister and Ruys, *op. cit. supra* note 5, pp. 135–154.

70. Council Decision 2004/513/EC, O.J. 2004, L 213/8 (Framework Convention on Tobacco Control); Council Decision 2006/515/EC, O.J. 2006, L 201/15 (Cultural Diversity Convention).

71. For questions of implementation of the IHR within the Community see COM(2006)552 final, of 26 Sept. 2006.

### 2.3. EU status

Whereas all the previous examples related to first pillar matters and thus concerned the Community only, there are also important developments going beyond the reach of Community competence. The most prominent example is the newly established UN Peace-Building Commission (PBC), a subsidiary body of the UN Security Council and the UN General Assembly. As that Commission will focus on the crucial phase after the end of active hostilities, it may address issues involving both foreign and security policy (2nd pillar) and development policy (1st pillar). Alongside the elected members of the PBC, the participation of “institutional donors”<sup>72</sup> or of “relevant regional organizations”<sup>73</sup> is envisaged. That could open the door for either EC or 2nd pillar EU participation, or the participation of a *de facto* common EC/EU delegation. A relevant compromise between the institutions was agreed on COREPER level in May 2006. However, in the first meeting of the organizational committee in July 2006, the EC’s request to participate as an institutional donor was turned down. Pakistan spoiled the meeting with a similar request for the Organization of Islamic Cooperation, whose role in the field of global development policy can hardly be compared with the one exercised by the Community. Nevertheless, the OIC request was enough to trigger a debate in the organization committee, leading to the disappointing result that no institutional donor at all was admitted to the meeting. In contrast, the EC was invited to the first specific country meetings *vis-à-vis* Sierra Leone and Burundi in early October 2006 and participated with a *de facto* common EC/EU delegation. According to a COREPER decision of December 2006 that delegation shall sit behind the nameplate “European Union” within the meaning of Article 1(3) TEU.

Although politically much less important, another example is worth mentioning from the regional field because of its institutional significance. In summer 2006, the EU applied for observer status at the inter-governmental South Asian Association for Regional Development (SAARC). The joined letter of the Council and the Commission set out that the EU will be represented by the Commission for matters falling under Community compe-

72. Para 9 of GA resolution 60/180 and Security Council resolution 1645 (2005) establishing the PBC reads: “Decides that representatives of the World Bank, the International Monetary Fund and other institutional donors shall be invited to participate in all meetings of the Commission” (underline and emphasis added).

73. Para 7 (b) of the quoted resolutions reads: “Also decides that *country-specific meetings* of the Commission, upon invitation of the Organizational Committee ... shall include as members, in addition to members of the Committee, representatives from ...” relevant regional and subregional organizations”.

tence and by the Presidency for matters of foreign and security policy. To the author's knowledge, this is the first time the EU (comprising both pillars) has been accepted as an observer in another international organization.

### 3. International law

#### 3.1. *Full participant status*

The above review shows that the legal status of the European Community in other international organizations oscillates between membership and observer status. As a rule of thumb, the former is granted in international organizations dealing with trade (WTO, *Codex Alimentarius*, probably WCO), fisheries (regional fisheries organizations) or internal market areas with a large degree of harmonization (energy community, judicial cooperation in civil matters), whereas the latter is the traditional format in the UN main organization and its specialized agencies. One striking feature of the recent developments is, however, that the observer status has in the meanwhile abandoned its classic format in many instances. In the ICAO, as well as for treaty negotiations under the auspices of the WHO and UNESCO and to a certain degree in the ILO, the Community is nowadays treated equally to members of these organizations, except in relation to the right to vote. It also enjoys such enhanced status in important regional organizations, such as the OECD and the Council of Europe. With a certain simplification one may call this arrangement a "full participant" status,<sup>74</sup> referring to a term that was first used to describe the enhanced observer rights of the European Community in the Commission on Sustainable Development (CSD) in 1995.<sup>75</sup> A particularly exhaustive contem-

74. For an early analysis of this notion see Dormoy, "Le statut de l'Union européenne dans les organisations internationales" in Dormoy (Ed.) *L'Union européenne et les organisations internationales* (Brussels 1997), pp. 52–54.

