



THE UNIVERSITY *of* EDINBURGH

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Legal mechanisms for the European Union to
participate in the decision-making of multilateral
 fora in the field of maritime affairs

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Abstract

The European Union (EU) increasingly participates in various arrangements at the international level in order to further the objectives of the Union. Yet, such participation poses challenges in terms of ensuring that the EU has an effective voice, whilst also ensuring certainty and clarity for other participants. This thesis focuses on the EU's participation in the decision-making processes of multilateral fora in the field of maritime affairs in order to examine how these challenges can be met. The thesis explores the legal mechanisms in both EU law and international law that accommodate the ability of the EU to participate in international arrangements. It will consider whether these mechanisms ensure clarity and certainty to the key actors involved and whether consistency exists between the internal and external mechanisms. Through collecting, examining, and analysing historical and contemporary materials relating to the shaping and operating of the internal and external legal mechanisms, this thesis aims to explain and analyse how the legal mechanisms are established and how they can be adapted to meet the challenges facing the EU, its Member States, third States, and international institutions in a clearer and more consistent manner.

The research diagnoses several key factors that have contributed to the possible ambiguity, uncertainty, and inconsistency of these mechanisms, including the evolving nature of shared competence and a heavy reliance on the Court of Justice in ascertaining and safeguarding the contours of the EU legal order and its interface with the international legal order. It then examines how the internal legal mechanisms have been projected externally, by using selected case studies of the participation of the EU in the International Maritime Organisation, the United Nations Convention on the Law of the Sea, the Food and Agriculture Organisation of the United Nations, and Regional Fisheries Management Organisations. This thesis illustrates that although various mechanisms have been adopted internally and externally to tackle the challenges facing the EU's participation, several sets of asymmetries can be found across different legal mechanisms. The thesis evaluates the strengths and weaknesses of these mechanisms and it further suggests that adopting the mixed-participation mode for the EU and its Member States to participate in the multilateral fora may be preferable, or indeed necessary, even in areas where the EU enjoys an exclusive competence.

Declaration

This is to certify that the work contained within has been composed by me and is entirely my own work. No part of this thesis has been submitted for any other degree or professional qualification.

Wei-sheng Hong

15.05.2014

Acknowledgment

Pursuing a Ph.D. is a process of exploring my potentials and limits, a journey with highs and lows. As a non-European researcher coming from a country that neither has a formal diplomatic relation with the EU and its Member States nor being a formal participant in any of the multilateral fora covered by this thesis, it is rather challenging for me to conduct this research. Without enormous help from different sources throughout the years, accomplishing this thesis would not have been possible. I would like to express my gratitude to those from whom I have benefited throughout the journey.

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Wei-sheng Hong
30.09.2013
At the Ph.D. "Tunnel" Office
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Wei-sheng Hong
29.04.2014
Taipei, Taiwan

Abbreviations

ACIL	Amsterdam Center for International Law
AEJ	Asia Europe Journal
AG	Attorney-General
AJIL	American Journal of International Law
Bull. EC/EU	Bulletin of the European Communities/of the European Union
BYIL	British Yearbook of International Law
CAP	Common Agricultural Policy
CCP	Common Commercial Policy
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CECAF	Fisheries Committee for the Eastern Central Atlantic
CEPS	Centre for European Policy Studies
CFP	Common Fisheries Policy
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Review
COFI	Committee on Fisheries
COREPER	Committee of Permanent Representatives of the Member States
CSLR	Cambridge Student Law Review
CUP	Cambridge University Press
DG	Directorate-General
DG-MARE	Directorate-General for Maritime Affairs and Fisheries
DoC	Declaration of Competence
EALR	East Asia Law Review
EC	European Community
ECHR	European Convention on Human Rights
ECLR	European Constitutional Law Review
ECR	European Court Reports
EEA	European Economic Area
EEAS	European External Action Service
EEC	European Economic Community
EELR	European Environmental Law Review
EEZ	Exclusive Economic Zone
EFAR	European Foreign Affairs Review
EJIL	European Journal of International Law
ELR	European Law Review
EU	European Union
EUI	European University Institute
ex-TEC	Treaty Establishing the European Communities (the version in force until 30 November 2009)
ex-TEU	Treaty on European Union (the version in force until 30 November 2009)
FAO	Food and Agriculture Organisation
FILJ	Fordham International Law Journal
GYBIL	German Year Book of International Law
HILJ	Harvard International Law Journal
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICJ	International Court of Justice

ICLQ	International and Comparative Law Quarterly
IGO	Intergovernmental Organisation
IJMCL	The International Journal of Marine and Coastal Law
ILC	International Law Commission
IMCO	Intergovernmental Maritime Consultative Organisation
IMO	International Maritime Organisation
IMP	Integrated Maritime Policy
IO	International Organisation
IOLR	International Organisations Law Review
IOTC	Indian Ocean Tuna Commission
ITLOS	International Tribunal for the Law of the Sea
JIML	Journal of International Maritime Law
JMLC	Journal of Maritime Law & Commerce
LCGGS	Leuven Centre for Global Governance Studies
LPICT	Law and Practice of International Courts and Tribunals
MARPOL	International Convention for the Prevention of Pollution by Ships
MJECL	Maastricht Journal of European and Comparative Law
MJIL	Michigan Journal of International Law
MPB	Marine Pollution Bulletin
MPEPIL	Max Planck Encyclopaedia of Public International Law
NAFO	Northwest Atlantic Fisheries Organisation
NEAFC	North-East Atlantic Fisheries Commission
NYIL	Netherlands Yearbook of International Law
ODIL	Ocean Development and International Law
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PFOS	Perfluorooctane Sulfonate
PLR	Pepperdine Law Review
POPs	Persistent Organic Pollutants
REIO	Regional Economic Integration Organisation
RFMO	Regional Fishery Management Organisation
RoP	Rules of Procedure
SDILJ	San Diego International Law Journal
SEAFO	South-East Atlantic Fisheries Organisation
SOLAS	International Convention for the Safety of Life at Sea
SPRFMO	South Pacific Regional Fisheries Management Organisation
TEEC	Treaty establishing the European Economic Community
TFEU	Treaty on the functioning of the European Union
TJICL	Tulane Journal of International and Comparative Law
UK	The United Kingdom of Great Britain and Northern Ireland
UN	The United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
USA	The United States of America
VCLT	Vienna Convention on the Law of Treaties
YEL	Yearbook of European Law
YJIL	Yale Journal of International Law
YUP	Yale University Press
WCPFC	Western and Central Pacific Fisheries Commission
WECAFC	Western Central Atlantic Fisheries Commission
WTO	World Trade Organisation

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Chapter 1

Introduction

1. *The nature of the European Union (EU) and its participation in multilateral relations—the challenges*

The European Communities, later to become the European Union (EU),¹ was established to achieve a set of unconventional and ambitious objectives;² they aim to promote peace as well as the values the EU Member States uphold, including respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, both within the borders and beyond.³ The EU Member States resolve to achieve a high level of integration among themselves through different mechanisms, among which is to establish an internal market and an area of freedom, security and justice without internal frontiers so that its citizens can enjoy their freedom of movement.⁴

In order to achieve these formidable objectives, the EU Member States endowed the EU with legal personality,⁵ and conferred on it various competences—be they exclusive, shared, or supplementary in nature.⁶ They

¹ This thesis will use the term “European Union” to refer to the European Union as well as the European Union’s predecessor entities, such as the European Coal and Steel Community, the European Economic Community, and the European Community, unless necessary for the reference of the specific historical or legal context otherwise. *See* Article 1.3. Treaty on European Union (Consolidated version 2012) (TEU) [2012] OJ C326/13. The research will be based on the latest institutional framework of the EU as set down in the Treaty of Lisbon

² Preamble and Article 3 TEU and Preamble of the Treaty on the Functioning of the European Union (Consolidated version 2012) (TFEU) [2012] OJ C326/47

³ Article 2 and 4 TEU

⁴ Article 3 TEU

⁵ Article 47 TEU

⁶ Article 2-6 TFEU. For the discussion of the mixed usage of the terms “power”, “competence”, “competences”, and “competencies” in much research of the law of the European Union, *see* Armin von Bogdandy and Jürgen Bast, “The Federal Order of Competences” in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (2nd edn, Beck/Hart 2010) 278; *see also* Dominic

foresaw that in order to carry out the tasks they entrusted to the EU, the EU would inevitably need to participate in international affairs in the multilateral context.⁷ They laid down the relevant provisions concerning this matter in their fundamental Treaties in order to guide the practice of the EU.⁸

Nonetheless, enabling the EU to participate in international affairs in a multilateral context is not an easy task that can be accomplished by merely including provisions in the EU Treaties. It involves not only the EU and its Member States, but also third States and other international institutions, and has been a puzzling task for them. On the one hand, as the fundamental Treaties of the EU suggest, the EU seeks to enhance its external involvement in the activities under the framework of the United Nations, and to establish “appropriate forms” of participation in the organs of the United Nations, its specialised agencies, and other international organisations.⁹ On the other hand, the United Nations and many other international organisations have been established on the legal basis that States are the basic— and often the only— formal constituents of such multilateral relations.¹⁰ Moreover, the EU Member States have long been involved in these institutions themselves. Therefore, to accommodate the participation of the EU in these multilateral relations in an “appropriate form” often requires a rearrangement of the existing rules, and brings in challenges from both EU law and international law perspectives.

1.1. The State-oriented approach of international law

McGoldrick, *International Relations Law of the European Union* (Longman 1997) 40. This thesis prefers to stick to the term “competence” and “conferral” in principle to avoid confusing with the terms externally used in many international agreements, as will be shown in the later chapters

⁷ See e.g. Article 21 TEU and Part Five TFEU

⁸ See e.g. Chapter 1 of Title V TEU and Article 205 TFEU

⁹ Article 220 TFEU

¹⁰ See e.g. Article 4 UN Charter, Article 5-8 Convention of the Intergovernmental Maritime Consultative Organisation (adopted 6 March 1948, entered into force 17 March 1958) 1520 UNTS 197

International law has functioned for a long time as a system of law governing relations between States. Although it no longer holds true that States are the only actors that have rights and duties under international law, States still predominate.¹¹ This is not necessarily to suggest, however, that the understanding of the nature and the purpose of basic concepts such as sovereignty and statehood in international law remain unchanged. On the contrary, as many leading scholars have indicated, the rightful place of these concepts in international law varies from time to time; they are relative questions largely dependent on the different approaches demanded by the changing context and the law that curtails it.¹² Neither does it suggest that actors other than States have no role in influencing the shaping of international law and international relations. Contrarily, the increasing role these actors have played has attracted more and more attention.¹³

One of the variables that has challenged the development of international law is the emergence of international organisations or international institutions as independent actors in the international legal system. Although international organisations are still largely treated as “second rate subjects” in international law, shaped and governed by States,¹⁴ they are considered as offering an important framework to cope with the increasing interdependence between States.¹⁵ As a result, legal issues

¹¹ Michael Akehurst, *A Modern Introduction to International Law*, (6th edn, Routledge 1995) 1; Luigi Condorelli and Antonio Cassese, “Is Leviathan Still Holding Sway over International Dealings?”, in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 15-21; José E. Alvarez, “State Sovereignty is No Withering Away: A Few Lessons for the Future”, in Antonio Cassese (ed), *ibid.*, 29-34

¹² Robert Jennings, “Sovereignty and International Law”, in Gerard Kreijen and others (eds), *State, Sovereignty, and International Governance* (OUP 2002) 27; Martti Koskenniemi, “The Future of Statehood”, 32 *HILJ* (1991) 408; Luigi Condorelli and Antonio Cassese, (note 11) 22-25

¹³ For a collection of such a result, can See e.g. Andrea Bianchi (ed), *Non-State Actors and International Law* (Ashgate 2009)

¹⁴ Rachel Frid, “European Community, Membership in International Organisations or Institutions”, *MEPIL* (2009) para. 1

¹⁵ Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn, Brill 2011) 3

surrounding the participation of international organisations in the international community and in international law-making have undergone more and more scrutiny from legal scholars.¹⁶ For instance, the issues raised by the nature of the relationship between States and international organisations, and the contestation of sovereignty within international organisations have been subjects that have attracted academic interest.¹⁷ Due to its unique nature, the arrival of the EU has brought further challenges.

1.2. The nature of the EU

This thesis cautiously refrains from jumping to the quick conclusion of referring to the EU as an international organisation, and to directly equating the challenges it brings to international law to those of an international organisation. Rather, the situation is more complicated. On the one hand, the EU may not be considered as a State in international law,¹⁸ yet it sets the protection and promotion of the interest of not only the Member States but also its citizens as one of its core objectives.¹⁹ It possesses and uses many powerful instruments traditionally considered available only to sovereign States,²⁰ raising doubts as to how far away it is from being a State.

¹⁶ See e.g. José E. Alvarez, *International Organisations as Law-makers* (OUP 2005); Alan Boyle and Christine Chinkin, *The making of International Law* (OUP 2007) particularly Chapter 3

¹⁷ See e.g. Dan Sarooshi, *International Organisations and Their Exercise of Sovereign Powers* (OUP 2005)

¹⁸ Ioannis Papathanasious, "The European Union's identity as a subject of the international legal order: evolutions under the Treaty of Lisbon", *CSLR* (2009) 38; Paul Marnette, *What is the European Union? Nature and Prospects* (Palgrave Macmillan 2005) 195; Eileen Denza, *The Intergovernmental Pillars of the European Union* (OUP 2002) 86-90

¹⁹ Article 3.5 and 13.1 TEU

²⁰ Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 4 (concluding that the EU already possess and use most, if not all, of those "powerful instruments" considered only available by a single sovereign State by Eileen Denza, including the international legal personality; the power to conclude treaties, to become a member of international organisations, to send and receive diplomatic and consular missions, to defend its external interests by domestic legislation and its physical and political integrity by armies and weapons, to exploit its natural and human resources and to

On the other hand, the EU may be *prima facie* considered as an international organisation.²¹ Nevertheless it possesses unique characteristics, which will be discussed in detail later in this chapter and throughout the thesis, distinguishing it from other international organisations.

Whilst expressly assigning a legal personality to the EU through the inclusion of Article 47 TEU is considered to provide clarity, transparency, and visibility toward third States as well as their citizens,²² it nonetheless does not solve the puzzle of the EU's status for many reasons. Firstly, indeed, whether the EU possesses a legal personality may become clearer in regard to its Member States,²³ yet such explicit Treaty provision adopted among the EU Member States only binds them as such.²⁴ Whether the EU has an objective international legal personality in regard to third States (*erga omnes*) still requires resorting to the ICJ's jurisprudence derived from the *Reparation for Injuries Suffered in the Service of the United Nations*.²⁵ Secondly, and more

have money at its disposal which may be used for internal as well as external purposes)

²¹ Philippe Sands and Pierre Klein (eds), *Bowett's Law of International Institutions* (6th edn, Sweet & Maxwell 2009) 18

²² Marise Cremona, "Defining Competence in EU External Relations", in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations: Salient Feature of a Changing Landscape* (CUP 2008) 39

²³ For the issue and controversy of legal personality and the EU prior to the Treaty of Lisbon, can see e.g. Delano Verwey, *The European Community, the European Union and International Law of Treaties: a comparative legal analysis of the community and union's external treaty-making practice* (TMC Asser Press 2004) 66; Remses A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Brill 1999) 242. But see Jan Klabbers, "Presumptive Personality: The European Union in International Law" in Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Brill 1998) 231-253 (suggesting that whether or not to endow the Union with international personality is not a major concern)

²⁴ Part III section 4 VCLT (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

²⁵ ICJ, *Advisory Opinion on Reparation for injuries suffered in the service of the United Nations (Advisory Opinion on Reparation)*, *I.C.J. Reports* (1949) 174.

Although 28 EU Member States themselves could hardly be considered as "representing the vast majority of the members of the international community," considering the EU have concluded agreements or engaged with the majority of third States as a legal person, it is arguable that the EU possesses the objective international personality according to the ICJ's jurisprudence. For the ICJ's opinion

importantly, “legal personality” in international law carries many different conceptions; to entitle an entity to an international legal personality does not result in the clarification of the entity’s legal nature in international law. As the ICJ clearly indicated in its Advisory Opinion, even if it is concluded that the UN is a legal person, it does not follow that its legal personality and rights and duties are the same as those of a State. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims.²⁶ An international legal personality can be and still is distinguished from the entitlement of statehood and sovereignty.²⁷

The Commission of the EU once summarised the uniqueness of the EU in its comment on the responsibility of international organisations to the International Law Commission. It described how the EU differs from the classic model of international organisations in two principal ways:

“Firstly, the EC is not only a forum for its Member States to settle or organize their mutual relations, but it is also an actor in its own right on the international scene. [...] Secondly, the EC is regulated by a legal order of its own, establishing a common market and organizing the legal relations between its members, their enterprises and individuals. Legislation enacted under the EC treaty forms part of the national law of the Member States and thus is implemented by Member States’ authorities and courts. In that sense, the EC goes well beyond the normal parameters of classical international organisations as we know them.”²⁸

on the objective international personality in regard to non-Member States, see *Advisory Opinion on Reparation*, Ibid., 185; See also Finn Seyersted, “Is the International Personality of Intergovernmental Organisations valid vis-à-vis Non-Members?”, in Jan Klabber (ed), *International Organisations* (Ashgate 2005) 207

²⁶ *Advisory Opinion on Reparation*, (note 25) 179

²⁷ Ibid. (stating that to conclude that an international organisation is an international legal person is not the same thing as saying that it is a State or that its legal personality and rights and duties are the same as those of a State); For an analysis of the different conceptions of legal personality in international law, see Roland Portmann, *Legal Personality in International Law* (CUP 2010)

²⁸ ILC, *Responsibility of international organisations: comments and observations received from international organisations* (Doc. A/CN.4/545) 5. For the European Community and responsibility of international organisations, see Stefan Talmon, “Responsibility of international organisations: does the European Community

Nonetheless, whether the two accounts put forward by the Commission concerning the uniqueness of the EU distinguish the EU from other international organisations and support the argument for excluding the EU from the ordinary international rules governing international organisations remains doubtful. International affairs are covered by a complex matrix shaped by States, international organisations, and other actors in the modern world; commonly the affairs governed by international organisations overlap with others. It is unrealistic to narrowly define an international organisation only as a forum for its Member States to settle or organise their mutual relations. The interdependence of the different actors inevitably involves an international organisation to a certain extent becoming an actor on the international scene in its own right— it is indeed this phenomenon that suggests the law on the responsibility of international organisations can no longer be governed by the constitutive law of each international organisation. The difference between the EU and other international organisations from this perspective may rather be a difference of degree— unlike other international or inter-governmental organisations that do not focus primarily on their function of external relations with non-Member States or entities, the EU has concentrated, and will continue to concentrate more and more, on its external relations with non-Member States or entities as one of its major institutional functions.²⁹

The uniqueness of the EU, however, goes beyond this seeming difference of degree. As the Court of Justice of the European Union (CJEU) pointed out in its judgment:

“[...] by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the

require special treatment?”, in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Brill 2005) 405

²⁹ Article 21.1 TEU

Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves”.³⁰

Similarly, Sir Neil MacCormick observed that neither politically nor legally is any EU Member State in possession of ultimate power over its own internal affairs.³¹ The legal order created by EU law and the mechanism of conferral of competences, which on many occasions leads to the result that certain competences are exclusively exercised by the EU but not its Member States,³² distinguish the EU further from other international organisations. This leads to the insufficiency of applying the rules governing international organisations directly to the EU. Even for those who tend to treat the EU on the same footing as other international organisations in international law, it is acknowledged that particular attention should be given to considering the specific roles and functions of the EU.³³ It is arguable that using the term “*sui generis* entity” – an entity of its own kind³⁴ – to locate the EU’s nature as a subject in international law serves better in describing such uniqueness.³⁵

³⁰ Case 6/64 *Costa v ENEL* [1964] ECR 585, at 593-4; See also Case 26/62 *Van Gend en Loos* [1963] ECR 1; James Crawford and Alan Boyle, “Opinion: Referendum on the Independence of Scotland – International Law Aspects” in *Scotland analysis: devolution and the implications of Scottish independence* (Scotland Office, HM Treasury and Cabinet Office 2013) 98

³¹ Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) 131-132

³² For the discussion of conferral of competence under the EU law, see Chapter 2 Section 2

³³ Philippe Sands and Pierre Klein (eds) (note 21) 18 (maintaining that while the difference between integrational and co-ordinational types of organisations are often significant, integrational organisations nevertheless remain international organisations in the given definition, as long as they have not ‘absorbed’ their Member States). See also Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn CUP 2009) 24-25

³⁴ For the discussion of selected special entities in international law, see James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 197-252 (but note the EU is not listed as one of the *sui generis* cases there, and the book stated that “The term ‘sui generis’, often used to describe situations not readily categorized, tends to pre-empt analysis; it is used to end discussion, not to advance it.”)