75. ECOSOC Decision 1995/201 of 8 Feb. 1995. The relevant part reads: "(a) The European Community, while not being a member of the Commission on Sustainable Development, shall be entitled to participate fully, within its areas of competence, in the work of the Commission or any subsidiary body thereof, in accordance with the present decision. Such full participation shall include the right to speak and the right of reply, as well as the right to introduce proposals and amendments. Such full participation shall also include the right to raise as a point of order the fact that consultations are continuing among the Community and its member States on a matter on which a final decision is about to be made and for which the Community is the representative on the Commission in accordance with the present decision, provided that the right to raise this point of order shall not include the right to challenge the decision of the Chairman in response to that order.

The Community shall not have the right to vote but may submit proposals that shall be put to the vote if any member of the Commission so requests. The participation of the representatives

poraneous explanation of this notion was put forward by the UK ambassador at the meeting of the UNESCO Executive Board, after the Board had decided on 26 April 2005 to invite the Community to “participate as appropriate” in the negotiations of the UNESCO Convention on Cultural Diversity. The EU and the US, with the agreement of other leading UNESCO members, had come up with the following formula:

“The Decision refers to active participation as fully as appropriate. The European Union considers that this active participation shall consist, within the negotiation of the convention, of the ability to speak as other participants. Such active participation shall also consist of the ability to reply, to put forward proposals and amendments on issues for which it has competence at formal meetings. It shall also include the ability to take part in the discussion of procedural issues within the context of the Draft Cultural Diversity Convention and the ability to take part in the committees, working groups, formal or informal meetings set up in the course of the work relating to negotiation of this Convention. The European Community shall have its own nameplate. The European Community may not chair committees or sub-committees or serve as rapporteur unless there is full consensus. The European Community shall not have the right to vote nor break or block consensus. Furthermore, European Community participation does not mean an additional voice. Indeed, the European Community decides in internal coordination whether the Commission will speak, in matters of its competence, on behalf of the Community and its Member States. During this process, we have been open to providing further explanations concerning competences of the Community as regards the draft Convention whenever it speaks and we will continue to do so.”<sup>75a</sup>

From an international law perspective the question may arise what is the appropriate institution within an international organization to confer such status upon the Community. On the one hand, one may argue that decisions concerning the fundamental architecture of an organization should in principle be taken by the plenary organ. On the other hand, every organ has the power to adopt its own rules of procedure. These may have a direct bearing on the admission and status of non-members as long as they are in line with the constitutional treaty of the organization. Against that background the recent practice of several international organizations may be an important factor in discerning any guiding principle.

The original resolution on participant status in the CSD was adopted by ECOSOC, regulating the activity of one of its functional commissions. The

of the Community shall in no case entail an increase in the representation to which the member States of the Community would otherwise be entitled . . .”

75a. UNESCO Doc. 171 EX/SR.1-10, Summary of the Records of the 171st session of the Executive Board (18–28 April 2005), pp. 292–293.

ECOSOC is a restricted body of 54 members; the main organization's plenary organ, the UN General Assembly, was not involved in that decision. Similarly, the ICAO Council decided in which fashion the Community may participate in its meetings. Inside the UNESCO the Executive Board (a restricted body) opened the organization for the participation of the Community for the negotiations of the Cultural Diversity Convention. In contrast, the two decisions enabling the Community to negotiate legally binding texts in the WHO were taken by the World Health Assembly (and not the WHO Executive Board). In the Council of Europe, the Community's participant status was granted by the Secretary-General; however, internally he had acted upon a specific mandate conferred to him by the Committee of Ministers,<sup>76</sup> where all the Council of Europe States are represented and decide by unanimity. Finally, in the OECD, the participant status of the Community was already foreseen in its constitutional document, thereby having a consensual basis from the membership of that organization.

Despite their obvious differences, it appears that these examples follow a common logic. Whenever the status of the Community relates to the activities of one organ or its subsidiary bodies only, that organ took the relevant decision itself. It does not matter, whether that body is of a restricted or plenary character. Accordingly, the ECOSOC, the ICAO Council, the UNESCO Executive Board and the World Health Assembly did not transgress into the realms of other organs of their respective organizations: rather, they regulated the rights and duties of the Community for activities falling under their internal institutional competence (participation in its own meetings, negotiations of a Convention under its auspices). By way of differentiation, the plenary organ decided whenever the status relates to activities of the organization as a whole, as has been the practice in the Council of Europe (and, *a fortiori* in the OECD where the decision was taken directly by the Contracting Parties).

### 3.2. *Membership in treaty bodies*

By now it is settled practice that the Community may accede to multilateral conventions on the basis of a specific clause designed for that purpose. Two methods have been used so far. Under the first technique, the clause is formulated in abstract terms, referring to any "regional economic integration organization" (REIO). The Community is the first organization to qualify, but other regional organizations may rely on it in the future, once they have achieved a sufficient level of integration. That is the traditional approach un-

76. Resolution 85 (5) of the Council of Europe Committee of Ministers of 25 April 1985.

der a wide variety of UN conventions.<sup>77</sup> Accordingly, the clause can be found in conventions on fisheries, the environment or judicial cooperation alike. The only minor modification may occur in the UN Convention on the rights of persons with disabilities. Given the human rights focus of this Convention, it may seem appropriate to refer to “regional integration organization” (RIO), de-emphasizing its economic character. Under the second technique, the Community is directly mentioned by name, thereby accepting its special status for the time being. The most prominent examples of this technique are Article XI (1) of the WTO agreement and a number of commodity agreements.

Once the Community has used such “entry ports”, whatever their designation, it enjoys equal rights and duties as other Parties. True, in a mixed situation where Member States are also a party to the same Convention, the right to vote and the duty to implement follow the division of powers between the Community and its Member States. In the Conference of Parties, the Commission votes for the Community with 25 votes in areas of Community competence; the Member States keep silent. In areas of Member State competence, the Member States could delegate their voting power to the Presidency according to a common position or vote individually; the Community keeps silent. A declaration of competence, issued by the Council at the time of ratification and regularly updated, will clarify this matter for the benefit of the other contracting parties.<sup>78</sup> The underlying principles have been exhaustively analysed so far,<sup>79</sup> and recent practice has not shed any new light thereon.

However, a new legal question has come up with regard to the representation of the Community in treaty bodies under a mixed Convention. Whereas many conventions establish a Conference of the Parties and a secretariat only, some may also include a restricted body. An important case is the UNESCO Convention on cultural diversity with an intergovernmental committee of 18 elected representatives, based on the principles of equitable geographical representation as well as rotation. How does the Community fit in such a set-up? Would not the presence of the Community, with a weight of 25 Member States, necessarily disturb the balance in such restricted organ? Or

77. See Frid, *The relations between the European Community and International Organizations, Legal Theory and Practice* (The Hague, 1995), p. 229 et seq.

78. The declaration of competence may also serve as a useful point of reference in the analysis of shared competence for internal purposes. See Case C-459/03, *Commission v. Ireland* (“Mox Plant”), [2006] ECR I-4635, paras. 104–109.

79. Most recently Cremona, “Community report” in Xenopoulos (Ed.), *FIDE 2006 national reports, External relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility and Effects of International Law* (Nicosia 2006), pp. 343–348.

should the Community, for that purpose, be admitted as any other contracting party, but only exercise one vote? Or should the Community not be eligible to the restricted body at all? The drafters of the UNESCO Convention seem to have opted for the last (and easiest) option. According to Article 23(1) of the Convention, only 18 representatives of “States Parties” can be elected to the intergovernmental Committee. The qualifier “States” may be read as excluding the Community as a REIO. However, under its Article 27(3)(a), the Convention is open to accession by any REIO, which shall fully bound by the provisions of the Convention “in the same manner as State Parties” in the areas of its competence. That clause may not only be interpreted as an opening clause (allowing the Community to become a Party), but also as an assimilation clause (requiring to treat the Community equally to State Parties). With such an understanding, one may arrive at the result that the Community would be eligible as any other State Party to the Intergovernmental Committee with the caveat that it would have the same voting rights (only one and not 25 as in the Conference of State Parties). For sure, as a matter of political prudence, the Community is not likely to put forward a candidature for the Intergovernmental Committee in the first years of the Convention’s operation. Nevertheless, it would seem arguable that election to that body is in principle not legally excluded.