³⁵ But see, Ioannis Papathanasious, (note 18) (suggesting that “a federation of sovereign States” as a more illuminating definition than the mere statement that the Union’s identity is *sui generis*)

1.3. The challenges of the participation of the EU in the multilateral fora



Illustration 1.1.³⁶

Let us consider some of the problems created by this situation. If we consider the participation in multilateral relations as a masquerade where the participants are asked to put on a mask of the State they represent, then EU Member States are given two masks whilst they are somehow bound together by their legs. Such a situation confuses not only the EU Member States but also the other guests at the party.³⁷ This illustrates the background against

³⁶ The underlying concept and the draft of the illustration was initiated and drew by the author and finished by Taiwanese illustrator Sana Wu (<http://sana217.pixnet.net/blog>)

³⁷ In the meantime, we can also see that the EU and its Member States are not the only participants bringing in such confusion and challenge to the multilateral relations. There exist some other participants— other *sui generis* entities emerged for similar or different reasons—facing similar difficulties because of their unique

which this research is based. The unique nature of the EU and the environment of international law in which the EU is located inevitably bring challenges for the participation of the EU in multilateral fora. Because the EU has been conferred many competences that effectively— even exclusively in many circumstances— cover a wide range of affairs, the Member States are often no longer in the position of dealing with those matters alone.³⁸ This has two consequences. On the one hand, the participation of the EU in international law-making and the works of international institutions becomes necessary for the EU and its Member States so as to materialise their internal distribution of competence. On the other hand, to include the EU as a participant in international law-making and the works of international institutions also becomes necessary for third States and international organisations to ensure the effective enforcement of international rules.

Yet, what constitutes an “appropriate” form for the EU to relate with other international institutions, as specified by Article 220 TFEU remains unclear. To include the EU as a participant in international organisations and the process of international law-making is not uncontroversial. For those international organisations that are open only to States, the best available status for an entity not recognised as a State is generally as an observer.³⁹ Nevertheless, the limited rights of observer status— for instance, limited attendance of meetings, or the lack of voting rights in decision-making⁴⁰—

nature, and cause further confusion to the situation. See Pasha L. Hsieh, “An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan”, 28 *MJIL* (2006) 765 (stating that “[t]he nation [Taiwan] exists as one entity with multiple identities. For instance, Taiwan’s embassy may be called ‘Taipei Economic and Cultural Office’, ‘Taiwan Representative Office’, or ‘Chung Hwa Travel Service’, and its memberships in international organisations are often labeled ‘Chinese Taipei’, ‘Taipei, China’, or ‘China(Taiwan)’, at 766-767)

³⁸ For the issue of the competence under the EU law, see Chapter 2 Section 2.1

³⁹ See e.g. The permanent observer status of the UN

(<http://www.un.org/en/members/aboutpermobservers.shtml> <last accessed:05.08.2013>); Thilo Rensmann, “International Organisations or Institutions, Observer Status”, *MPEPIL* (OUP 2007)

⁴⁰ Ibid., (an overview of the limited rights of observer status in international organisations or institutions)

does not always correspond to the extensive competences the EU enjoys.⁴¹ Furthermore, to grant a formal membership to the EU, along with practical and technical issues, may further raise the ideological sensibility of its implication of statehood or sovereignty.⁴²

As will be further discussed later in Chapter 4 on the EU's participation in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), President Koh of the Conference summarised during the drafting process the questions that needed to be brought to their attention concerning the EEC's participation in the UNCLOS as a formal Contracting Party. These questions outlined the practical and technical controversies, including not only the EEC's participation as a Contracting Party in the UNCLOS at that time, but also the EU's participation in almost all multilateral fora. The questions include:

- “ (a) the extent of the rights and duties of the organisation and the extent of the obligation of third States to recognize those rights;
- (b) the areas of competence transferred by members to the organisation with respect to matters falling within the sphere of the Convention;
- (c) the question of information to be obtained or notification to be made to third States directly or through the depositary with regard to such competence;
- (d) the question of rights or benefits that a member of the organisation may or may not obtain when that member is not a Party to the Convention;
- (e) the question of dual representation;
- (f) the question of responsibility for infringement of the rights of third States, or failure to comply with obligations by the organisation; and

⁴¹ Jan Wouters and others, *Study for the Assessment of the EU's Role in International Maritime Organisations* (Final Report, LCGGS 2009) 60

⁴² For the general discussion of collective recognition and membership of international law, can see James Crawford, *Brownlie's principles of public international law* (OUP 2012) 150-151; Such concern also affects the EU's own policy on supporting other international actors' membership or full participation in international organisations. See Sigrid Winkler, “A question of sovereignty? The EU's policy on Taiwan's participation in international organisations”, *AEJ* (2013) 16

(g) the application of the settlement of dispute provisions with respect to the organisation.”⁴³

Article 305.1.(f) and Annex IX of the UNCLOS to a certain extent answered the questions summarised by President Koh, at least for the purposes of that instrument.⁴⁴ Moreover, as the EU’s participation in multilateral fora is no longer rare,⁴⁵ these questions are not completely lacking answers. Nevertheless, the challenging issues brought about by the EU’s participation in multilateral fora continue. Each individual multilateral forum may have partly or wholly responded to the questions listed above. However, different multilateral fora may have responded to similar questions with different answers. Moreover, due to the fact that the internal delimitation of competence between the EU and its Member States does not always correspond with the areas externally covered by international organisations,⁴⁶ one area of competence delimited by the EU and its Member States may externally fall in areas governed by different international organisations with different attitudes and rules concerning the participation of the EU. All of these factors potentially threaten the pursuit of consistency, clarity, and certainty in the law and practice governing the EU’s participation in multilateral fora, and hinder the form of participation being considered appropriate.

The need for consistency, clarity, and certainty in the law and practice governing the EU’s participation in multilateral fora is crucial for many

⁴³ Shabtai Rosenne and Louis b. Sohn (eds), *Volume V of United Nations Convention on the Law of the Sea 1982: A Commentary* (Brill 1989) 189; For the issues involved, *See also* Rachel Frid de Vries, (note 14) 1-2; Piet Eeckhout, (note 20) 255-258

⁴⁴ *See* Chapter 4, Section 4.2

⁴⁵ For an overview of the EU’s participation in the UN system and the multilateral fora concerning maritime affairs, *see* Michael Emerson and others, *Upgrading the EU’s role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy* (Centre for European Policy Studies 2011) Annex A (Overview of EU Participation in the UN System) and Annex C (Overview of EU Participation in International Maritime Organisations); Jan Wouters and others, (note 41) Annex I (Overview Official Status EC in International Agreements and IMAOs)

⁴⁶ For the occurrence of inevitable overlap of international organisations and its causes, *see* Henry G. Schermers and Niels M. Blokker, (note 15) §1703

reasons. From the EU and its Member States' perspective, many Treaty provisions governing the EU's policies and actions specifically require consistency and coherence⁴⁷— it is suggested that consistency constitutes a necessary, though insufficient, condition for achieving coherence.⁴⁸ Moreover, as the rule of law is one of the core values on which the EU was founded and one of the principles that guides the EU's external relations,⁴⁹ whether the law and practice governing the EU's participation in the multilateral fora have been consistent, clear, and certain— the key features for the rule of law⁵⁰— undoubtedly needs to be ensured. Furthermore, the existence of inconsistency and uncertainty may deprive the EU of credibility in performing its effective role in the international arena.⁵¹ From the external/international law perspective, consistency, clarity, and certainty in the law and practice governing the EU's participation in multilateral fora could provide third States and international organisations clear and certain guidelines on who should be involved in the decision-making procedures in the multilateral fora. It is also crucial to determine whether the rules have been complied with. To examine whether the law and practice governing the EU's participation in the multilateral fora meet the need for consistency,

⁴⁷ See e.g. Article 11.3, 13.1, 16.6, 17.6, 18.4, 21.3, 26.2 TEU, Article 7 and 256.3 TFEU

⁴⁸ Christophe Hillion, "Tous pour un, un pour tous! Coherence in the External Relations of the European Union" in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008) 12; Simon Duke, "Consistency, coherence and European Union external action: the path to Lisbon and beyond" in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011) 18

⁴⁹ Preamble and Article 2 TEU; Article 21 TEU

⁵⁰ See e.g. Lon L. Fuller, *The Morality of Law* (Revised edition, YUP 1969) 39 (elaborated eight ways to fail to create and maintain a system of legal rules. Arguably the eight ways Fuller elaborated may link to the need for consistency, clarity, and certainty); Stephane Beaulac, "The Rule of Law in International Law Today", in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart 2009) 198-204; Juha Raitio, *The Principle of Legal Certainty in EC Law* (Kluwer 2003), particularly Ch. 5.2 (The term 'Rule of Law', Legality and the Requirements of Democracy) and Ch. 8 (Predictability and Acceptability as Aspects of Legal Certainty)

⁵¹ Simon Nuttall, "Coherence and Consistency", in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (OUP 2005) 94

clarity, and certainty from this perspective is equally challenging, but valuable.

Since the notion of “consistency” and the related— considered interchangeable by some⁵²— notion of “coherence” have been widely explored in the study of EU external relations law,⁵³ it is worth further clarifying the way in which this research examines the issue of “consistency”. It will not be fully in line with the notions “consistency” and “coherence” commonly employed in the field of EU external relations law. For many EU lawyers, the issue of consistency and coherence is somehow puzzling and even rooted in the terms used by different language versions of the Treaty.⁵⁴ Several different sets of consistency under the EU Treaties have been identified,⁵⁵ and the different issues concerning consistency and coherence have also been approached mainly from two dimensions— the vertical dimension, meaning the consistency or coherence between the Union and Member State’s actions;⁵⁶ and the horizontal dimension, meaning inter-policy and inter-pillar consistency or coherence.⁵⁷ In contrast, this thesis will focus more on consistency with a narrower meaning known to a wider legal community— the consistency that requires the absence of contradiction between different legal arrangements and between law and practice.⁵⁸ Such consistency still

⁵² Ibid., 93

⁵³ For the discussion of coherence and consistency under EU external relations law, see e.g. Simon Duke, (note 48) 15; Marise Cremona, “Coherence in European Union foreign relations law”, in Panos Koutrakos (ed), (note 48) 55; Ramses A. Wessel, “The dynamics of European Union legal order: an increasingly coherent framework of action and interpretation”, *ECLR* (2009) 117; Leonhard den Hertog and Simon Strob, “Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term”, 18(3) *EFAR* (2013) 373-388

⁵⁴ Christophe Hillion, (note 48) 12; Simon Duke, (note 48) 17-18

⁵⁵ Simon Duke, (note 48) 16-17

⁵⁶ See e.g. Marise Cremona, (note 48) 62; Christophe Hillion, (note 48) 17; Simon Duke, (note 48) 21; Simon Nuttall, (note 51) 106-108

⁵⁷ Marise Cremona (note 48) 76; Christophe Hillion, (note 48) 17; Simon Duke, (note 48) 21; Simon Nuttall, (note 51) 103-106

⁵⁸ Christophe Hillion, (note 48) 14-15; Peter van den Bossche, *The law and policy of the World Trade Organisation: text, cases, and materials* (CUP 2005) 652 (the term consistency used by the WTO Appellate Body to refer to the absence of legal clash)

involves many possible dimensions, for example: 1) the consistency of internal law and practice of the EU and its Member States relating to participation in external affairs; 2) the interfacial consistency between law and practice under the internal sphere of the EU law and under the external sphere of international law; 3) the external law and practice across different international institutions or multilateral treaties governing such participation.⁵⁹ Even though achieving consistency under this narrow and passive meaning may still fall short of achieving the sort of coherence that is ultimately required under EU law, this study will nevertheless suggest that whether consistency has been achieved remains dubious.

2. *The questions and objectives of the research*

Research on EU external relations law and international law aspects of the EU is not rare. From the EU law perspective, many authors have dealt with the power and institutions of EU external relations, mainly concentrating on issues surrounding the delimitation of competence between the EU and its Member States and the coordination and co-operation procedure of the EU and its Member States in external relations.⁶⁰ Discussions from the international law aspect dealing with the legal issues concerning the EU as an international actor in a global context are also

⁵⁹ For coherence of the EU law from different perspectives, see Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (OUP 2008) (concentrates mainly on the concepts of rights and discretion in elected policy areas)

⁶⁰ See e.g. Dominic McGoldrick, (note 6); Remses A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Brill 1999) 242; Marise Cremona and Bruno de Witte (eds), *EU foreign relations law: constitutional fundamentals* (Hart 2008); Marise Cremona, (note 48); Alan Dashwood and Christophe Hillion (eds), *The General Law of E.C. External Relations* (Sweet & Maxwell 2000); Ian MacLeod, I.D. Hendry, and Stephen Hyett, *The external relations of the European Communities : a manual of law and practice* (OUP 1996); Ramses A. Wessel, "Inside Looking Out: Consistency and Delimitation in EU External Relations", 37 *CMLR*(2000) 1135

fruitful.⁶¹ This thesis aims to focus on furthering the research on the interface between the EU and international law to see how the law and practice from both perspectives have been affected by each other. Moreover, whilst abundant existing work, either from the internal/EU law perspective or from the external/international law perspective, had been conducted in the pre-Lisbon Treaty context,⁶² more and more research about the EU external relations in the post-Lisbon context is now emerging.⁶³ Much of it concentrates on introducing and analysing the new institutional design, including the High Representative and the European External Action Service,

⁶¹ See e.g. Delano R. Verwey, (note 5); Enzo Cannizzaro, *European Union as an Actor in International Relations* (Kluwer 2002); Rachel Frid, *The relations between the EC and international organisations: legal theory and practice* (Brill 1995); Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Brill 2001); Alan Dashwood, "Editorial Comment: The European Union- A New International Actor", 38 *CMLR* (2001) 825; Ramses A. Wessel, "The International Legal Status of the European Union", 2(1) *EFAR* (1997) 109; Rachel Frid, "The European Community, a Member of a Specialized Agency of the United Nations", 4 *EJIL* (1993) 239; Maria Gavouneli, "International Law Aspects of the European Union", 8 *TJICL* (2000) 147

⁶² See e.g. Jorn Sack, "European Community's Membership of International Organisations", *CMLR* (1995) 1227; Joni Heliskoski, "Internal Struggle for International Presence: The Exercise of Voting Rights Within the FAO" in Alan Dashwood and Christophe Hillion (eds), (note 60) 79; Christiaan Timmermans, "Organising Joint Participation of EC and Member States" in Alan Dashwood and Christophe Hillon, *ibid.*, 239; Jan Wouters and others, (note 41); Commission, *Community participation in Regional Fisheries Organisations*, COM(1999) 613 final); Rachel Frid, (note 61) 239; Inge Govaere, Jeroen Capiau and An Vermeersch, "In-Between Seats: The Participation of the European Union in International Organisations", *EFAR* (2004) 155; Uwe Jenisch, "The European Union as an Actor in the Law of the Sea: The Emergence of Regionalism in Maritime Safety, Transportation and Ports", 48 *GYIL* (2005) 223-264; Although some researches and analysis regarding the role EU plays in selected multilateral organisations are currently available, updates for their developments in the post-Lisbon context are still necessary. See e.g. Jan Wouters and others, (note 41) (selected ICCAT, FAO, IMO, and IWC as its case studies); European Commission, (note 62); Sergio Marchisio, "EU's Membership in International Organisations" in Enzo Cannizzaro (ed), (note 61) (concentrates mostly on EU's Membership in WTO and FAO); Lucia Cavicchioli, 'The Relations between the European Community and the International Labour Organisation' in Enzo Cannizzaro (ed), *ibid.*, 261

⁶³ See e.g. Panos Koutrakos (ed), *The European Union's external relations a year after Lisbon* (CLEER Working Papers 2011/3)

introduced by the Lisbon Treaty.⁶⁴ This thesis will build on this previous scholarship, but will focus not on the institutional design but more on the interaction of the aforementioned internal/external perspectives and the impact of the entry of the Lisbon Treaty in this regard. Particularly as many of the external legal mechanisms provided for the EU to participate in the decision-making of multilateral fora in the field of maritime affairs predate the entry into force of the Lisbon Treaty, it is important to examine its impact thereon i.e. how the mechanisms set by the Lisbon Treaty may be inconsistent or incompatible externally with the existing mechanisms, and whether further internal or external adjustment may be necessary. Based on the understanding of the background and the existing research, this thesis attempts to ask and answer the following questions from a legal perspective:⁶⁵

1) How, and to what extent, have the legal mechanisms, both internally under the EU legal order and externally under international law, been designed and operated to enable the EU to participate in the decision-making of multilateral fora? Have they been designed and operated in a way that could provide consistency, certainty, and clarity for all the actors involved in issues concerning how, the EU and its Member States can, and should participate in the decision-making of the multilateral fora?

⁶⁴ See e.g. Jonas Paul, *EU Foreign Policy after Lisbon: Will the New High Representative and the External Action Service Make a Difference?* (C·A·P Policy Analysis 2/08); Jan Wouters and others, "The European Union's External Relations after the Lisbon Treaty", in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 143; Christine Kaddous, "High Representative for Foreign Affairs and Security Policy", in Stefan Griller and Jacques Ziller (eds), *ibid.*, 220; Leendert Erkelens and Steven Blockmans, "Setting up the European External Action Service: an act of institutional balance", 8 *ECLR* (2012) 246

⁶⁵ For the question the legal approach tends to ask and its limitations, see Knud Erik Jorgensen and Ramses A. Wessel, "The position of the European Union in (other) international organisations: confronting legal and political approaches" in Panos Koutrakos, (note 48) 264-273

2) Is the internal distribution of competence under the EU legal order consistent with those powers externally granted by the legal mechanisms of the multilateral fora?