#### **4. European law**

##### *4.1. Role of the Commission and the Council on status requests*

When the Community wishes to achieve a formal status in an international organization, the question arises of the appropriate procedures under European law. Which institution should present the application, carry out negotiations, or take formal decisions in this regard? What is the role of the European Parliament? Under Articles 303 and 304 EC, “the Community” shall establish close cooperation with the Council of Europe and the OECD, leaving open the institutional details. In contrast, Article 302 EC calls upon “the Commission” to ensure the maintenance of all appropriate relations with the UN and other international organizations. Appropriate relations are particularly fruitful on the basis of an agreed legal status of the Community within another organization. Accordingly, Article 302 EC provides the legal basis for the Commission to apply on behalf of the Community for an observer status. Already back in 1966, the Commission agreed to consult the Council on the opportuneness, the modalities and nature of the relations it

intends to establish on the basis of Article 302 EC.<sup>80</sup> The European Court of Justice confirmed that the exchange of letters between the European Commission and the ILO of 1989 led to the observer status of the European Community at the ILO.<sup>81</sup> As the “full participant” status can be seen as a sort of enhanced observer status, the same procedure is applicable for such requests. With the political backing of the Council, the Commission negotiated the relevant status in the ICAO Council and entered into to the exchanges of letters with the Council of Europe.

The legal situation is different as regards Community membership in an international organization or in a treaty body. Such status is usually conferred upon the Community by treaty-making. The Community would have to ratify the accession treaty with the organization or the new convention. Accordingly, the Commission can only negotiate these instruments on the basis of a formal negotiating directive adopted by the Council on the basis of Article 300(1) EC. What happens, however, if the Council fails to do so despite a recommendation from the Commission to that effect? As demonstrated above, this is not a mere hypothetical question. Rather, it denotes the present impasse as regards the International Maritime Organization and the two international River Commissions (Rhine Commission/Danube Commission). Is there a duty under Community law for the Council to act? A textual reading of Article 300(1) EC leads to a negative response. The political prerogative of the Council under Article 300(1) EC is not specifically qualified. Under that provision, the Council is free either to adopt negotiating directives or to reject a recommendation from the Commission. However, the provision needs also to be read in the context of the Treaty’s overall approach on institutional relations. Under Article 10(1) second sentence EC, the Member States shall facilitate the achievement of the Community’s tasks. That imposes on the Member States and the Community institutions mutual duties to cooperate in good faith.<sup>82</sup> In the external relations sector, the Court has specifically emphasized that the Member States and the Community institutions are under an obligation to employ all legal and political means at their disposal to ensure the participation of the European Community in an international organization, which decides on matters falling under Community competence.<sup>83</sup> In that case, the duty arose after the expiry of the transitional period leading to exclusive Community competence for the conservation of maritime resources; however, the underlying reasoning would be the same in an area of shared

80. Part A, Fifth paragraph of the Luxembourg compromise of 1966, EC Bull. 3–1966.

81. ECJ, Opinion 2/91 of 19 March 1993, [1993] ECR I-1061, at p. 1066.

82. Case C-334/01, *Germany v. Council*, [2004] ECR I-2081, para 79.

83. Joined Cases 3, 4 & 6/76, *Kramer*, [1976] ECR 1279, paras. 44–45.

competence.<sup>84</sup> That is especially true in areas that were originally shared, but where the Community became exclusively competent through the adoption of internal legislation covering to a large extent the relevant policy field of an organization. Therefore, the duty of loyal cooperation may include a duty of the Council and Member States to promote EC membership in such international organizations.<sup>85</sup> Accordingly, a formal Council decision (not just a failure to act) not to adopt the recommended negotiation directives for that purpose may well be subject to attack under Article 232 EC.

#### 4.2. *The role of the European Parliament*

As regards the role of the European Parliament, the above-mentioned distinction between observer/full participant status and membership is equally relevant. Whereas the Parliament has no formal role as regards requests for the former under Article 302 EC, it is involved in the conclusion phase of an international agreement leading to membership of the Community in an organization or a treaty body under Article 300 EC. Nevertheless, difficulties may arise in identifying the correct degree of parliamentary involvement. Would the Parliament have to be consulted under Article 300(3) 1st subparagraph EC, or is its assent under the 2nd subparagraph required? In this respect the interpretation of the phrase “agreements establishing a specific institutional framework”, as one of the four categories triggering assent in Article 300(3) 2nd subparagraph EC, is of importance.