3) Are there significant differences between the legal mechanisms established by different fora, whereby the EU enjoys different status and rights within? Has the influence of the EU or the effectiveness of the EU's participation been coherent and consistent throughout different modes of participation provided by different fora? Following the same concern, do the current legal mechanisms, both internally and externally, need to be improved?

4) What is the implication of enabling the EU to participate in the decision-making of multilateral fora through different legal mechanisms?

Aiming to answer these research questions, this thesis endeavours to offer a general framework to understand the similarities and differences of how the EU, as a *sui generis* entity, participates in the decision-making of multilateral fora, and to consider the implications of the design and operation of the legal mechanisms enabling the EU's participation in the decision-making of multilateral fora for the development of international law. Firstly, this thesis, on the one hand, examines in detail the legal mechanisms of the EU to see how law and practice have evolved to deal with participation in decision-making in multilateral fora. On the other hand, it examines the legal mechanisms of selected multilateral fora to see how different organisations and instruments deal with similar issues, namely, the participation of the EU in the decision-making of such multilateral fora.

Secondly, the research aims to contribute to improving the legal mechanisms governing the structure and functioning of both the EU and international organisations so as to ensure certainty, clarity, and consistency of the internal and external sets of rules. It will consider whether specific sets of internal or external mechanisms function better to optimise participation, from the perspective of the EU, its Member States, third States, and international organisations.

3. *The scope of the research and the choice of case studies*

As the title of this thesis suggests, it is about the legal mechanisms— both internal and external— available for the EU to participate in the decision-making of multilateral fora in the field of maritime affairs. It focuses on the design and operation of such legal mechanisms for the EU. By referring to this thesis as a study about “multilateral fora”, the practice concerning the EU’s participation in important international institutions and multilateral treaties will be considered side-by-side.⁶⁶ The use of the generic term “multilateral fora” may fall short of precision. Nevertheless, this thesis uses such a generic term so as to possibly include both the EU’s participation in international institutions and its participation in multilateral agreements. The relationship between “mixture of memberships of the EU and its Member States in international institutions”— meaning that both the EU and its Member States being the formal members of an international institution— and the “conclusion of the mixed agreement”— meaning that both the EU and its Member States conclude international agreement as Contracting Parties with third parties— as Piet Eeckhout suggested, could be principally dealt with separately, as the issues present their own political and legal problems.⁶⁷ For instance, as the research on the EU’s participation in the UNCLOS will show, the legal questions that emerged from the EU’s participation in the context of multilateral agreements centred on who is competent for specific obligations under the agreement and responsible for any non-compliance with such obligation. Whereas the research on the EU’s participation in the FAO and RFMOs will show that the EU’s participation in international organisations— although mostly still based on a multilateral

⁶⁶ For using the generic term “international institutions” to encompass both international organisations and treaty organs, see Jan Klabbers, (note 33) 10

⁶⁷ Piet Eeckhout, (note 20) 213. *But note* that his account on “no examples of sole Community membership” could be countered by the cases of EU’s participation in maritime - particularly fishery - affairs

agreement— also concerns the allocation of competence but at the same time focuses on participation in the decision-makings of such international organisations and assuming international commitments within such a framework⁶⁸. This particularly applies to the rules governing the exercise of the Member’s rights, including, for example, making statements and voting, between the EU and/or its Member States in such international organisations.

Nevertheless, in practice the issue of mixity, as will be seen throughout this thesis, dominates the overwhelming concern of both “mixity of memberships of the EU and its Member States in international institutions” and the “conclusion of the mixed agreement”. Indeed, there have been shared internal and external challenges, and they shared similar responses. Moreover, both the conclusion of mixed agreements and mixed membership of international institutions are governed by the same overarching legal doctrine identified by the Court of Justice, namely the duty of co-operation between the Member States and the EU.⁶⁹ All these concerns indicate the value of researching the problems caused by the conclusion of the mixed agreement and the mixity of membership of the EU and its Member States in other international institutions together. In order not to concentrate on just one side of the coin and lose sight of the whole picture, this thesis employs the term “multilateral fora” so as to bring in the broader view of the EU’s participation not only in the decision-making of international organisations but also of multilateral agreements or the operation of less formal international institutions. This is also the term chosen by the EU when discussing its external participation in the field of maritime affairs.⁷⁰

The aim of the research is not to provide an exhaustive overview of all issues concerning the current law and practice of the EU’s participation in the multilateral fora. In other words, not all the questions summarised by

⁶⁸ Joined Cases 3/76, 4/76 and 6/76 *Cornelis Kramer and others* [1976] ECR 1279, para 13

⁶⁹ *Ibid.*

⁷⁰ *See e.g.* Commission, “Developing the international dimension of the Integrated Maritime Policy of the European Union”, COM(2009) 536 final, 7-8

President Koh will be core issues of this thesis. This thesis will focus on the issue of the EU's participation in the decision-making of multilateral fora. It is not research concerning the enforcement of international law within the EU legal order, or vice versa. Neither does the responsibility of the EU and/or its Member States arising from such participation constitute the core concern of this thesis. Their relevance to this thesis will be limited to the degree to which those issues are related to the mechanisms governing decision-making.

Although issues concerning the EU's participation in the multilateral fora are important in both law and practice for academia and practitioners, it is difficult, if not impossible, to cover the whole range of the EU's participation in the multilateral fora within the scope of a Ph.D. thesis. Therefore, this thesis focuses on one area: the EU's participation in the field of maritime affairs, as it provides good and sufficient examples covering the abovementioned controversies and challenges in law and practice. In this thesis, the term "maritime affairs" is not limited to the affairs concerning seaborne navigation and shipping, but refers to those affairs governed by the international law of the sea, particularly the subject matter covered by the UNCLOS. On the one hand, maritime affairs involve a wide range of policy sectors with different natures of competence within the EU.⁷¹ On the other hand, maritime affairs cannot be managed without cooperating with third States and subregional, regional and international organisations and are indeed covered by a complex matrix of regional and international treaties and organisations externally. Whilst part of the governance of maritime affairs involves issues that are highly linked to the core of State sovereignty, many other parts involve scientific or technical issues that are more or less distant from it. The relatively varied and diverse forms and modes of the EU's external participation in the multilateral fora in this field could present an

⁷¹ http://ec.europa.eu/maritimeaffairs/sectoral_en.html <last access 01.03.2010> However, as will be demonstrated in the later chapter, the scope of "maritime affairs" governed by the UNCLOS may not be identical to the EU's policy-based definition

assorted and complicated practice and provide sufficient materials for the purpose of this research.

Nonetheless, due to the limits of space, this thesis further focuses on selected practices across different areas and different modes of participation. The reason for selecting these case studies goes beyond the fact that the Commission specifically pinpointed them when blueprinting the roadmap for developing the international dimension of the Integrated Maritime Policy of the EU.⁷² The selection of the case studies aims to demonstrate a spectrum or variety of modes that exist for the EU to participate in multilateral fora in the field of maritime affairs. This thesis selects the EU's formal participation in the UNCLOS so as to explore the prototype of the EU's formal participation in the fundamental instrument in the field of maritime affairs. It selects the practice of the EU's participation in the International Maritime Organisation (IMO) to represent the practice of the default setting of the multilateral fora, where the UNCLOS model is not followed and the State-centric approach is still followed. In this context, the EU can only participate in the IMO as an observer, which raises a number of challenges. It selects the practice of the Food and Agriculture Organisation (FAO) to represent the mixed-membership mode adopted by an international organisation to accommodate the EU's formal membership and participation broadly following the UNCLOS model. This thesis, however, will demonstrate that the mode adopted by the FAO may not be identical to the UNCLOS prototype. In the selected practices of the EU's participation in the Regional Fishery Management Organisations (RFMOs), this thesis selects the General Fisheries Commission for the Mediterranean (GFCM), the International Commission for the Conservation of Atlantic Tunas (ICCAT), and the North-East Atlantic Fisheries Commission (NEAFC) as examples to demonstrate the diverse modes of the EU and its Member States' participation in RFMOs and the potential inconsistency in the law and practice of this participation. The

⁷² Commission, (note 70) 7-8. For the discussion of the Integrated Maritime Policy, can see Chapter 2 Section 3

selected practices, as we will see in later chapters, clearly present the diverse forms of legal mechanisms providing for the EU's participation in the decision making of multilateral fora, and they therefore present a representative sample of participation mechanisms.

4. The outline of the research

Based on the understanding of the background, the questions, and the objectives set to conduct this research, the outline for this thesis after this introduction is the following:

There will be two parts to the substantive chapters in this thesis. Part I focuses on the internal and general aspects of EU law governing the EU's external participation in the field of maritime affairs. The objective of Part I is to build up a background understanding and analysis of the legal mechanisms under the EU legal order that govern the EU's external participation in the decision-making of multilateral fora in order to lay down the basis for further examination of how the mechanisms can and should be projected externally onto the legal mechanisms provided by multilateral fora to ensure clarity, certainty, and consistency. Chapter 2 deals with issues concerning the conferral of competence on the EU by its Member States, and the complexity of delimiting the allocation of competence between them. It will focus on providing an overview and analysis of the related provisions of the Lisbon Treaty so as to lay down the basis for demonstrating that this is, on the one hand, the key legal mechanism that enables the EU to enjoy the competences to participate in the decision-making of multilateral fora but, on the other hand, the source that causes potential ambiguity, uncertainty and inconsistency. This will be followed by a section on the efforts of developing an integrated maritime policy within the EU in order to show the complexity of maritime affairs under the EU legal order. Understanding the need for and the difficulty of achieving an integrated maritime policy will also facilitate the understanding of why it is necessary for the EU to participate externally in

the decision-making of a wide range of multilateral fora in the field of maritime affairs and the reason uncertainty and inconsistency may potentially emerge. It will also offer a reference point for further consideration of whether a status for the EU based on the nature of the EU competence is an appropriate approach.

Chapter 3 will then examine the two key doctrines that govern the EU and its Member States' external participation in multilateral fora— the duty of sincere co-operation between the EU and its Member States in external relations and the maintenance of the autonomy of the EU legal order and the exclusive jurisdiction of the CJEU. It will demonstrate that these doctrines to a large extent supplement the functioning of the conferral of competence under EU law. They aim to ensure that the conferral of competence under the EU legal order can be consistently projected externally through the EU and/or its Member States' participation in multilateral fora and amid the EU's limited status for its external relations. According to the analysis, it will show that the constraints laid down by these doctrines have impacted more on the Member States than on the EU. It will further raise doubts about whether the CJEU is the proper organ to be entrusted with developing and safeguarding the governing doctrines in this area.

After establishing the understanding of these rules and mechanisms, the thesis will begin to shift direction from the internal dimension to Part II— the external dimension and its interaction with the internal mechanisms previously discussed. In Part II, the research will look into the external participation of the EU and its Member States in the multilateral fora in the field of maritime affairs by introducing the case studies to see whether those rules laid down by the EU legal mechanisms internally are consistently ensured externally by the legal mechanisms provided by different multilateral fora. It will further examine and analyse how the internal mechanisms have been developed and adapted in order to consistently interact with the external mechanism.

Chapter 4 will start by examining the EU and its Member States' participation in the 1982 UNCLOS. From the law of the sea perspective, the UNCLOS is considered to be the fundamental instrument that sets out the legal framework within which all activities in the oceans and seas must be carried out.⁷³ From the EU's external participation perspective, the UNCLOS offers the framework and mechanisms to accommodate the EU's formal participation in multilateral fora. In this chapter, the research will conduct an in-depth study of the negotiating and drafting history concerning the design of the relevant legal mechanisms that enabled the EU's participation in the UNCLOS. This will amplify the key concerns, which have more general implications, raised by the EU, its Member States, and third parties throughout the negotiation process. The mechanisms adopted in the UNCLOS as well as the EU's participation will accordingly be examined and analysed in detail. This thesis will show that regardless of whether formal membership has been made available to the EU under the rules provided by the UNCLOS, the external rules governing the delimitation of competences between a regional economic integration organisation and its Member States— particularly the concept of “transfer of power” that requires exclusiveness— are asymmetric to the internal rules governing the delimitation of competences between the EU and its Member States— particularly the “conferral of competence” that allows a conferral of non-exclusive competences. It will argue that such asymmetry is likely to be the key source contributing to many aspects of the problem concerning consistency, clarity, and certainty.

In Chapter 5, the research will examine the EU's participation in the IMO, where the traditional state-centric approach is still largely followed and the EU has no formal member status despite the model for the EU's formal participation being provided by the UNCLOS. As the IMO functions as the principal competent international organisation governing the development of

⁷³ Resolution on “Oceans and the law of the sea”, UNGA Res (10 March 2010) UN Doc A/RES/64/71

the law of the sea concerning maritime safety and the protection of the marine environment from vessel-source pollution, subjects in which the EU enjoys a wide range of competence under EU law, the participation of the EU in the IMO as a formal member has been set as one of the key aims for the EU in its external relations. This chapter will study how the EU and its Member States put forward their not yet successful goal of pursuing formal membership of the IMO. It will also examine how an interim practical mechanism has been facilitated in order to ensure consistency, certainty, and clarity, whilst maximising the possible EU involvement in the work of the IMO with its observer status or through the EU Member States. Finally, the chapter will examine the options for moving forward, arguing that even though the UNCLOS model does allow for the EU to be admitted to the IMO as a formal member, the EU should aim to become a Party of certain IMO related regulatory treaties that allow it to participate formally in the law-making process of the IMO, so as to utilise the uniqueness and advantage of the IMO regime as a forum provider actively participating in the law-making process regardless of its lack of formal membership of the IMO.

Following the study of the EU's participation in the UNCLOS and the IMO, Chapter 6 will continue the study of the EU's participation in the FAO, where the EU enjoys formal member status along with all of the EU Member States. This is also the first and the only specialised agency of the UN which has granted the EU formal member status. This chapter will discuss and analyse the relevant rules enabling the EU's participation in the decision-making of the FAO. It will also emphasise the study of the internal arrangement made between the EU and its Member States concerning their participation in the FAO, which substantialised the duty of co-operation in order to ensure a clear rule to be followed to pursue consistency and coherency in practice. It will include the study on the latest post-Lisbon development on the issue– the proposal to submit an updated Declaration of Competence (DoC) to the FAO and the proposed new arrangements between the Council and the Commission for the exercise of membership rights of the

EU and its Member States, which were tabled in late May 2013 and have not yet been introduced or examined elsewhere. An examination and comparative analysis of the post-Lisbon Treaty development on the General Arrangements on EU Statements in multilateral organisations will also be included.

After the study of the EU's participation in the FAO, Chapter 7 will complete the case studies by examining selected RFMOs, including the GFCM, the ICCAT, and the NEAFC. The selection of these different RFMOs aims to reflect the diversity of the statuses enjoyed by the EU in different RFMOs, be it a sole and full membership under a generalised arrangement, a full membership with some, but not all, of the EU Member States, or a specified full member status. This thesis will also include the relevant law and practice of the EU and its Member States in other RFMOs or treaty bodies when necessary to show the diversity and complexity of the practice and the legal issues surrounding the participation of the EU in RFMOs. This chapter will demonstrate that even if the EU enjoys exclusive competence internally in a policy area that externally falls fully within the purview of a RFMO, the need for mixed-participation, which itself contains shortcomings, may still potentially exist. It will argue that none of the modes provided by these RFMOs could guarantee long-term certainty and clarity for the EU's participation. It will further argue that a sole formal membership with one single vote for the EU, even in a multilateral forum that governs matters that fall within the exclusive competence of the EU, may in fact weaken, rather than strengthen, the EU and its Member States' power and influence in such a multilateral fora.

Chapter 8 will systematically summarise the findings of the thesis. Where possible, it will propose adjustments to refine the limits or shortcomings that exist in the current legal mechanisms. Finally, it will consider the implications of the findings for the EU and its status in international law.

Part I:

The legal mechanisms under the EU legal order: Enabling and safeguarding the EU's external participation in the decision-making of multilateral fora in the field of maritime affairs

Chapter 2

The conferral of competence under the EU legal order and the Integrated Maritime Policy (IMP)

1. *Introduction*

Unlike States, the EU does not enjoy sovereignty or the general power by default to engage with other States in international law. Instead, the legal mechanism for the EU Member States to confer on the EU a wide range of competences has enabled, and created the need for, the EU to engage with third States and international organisations and to participate in the decision-making of multilateral fora. As will be seen in the later case study chapters, externally the conferral of competence constitutes the key basis for establishing the whole mechanism— including the status, the rights, the obligations, the responsibilities etc.— for the EU’s participation in the multilateral fora. Ascertaining to what extent the Member States have conferred the competences on the EU in a certain area and whether the Member States have been excluded from exercising such competences becomes critical for not only the EU and its Member States, but also the international counterparts. If the task for ascertaining the allocation of competence between the EU and its Member States is complex, challenging and sometimes even problematic, then it would not be too surprising that the functioning of the rest of the mechanisms set up based on the conferral of competence are potentially complex and uncertain. Unfortunately this seems to be the situation facing the EU in the issue of its participation in multilateral fora. Based on this understanding, this thesis begins this chapter with the study of the mechanism of conferral of competence in principle under the EU law to see how external competences are allocated between the EU and its Member States. It will demonstrate that even though the Lisbon Treaty attempted to clarify the issue, the complexity of the mechanism of

conferral of competence persists, and we will see the significant impact of this complexity and uncertainty later in the case studies chapters.

After describing the legal framework under the EU legal order governing the conferral of competence under EU law, the following section of this chapter will continue to examine the EU's efforts to integrate the policies related to maritime affairs, which have been spread across different policy sectors within the EU, into an integrated maritime policy. Such integration of maritime policy on the one hand shows how maritime affairs involve policies that fall within different policy areas that have different nature of competence, and how the EU aims to ensure the consistency of its maritime policy and to avoid the sectoral practice of the governance of the EU maritime affairs amid such difference and complexity. On the other hand it demonstrates how the importance of the external multilateral factor has been emphasised throughout the process of integrating the maritime policies, and how much—or how little—the aims have been achieved to this end. After laying down the grounds for understanding the competences of the governance of maritime affairs and the integrated maritime policy from the internal/EU law perspective, this thesis will continue to explore the other key doctrines that govern the EU's external participation in the multilateral fora in the following chapter before moving on toward the study of the external/international dimension.