In that respect recent practice does not seem to be particularly coherent, in particular as regards multilateral fisheries conventions. One may distinguish three types. A first type consists of framework conventions with no elaborate institutional set-up, like the UN straddling socks Convention establishing a review conference under its Article 36. It was concluded after consultation of the Parliament. A second type of agreements, like the Convention establishing the regional South East Atlantic Ocean Commission (SEAO), creates an international legal personality and subsidiary bodies. Organizations of the second type also have the power to take binding conservation and management measures. Again, the European Parliament was only consulted in the conclusion phase of SEAO. Third, there are regional Commissions with an elaborate institutional set-up, including subsidiary bodies on technical aspects. All these Commissions have international legal personality. They may

84. Govaere, Cabiau and Vermeersch, “In-Between Seats, The participation of the EU in international organizations”, 9 EFA Rev. (2004), 167 at 173–174.

85. Wouters, Hoffmeister and Ruys, “Epilogue: The UN and the EU: The road to partnership”, in Wouters, Hoffmeister and Ruys, op. cit. *supra* note 5, p. 383, at p. 387.

adopt legally binding decisions with different levels of majority voting (two-thirds in IOTC and GFCM or three-fourths in WCPO), but with a possibility of subsequent opt-out. The Agreement for the establishment of the Indian Ocean Tuna Commission (IOTC) was concluded after consultation of the Parliament, whereas the Agreement establishing the General Fisheries Commission for the Mediterranean (GFCM) and the Convention on the conservation and management of highly migratory fish stocks in the Western and Central Pacific Ocean (WCPO) obtained the assent of Parliament.

Whereas there is no doubt that agreements of the first type do not require the assent of the European Parliament, the situation is less evident as regards the other two types of multilateral fisheries conventions. First, practice as regards the third type is not consistent: it is hard to explain why GFCM and WCPO obtained consent, whereas IOTC did not. Second, also the difference between the second and the third type in the decision-making procedure may not be so fundamental as to justify a change in the internal EC conclusion procedure. Whereas, in the second type, decisions are only taken by consensus the third type allows for majority voting for a decision to be taken. It seems that the essential reason to opt for assent for the third type was that kind of “supranational” element. However, both procedures nevertheless resemble each other in other aspects. In the second type, a decision may not be taken against “non present” members, and also in the third type, majority decisions will not become binding against the will of a “no-voter” if he uses the subsequent “opt-out” procedure. Only in the case of the WCPO will a measure become binding even against a subsequent try of “opt-out”, if a review panel finds that the decision in question need not be modified, amended or revoked.

The situation is more straightforward with respect to multilateral environmental agreements. Their typical institutional framework comprises a conference of the parties (COPs), a secretariat, and several technical subcommittees.<sup>86</sup> As for the power to develop substantive obligations in cases provided in the agreements: some COPs do not have such power or the scope of such power is rather limited and has been strictly defined by the agreements; some COPs have the power to make decisions or proposals of amendments to the agreements and annexes, and such decisions and proposals will be adopted by consensus or majority vote of the presenting parties in case of failure to reach consensus, i.e. three-fourths or four-fifths. However, the decisions and amendments to the agreements and annexes only bind those parties who have voted for the measures, or raise no objection later on. All environmental agreements were concluded by the Council after consultation of the Parlia-

86. Churchill and Ulfstein, ‘Autonomous institutional arrangements in multilateral environmental agreements’, 94 AJIL (2000–4), 623–659, 623 and 625 et seq.

ment. In other words, neither the elaborate institutional structures, nor the establishment of an international legal personality, nor majority voting in the COPs with subsequent opt-out in any MEA triggered the assent procedure.

Even less involvement of the Parliament was sought in relation to trade and commodity agreements. These usually establish international organizations with a council representing the members, an executive committee and a secretariat. As regards decision-making, one may identify three types. There may be commodity agreements, where the council decides by consensus of the members present, with an opt-out for those that did not participate in the session 30 days after. Fulfilling these criteria, the Protocol prolonging the International Olive Oil Agreement was concluded with no involvement of the Parliament, on the basis of Article 133 and 300(2) 1st sentence EC. The standard commodity agreement foresees an elaborate system of voting. Votes in the Council are divided between exporting and importing members. Each group holds 1000 votes and legally binding decisions in the Council are taken by distributed simple majority. This is the common feature of the Cocoa, the Coffee and the Grains Agreement. Within the Community, the Cocoa and the Coffee Agreement were concluded on the basis of Article 133 only (no EP involvement), whereas the Grains Convention triggered consultation of the Parliament because Article 181 (ex 130y) EC was used as an additional legal basis. Finally, the WTO agreement may be considered *sui generis*. The Council concluded that agreement after having obtained the assent of the Parliament. Whereas this is fully justified given the political significance, complexity of the institutional set-up, the possibility of majority-voting and the budgetary implications, the practice as regards commodity agreements is less obvious. Although decisions taken with weighted majority may bind the Community against its will, no assent of the Parliament was sought. The reason may lie in the fact that Parliament does not have at present any formal role in the adoption of internal acts relating to trade in goods under Article 133 (1) EC either. It would have affected the institutional balance if the mere fact that a body set up by an agreement may take binding decisions triggered assent under Article 300(3) 2nd subparagraph EC.