2. The conferral of competence under the Lisbon Treaty—a better division and definition of competence in the EU?

The EU enjoys the competence that its Member States have conferred upon it to engage with third States and international organisations.¹ The conferral of competence on the EU, in both the internal and the external dimension, has long been one of the central issues in EU law.² Echoing the

¹ Article 5 ex-TEC and Article 5 TEU

² See e.g. Armin von Bogdandy and Jürgen Bast, “The European Union’s vertical order of competences: the current law and proposals for its reform”, 39 *CMLR* (2002) 227

Laeken Declaration on the Future of the European Union that called for a “better division and definition of competence in the European Union” and the reform brought by the un-ratified Treaty establishing a Constitution for Europe (Constitutional Treaty),³ the Lisbon Treaty endeavoured to clarify the issue of the allocation of competence between the EU and its Member States, following largely from the previous practice and case law of the EU.⁴ Article 5.1 and Article 5.2 TEU provided that the limits of Union competences are governed by the principle of conferral, meaning that the Union shall only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.⁵ The use of Union competences is governed by the principles of subsidiarity and proportionality. The principle of subsidiarity requires that in areas which do not fall within its exclusive competence, the Union shall only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level.⁶ The principle of proportionality, on the other hand, requires that the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.⁷

2.1. A clear scope of the exclusive external competence?

³ Laeken Declaration on the Future of the European Union, annexed to the Presidency Conclusions, Laeken, 14 and 15 December 2001; Title III, Part I of the Treaty establishing a Constitution for Europe, [2004] OJ C310/14-18

⁴ For an overview of the previous case law and practice of the issue of competence, see Ronald van Ooik, “The European Court of Justice and the Division of Competences in the European Union” in Daniela Obradovic and Nikos Lavranos (eds), *Interface between EU Law and National Law* (Europa Law Publisher 2007) 13; Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (4th edn, OUP 2008) 88-100; Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (2nd edn, OUP 2011) 11-119

⁵ Article 5.1 and 5.2 TEU

⁶ Article 5.3 TEU

⁷ Article 5.4 TEU. See also Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality [2008] OJ C115/206

Title 1 of Part One of the TFEU stipulated the categories and areas of Union competences, it followed the attempt of the Constitutional Treaty to codify the previous case law and to specify the competences of each category of competence of the EU⁸. Article 2 TFEU categorised the competences into exclusive, shared, and complimentary competence.⁹ For areas where the EU is conferred an exclusive competence, only the Union may legislate and adopt legally binding acts; the Member States are able to act in areas where the EU has exclusive competence only when such an act is empowered by the Union or for the implementation of Union acts.¹⁰ Among the areas where the Union has an exclusive competence, “the conservation of marine biological resources under the common fisheries policy” is the one most relevant to the field of maritime affairs.¹¹

In addition to the listed areas in Article 3.1 TFEU, Article 3.2 TFEU further provides that “[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope”. It attempts to reflect the different situations where the EU enjoys an exclusive external competence summarised by the CJEU in its Opinion 1/03 and the tests developed by it.¹² Yet this provision may blur the line between, in Alan Dashwood’s words, “the

⁸ Article I-13, I-14, I-15, I-16, I-17 Constitutional Treaty; Ronald van Ooik, (note 4) 13

⁹ Article 2 TFEU. Although the list of categories is argued discernable from the pre-existing case law, the category of the nature of competences it listed is not uncontroversial. See Armin von Bogdandy and Jürgen Bast, “The Federal Order of Competences” in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (2nd edn, Beck/Hart 2010) 287-297; See also Robert Schutze, “Lisbon and the federal order of competence: a prospective analysis”, 33(5) *ELR*(2008) 709

¹⁰ Article 2.1 TFEU

¹¹ Article 3.1 TFEU

¹² Opinion 1/03 [2006] ECR I- 1145 (“Lugano Opinion”), paras 122, 125-126; Opinion 1/03, paras 43, 54, 58, and 122

existence question” and “the exclusivity question”,¹³ which suggests a two-stage approach i.e. first establish the existence of the external competence then distinguish the nature of the competence for assessing the competence issue. Under this new provision, particularly the “necessary to enable the Union to exercise its internal competence” clause, what was considered the criteria to decide the existence of the implied external competence established and developed by the *ERTA judgement* and the relevant case law has been linked directly to the exclusivity of that implied external competence.¹⁴

Prior to the Lisbon Treaty, the most important doctrine regarding the “existence question” laid down by the case law established by the *ERTA Judgement* and the following cases is the doctrine of parallelism.¹⁵ Other than the express external powers, the CJEU ruled that the external power comes not only from an express conferment by the Treaty, but also could come implicitly from the Treaty provisions.¹⁶ In the absence of a specific provision explicitly granting the community competence to act externally, the EU has a parallel external competence— an implied external competence— if it is necessary to further one of the objectives of the EU, as the Court summarised in Opinion 1/76 (“Rhine Navigation”).¹⁷ Later case law shared a more restrictive view regarding the interpretation of the implied external competence, stating that the mere existence of an internal competence does not equal the conferment of the external competence. Only where the

¹³ Alan Dashwood, “Implied External Competence of the EC”, in Martti Koskenniemi (ed), *International Law Aspects of the European Union*, (Brill 1998) 113

¹⁴ Case 22/70 *Commission v Council* [1971] ECR 263 (“ERTA Judgement”), para 16; Opinion 2/94 [1996] ECR 1959, para 26; For an analysis of the case law on the implied external competence and its exclusivity, can See Marcus Klamert and Niklas Maydell, “Lost in Exclusivity: Implied Non-exclusive External Competence in Community Law”, 13 *EFAR* (2008) 493

¹⁵ Takis Tridimas and Piet Eeckhout, “The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism”, 14(1) *YEL*(1994) 143

¹⁶ *ERTA Judgement*, para 16; Opinion 2/94 further referred “it is *settled case-law* that the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions.” (emphasis added). See Opinion 2/94, para 26

¹⁷ Opinion 1/76 [1977] ECR 741, para 3

external action is necessary for the attainment of a specific objective of the Community, does the doctrine apply.¹⁸

Nevertheless, Article 3.1 TFEU provides that when it is necessary to enable the Union to exercise its internal competence, the EU then possesses the parallel external competence of an exclusive nature. This interpretation suggests that even if the internal competence is of a non-exclusive nature, as long as the external competence is necessary to enable the EU to exercise that internal competence, the parallel external competence based on the non-exclusive internal competence is still exclusive external competence. As Alan Dashwood has indicated, this would constitute a significant extension beyond the principle established by case law.¹⁹ This interpretation is particularly dubious in areas where the EU competences are of supplementary or complimentary nature. Because the Lisbon Treaty provides the supplementary or complimentary competence as one category of competences,²⁰ where the Union has competences to carry out actions to support, coordinate or supplement the actions of the Member States, whether the EU can resort to Article 3.2 TFEU to claim its exclusive external competence when it involves supplementary or complimentary competences is uncertain and controversial. The Treaty provision seems to make no exception, meaning that as long as the external competence is necessary for enabling the EU to exercise one of these supplementary or complimentary competences, that external competence will not be of supplementary or complementary nature, but of exclusive nature. Nonetheless, considering that the complimentary competence of the EU— unlike the shared competence—

¹⁸ Delano Verwey, *The European Community, the European Union, and the international law of treaties : a comparative legal analysis of the community and union's external treaty-making practice* (T.M.C. Asser Press: 2004) 26; Paul Craig and Grainne de Burca, (note 4) 175-176; Alan Dashwood, "The Attribution of External Relations Competence", in Alan Dashwood and Christophe Hillion (eds), *The General law of E.C. External Relations* (Sweet & Maxwell 2000) 117-118

¹⁹ Alan Dashwood, "Mixity in the Era of the Treaty of Lisbon" in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010) 361

²⁰Article 6 TFEU

entertains no pre-emption effect that would turn the conferred non-exclusive competence into an exclusive one to be exercised by the EU,²¹ it can be also argued, and perhaps more persuasively, that the scope of Article 3.2 should be interpreted in a limited way i.e. such a source for the external exclusive competence should not apply to areas of complimentary competence so as to have the complimentary competence retain its complimentary nature, as stipulated in Article 2.5 TFEU.

The uncertainty and ambiguity of the scope of the exclusive external competence exist not only in the aforementioned situation. Considering Article 216.1 TFEU provides a very similar but slightly different provision on the external competence of the EU, stipulating that “[t]he Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope”. The distinction between the exclusive external competence and the non-exclusive implied external competence also becomes ambiguous and needs further clarification, particularly the nature of the implied external competence based on Article 216.1 TFEU. Since Article 3.2 TFEU and Article 216.1 TFEU are very similar, could all the Article 216.1 TFEU external competences be considered as exclusive external competences according to Article 3.2 TFEU? If not, how could an external competence based on Article 216.1 TFEU be considered as an implied non-exclusive external competence? The room for the non-exclusive external competence lies in a detailed comparison of differences between the texts adopted by Article 3.2 TFEU and Article 216.1 TFEU i.e. “when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope” and “where the conclusion of an

²¹ Article 2.2 TFEU

agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope”.

It is noticeable that whilst Article 3.2 TFEU and Article 216.1 TFEU both adopted the same term “likely to affect common rules or alter their scope”, hence the external competence based on this condition shall possess the exclusivity; there are slight differences between the other two conditions set up by Article 3.2 TFEU and Article 216.1 TFEU. Firstly, for the implied external competence based on “where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties” of Article 216.1 TFEU, this provision suggests that, as Jan Wouters and others have observed, there may exist further external competences that go beyond the parallelism of internal and external competence for the EU to act externally, as no internal competence is required in this circumstance.²² Arguably, for those external actions that are necessary to achieve one of the objectives of the EU but no internal competence is provided by the Treaty, the EU could, based on Article 216.1 TFEU, claim its external competence. But it cannot claim such competence to be of exclusive nature according to Article 3.2 TFEU, therefore this external competence can be deemed as implied non-exclusive external competence.

Secondly, for the implied competence based on what is “provided for in a *legally binding Union act*”(emphasis added) of Article 216.1, it is observable that the language used here is different from that of Article 3.1, which provides the exclusive external competences exist when the conclusion of an international agreement is provided for in “a legislative act of the Union”. The difference was taken by Jan Wouters and others to argue that

²² Jan Wouters and others, “The European Union’s External Relations after the Lisbon Treaty”, in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 178

the scope of “legally binding Union act” appears to be broader than merely a “legislative act of the Union,” as the former includes any acts except opinions and recommendations, whilst the latter is only limited to legal acts adopted by legislative procedure²³. Nevertheless, considering that Article 288 TFEU includes regulations, directives, and decisions as legally binding Union acts, whilst Article 289 TFEU provides that regulations, directives, and decisions shall be adopted by legislative procedure, and legal acts adopted by legislative procedure shall constitute legislative acts, it could be argued that the scope of the implied external competence based on a *legally binding Union act* is identical to that of the exclusive external competence based on a *legislative act of the Union*.

Yet all these interpretations and applications of the exclusivity of the competences determined by Article 3.2 TFEU have not been ascertained by the CJEU and leave uncertainty as to the exact scope of the external exclusive competence. As Alan Dashwood and Marise Cremona both pointed out, even though the existence of implied external competence is established by the case law of the CJEU, its precise extent, and the extent to which implied competences are exclusive, are still controversial; many of the issues will need to be resolved by new case law.²⁴ Even if for some policy areas, the external competence has been explicitly provided in the Treaty and the ambiguity and uncertainty caused by the “implied external competence” provisions may be less relevant,²⁵ the aforementioned ambiguity and uncertainty on the clarification of the existence and the nature of the EU

²³ Ibid., 176

²⁴ Alan Dashwood, (note 19) 362; Marise Cremona, “Defining competence in EU external relations: lessons from the Treaty reform process” in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (CUP 2008) 50

²⁵ For example, Article 191.4 (environment), Article 209.2 (development cooperation), and Article 212.3 (economic, financial, and technical cooperation with third countries), Article 214.4 (humanitarian aid) of the TFEU expressly grant the EU competence to take international commitments, and further stipulate that Member States' competence to negotiate in international bodies and to conclude international agreements shall not be prejudiced. Therefore resorting to Article 3.2 and 216.1 TFEU may not be necessary

competence still exist in most EU policy areas where similar express provisions that confer external competence on the EU do not exist. As such clarification of competence is still the key element for the mechanisms for the EU's participation in the decision-making of the multilateral fora, which will be seen in the case study chapters, this ambiguity and uncertainty within the EU law sphere inevitably extends to the external/international sphere, and contributes to the potential inconsistency.

2.2. A clear line between exclusive and shared competence?

Alongside the exclusive competences of the EU, a large category of the competences conferred to the Union is of a shared nature. Areas of shared competence confirmed by Article 4 of the TFEU, include those that may be related to the field of maritime affairs: (a) fisheries, excluding the conservation of marine biological resources; (b) environment; (c) transport; (d) energy; (e) area of freedom, security and justice.²⁶ When a shared competence is conferred on the EU by the Member States in a certain area, the Union and the Member States may legislate and adopt legally binding acts in that specific area. The Member State shall exercise their competence to the extent that the Union has not exercised its competence, and shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.²⁷ This pre-emption effect of the shared competence causes confusion. An area of competence listed in the Treaties as a shared competence gives the impression that such competence is concurrently exercised by the EU and its Member States. But such understanding is inaccurate. Even if one area of competence is listed as an area of shared competence in the Treaties, once the EU has exercised the competence, such "shared competence" becomes exclusively exercised by the

²⁶ http://ec.europa.eu/maritimeaffairs/sectoral_en.html <last access: 03.07.2010>

²⁷ Article 2.2 TFEU. Some authors identify this type of competences as "concurrent competence", whereas "parallel competence" refers to those shared competences does not have pre-emption effective. *See e.g.* Armin von Bogdandy and Jürgen Bast, (note 9) 290-295

EU – with the exception of the areas of research, technological development and space and areas of development co-operation and humanitarian aid, the two areas that are listed as of shared competence without the pre-emption effect.²⁸ This “shared competence exclusively exercised by the EU” is identical to the exclusive competence of the EU rather than to the shared competence un-pre-empted by the EU.²⁹

The pre-emptive effect of the shared competence is further complicated by the issue of ascertaining the scope of the competence exclusively exercised by the EU. Unlike the listed exclusive competence, which assigns a whole policy area as an area where the EU exclusively exercises its competence, in an area of shared competence, the pre-emptive effect of the exercise of a shared competence, as suggested by Article 2.2 TFEU, extends not to the whole policy area but only to the extent where the EU has exercised its competence. Yet Article 3.2 TFEU and the ERTA doctrine allow exceptions for such pre-emption— the occupation of the entire field is not required, a policy area covered ‘to a large extent’ by the Union rules might be affected by the Member States’ concurrent action may pre-empt the Member States to exercise its competence in that policy area.³⁰ The complexity of the pre-emption effect of shared competence makes identifying the actual nature of competence of the EU in a specific area confusing. It also brings doubt on whether the concept of “conferral” of competence used internally in EU law is symmetric to the concept of “transfer” of power commonly used externally in the basic instruments of the multilateral fora, as we will see and discuss in the case studies. Considering the complexity and the dynamic nature of identifying the exclusivity of the listed shared competence as well as that of the external competence, it is not difficult to understand why the clarification of competence has become one of the core

²⁸ Article 4.3 and Article 4.4 TFEU. *See also* Protocol No 25 of the Lisbon Treaty

²⁹ But *see* Armin von Bogdandy and Jürgen Bast, (note 9) 291

³⁰ *See* Armin von Bogdandy and Jürgen Bast, (note 9), 291

issues challenging the participation of the EU in the multilateral fora concerning maritime affairs.³¹

2.3. The effect of conferral of competence — a “transfer” of power?

The effect of the conferral of competence is rather controversial. It was argued that the conferral of competence of the EU is a transfer of power that was one-way and irreversible.³² Such an argument may hold true in the areas of exclusive competence, where no express provision of withdrawing the competence from the EU to the Member States is provided. Legally speaking the Member States are always left with the choice to amend the Treaties or to withdraw their membership from the EU so as to withdraw the competence from the EU back to the Member States. This is however an extreme, if not impossible, case,³³ and it has not happened in the EU. Moreover, the revocability in these extreme cases does not itself bar the conferral of competence being categorised as a “transfer of power”, as long as it is demonstrated that the Member States have no, or a very limited, degree of control over the exercise of such competence, and such competence is not concurrently but exclusively exercised by the international organisation.³⁴ This is the case in the EU’s exercise of its exclusive competence.

However, the Treaty provisions seemed to suggest the contrary, at least in the areas of shared competence. Article 2.2 TFEU stipulates that

“[w]hen the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”

³¹ For a discussion on the blurring the boundary between Union competences from different perspective, see Alan Dashwood, (note 19) 363-364

³² Delano Verwey, (note 18) 16

³³ Neil MacCormick, “Sovereignty: Myth and Reality”, 11 *Scottish Affairs* (1995) 9

³⁴ Dan Sarooshi, *International Organisations and their Exercise of Sovereign Powers* (OUP 2007) 29-32

The first sentence indicates that at the time the conferral of competence is made by the Treaty, the competence retains its non-exclusive character and the Member States may still exercise such competence. The second sentence suggests that the competence becomes exclusively exercised by the EU when, and only when, the EU begins to exercise such competence. This dynamic shift of the conferred competence from what can be concurrently exercisable by both the EU and its Member States to that being exclusively exercised by the EU makes the question of whether the conferral of competence in the areas of shared competence under the EU Treaty meets the exclusivity required by a “transfer of power” externally dubious. Furthermore, the third sentence also challenges the criteria of irrevocability required by a transfer of power. Even though this has not happened in practice, this provision suggests that such conferral of competence is not one-way and irreversible. The EU may cease to exercise the competence it has exercised and such competence shall hence reverse to the competence that is again exercisable by the Member States. It may be argued that such reversibility is still distinguishable from revocability, as the current provision only allows one-way reversibility, namely, only the EU can decide to cease to exercise the shared competence that has been exclusively exercised by it, resulting in the competence reversal to be exercisable by both the EU and the Member States. It does not, however, allow the Member States to revoke and retrieve the competence back to their own hands. Such irrevocability may be crucial from the EU and its Member States’ perspective, nevertheless, from the third States and international organisations’ perspectives, the fact that such conferred competence is shiftable is identical to the consequence that a conferral of competence is revocable. As we will see in the later chapters, since the term “transfer” of competence or power is rather commonly used externally in the multilateral fora to accommodate the participation of the EU, this puzzling relationship between the concepts “conferral of competence” and “transfer of competence” indeed brings in challenges and causes potential uncertainty and inconsistency.

Amid the difficulty, the Lisbon Treaty aimed to mitigate the uncertainty and inconsistency over the issue of allocation of competence by further clarifying the competence and providing a list of areas that fall in different categories of competence in the Treaty. This effort may be considered to a certain extent as responding to the previous controversies that concerned the issue surrounding the allocation of external competence between the EU and its Member States. However, as has been pointed out in this section, several ambiguities and uncertainties still exist in the current provisions, arguably the allocation and the nature of competence will still be one of the key reasons that causes ensuring a consistent, clear, and certain rule for governing the EU's competence for its participation in multilateral fora to be challenging. In the following section, we will explore how the effort of seeking an integrated maritime policy has, or has not, aided the provision of clearer, more certain, and more consistent guidance governing the EU's participation in the decision-making of multilateral fora. It will also highlight the need for the EU to participate in the decision-making of multilateral fora in the field of maritime affairs that has been continuously amplified throughout this effort.