In order to provide for more consistency it is suggested to have a closer look at the normative guidance one can draw from Article 300(3) 2nd subparagraph EC. The wording “specific institutional framework by organizing cooperation procedures” is rather broad. It neither envisages nor excludes that the international agreement establishes an international organization with legal personality.<sup>87</sup> Finally, the wording emphasizes “cooperation” rather than

87. MacLeod, Hendry and Hyett, *The External Relations of the European Communities: a manual of law and practice* (Oxford, 1996), p. 102.

“integration” thereby possibly not requiring decision-making by majority vote, but more than just supervising implementation of the agreement. Read in the context of the first alternative, the scope of the second alternative of Article 300(3) 2nd subparagraph EC seems to be more restrictive. It appears from the word “other”, that agreements establishing a specific institutional framework are close to association agreements under Article 310 EC. In this perspective, the notion was presumably meant to cover bilateral cooperation agreements,<sup>88</sup> in particular the PCAs concluded with the successor States of the former Soviet Union. These follow largely the structure of the Europe Agreements, but are concluded under a multitude of internal legal bases relating to internal policies. Such “quasi-association agreements” should therefore share the main characteristics of an association agreement under Article 310 EC. In the view of several authors the main criterion derived therefrom is that the relevant institutions should be entitled to take legally binding measures.<sup>89</sup> That seems to be indeed relevant given that a treaty body with decision-making power puts the Community in a very close relationship to the other contracting parties. Such treaty body decisions may create new mutual obligations or even develop a special legal regime. That is a similar situation to an association agreement where the Community may open important parts of its internal policies to common regulation with third States. Less clear is whether the comparison with association agreements may lead to a criterion according to which only binding decisions adopted by majority vote should trigger parliamentary assent. As is well known many association agreements concluded under Article 310 EC foresee decisions to be taken by consensus between the Community and the other Party. Nevertheless, such decisions may have far-reaching consequences for Community law, as for example Decisions 1/80 and 3/80 of the EC-Turkey Association Council on the status of Turkish workers in the Community.<sup>90</sup> It would appear illogical if an association agreement with consensus decisions needs parliamentary assent, whereas other agreements would only do so if their institutional framework foresees majority decisions. Using the words “by way of derogation from the previous subparagraph”, Article 300(3) 2nd subparagraph EC is construed as

88. See Tomuschat, in V.d.Groeben, Thiesing and Ehlermann (Eds.), *Kommentar zum EG-/EU Vertrag*, 5th edition, Art. 228, para 30.

89. See Krück, in Schwarze (Ed.): *EU-Kommentar*, Art. 300, para 27: Organe “mit eigenständiger Entscheidungsbefugnis” (institutions with autonomous decision-making power) contrary to institutions that can only issue recommendations. Similarly, Schmalenbach, in Callies and Ruffert (Eds.), *EG/EUV*, 2<sup>nd</sup> ed., Art. 300, para 34.

90. Cf. Lensky, “Turkey (including northern Cyprus)”, in Blockmans and Lazowski (Eds.), *The European Union and its neighbours: A legal appraisal of the EU’s policies of stabilisation, partnership and integration* (Cambridge, 2006), pp. 283–313, at 292–293.

an exception. It may therefore be argued that any notion in the subparagraph should not be interpreted too generously, running the risk of turning the exception into the rule. However, once it is established that the exception is applicable, it derogates “from the previous subparagraph”. That includes both cases mentioned in subparagraph 1 (i.e. no EP involvement for trade agreements or consultation for other agreements). Accordingly, Article 300(3) 2nd subparagraph EC may cover certain trade agreements even if their substantive basis is Article 133 EC only.

Turning to the object and purpose, one may identify two main ideas. First, Article 300(2) 2nd subparagraph EC may be designed to safeguard the Parliament’s internal powers. It is noteworthy, that two of the situations mentioned in that subparagraph expressly relate to fields where the Parliament has important internal powers (budget, legislation). The connected object and purpose seems to be to safeguard the institutional equilibrium, i.e. to exclude that the Council “governs” by concluding international agreements with large-scale internal implications. As regards the other two situations (association agreements and agreements with an institutional framework) the rationale may be similar: Parliament should give its assent when a treaty body is empowered to take subsequent decisions binding on the Community and thereby – possibly – affecting internal parliamentary rights. However, the object and purpose to safeguard the EP’s internal powers does not lead to a criterion that distinguishes the mode of decision-making of the treaty body: from the perspective of Strasburg, it is legally irrelevant whether the Community has a power to veto such decisions or not, since it will usually be the Council which determines such EC positions in a treaty body under Article 300(3) 2nd subparagraph. Second, that provision may label association agreements and agreements with an institutional framework as politically significant.<sup>91</sup> In that perspective, it is less important how the agreement functions in detail. Rather, it counts that the Community is a contracting party of an international agreement with considerable weight in international relations. The European Parliament should hence exercise some control of whether participation is politically desirable in view of the tasks and impact of the treaty bodies: e.g. association agreements send a political signal of close political relations with a certain country or region. In the same vein, participation in a multilateral convention may be seen as signal of supporting effective

91. See Corbett, Jacobs and Shackleton (Eds.), *The European Parliament*, 5th ed. (London, 2004), p. 203 (“the Member States agreed in the Treaty of Maastricht to change the provisions of the EC treaty in order to require Parliament’s assent for all important agreements. These were defined as any agreement having a specific institutional framework ...”).

multilateralism in a given policy field. From that perspective, membership in international organizations with legal personality is likely to be politically important. One may note that, according to some authors, the establishment of an international organization by the Community should always trigger parliamentary assent.<sup>92</sup>

In sum, both recent practice and a detailed interpretation of Article 300(3) 2nd subparagraph EC, leave considerable discretion to the Community institutions how to interpret the notion of an “agreement establishing a specific institutional framework by organising cooperation procedures”. It is suggested not to use a single criterion which determines the level of parliamentary participation prior to conclusion by the Council. Rather an indicative list of factors determining the overall nature of an agreement (including trade agreements) should be assessed whether to ask for parliamentary assent. The relevant factors are:

- a) Creation of an international organization with legal personality;
- b) Establishment of autonomous treaty bodies with a power to take legally binding decisions;
- c) Decision-making in such bodies with majority voting;
- d) Political or economic importance of the subject matter of decisions taken by such bodies;
- e) No possibility for the EC to avoid being bound by such decisions through subsequent opt-out procedures.

One factor taken in isolation would usually not be decisive for the determination of the proper involvement of the European Parliament. However, the more such factors are present in a given agreement, the more it is imperative to require the assent of the European Parliament. This does not absolve from a careful assessment of the overall significance of a given agreement for the Community as an international actor.

#### 4.3. *Coordination of Community and common positions*

It is firmly established in the Court’s case law that the Community and the Member States have an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they conclude a mixed agreement.<sup>93</sup> One aspect of such duty is to strive for Community

92. Sack, “Die Europäische Union in den Internationalen Organisationen – Bedeutung der Beteiligung sowie Aktion und Einfluss von Gemeinschaft und Mitgliedstaaten in diesen Gremien”, 5 ZEuS (2001), 280; Kokott, in Streinz (Ed.), *EUV/EGV*, Art. 300, para 53.

93. Case C-459/03, *Commission v. Ireland*, (Mox Plant), cited *supra* note 78, para 175.

positions (in areas of Community competence) and in common positions (in areas of Member States competence) that mutually reinforce each other.<sup>94</sup> In order to facilitate daily work, the Commission has put before the Council draft codes of conduct in several fields. These relate, for example, to the coordination of the Community and the Member States in the ICAO, the WHO, the IMO and the treaty bodies under the UNESCO cultural diversity convention. However, with the exception of the working group on public health, the reaction in the Council was rather sceptical. The ECJ's emphasis on the binding nature of the internal arrangement in the FAO<sup>95</sup> may help to explain why the Member States are cautious in this area.<sup>96</sup> That is all the more regrettable as a considered EU position reached in due coordination usually carries the political benefit of reaching out well to other partners in the international organization or treaty body.