3. Efforts of developing an IMP

3.1. Policy areas involving maritime affairs

The governance of maritime affairs in the EU is the epitome of how intertwining and complex in law and practice the institutions, actors, and powers involved are in international affairs concerning the EU and its members. The EU Treaties contain a wide range of policy areas, but the policy on maritime affairs is not explicitly listed as one of them. However, this does not mean that the policy on maritime affairs is not important; contrarily, in the Commission's view, maritime affairs cover a wide range of policy areas of the EU, including at least: 1. Fisheries; 2. Environment; 3. Transport and energy; 4. Research; 5. Enterprise and Industry; 6. Regional Policy; 7.

Competition; 8. Freedom, Security and Justice; 9. Employment, Social Affairs and Equal opportunities etc.³⁵ The involvement of different policy areas implies the involvement of different institutions, different decision making processes, and different legal instruments of the EU. They are also allocated differently in the categories of the nature of competences under the EU law. All these factors lead the governance of maritime affairs to be even more complicated than that of a single listed policy area. Maritime affairs further involve different institutions and actors in international, regional, national/Member State levels both internally and externally. The EU's broad view of policy-based maritime affairs makes it difficult, if not impossible, to reconcile one or a few international instruments, for example, the UNCLOS and the relevant agreements, to cover the matter. A compartmentalisation of maritime governance follows closely the development via a sectoral approach through different institutions at different levels in the EU.³⁶ The EU has realised these issues and has grappled to develop an integrated policy to deal with maritime affairs so as to avoid maritime affairs being further governed in a fragmented way. In order to understand the key objectives the EU attempts to achieve concerning the governance of maritime affairs through its external relations, it is necessary to explore the EU's attempts to achieve an integrated maritime policy. Also, it would provide us with an opportunity to examine how much, or how little, it has met the challenges caused by the conferral of competence mentioned in the earlier sections.

3.2. The ongoing journey toward an IMP of the EU

3.2.1. An IMP for the European Union (Blue Book)³⁷

³⁵ http://ec.europa.eu/maritimeaffairs/sectoral_en.html < last access: 03.07.2010 >

³⁶ Commission, "Guidelines for and Integrated Approach to Maritime Policy: Towards best practice in integrated maritime governance and stakeholder consultation" COM(2008) 395 final, 6

³⁷ Commission, "An Integrated Maritime Policy for the European Union", COM(2007) 575 final

After the consultation process set up by the Green Paper issued in 2006,³⁸ the Commission, building on the input it had received, proposed an Integrated Maritime Policy (IMP) “based on the clear recognition that all matters relating to Europe’s oceans and seas are interlinked, and that sea-related policies must develop in a joined-up way”.³⁹ The IMP was set to change the way the EU makes policy and takes decisions, and to develop and deliver a programme of work.⁴⁰ Considering that different policy areas had been developed by the EU on different tracks and had caused fragmented decision-making in maritime affairs, which at times led to inefficiencies, incoherencies and conflict of use, the Commission considered the introduction the IMP as an innovative and holistic approach that would provide a coherent policy framework that would allow for the optimal development of all sea-related activities in a sustainable manner.⁴¹

Alongside the proposed governance framework, tools, and actions in the wide range of areas of maritime policy,⁴² the Blue Book spent a large amount of space on the maritime policy concerning the external dimension of maritime affairs,⁴³ which is more related to this thesis. It set promoting Europe's leadership in international maritime affairs as one of the objectives of the IMP. With this goal, the Commission stated it would promote co-operation under the Enlargement, the European Neighbourhood Policies, and the Northern Dimension to cover maritime policy issues and management of shared seas, and would propose a strategy for the external projection of the Union's Maritime Policy through a structured dialogue with major partners.⁴⁴

³⁸ Commission, “Green Paper: Towards a future Maritime Policy for the Union: A European vision for the oceans and seas”, COM(2006) 275 final

³⁹ *Ibid.*, 2

⁴⁰ *Ibid.*, 3

⁴¹ *Ibid.*, 4

⁴² *Ibid.*, 5-8

⁴³ *Ibid.*, 13-14

⁴⁴ *Ibid.*, 15

The Blue Book responded to almost all the issues raised in the Green Paper in a quite detailed way—except the part concerning maritime governance in the external dimension.⁴⁵ In this aspect, only relatively little was mentioned, that is, the external dimension of governance in the bilateral context and in the context in the Enlargement, Neighbourhood Policy, and the Northern Dimension. Although the Green Paper emphasised that the rule-making in a multilateral context as well as the role and status of the EU in international organisations governing maritime affairs are crucial to an IMP and needed to be reviewed to take into account the fact that in several cases the issues under consideration fall within the exclusive competence of the EU,⁴⁶ rarely was anything mentioned in the later integrated policy proposed in the Blue Book.

The accompanying document to the Blue Book (“the Action Plan”), spent several sections deliberating the action to tackle the external multilateral dimension of the governance of maritime affairs (Point 7.1), including: 1) to conduct the assessment of the situation of the EU within all the international organisations with maritime objectives in order to lay the foundation for a more detailed reflection on the EU’s role and position in the international context; 2) to ensure appropriate EU action in relation to its international partners, for example on the implementation of rules agreed in international bodies; and 3) to promote European standards internationally.⁴⁷ In addition, the Commission proposed developing specific proposals for the further inclusion of maritime issues in dialogues and negotiations with third countries and for increased support to developing countries in the implementation of the international maritime policy agenda and of their maritime commitments under international law.⁴⁸ It also proposed to maintain a database on the ratification by Member States of

⁴⁵ For the external dimension of the Green Paper, see “International Rules for Global Activities”, in Commission (note 38) 41-44

⁴⁶ Commission, (note 38) 42-44

⁴⁷ Commission, “Commission Staff Working Document: Accompanying document”, SEC(2007) 1278, 28

⁴⁸ *Ibid.*, 29-30

international Conventions in the maritime area and on a case-by-case basis encourage Member States to implement and ratify international Conventions as appropriate, with the objective in mind of promoting the EU to become part of such international Conventions in due course.⁴⁹ Although this Action Plan addressed the external multilateral dimension of the issue, it concentrated more on collecting information and conducting an assessment of the situation of the EU within all the international organisations with maritime objectives. Moreover, fisheries governance was mentioned—although very little—in the Blue Book, but how this IMP interrelates with the existing policy based on express treaty law—the Common Fisheries Policy (CFP)—was left blank. The failure to subject the CFP to the objectives of the IMP is argued to be the greatest impediment to an integrated approach, considering the importance of the CFP in the field of maritime affairs;⁵⁰ it also exemplifies that the EU’s policy-based definition of “maritime policy” may not always correspond to what is externally considered maritime affairs by international instruments.

*3.2.2. Marine Strategy Framework Directive— focus on the environmental dimension of the maritime policy*⁵¹

A further step of the IMP was taken by the EU in 2008 when they adopted a Directive establishing a framework for Community action in the field of marine environmental policy (the Marine Strategy Framework Directive, hereinafter MSFD). It set “good environmental status” in the marine environment by the year 2020 at the latest, as the objective of the Directive,⁵² and set up plans of action to achieve such an objective. However, this legal instrument, although entitled the Marine Strategy Framework

⁴⁹ Ibid., 29

⁵⁰ Jill Wakefield, “Undermining the Integrated Maritime Policy”, 60 *MPB* (2010) 323

⁵¹ Directive 2008/56/EC of the European Parliament and of the Council of 17 June establishing a framework for community action in the field of marine environmental policy

⁵² Article 1(1) MSFD

Directive, concentrated mainly on the environmental dimensions of maritime affairs instead of maritime affairs as a whole. It was legally based on the environment policy provided by Article 175.1 of ex-TEC,⁵³ and hence became an important but partial step in forwarding the ongoing process of policy evolution toward an ecosystem-based framework management regime for maritime affairs, and could be considered as the environmental pillar of a wider IMP.⁵⁴ Nevertheless, how the Directive can promote the IMP is yet to be seen. It is doubtful whether to advance the IMP by using different legal instruments based on different legal bases is the optimal way to realise the policy. Such approach may also contradictorily lead to a sectoral rather than an integrated policy again in the future. The solution itself seemed to bring other unanswered questions.

3.2.3. Developing the international dimension of the IMP of the EU⁵⁵

The major objective of developing the international dimension of the IMP, according to the Commission, was to explore the possibility to extend the European IMP into a wider international arena, and to envisage the creation of a EU framework for a global integrated approach to maritime affairs. It set the key themes for an EU platform in international maritime affairs as: 1) ensuring international governance based on the rule of law; 2) protecting of marine biodiversity, including in the high seas; 3) tackling climate change; 4) ensuring maritime safety; 5) promoting decent work in the maritime sectors; 6) understanding the sea better. In order to do so, the role of the EU in international fora, including United Nations fora, other intergovernmental fora and other informal processes needs to be enhanced,⁵⁶ particularly,

⁵³ Preamble of the MSFD

⁵⁴ Lawrence Juda, "The European Union and the Marine Strategy Framework Directive", 41 *ODIL* (2010) 45

⁵⁵ Commission, "Developing the international dimension of the Integrated Maritime Policy of the European Union", *COM(2009) 536 final*

⁵⁶ *Ibid.*, 7

“[t]he EU should consistently seek membership in international organisations that are relevant for maritime affairs, notwithstanding , the complex distribution of competence between the EU and its Member States. The difficulty which traditional intergovernmental organisations face in trying to accommodate the specificity of the EU needs to be overcome.[...]”⁵⁷

“Full EU membership and maximum participation need to be pursued in all relevant agreements and organisations. Common or coordinated positions should be adopted in line with the duty of loyal cooperation. It is crucial that the EU speaks with a single voice or at least delivers a consistent message, if it is to enhance its influence in key multilateral fora.”⁵⁸

As will be seen in the case study chapters, the methods set out to enhance international dimension of the IMP of the EU in this Communication, including seeking full membership for the EU in international organisations related to maritime affairs and adopting positions in line with the duty of co-operation, did indeed summarise the approach adopted by the EU across different multilateral fora in practice. Nonetheless, as this thesis will later show, whether these approaches indeed guarantee consistency and maximise the EU’s external influence in the field of maritime affairs remain doubtful. In summary, generally, the Commission would like to strengthen the EU’s role as a global player through greater and more unified participation in multilateral fora, in coherence with the principle of the unity of the EU’s external representation. It aimed to ensure coherence between the activities of various organisations, notably in the fisheries, environmental and transport fields. Specifically, it would concentrate on tackling a wide range of maritime issues through a multilateral approach.⁵⁹ This Communication could be considered the guiding document that tackled the issue of developing the international dimension of the IMP of the EU, ever since. Nevertheless, little was mentioned in this Communication about what should be done to tackle the existing difficulties.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid., 11

3.2.4. The implications of the attempt to achieve an IMP

Although the internal dimension of the IMP was largely well progressed by the Commission,⁶⁰ the same could hardly be said of the international dimension, particularly the multilateral dimension. After years of promoting an integrated maritime policy, the agenda of the international dimension of the policy remains largely unchanged. The insufficient status and the role of the EU in multilateral fora that cannot fully reflect the competence it enjoys and the incoherence between activities of various origins in the same or different field remain largely unchanged. As we can observe from the reports on progress, even though several aims or issues were originally identified in the Green Paper, for example, it called for promoting the formal participation of the EU in multilateral fora and advancing the EU's status in international organisations that could coherently reflect the competence it enjoys within the EU, nevertheless, rarely were these objectives or issues later responded to or even mentioned. This indicates the limitation of the external dimension of the EU self-driven IMP. Without the willingness of third States, international organisations, or even the EU Member States themselves to share the same objectives, such objectives are difficult to promote externally by the EU unilaterally. Whilst the complex rules and the results of the allocation of competence under EU law could be diagnosed as an inherent obstacle for the EU and its Member States to pursue an external status that could coherently reflect the competence within, the IMP did not touch upon any of the obstacles. It is therefore unsurprising that little has been progressed in this regards, and the "success" is evaluated based on factors other than the advancement of the EU's status in international organisations and other multilateral fora.

⁶⁰ Commission, "Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions", COM(2009) 540 final; DG-MARE, "Progress of the EU's Integrated Maritime Policy—Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions", COM(2012) 491 final

This also bring us to a point to consider whether the effort of moving toward the IMP has affected or clarified the allocation of competence in the field of maritime affairs within the EU, particularly, whether pursuing the IMP constitutes “an exercise of the Union’s competence” over such a policy area. Even if the Union has endeavoured to put forward the IMP, such a move is still distinct from the adoption of legally binding acts or an exercise of competence that could pre-empt the exercise of competence by the Member States in areas of shared competence, as provided in Article 2.2 TFEU. Only when the EU legislate and adopt legally binding acts to realise IMP policy that falls within the area of shared competence shall such competence become exclusively exercised by the EU. In other words, the mere adoption of the IMP does not largely clarify the nature of competence enjoyed by the EU concerning maritime affairs, nor does it alter the way of determining whether such competence has been exercised by the EU. The only exception perhaps is the Marine Strategy Framework Directive, which constitutes a legally binding act in accordance with Article 288 and Article 289 TFEU. However, as mentioned in the previous section, the Directive is explicitly limited its scope to the environmental policy of the maritime affairs and specifically based the Directive on Article 175.1 ex-TEC (environmental policy). It does not provide clearer guidance on the allocation of competence between the EU and its Member States in the field of maritime affairs as a whole. The IMP does not provide an answer regarding to what extent the EU has opted to exercise its competence and hence pre-empt the Member States to exercise theirs over maritime affairs. That answer still needs to be addressed in a sectoral manner and with a case-by-case approach. Without tackling the inherent cause that triggered the difficulty in the EU’s participation in the multilateral fora concerning maritime affairs externally, the question of whether the IMP could serve its purpose to integrate maritime policy and promote the EU’s external presence concerning maritime affairs, remains doubtful.

The need for maritime affairs to be considered with an integrated and coherent approach suggested by the IMP leads us to consider what constitutes a status that can fully reflect the competence the EU enjoys under EU law in international organisations. There is still uncertainty and difficulty in ascertaining the allocation of competence between the EU and its Member States, even for those areas that can be identified as areas of the EU's exclusive competence as the IMP suggested. To exercise such competences still potentially needs to take into account the considerations from different policy areas, which may or may not fully fall under the exclusive competence of the EU. A sole and exclusive full member status for the EU externally in multilateral fora that governs the affairs that fall within the areas where the EU enjoys the exclusive competence is not necessarily the ideal approach. This argument will be further revisited later in Chapter 7 regarding the EU's participation in the RFMOs.

4. Concluding remarks

The legal mechanism under EU law that makes the EU's participation in multilateral relations necessary and possible is rather sophisticated. It began with the conferral of competence from the Member States on the EU, and the challenge and difficulty is rooted from this very beginning. From a formal viewpoint, the EU Treaties have listed the different groups of the areas of competence specifically, that list could function as a clear guideline for all the actors involved. Nevertheless, upon a closer examination of the law and practice developed by the EU and its Member States, the conferral of competence is not a one-off and clear-cut event, but a dynamic and evolving process. The conferral of competences from the Member States to the EU and the result of a complex allocation of competences between the EU and its Member States is probably the main internal cause of the difficulties both internally and externally for the EU, its Member States, and third States or international organisations to handle their multilateral relations. The

difficulty particularly comes from the uncertainty of the scope of the exclusive external competence of the EU. The pre-emptive effect, both internal and external, of the large category of shared competence under EU law, results in a non-static state of the delimitation of competence between the EU and its Member States. Even if an area of competence is listed as a “shared” competence in the Treaties, when the EU opts to exercise its competence over the area, the competence becomes, fully or partly, exclusive both internally and externally exercised by the Union. Fisheries and international transport, for example, are considered as areas where the Union has enacted extensive legislation and has extensively acquired competence that excludes Member States acting.⁶¹ Moreover, an internal shared competence may externally be an exclusive competence, as Article 3.2 TFEU suggests—yet no clear list of the competences of this kind has been provided either. The conferral of competence in the external aspect, according to the analysis in the previous section, may pre-empt the Member States from any autonomous action more easily than in the internal aspect as has been established by CJEU case law, in that the occupation of the entire field is not required according to the ERTA doctrine of implied external powers. It suffices that a policy area covered ‘to a large extent’ by the Union rules might be affected by the Member States’ concurrent action.⁶² This makes the provision of a full, clear and concrete list of the delimitation of competence between the EU and its Member States in a multilateral forum difficult, if not impossible. The practice shows a reliance on the CJEU to clarify on a case-by-case basis. However, this case-by-case and post-dispute approach could hardly serve the aim of legal consistency and clarity, and leaves uncertainty as to the exercise of power between the EU and its Members, but also makes it difficult to follow by third States and international organisations. If the allocation of competence of the maritime affairs between the EU and the Member States is somehow vague, dynamic and yet to be further clarified case by case, what equates to a status in an

⁶¹ Jan Wouters and others, *Study for the Assessment of the EU’s Role in International Maritime Organisations: Final Report* (LCGGS 2009) 16

⁶² Armin von Bogdandy and Jürgen Bast, (note 9), 291

international organisation that fully reflects the competence the EU enjoys becomes a question without a determined answer and seriously undermines the main objective the EU tries to pursue externally in multilateral fora.

Even though the attempt to pursue an IMP in order to mitigate the negative effects of a sectoral approach, and the progress in the internal dimension, were highly evaluated by the Commission, the effect of an integrated maritime policy in the international dimension so as to promote the participation of the EU in maritime governance, particularly in the multilateral context, is yet to be seen. The reports of the evaluation of progress rather showed that little progress has been made particularly regarding the advancement of the EU's status in multilateral fora regardless of the reform put forward by the Lisbon Treaty and the IMP. Neither has the effort to move toward the IMP provided a clearer guideline to the EU's competence in the field of maritime affairs. It has provided us with a reference point for further consideration of the complexity of the search for the appropriate status of the EU to participate in decision-making of multilateral fora in the field of maritime affairs, which is addressed later in the case study chapters.

Chapter 3

Key doctrines of governing the relationship between the EU and its Member States in the EU external relations—enhancers or constraints?

1. Introduction

As the previous chapter showed, the EU's participation in the decision-making of multilateral fora in the field of maritime affairs internally started from a background where the allocation of competences between the EU and its Member States and the nature of the competences conferred on the EU are uncertain and evolving, and involve a complex and detailed case-by-case analysis. And, as discussed in the introduction chapter, the issue of competence externally may not only involve the allocation of obligations and responsibilities between the EU and its Member States, but also involve the EU and/or its Member States' day-to-day activities, including making statements, exercising voting rights etc. in an international organisation. Although the exact scope of the EU's competence in maritime affairs remains uncertain, the EU has struggled to seek a status for its participation that could fully reflect the competence it enjoys in the field of maritime affairs amid the limited status available for the EU to participate in many multilateral fora. Two key doctrines have been developed under EU law in the area of external relations law—the duty of sincere co-operation of the EU and its Member States (Section 2) and the exclusive jurisdiction of the Court of Justice of the European Union (CJEU) (Section 3). Both have facilitated safeguarding the EU's external participation amid the difficulties of requesting the EU Member States to act externally when the EU has the external competence under EU law but enjoys no proper status externally in a multilateral fora to act. On the other hand, they request the EU Member States to refrain from acting even though they enjoy formal full member status of a multilateral forum, when such an act would impede the EU from

exercising its external competence, and refrain from bringing cases that may lead external tribunals to rule on the issue of EU law, including that which governs the internal mechanism of conferral of competence between the EU and its Member States. This chapter aims to demonstrate that these two doctrines have, to a certain extent, enhanced the EU's participation externally despite its limited formal member status in multilateral fora, yet they have also restrained the freedom of the EU and its Member States, particularly the latter, from exercising their power externally under the law of multilateral fora. It will also show the heavy reliance on the CJEU in developing and ascertaining these doctrines— the thesis will further reflect on the shortcomings of this approach.

After laying down the background understanding and analysis of the major legal mechanisms that govern the EU's participation in multilateral fora in the field of maritime affairs under EU law, this thesis will be able to further examine whether these key mechanisms have been clearly and consistently projected into the external sphere of the legal mechanisms of the multilateral fora, to enable the EU's participation.

2. *Duty of sincere co-operation between the EU and its Member States in external relations*

Prior to the Lisbon Treaty, Article 10 of the ex-TEC provided that

“Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

This provided the textual basis for treaty law in construing the duty of co-operation. However, Article 10 ex-TEC was not the only legal basis for construing the duty of sincere co-operation under the EU legal order prior to

the Lisbon Treaty. Two CJEU's decisions, *C-45/07 Commission v Greece*¹ and *Case C-246/07 Commission v Sweden*,² made around the time of the entry into force of the Lisbon Treaty, offer a good overview of the state of EU law at the time the Lisbon Treaty entered into force. They provided an opportunity to see how the Court construed the duty of co-operation and the relation of the duty to the different nature of the external competence the EU enjoyed in a multilateral context.

2.1. Commission v Greece and Commission v Sweden— a summary and extension of the CJEU case law

2.1.1. *Case C-45/07 Commission v Greece: EU's exercise of exclusive external competence without the membership in an international organisation*

In *Case C-45/07 Commission v Greece*, the Court faced a case concerning an area where the EU has external exclusive competence under EU law, but externally has no membership in the international organisation governing the affair.³ Greece submitted to the IMO a proposal⁴ to ask the IMO Maritime Safety Committee to examine the creation of check lists or other appropriate tools for assisting the Contracting States of the International Convention for the Safety of Life at Sea (“the SOLAS Convention”).⁵ The Commission sought the Court to declare that in monitoring whether ships and port facilities complied with the relevant rules,⁶ Greece had failed to fulfil its obligations under Articles 10 ex-TEC, 71 ex-TEC and 80.2 ex-TEC.⁷

The Commission argued that before the submission of the proposal to the IMO Maritime Committee, the EU had adopted a regulation on

¹ Case C-45/07 *Commission v Greece* [2009] ECR I-701

² Case C-246/07 *Commission v Sweden* [2010] ECR I-3317

³ For the status of the EU and its Member States in the IMO, see Chapter 5 Section 3

⁴ MSC 80/5/11

⁵ 1184 UNTS 3 (adopted 1 November 1974, entered into force 25 May 1980)

⁶ International Ship and Port Facility Security Code (“the ISPS Code”)

⁷ Case C-45/07, para 1

enhancing ship and port facility security and integrated both Chapter XI-2 of the Annex to the SOLAS Convention, and the ISPS Code, into Community law (“the Regulation”).⁸ Since then, the EU has enjoyed exclusive competence to assume international obligations in the area covered by that regulation. The Member States therefore no longer have competence to submit to the IMO national positions on matters falling within the exclusive competence of the Community unless expressly authorised to do so by the Community.⁹

The Court observed that, under Article 3.1.(f) ex-TEC, the setting of a common policy in the sphere of transport is specifically mentioned as one of the objectives of the Community, and the Member States must both take all appropriate measures to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the institutions, and also abstain from any measure which might jeopardise the attainment of the objectives of the Treaty, under Article 10 ex-TEC and the case law of the CJEU.¹⁰ It followed that, to the extent to which the Regulation has been promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.¹¹

The Court followed the opinion of the Advocate General, finding that the possible adoption of such new rules because of the Greek proposal would, as a consequence, have an effect on the Regulation which the Community legislature had decided to incorporate, in the substance of the international instruments, into Community law. The proposal was considered as an initiative likely to affect the provisions of the Regulation, constituting an infringement of the obligations under Articles 10 ex-TEC, Article 71 ex-TEC and Article 80.2 ex-TEC.¹² The Court further added that a breach of Article 10

⁸ Regulation (EC) No 725/2004 on enhancing ship and port facility security and integrated both Chapter XI-2 of the Annex to the SOLAS Convention and the ISPS Code into Community law, [2004] OJ L29/6

⁹ Case C-45/07, para 14

¹⁰ Case C-45/07, paras 15-16, Case 22/70 *Commission v Council* [1971] ECR 263 (*ERTA Judgement*), paras 21-22

¹¹ Case C-45/07, paras 15-18, *ERTA Judgement*, para 22

¹² *Ibid.*, paras 21-23

ex-TEC by the Commission could not entitle a Member State to take initiatives likely to affect Community rules promulgated for the attainment of the objectives of the Treaty, which would be in breach of that State's obligations arising under the EU Treaties.¹³ Nor could a gentleman's agreement, in any event, affect the division of power between the Member States and the Community resulting from the provisions of the Treaty.¹⁴ A Member State is not permitted, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty.¹⁵

This decision is significant to the EU's participation or non-participation in multilateral fora. The Court, facing the situation that the EU has no membership in the area it enjoys the implied exclusive external competence, refused to accept the argument made by the Member State claiming that an obligation to abstain from active participation in the IMO would not ensure that the EU interest was protected because the EU is not a member of that international organisation.¹⁶ It clearly held that the mere fact that the EU is not a member of an international organisation in no way authorises a Member State, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect EU rules promulgated for the attainment of the objectives of the Treaty¹⁷. The fact that the EU is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest.¹⁸

Case C-45/07 gave a picture of the CJEU's view of to what extent an external exclusive competence of the EU – in this case, a competence that

¹³ Ibid., para 26

¹⁴ Ibid., para 27

¹⁵ Ibid., paras 24-29

¹⁶ Ibid., para 30, *see also* Opinion 2/91 [1993] ECR I-1061, para 5

¹⁷ Ibid.

¹⁸ Ibid., paras 30-31

became exclusively exercised by the EU because of the pre-emptive effect of the shared competence—could be exercised or utilised by employing the duty of sincere co-operation. Once the EU has been conferred an exclusive competence, even without being a formal member of the international organisation of the area externally, that exclusive competence does not shift from the EU back to the Member States in that arena. On the contrary, the activities of the Member States in certain international organisations might be limited in areas where the EU has the exclusive competence. Even when the EU fails to act under Article 10 ex-TEC, the breach cannot justify a Member State acting unilaterally. The Member States are required to seek a remedy for a breach of EU law within the EU institutional framework—although this is legally and politically unlikely to be feasible, for the reason that even if omissions are considered as reviewable acts under Article 232 ex-TEC, the Commission still has broad discretion on when and whether to act.¹⁹ Moreover, considering the procedural requirement before initiating the procedure, particularly the need for two months for the Commission to act when it is called upon to do so, a position can hardly be reached to meet the timetables set externally by multilateral fora.²⁰

The significance of *Case C-45/07* regarding the issue of the EU and its Member States' participation in multilateral fora can highlight several points. Firstly, in deciding whether the competence has become exclusively exercised by the EU due to the pre-emptive effect of the shared competence, the Court conduct a case-by-case minimal approach, specifically determining the scope of such an exclusive competence by analysing the external rules of the relevant international instruments and those of the internal regulation, giving exclusive effect to the extent that the internal and external rules had aligned. The pre-emptive effect does not, following this approach, extend to a larger policy area i.e. transportation, or even a narrower, but vaguely defined,

¹⁹ Marise Cremona, "Case Comment: Extending the reach of the AETR principle: comment on *Commission v Greece (C-45/07)*", 34(5) *ELR* (2009) 755-756

²⁰ *Ibid.*

maritime security policy.²¹ Secondly, by construing the duty of sincere cooperation, it supported a stringent effect of the EU's exclusive competence, under which the Member States can only act under a unified EU position, regardless whether the EU has a formal Party/Member status in a specific multilateral forum, or whether the EU institution itself has fully fulfilled its duty in reaching the position. It suggested that, if there is no EU position taken on a matter of exclusive competence, then no action can be taken by an individual Member State.²² Considering the Court's stance taken later in *Case C-246/07*, where a shared competence is involved, this position seems rather more understandable and less surprising.

2.1.2. Case C-246/07 Commission v Sweden: EU's exercise of non-exclusive external competence with mixed-membership with its Member States in a multilateral agreement

Unlike *Case C-45/07*, *Case C-246/07 Commission v Sweden* concerned an area where the EU does not enjoy exclusive competence, only non-exclusive competence on the subject matter. In *Commission v Sweden*, the Commission requested the Court to declare that, by unilaterally proposing a substance (perfluorooctane sulfonate "PFOS") to be added to Annex A to the Stockholm Convention on Persistent Organic Pollutants (POPs) ("the Stockholm Convention"),²³ Sweden failed to fulfil its obligations under Articles 10 ex-TEC and 300.1 ex-TEC.²⁴

On 4 August 2004, the Commission presented a proposal for a Council decision,²⁵ seeking authorisation to submit, on behalf of the Community and the Member States, proposals to have a certain number of chemicals included in the relevant Annexes to the Aarhus Protocol and/or the Stockholm Convention.²⁶ In the proposal and its related documents, obligation of co-

²¹ See, *ibid.*, 763

²² See, *ibid.*, 763-764

²³ 2256 UNTS 119 (adopted 22 May 2001, entered into force 17 May 2004)

²⁴ *Case C-246/07*, para 1

²⁵ COM(2004) 537 final

²⁶ *Ibid.*, para 29

operation and unity in the international representation of the Community that flow from Article 10 ex-TEC were reiterated, and it was also stated that proposals to amend Annexes to the Convention or the Protocol should only be done on behalf of the Community and its Member States jointly.²⁷ PFOS was not covered by the proposal for a Council decision, nor was later proposed by the Community and the Member States to the POPs Review Committee of the Stockholm Convention.²⁸ Whilst the discussion of the listing of PFOS within the framework of Community had been on-going, no measure was taken. Sweden later submitted in its name, and on its own behalf unilaterally, a proposal to list PFOS in Annex A of the Stockholm Convention to the Secretariat of that Convention.²⁹

The Court began its rationale by clarifying the scope of the duty of co-operation in good faith provided in Article 10 ex-TEC. Sweden argued this duty is limited in scope when areas are involved in which competences are shared between the Community and the Member States.³⁰ However, the Court, citing its previous case law,³¹ held that the duty of genuine co-operation is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member State to enter into obligations towards non-member countries.³² The Court also cited its case law concerning the obligation flowing from the requirement of unity in the international representation of the Community,³³ stating that in cases where the subject matter of an agreement or Convention falls partly within the competence of the Community and partly within that of its Member States, it is essential to ensure close co-operation between the

²⁷ Ibid., paras 33-34

²⁸ Ibid., paras 35-39

²⁹ Ibid., para 40

³⁰ Ibid., paras 60, 70

³¹ Ibid., para 71, citing Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, para 58, and Case C-433/03 *Commission v Germany* [2005] ECR I-6985, para 64

³² Ibid., para 72

³³ Ibid., para 73, citing Ruling 1/78 [1978] ECR 2151, paras 34-36; Opinion 2/91 [1993] ECR I-1061, para 36; Opinion 1/94 [1994] ECR I-5267, para 108; and Case C-25/94 *Commission v Council* [1996] ECR I-1469, para 48

Member States and the Community institution, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into.³⁴

In deciding the point at which the Member States are obliged to absent at international level, or at least to closely cooperate with the EU, in order to facilitate the achievement of the EU tasks and to ensure the coherence and consistency of the action and its international presentation, the Court, again resorted to its case law,³⁵ holding that Member States are obliged to do so as long as the “point of departure for concerted Community action” at international level can be marked.³⁶ The “point of departure for concerted Community action” is quite a broad concept. According to the Court, it starts from the adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community, or even much earlier, including in situations where the Commission has submitted a proposal to the Council, even when the proposal has not been adopted by the Council.³⁷ In this case, the Court found that by submitting a unilateral proposal which was within the institutional and procedural framework of the Stockholm Convention when there was a common strategy not to propose to list PFOS in Annex A to the Stockholm Convention, Sweden dissociated from a concerted common strategy within the Council and hence breached Article 10 ex-TEC.³⁸

The following rationale given by the Court is more significant regarding the practice of mixed-membership in international organisation, or mixed participation in bodies established by multilateral treaties of the EU and its Member States. The Court held that, by examining the decision-making process provided for by the Stockholm Convention, a proposal to list a substance in Annex A to the Convention has consequences for the Union. According to Article 23.2 Stockholm Convention, a regional economic

³⁴ Case C-246/07, para 73

³⁵ Ibid., paras 74-75

³⁶ Ibid., 74

³⁷ Ibid., paras 74-75, citing Case 804/79 *Commission v United Kingdom* [1981] ECR I-1045, para 28; *Commission v Luxembourg*, paras 59-60, and *Commission v Germany*, paras 65-66

³⁸ Case C-246/07, paras 75-91

integration organisation (REIO) like the EU, is not to exercise its right to vote if any of its Member States exercises its right to vote and vice versa.³⁹ Article 25.2 of the Convention provides that in the case of a REIO Party whose one or more Member States is a Party to this Convention, the organisation and its Member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organisation and the Member States shall not be entitled to exercise rights under the Convention concurrently. Even though there is a requirement for a Party organisation to declare the extent of its competence in respect of the matters governed by this Convention and to inform the depositary, who shall in turn inform the Parties, of any relevant modification to the extent of its competence, the declaration provided by the EU did not contain specific rules regarding the allocation of competence between itself and the Member State. It only stated that “[t]he Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force” and that “[t]he exercise of Community competence is, by its nature, subject to continuous development”.⁴⁰

Under these procedural arrangements provided for by the Convention, the Court analysed that there would be several negative consequences. Firstly, the submission of a proposal for the listing of a substance under the Stockholm Convention by a Member State could give rise to a situation where either the Union voted against that proposal, depriving the Member State making the proposal of the possibility of defending its own proposal at the level of the Conference of the Parties. Or, that the Member State exercised its right to vote in favour of its own proposal, thus depriving the Union of the possibility of exercising its right to vote with a number of votes equal to the

³⁹ For the discussion similar arrangements in other multilateral fora, *see* Chapter 6 Section 4.1 and Chapter 7 Section 3.1

⁴⁰ *Ibid.*, paras 93, 95. Article 23 and 25 Stockholm Convention; For the discussion of the declarations of competence the EU and its Member States submitted to multilateral fora, *see* Chapter 4 Section 5.1, Chapter 6 Section 4.2, and Chapter 7 Section 3.1

number of its Member States and leaving the other Member States free to vote for or against the proposal.⁴¹

Secondly, a concern of legal uncertainty is raised. Even supposing that the Union could notify a declaration of non-acceptance of an amendment proposed and voted for by several Member States, such a situation could give rise to legal uncertainty for the Member States, the Secretariat of the Stockholm Convention and non-member countries which are parties to that Convention.⁴²

Thirdly, the objective of depositing a proposal for the listing of a substance in Annex A to the Stockholm Convention is the adoption of an international legal rule which will be binding on the parties to that Convention. The EU, as a Party to that Convention, could be bound by the resulting amendment to that annex, provided it has not previously, in compliance with the internal procedures set out in Article 14.1 of the POPs Regulation, notified a declaration of non-acceptance within a period of one year from the date on which the depositary communicated that annex, was amended.⁴³

The Court therefore, after examining the decision-making process provided by the Stockholm Convention, found that a proposal to list a substance in Annex A to the Convention had consequences for the Union.⁴⁴ Furthermore, the Court pointed out that, as the Union could be bound by an amendment to an Annex to the Stockholm Convention, as differentiated from a national measure more stringent than a minimum Union measure, which is not binding on the Union, and cannot be justified by resorting Article 176 ex-TEC (the power of the Member States to maintain or introduce more stringent protective measures under the environmental policy).⁴⁵

The development of the duty of co-operation summarised through these two cases can be highlighted into the following points:

⁴¹ Case C-246/07, para 94

⁴² *Ibid.*, para 99

⁴³ *Ibid.*, para 100

⁴⁴ *Ibid.*, para 101

⁴⁵ *Ibid.*, para 102

a) For the legal basis of the duty of co-operation, the Court clearly stated two sources were important. Both Article 10 of ex-TEC and the requirement of unity formed the legal basis for the duty of co-operation.⁴⁶

b) Regarding the scope of the duty of co-operation, it is not limited only to areas where the EU has exclusive competence. It does not matter whether or not the EU has a member status in a specific international organisation. Nor does an obligation toward non-Member States exclude a Member State from carrying out the duty.⁴⁷ Whether the EU fails to act on its own duty does not exempt the Member States from performing their own duty.⁴⁸ A Member State is not permitted in any circumstance to act individually in the context of its participation in an international organisation to assume obligations likely to affect Community rules promulgated for the attainment of objectives of the Treaty.⁴⁹ The competence of the EU is to be exercised through the Member States acting jointly in the interest of the Union, in cases where the EU is not a member of such an arena.⁵⁰

c) Concerning the beginning of the duty, the criteria lies on the “point of departure” for a concerted Community action. It could begin from when the Commission has submitted to the Council proposals—even if they have not been adopted by the Council, as well as an adoption of a decision

⁴⁶ For Article 10 of ex-TEC as the legal basis of the duty of co-operation, *see*: Case C-246/07, para 69; Opinion 1/03, para 119; Opinion 2/91 [1993] ECR I-1061, para 10; Case C-459/03, para 174; Case C-45/07, para 16; Case 22/70 para 21; For requirement of unity as the legal basis of the duty of co-operation: Case C-246/07 para 73; Ruling 1/78 [1978] ECR 2151, para 34-36; Opinion 2/91 [1993] ECR I-1061, para 36; Opinion 1/94 [1994] ECR I-5267, para 108; Case C-25/94, para 48. For a discussion of the constitutional foundation of the duty of co-operation, *see* Christophe Hillion, “Mixture and Coherence in EU External Relations: The Significance of the ‘Duty of Co-operation’”, in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: the EU and its Member States in the world* (Hart 2010) 88-92

⁴⁷ Case C-246/07, para 71; *Commission v Luxembourg*, para 58; Case C-433/03 *Commission v Germany*, para 64

⁴⁸ Case C-45/07, para 26; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, para 20 (by analogy); Joined Cases 90/63 and 91/63 *Commission v Luxembourg and Belgium* [1964] ECR (English) 625, para 2; Case 323/78 *Commission v France* [1979] ECR 2435, para 9

⁴⁹ Case C-45/07, para 29; Case 204/86 *Greece v Council* [1988] ECR 5323, para 17

⁵⁰ Case C-45/07, para 31; Opinion 2/91, para 5

authorising the Commission to negotiate a multilateral agreement on behalf of the Community.⁵¹

d) From the two cases, one may observe that different types of obligation have arisen out of the duty of cooperation in cases of EU exclusive competences and in cases of shared competences. In cases of EU exclusive competences, as Case C-45/07 showed, the obligation is more straightforward—the Member States can only act under a unified EU position, no matter whether the EU itself has a formal Party/Member status. If there is no EU position taken on a matter of exclusive competence, then no action can be taken by an individual Member State. Meanwhile, in cases of shared competences, the obligations lie in manifolds. On the one hand, under the duty of cooperation, the Member States are obliged to closely cooperate with the EU to and seek common action in the international sphere in matters that fall within the area of shared competence. On the other hand, once a concerted Community action at international level can be marked, even if a common action has not been adopted, the Member States can be obliged to absent themselves at international level if necessary so as to facilitate the achievement of the EU tasks and to ensure the coherence and consistency of the action and its international presentation.