Whereas the Commission has barely any tool to force Member States to enter into such informal inter-institutional arrangements aimed at improving the process of coordination, the legal situation gets more serious if a Member State actually departs from an agreed Community position. That is notorious in the IMO, where certain Member States are tempted to put forward national positions rather than supporting the Community position expressed by the Presidency in the name of all the Member States and the Commission.<sup>97</sup> In that situation, infringement cases alleging a breach of Article 10 EC are not excluded. Another possible area of deplorable non-cooperation may arise when a Member State deliberately seeks to reduce the voting power of the Community. As mentioned above, voting rights of the Community in the *Codex Alimentarius* depend on the presence of the Member States. In May 2004, two Member States which had opposed the COREPER decision establishing the relevant Community position by qualified majority left the room in Rome just before the Community delegate voted for an international standard protecting the geographic indication "Parmesan". Fortunately, Member State discipline increased after that incident after the Commission had reminded them of their obligations under Article 10 EC.

94. Opinion 2/91 *re Convention No 170 of the ILO*, [1993] ECR I-1061, paras. 36–38. For a comprehensive discussion of the duty of co-operation Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations* (OUP, 2004), pp. 209–215.

95. Case C-25/94, *Commission v. Council (FAO)*, [1996] ECR I-1459, para 49.

96. Govaere, Cabiau and Vermeersch, *op. cit. supra* note 84.

97. It will be recalled that the Community is not regarded as an observer in the IMO. Rather, that status is said to have been granted to the Commission only. Hence, Community positions need to be put forward by using an extraordinary technique which is at odds with the institutional structure of the Community.

## 5. Conclusion

After the breakthrough of Community membership in the FAO in 1991, the status of the European Union has further advanced in other international organizations and treaty bodies. Despite some resistance, *inter alia* from the United States, the Community has achieved greater visibility within and influence over the activities over several important organizations on the global level (ICAO, WHO, UNESCO). It has also consolidated and further refined its participant status in the Council of Europe and the OECD. It became a member in such diverse organizations as the Hague Conference on international private law and the newly founded Energy Community. On the other hand, the Community also keeps on struggling with the reluctance of some Member States to accept such a role in the transport sector in particular (IMO, Rhine and Danube Commissions) and continues to face a deadlock in some important UN bodies (for example UNHCR).

Against the backdrop of this mixed picture of factual developments, some interesting questions under international law came to the forefront. It could be shown that decisions to grant the status of a “full participant” to the Community belong to the respective organs of an international organization, as long as they do not intend to regulate the overall status of the Community in the whole organization. In the latter scenario, the decision must be taken by the plenary organ. It also became clear that the Community’s membership in treaty bodies will face new challenges when such bodies are not open to all contracting parties, but only to a certain number of elected members.

Under European law, the status of a “full participant” can be requested by the Commission on behalf of the Community on the basis of Article 302 EC. In contrast, Community membership in another international organization or a treaty body can only be brought about by virtue of the procedures laid down in Article 300 EC. In that respect, it is suggested that the Council is under a duty to adopt negotiating directives if and insofar an international organization decides about matters falling largely under Community competence. Once the Community concludes an agreement allowing for accession to an international organization or establishing treaty bodies, the European Parliament’s assent under Article 300(3) 2<sup>nd</sup> subparagraph EC may be required. Relevant factors are the creation of an international organization with legal personality, the establishment of autonomous treaty bodies with a power to take legally binding decisions, the decision-making in such bodies with majority voting, the political or economic importance of the subject matter of decisions taken by such bodies and the absence of a possibility for the EC to opt out from such decisions. Finally, the duty of loyal cooperation under Article 10 EC imposes certain disciplines on Member States when acting in

international organizations or treaty bodies where the Community is also a party or presented a Community position *via* the medium of the Presidency.

In a nutshell, the European Union is neither an outsider anymore nor has it become a frontrunner in the multilateral arena. Rather it turns into a respected actor in international organizations and treaty bodies with the same speed as the law develops. Under international law that needs years of skilful multilateral diplomacy, under European law the European Court of Justice may accelerate the process.