The significance of Case C-246/07 went further than summarising the previous case law. It arguably extended the pre-emptive effect of shared competence, at least the external dimension, to the stage where the EU has not acted, but only proposes to act, through the interpretation of the duty of co-operation. It leads to a duty to remain silent or abstain in this circumstance.⁵² Yet this broad interpretation of the duty of co-operation does not enhance certainty, it rather leaves many questions still open and gives

⁵¹ Case C-246/07, para 74; Case 804/79 *Commission v. United Kingdom* [1981] ECR 1045, para 28; Case C-266/03, para 60; Case C-433/03, para 66

⁵² See Geert De Baere, “O, where is faith? O where is loyalty?” Some thoughts on the duty of co-operation and the Union’s external environmental competences in the light of the PFOS case”, *ELR* (2011) 417; Andrés Delgado Casteleiro and Joris Larik, “The duty to remain silent: limitless loyalty in EU external relations?”, 36(3) *ELR* (2011) 524

rise to uncertainty.⁵³ For example, it further contributes to the ambiguity of the line between exclusive competence and shared competence—internally, the Member States are still able to act as if the shared competence had not been exercised by the EU, yet externally they have been pre-empted to act in circumstances like Case C-246/07 due to the duty of co-operation.⁵⁴ This further causes potential inconsistency and ambiguity of the delimitation and the nature of the external competence between the EU and its Member States.

The Lisbon Treaty took Article 10 ex-TEC and the spirit drawn from the case law, and expressly laid down the principle of sincere co-operation as part of the general provisions governing the EU and its Member States. Article 4.3 TEU transformed the duty of co-operation to the principle of sincere co-operation, of which the legal basis is explicitly provided. However, without codifying the scope and timing for operating such a principle in the Treaties, the substantive rules of practicing the principle still largely rely on the case law established by the CJEU, and inevitably inherited the uncertainty and ambiguity left by it. It is also noticeable that, whilst paragraph 1 of Article 4.3 addressed the duty to both the Union and its Member States, paragraph 2 and 3, like Article 10 ex-TEC, addressed the duty only to the Member States. This stance to heavily address the duty on the Member States but less so on the EU seemed to be in line with the stances taken in the CJEU case law, as represented by Case C-45/07 and Case C-246/07. Such a stance is understandable considering that in many cases the EU either has no formal Party/Member status in multilateral fora or has a formal Party/Member status with inferior power to its Member States. Requiring the Member States to carry out of the duty of cooperation to, on the one hand, enhance the EU's participation in the decision-making of multilateral fora through the co-operation with its Member States and, on the other hand, to restrain the Member States from actions that would hinder the EU's exercise of its competence externally, is necessary. Yet as will be shown

⁵³ See Marise Cremona, "Case C-246/07, Commission v. Sweden (PFOS), Judgment of the Court of Justice (Grand Chamber) of 20 April 2010", 48(5) *CMLR*(2011) 1664

⁵⁴ See Andrés Delgado Casteleiro and Joris Larik, (note 52) 540

later in Chapter 7,⁵⁵ the Member States may occasionally, on the contrary, need to exercise their competences through the EU due to their lack of formal Party/Member status. Resorting to the duty of co-operation addressed to the EU, is a dimension which has relatively scarcely been dealt with, but which may become necessary for them.

2.2. A internal arrangement as a fulfilment of the duty of co-operation: Case C-25/94 of the CJEU

The CJEU's case law, as summarised in the previous sections, focused on requesting the Member States to act or refrain from acting externally so as to facilitate the EU to exercise its competence. It also focused on safeguarding that Member States would not externally assume any obligations or responsibilities in multilateral fora that may impede the EU's possibility of enjoying and exercising its competence. These only dealt with part of the picture of the EU's participation in the multilateral fora. Within the context of the EU's participation in the decision-making of multilateral fora, the duty of co-operation further plays a key role in endorsing the legal effect of internal coordination arrangements concerning the EU and its Member States' activities, including, for example, making statements and exercising voting rights, in multilateral fora. As will be discussed in more detail later in the research,⁵⁶ the EU and the Member States have in some areas developed or proposed mechanisms, commonly in the name of internal arrangements,⁵⁷ to internally coordinate their external participation in the multilateral fora.

The notion of seeking common action internally for the external action of the EU and its Member States was once explicitly provided in the Treaty establishing the European Economic Community (TEEC). In the chapter of

⁵⁵ See Chapter 7 Section 3

⁵⁶ See next section of this Chapter, Chapter 5 Section 3.5; Chapter 6 Section 5.

⁵⁷ Other titles, for example, "Code of conduct", are also being used. See e.g. Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ C 340/11

the TEEC devoted to the common commercial policy, two major provisions aimed to contribute to the realisation of a common policy in international economic relationships.⁵⁸ Whilst Article 113 TEEC dealt with the agreements concluded on behalf of the Community and accordingly negotiated according to the procedures set out in Articles 113, 114 and 228 TEEC, Article 116 TEEC provided that:

“From the end of the transitional period onwards, Member States shall, in respect of all matters of particular interest to the common market, proceed within the framework of international organisations of an economic character only by common action. To this end, the Commission shall submit to the Council, which shall act by a qualified majority, proposals concerning the scope and implementation of such common action.

During the transitional period, Member States shall consult with each other for the purpose of concerting the action they take and adopting as far as possible a uniform attitude.”⁵⁹

In CJEU’s words, this provision is “conceived with a view to evolving common action by the Member States in international organisations of which the Community is not part; in such a situation the only appropriate means is concerted, joint action by the Member States as members of the said organisations.”⁶⁰ However, the CJEU’s interpretation of Article 116 TEEC was argued to be illogical and leading to negative results because it excluded the Community from the activity of most international organisations.⁶¹

Article 116 TEEC was later repealed and was not replaced by other provisions in Title V ex-TEU,⁶² the duty of cooperation has become the key principle that governs internal coordination between the EU and its Member States on shaping the positions concerning the EU’s external participation.⁶³

⁵⁸ Opinion 1/78 [1979] ECR 2871, para. 50

⁵⁹ Translated by Rachel Frid, in Rachel Frid, *The relations between the EC and international organisations: legal theory and practice* (Brill 1995) 135

⁶⁰ Opinion 1/78, para 50; *See also* Joined Cases 3/76, 4/76 and 6/76 Cornelis Kramer and others [1976] ECR 1279, paras 42-45

⁶¹ Rachel Frid, (note 59) 144

⁶² For a detail analysis of Article 116 EEC, *see* Rachel Frid, (note 59) 133-144

⁶³ Rachel Frid, (note 59) 147-153 (but concluded that the conditions for applying the duty of cooperation differ in some points from the conditions of application of Article 116, *see* *Ibid.*, 149)

Based on the duty of cooperation, the CJEU confirmed the legal effect of the internal coordination arrangement concerning the EU and its Member States activity at a rather early stage in 1995 in Case C-25/94 *Commission v Council*.⁶⁴

In Case C-25/94, the Commission sought to annul the decision of the Fisheries' Council giving the Member States the right to vote in the FAO for the adoption of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.⁶⁵ The Court noted that the EU has been able to become a Party under a REIO clause after the amendment of the FAO Constitution, and an Internal Arrangement has been adopted between the EU and its Member States so as to coordinate the meetings, statements and voting in the FAO.⁶⁶ The Court noted the Internal Arrangement,⁶⁷ particularly Sections 1.12 and 1.13, providing the procedure of how the decision should be taken,⁶⁸ and the relevant provisions in Section 2.1 to 2.3 of the Internal Arrangement stipulated who, among the Commission, the Member States, and the Presidency, should speak and vote when an agenda item deals with matters of a nature different from the competences allocated between the Community and the Member States.⁶⁹

In this case the Commission proposed to the Council that the adoption of the draft Agreement on the Flagging of Vessels Fishing on the High Seas to Promote Compliance with Internationally Agreed Conservation and Management Measures should use the shared-competence formula,⁷⁰

⁶⁴ [1996] ECR I-1469

⁶⁵ [1996] OJ L117/26 (adopted 24 November 1993, entered into force 24 April 2003)

⁶⁶ Case C-25/94, paras 1-5. For the discussion of the arrangements for enabling the EU to participate in the FAO and the internal arrangements governing the EU and the Member States' participation in the FAO, see Chapter 6, Section 4 and 5

⁶⁷ The arrangement of the internal coordination between the European Commission and the EU Council of Ministers concerning the preparation of FAO meetings, statements and voting (FAO Arrangement), 9637/91 RELEX 61. The arrangement can be found at the Annex VI of Rachel Frid, (note 59)

⁶⁸ Case C-25/94, para 6

⁶⁹ *Ibid.*, para 7

⁷⁰ A declaration sent to the FAO body before the meeting to clarify the nature of competence of the agenda item, See Chapter 6 Section 4.2

considering that the registration of vessels lies within the Member States' competence.⁷¹ It nonetheless proposed a vote by the Community, for the reason that the thrust of the agreement fell within the area of conservation and management of fishery resources, for which the Community had competence.⁷² The Member States disagreed on the right to vote to be exercised by the Community proposed by the Commission.⁷³ The Committee of Permanent Representatives of the Member States (COREPER) later decided that the Member States should vote in accordance with the Arrangement, and an indication to that effect was sent to the FAO by the General Secretariat of the Council, in preparation for the 103rd FAO Council meeting in June 1993.⁷⁴

Nonetheless, the clauses relating to registration and flagging were removed from the draft agreement as a result of negotiations at the FAO Council meeting. A new draft, subsequently entitled Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, was drawn up.⁷⁵ That draft introduces a system of authorisation for fishing on the high seas by the flag State, with a view to ensuring that international conservation and management rules are respected.⁷⁶ The Commission again proposed to the Member States that the shared-competence formula, with the Community having the right to vote, should be used for the adoption of that draft Agreement, however, as no agreement had been reached, the COREPER later considered that the indication to be sent to the FAO should state shared competence - Member State vote.⁷⁷ That indication was transmitted by the Commission to the FAO before the 104th FAO Council meeting and the 27th FAO Conference meeting, at which the draft Agreement was to be adopted.⁷⁸

⁷¹ Ibid., para 8

⁷² Ibid., para 9

⁷³ Ibid., para 10

⁷⁴ Ibid., para 11

⁷⁵ Ibid., para 12

⁷⁶ Ibid., para 13

⁷⁷ Ibid., paras 14-15

⁷⁸ Ibid., para 16

The Commission later asked the Council to approve a declaration stating that the draft Agreement is essentially, if not wholly, a matter of the exclusive competence of the Community and should normally have been approved on the Community's behalf by a Commission vote, and matters of this nature should be dealt with in accordance with section 2.1 or 2.3, second indent, of the FAO Arrangements at a later meeting of the Fisheries Council.⁷⁹ The Council confirmed the COREPER's decision instead, considered the matter as "shared competence—Member State vote", and rejected the statement suggested by the Commission.⁸⁰ The Agreement was adopted by the FAO Conference later with the Member States voting in favour.⁸¹

For the substantive reasons related to the relation between the duty of co-operation and the Internal Arrangement, the Court noted that the parties did not dispute that there is shared competence and an agreement on a common position, but disagree as to whether the Agreement submitted for adoption by the FAO Conference concerns an issue whose main thrust lies in an area within the exclusive competence of the Community.⁸² After discussing the objective of the draft Agreement and the nature of the competence concerning licensing fishing vessels,⁸³ the Court began to elaborate on the duty of co-operation and its relation with the internal Arrangement, stating that

“where it is apparent that the subject-matter of an agreement or convention falls partly within the competence of the Community and partly within that of its Member States, it is essential to ensure close co-operation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community. The Community institutions and the Member States must take all

⁷⁹ *Ibid.*, para 17

⁸⁰ *Ibid.*, paras 17-19

⁸¹ *Ibid.*, para 20

⁸² *Ibid.*, para 40

⁸³ *Ibid.*, paras 41-47

necessary steps to ensure the best possible co-operation in that regard.”⁸⁴ (citation omitted)

The Court holds that section 2.3 of the internal Arrangement between the Council and the Commission “represents fulfilment of that duty of co-operation between the Community and its Member States” within the FAO in this case.⁸⁵ Moreover, the Court found it clear that from the terms of the Arrangement, the two institutions intended to enter into a binding commitment towards each other, and the Council has not contested its effect at any moment in the proceedings.⁸⁶ Consequently, the Court held that the Council acted in breach of section 2.3 of the Arrangement which it was required to observe by the duty of co-operation, because the Council concluded that the draft Agreement concerned an issue whose thrust did not lie in an area within the exclusive competence of the Community and accordingly giving the Member States the right to vote for the adoption of that draft.⁸⁷ The Council’s decision of 22 November 1993 was therefore annulled by the Court.⁸⁹

Case C-25/94 is important for the EU and its Member States’ participation in the FAO in many senses. Firstly, this case showed how the duty of co-operation effectively governs the co-operation and coordination between the EU and its Member States for their external participation. Regardless of the facts that the arrangement was set to be internal and informal, and the wording of the arrangement was carefully chosen to avoid “shall” or like terms to imply any formal and binding nature of this internal arrangement,⁹⁰ the Court held that this internal arrangement was substantially a fulfilment of the duty of co-operation. It resorted to the intentions of the two institutions reflected from the formation of and terminology in the internal agreement, and concluded that they intended to

⁸⁴ Ibid., para 48

⁸⁵ Ibid., para 49

⁸⁶ Ibid.

⁸⁷ Ibid., para 50

⁸⁹ Ibid., para 51

⁹⁰ See Chapter 6 Section 5.1

enter into a binding commitment toward each other. With the support of the CJEU, an internal arrangement became effectively binding for the coordination between the EU and its Member States. The preparation of the participation in the FAO, and any act considered in breach of the internal arrangement will be deemed as a breach of the duty of co-operation, and may be annulled in the end. The endorsement of the legal effect of the internal arrangement from the CJEU may leave less room for the EU and its Member States to depart their actions from the procedure stipulated in the internal arrangements, therefore less flexibility would be available. Nevertheless it would strengthen certainty for practice, and lead to a more consistent and coherent practice in this area.

Secondly, The CJEU's decision also endorsed Paragraph 2.3 second indent in the FAO Arrangements, regardless this provision may possibly extend the EU's power to a certain extent. According to this provision, if a common position has been reached, even if the issue does not fully fall into the exclusive competence of the EU, as long as the thrust of the issue is considered to be lying in an area within the exclusive competence, the voting power will still fall fully on the EU. The decision of the CJEU further implies that even if the Member States reached the common position based on a mistaken understanding that the thrust of the issue lies in an area outside the exclusive competence, it should still be the EU to vote in accordance with the common position. Paragraph 2.4 of the FAO Arrangements, stipulates that "[s]hould it prove impossible to reach a common position, [the] Member State shall speak and vote. In accordance with the FAO rules of procedure, the Commission would be able to participate in the discussion." So, if the Member States fail to reach a common position, they will have the right to speak and vote, regardless of whether the thrust of the issue lies in an area outside or within the exclusive competence of the EU. This may provide an incentive for the Member States not to reach a common position and to be able to vote on an issue which covers an area partly falling in the exclusive competence of the EU. From the third-State perspective, a similar matter may, on different occasions, be voted on by the EU or the Member States only

depending on whether or not the EU or the Member States have reached a common position. This causes further possible confusion and uncertainty.

Furthermore, the case showed the governing character of the duty of co-operation in EU external relations provided in EU law and reinforced by the CJEU, but at the same time showed the weakness and the limitation of this approach. Firstly, as the internal arrangement suggested, on many occasions the preparation of the participation in the FAO through the coordination procedure provided by the internal arrangement could not be done well in advance, many of them needed to be done on the spot right before or during the meeting.⁹¹ Any decision made by the EU and its Member States internally through the coordination procedure is likely to be presented externally shortly after the decision is made. This leaves no time for bringing the case to the CJEU to seek its decision should there be any dispute on the position taken. Any dispute raised from the coordination procedure will only be solved by the CJEU retrospectively in an ex post facto manner, after the possibly mistaken act has been presented externally in the FAO activities. This reflected the shortcoming of the issue or dispute being dealt with by a judicial branch with a passive and time-consuming nature.

Secondly, the case also reflected the limitation of any internal mechanism set to deal with external relations of the EU. Although an internal decision is governed by a broadly interpreted duty of co-operation and may be annulled by the CJEU accordingly, duties which flow from the EU Treaty law as well as the decisions or opinions delivered by the CJEU are after all binding on the EU and its Member States at most. Once an act such as voting or a statement has been made externally, even if internally the decision on which the act is based is later annulled and loses its internal legality, externally the legal effect of such an act remains and can hardly be revoked. If an obligation is created by such an act, these internal factors cannot externally justify the failure of performance. As the fact of Case C-25/94 showed, even though the Council decision was later declared annulled by the

⁹¹ See Chapter 6 Section 5.1

CJEU, externally it did not alter the fact the Agreement had been adopted. It is difficult to overturn a decision made in a multilateral context, especially merely based on the reason that the EU's internal decision is annulled by the CJEU. This further amplified the need for certain, consistent, and clear prior arrangements for the EU and its Member States. To provide such an arrangement for the EU and Member States to closely follow will minimise the EU or its Member States' actions that are incompatible with the EU legal order, and hence minimise any unwanted result caused externally. Yet as the following development of the General Arrangements will show, the practice seems to suggest the preference of the EU and its Member States went otherwise.

2.3. Post-Lisbon development: General Arrangements on EU Statements in multilateral organisations

At the end of October 2011, the Council endorsed the General Arrangements on EU statements in multilateral organisations (General Arrangements) agreed by the COREPER.⁹² The General Arrangements aimed to offer a number of general arrangements with regard to the delivery of EU Statements in multilateral organisations.⁹³ Nevertheless, it should not be misunderstood that the General Arrangements are indeed offering a new and forward-looking general applicable coordination procedure that could be applied to all the international organisations where the EU participates, to deal with all the activities in those international organisations. Neither would the General Arrangements provide a consistent and certain internal coordination procedure across different fora. On the contrary, the General Arrangements expressly stated, or reiterated, the restraints in many ways: 1) it stated that the preparation of statements relating to the sensitive area of

⁹² "EU Statements in multilateral organisations - General Arrangements" in Annex to the Note from the General Secretariat of the Council to the Delegations on the Council's endorsement of the General Arrangements for EU Statements in multilateral organisations, (24 October 2011) 15901/11

⁹³ Point 1 General Arrangements

competences of the EU and its Member States should remain internal and consensual;⁹⁴ 2) it reiterated that the EU can only make a statement in those cases where it is competent and there is a position which has been agreed in accordance with the relevant Treaty provisions;⁹⁵ 3) it emphasised that the external representation and internal coordination does not affect the distribution of competences under the Treaties nor can it be invoked to claim new forms of competences;⁹⁶ 4) whilst the General Arrangements is titled “general” arrangements, it rather reinforced the case-by-case approach, and clearly provided that Member States agree on a case-by-case basis whether and how to co-ordinate and be represented externally;⁹⁷ 5) it stated it was not incorporating and synchronising the existing internal arrangements for specific fora, such as those adopted for the participation in the WTO or the FAO;⁹⁸ 6) it specifically inserted a disclaimer claiming that “[t]he adoption and presentation of statements does not affect the distribution of competences or the allocation of powers between the institutions under the Treaties. Moreover, it does not affect the decision-making procedures for the adoption of EU positions by the Council as provided in the Treaties”;⁹⁹ 7) the General Arrangements only touched upon the issue concerning the delivery of EU Statements in multilateral organisations, it did not include the arrangements for coordinating other activities, particularly the exercise of voting rights, in the arrangements. As will be seen in later chapters, those internal arrangements that were in place before the adoption of the General Arrangements, such as the Draft IMO Arrangement and the FAO Arrangements governing the internal coordination between the EU and its

⁹⁴ Point 2 General Arrangements

⁹⁵ Point 3 Bullet 1 General Arrangements

⁹⁶ Point 3 Bullet 2 General Arrangements

⁹⁷ Point 3 Bullet 5 General Arrangements. For the observation and critic on the case-by-case approach adopted by the EU and its Member States in dealing with the internal coordination, see Joni Heliskoski, “Adoption of Positions under Mixed Agreements (Implementation)” in Christophe Hillion and Panos Koutrakos (eds) (note 46) 155

⁹⁸ Point 3 Bullet 9 General Arrangements

⁹⁹ Point 5 General Arrangements

Member States in the international organisations respectively, are still unaffected.¹⁰⁰

Nevertheless, the General Arrangements indeed provided several general practical guidelines for those fora where no existing internal arrangement had been available. The practical guidelines include: 1) EU representation will be exercised from behind an EU nameplate unless prevented by the rules of procedure of the forum in question. The local coordination and delivery of statements on behalf of the EU will be coordinated by the relevant actors competent to represent the Union as provided in the Treaties unless prevented by the rules of procedure of the forum concerned;¹⁰¹ 2) The preface of stating a EU position— should the statement refer exclusively to actions undertaken by or responsibilities of the EU in the subject matter concerned including in the CFSP, it will be prefaced by “on behalf of the European Union”¹⁰²; 3) The preface of stating a common position— should the statement express a position common to the European Union and its Member States, it will be prefaced by “on behalf of some of the EU and its Member States”. The introduction “on behalf of the EU and its Member States” does not preclude references to “the EU” or to “the Member States of the EU” later in the text, where such reference accurately reflects the factual situation;¹⁰³ 4) Statements relating to the exercise of national competences— should the Member States agree to collective representation by an EU actor of issues relating to the exercise of national competences, the statement will be prefaced by "on behalf of the Member States".¹⁰⁴

One should also notice that unlike the FAO Arrangement, which was concluded between the European Commission and the EU Council of Ministers, the Commission only “took note” of the General Arrangements, and further reserved the right to the use of all legal means at its disposal to

¹⁰⁰ For the discussion of the Draft IMO Arrangements and its relation with the General Arrangements, *see* Chapter 3 Section 3.5. For the discussion of the FAO Arrangements, *see* Chapter 6 Section 5

¹⁰¹ Point 3 Bullets 8 and 9 General Arrangements

¹⁰² Point 4 Bullet 1 General Arrangements

¹⁰³ Point 4 Bullet 2 General Arrangements

¹⁰⁴ Point 4 para 2 General Arrangements

ensure the respect of the provisions of the Treaties. In the report submitted by the EEAS after more than one year of the arrangements being put into practice, it is still reiterated that this General Arrangements is not a legal document but a pragmatic and political solution.¹⁰⁵ Although the General Arrangements was reported as having “worked relatively well in unblocking the delivery of EU statements in multilateral fora and the EU has been able to express its voice again internationally in the manner aligned with its multilateral priorities”,¹⁰⁶ nevertheless, considering the aforementioned reasons and that the General Arrangements is only of limited scope concerning EU statements, the General Arrangements are unlikely to greatly and generally change the practice of the EU’s participation in the decision-making of multilateral fora in the field of maritime affairs.

3. The maintenance of the autonomy of the EU legal order and the exclusive jurisdiction of the Court of Justice of the European Union (CJEU)

Another important perspective of the duty of co-operation exists in the sphere of dispute settlement under the external fora between the Member States and the EU, requiring the Member States to inform and consult the competent EU institutions prior to instituting dispute-settlement proceedings under a mixed agreement.¹⁰⁷ This perspective, together with the Treaty provision requiring the Member States not to institute a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties,¹⁰⁸ connect to the second key doctrine governing the external relations of the EU— the maintenance of the autonomy of the EU legal order and the exclusive

¹⁰⁵ EEAS, “Report on EU Statements In Multilateral Organisations – Implementation of General Arrangements” (2013) 1

¹⁰⁶ *Ibid.*, 1. Yet several fine-tunings of the application have been suggested. *See Ibid.*, 7

¹⁰⁷ Case C-459/03 *Commission v Ireland* [2006] ECR I-4653 (“MOX Plant Case”) paras 175-177, 179

¹⁰⁸ Article 344 TFEU

jurisdiction of the CJEU. Again this principle has been built up to largely rely on the case law of the CJEU¹⁰⁹ U – Article 292 ex-TEC on the exclusive jurisdiction of the CJEU was once even considered a provision that had remained hidden and undiscovered from the legal literature and CJEU jurisprudence.¹¹⁰ Other cases have focused on the context of the EU and its neighbouring States, and have concerned the risk that personal or institutional connections between the courts of different regimes may affect the autonomy of the EU legal order and the exclusive jurisdiction of the Courts of the EU.¹¹¹ However the MOX Plant Case between the Commission and Ireland touched upon the multilateral fora beyond the context of an agreement between the EU and its neighbouring States,¹¹² where the dispute settlement under multilateral fora may be disconnected from that of the EU. Therefore the worry that the personal or institutional connection between the courts of different regimes may be mitigated, but the concern of it adversely affecting the autonomy of the EU legal order and the exclusive jurisdiction of the CJEU may still remain.

3.1. The MOX Plant Case

This case involved a dispute between two EU Member States— the United Kingdom and Ireland, but was brought before the CJEU by the Commission against Ireland. Ireland objected to the UK’s authorisation of a project to build a MOX plant on the coast of the Irish Sea because of

¹⁰⁹ See *e.g.* Opinion 1/76, [1977] ECR 741; Opinion 1/91 ECR I-6079; Opinion 1/92 [1992] ECR I-2821; Opinion 1/00 [2002] ECR I-3493

¹¹⁰ Nikolaos Lavranos, “The MOX Plant judgment of the ECJ: How exclusive is the jurisdiction of the ECJ?” 15(10) *EELR* (2006) 291

¹¹¹ See *e.g.* Opinion 1/76 (concerned a Fund Tribunal established between EC and Switzerland); Opinion 1/91 and Opinion 1/92 (concerned draft European Economic Area (EEA) Agreement, and an EEA or EFTA Court proposed); Opinion 1/00 (concerned the European Common Aviation Area (ECAA))

¹¹² The UK’s project on the MOX plant has incurred many cases being brought before different bodies including the ITLOS, arbitral tribunal, and the CJEU. For the purpose of this section, the research will focus on the case before the CJEU here

environmental and nuclear safety concerns.¹¹³ It brought proceedings under the UNCLOS before an Arbitral Tribunal and the ITLOS, claiming the UK's project on the MOX Plant breached several provisions under the UNCLOS, mostly those concerning marine and environmental pollution.¹¹⁴ The UK raised the issue of the lack of jurisdiction on the dispute before both tribunals, arguing that certain claims Ireland brought before them were within the scope of EU law, and were in the exclusive jurisdiction of the CJEU. The UK's argument was rejected by the ITLOS, stating that it had the *prima facie* jurisdiction for the case seeking a provisional measure,¹¹⁵ but was carefully taken by the Arbitral Tribunal, which acknowledged that whatever the Parties might agree to be the scope and effects of EC law applicable in the dispute, the question was ultimately to be decided within the institutions of the EC, and particularly by the CJEU.¹¹⁶ It then ordered a suspension of the proceeding and asked for more information before deciding the case.¹¹⁷

The Commission considered the institution of the proceedings before ITLOS and the Arbitral Tribunal constituted a breach of Ireland's obligation under EU law, namely the duty of co-operation and the exclusive jurisdiction of the CJEU, and brought the dispute before the CJEU after Ireland failed to suspend those proceedings in accordance with the Commission's request.¹¹⁸ The complaint was claimed under three heads— Firstly, Ireland failed to respect the exclusive jurisdiction of the CJEU in regard to disputes concerning the interpretation and application of Community law.¹¹⁹ Secondly, Ireland's submission of instruments of Community law for interpretation and application by the Arbitral Tribunal amounted to a breach of current Article

¹¹³ Case C-459/03, paras 20-29

¹¹⁴ *Ibid.*, paras 30-48

¹¹⁵ The MOX Plant Case of the ITLOS (No 10) (Ireland v United Kingdom) (Provisional Measures, Order of 03 December 2011) para 53

¹¹⁶ The MOX Plant Case of the Arbitral Tribunal (Ireland v United Kingdom) (Order No. 3 of 24 June 2003) paras 26-27

¹¹⁷ *Ibid.*, paras 29-30

¹¹⁸ Case C-459/03, paras 49-57. The legal context of the case for the Court to review included relevant provisions of the Treaty establishing the European Atomic Energy Community, nonetheless, for the purpose of the discussion, this section will only cover the discussion relating to *ex-TEC*, the predecessor of the TFEU

¹¹⁹ Case C-459/03, para 60

344 TFEU.¹²⁰ Thirdly, Ireland failed to comply with the duty of co-operation under current Article 4.3 TEU by, firstly, instituting proceedings under the Convention on the basis of provisions falling within the competence of the Community and, secondly, bringing those proceedings unilaterally without having first informed and consulted the competent institutions.¹²¹

For the first head, the Court identified that two issues were involved. First, if, and to what extent, the provisions of the UNCLOS Ireland relied on constituted an integral part of EU law. Second, if the answer to the first issue was affirmative, whether the CJEU's jurisdiction over the interpretation and application of the provisions was exclusive.¹²² The Court recalled that agreements concluded under the conditions set out in Article 300 ex-TEC shall be binding on the institutions of the EU and on Member States, the provisions of an agreement signed by the EU following the procedure provided by EU law forms an integral part of the EU legal order.¹²³ It then identified that the UNCLOS is a mixed agreement concluded by the Community and its Member States on the basis of shared competence, whereas the provisions coming within the scope of EU competence have the same status in the EU legal order as purely EU agreements.¹²⁴ The Court recalled that for commitments arising from an agreement concluded by the EU institutions, the Member States fulfil, within the EU system, an obligation in relation to the EU in ensuring respect for the commitments.¹²⁵

The Court then examined whether the relevant provisions of the UNCLOS that Ireland's claim relied on in the proceedings before the Arbitral Tribunal came within the scope of the EU competence. The Court identified that all except one provision Ireland relied on were under Part XII of the UNCLOS entitled "Protection and preservation of the marine environment", and considered the current Article 192.1 TFEU the appropriate legal basis for

¹²⁰ Ibid., para 140

¹²¹ Ibid., para 158

¹²² Ibid., para 122

¹²³ Ibid., paras 81-82

¹²⁴ Ibid., paras 82-84

¹²⁵ Ibid., para 85

the conclusion of international agreements on protection of the environment.¹²⁶ Despite the external competence of the EU in regard to the protection of the environment, in this case the marine environment, is not exclusive but shared between the EU and its Member States in principle. The Court stated that the question of whether the provision of a mixed agreement comes within the competence of the Community is one which relates to the attribution, and thus, the very existence of that competence, and not to its exclusive or shared nature.¹²⁷ Thus the Community could enter into environmental agreements even if the specific matters covered were not, or were only very partially, the subject of rules at Community level, which, by reason of that fact, were not likely to be affected.¹²⁸ In other words, the Court did not assume that the Community had necessarily made use of the full scope of those competences in relation to the UNCLOS provisions on environmental protection.¹²⁹ The question then would be whether and to what extent the Community, by becoming a Party to the UNCLOS, elected to exercise its external competences in matters of environmental protection.¹³⁰ The Court examined the content of the Council decision approving the conclusion of the UNCLOS and the Declaration of Competence attached to it, it found that the matters covered by the provisions of the UNCLOS relied on by Ireland before the Arbitral Tribunal were very largely regulated by the EU measures, several of which were mentioned expressly in the appendix of that declaration. The Court concluded that these provisions come within the scope of the EU competence which the EU has elected to exercise by becoming a Party to the UNCLOS,¹³¹ and they are rules which form part of the EU order.

¹²⁶ Ibid., paras 86-90

¹²⁷ Ibid., paras 92-93

¹²⁸ Ibid., paras 92-105

¹²⁹ Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 236

¹³⁰ Case C-459/03, para 96

¹³¹ Ibid., paras 97-120. For the discussion of Declaration of Competence (DoC), a mechanism adopted by many multilateral instruments in order to clarify the allocation of the competence between the EU and its Member States with a specific multilateral fora, and the nature of that competence. See Chapter 4 Section 5, Chapter 6 Section 4.2, and Chapter 7 Section 3.1. For the discussion of the EU's DoC

The Court therefore has jurisdiction to deal with disputes relating to the interpretation and application of those provisions and to assess a Member State's compliance with them.¹³²

The second issue of the first head involved the question of whether such jurisdiction of the Court is exclusive. The Court reiterated its case law that an international agreement could not affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensured under Article 19.1 TEU.¹³³ Such jurisdiction of the Court is confirmed an exclusive one by Article 344 TEU.¹³⁴ The Court then stated that Article 282 of UNCLOS (obligations under general, regional or bilateral agreements), which provided alternatives for State Parties in settling disputes concerning the interpretation or application of the UNCLOS, precisely made avoiding a breach of the Court's exclusive jurisdiction and preserving the autonomy of the EU legal system possible.¹³⁵ It followed from that provision that the system for the resolution of disputes set out in the EC Treaty in principle had to take precedence over that contained in Part XV of the UNCLOS.¹³⁶ Furthermore, as the dispute was between two Member States regarding an alleged failure to comply with Community law obligations resulting from the relevant provisions of the UNCLOS, the Court held that it was clearly covered by the procedure set out in Article 259 TFEU.¹³⁷

The Court then held that it was sufficient that a significant part of the dispute related to the interpretation and application of Community law despite Ireland arguing that the proceedings before the Arbitral Tribunal also related to certain obligations of the United Kingdom concerning the risks connected with terrorism. It is for the Court to identify the elements of the

to the UNCLOS and the different understanding on the concept of “transfer of competence”, *see* Chapter 4 Section 5.

¹³² *Ibid.*, para 121

¹³³ *Ibid.*, para 123

¹³⁴ *Ibid.*, paras 122-123

¹³⁵ *Ibid.*, para 124

¹³⁶ *Ibid.*, para 125

¹³⁷ *Ibid.*, para 128

dispute which relate to provisions of the international agreement in question which fall outside its jurisdiction.¹³⁸ The Court rejected the argument that the UNCLOS arbitration proceedings offered certain advantages compared to an action before the Court, even if that was demonstrated. It could not in any event justify a Member State avoiding its Treaty obligations.¹³⁹ The Court therefore upheld the first head of complaint.¹⁴⁰

The Court used far fewer paragraphs in deciding the claims under the second and the third heads. For the second head, the Court found the fact rather obvious that Ireland had submitted instruments of EU law, mainly several Directives, to the Arbitral Tribunal for the purpose of their interpretation and application in the context of proceedings seeking a declaration that the United Kingdom had breached the provisions of those instruments.¹⁴¹ Such action was at variance with the obligation imposed on Member States by current Article 344 TFEU to respect the exclusive nature of the Court's jurisdiction to resolve disputes concerning the interpretation and application of provisions of EU law, in particular by having recourse to the procedures set out respectively in current Article 259 TFEU for the purpose of obtaining a declaration that another Member State has breached those provisions.¹⁴² Furthermore, in those circumstances, the institution and pursuit of proceedings before the Arbitral Tribunal involved a manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system may be adversely affected.¹⁴³ Therefore the Court upheld the second head of the Commission's claim.

The Court held largely in favour of the Commission's position under the third head, although reasoned slightly differently from the arguments raised by the Commission. It held that the obligation to recourse the judicial system of the EU and to respect the Court's exclusive jurisdiction, which is a

¹³⁸ Ibid., paras 134-135

¹³⁹ Ibid., paras 136-138

¹⁴⁰ Ibid., para 139

¹⁴¹ Ibid., paras 146-151

¹⁴² Ibid., paras 150-153

¹⁴³ Ibid., para 154

fundamental feature of the system, must be understood as a specific expression of Member States' more general duty of loyalty from Article 4.3 TEU.¹⁴⁴ Therefore, by bringing a case concerning the application and interpretation of EU law before tribunals other than the CJEU, the Member States violated the specific obligation under Article 344 TFEU and it is unnecessary to find that there has been a failure to comply with the general obligation contained in Article 4.3 TEU.¹⁴⁵

The Court identified, however, that there was a dimension of Ireland's breach of obligation distinguishable from the others, and not covered by current Article 344 TFEU but falling under the scope of current Article 4.3 TEU— Ireland breached Article 4.3 TEU by bringing proceedings before the Arbitral Tribunal without having informed and consulted the competent institutions of the EU. The Court reiterated that the Member States and the EU institutions have an obligation of close co-operation in fulfilling the commitments undertaken by them under joint competence when they conclude a mixed agreement.¹⁴⁶ This is particularly the position in the case of a dispute which, as in this case, relates essentially to undertakings resulting from a mixed agreement which relates to an area where the respective areas of competence of the Community and the Member States are liable to be closely interrelated.¹⁴⁷ To submit a dispute of this nature to a judicial forum such as the Arbitral Tribunal, the Court held, involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law.¹⁴⁸ Considering the Commission had already contended that the dispute concerned was a matter falling under the exclusive jurisdiction of the Court, the obligation of close co-operation within the framework of a mixed agreement involved a Member State's duty to inform and consult the competent EU institutions prior to

¹⁴⁴ Ibid., para 169

¹⁴⁵ Ibid., paras 170-171

¹⁴⁶ Ibid., paras 175-176

¹⁴⁷ Ibid., para 176

¹⁴⁸ Ibid., para 177

instituting dispute settlement proceedings within the framework of an external agreement. Ireland failed to comply with such an obligation.¹⁴⁹

The MOX Plant Case exemplified the challenge the EU and its Member States commonly face in mixed participation in multilateral fora, and is significant for clarifying the legal mechanisms governing the EU's participation. On the one hand, it recalled the principle governing the exercise of external competence of the EU in the area of shared competence, confirming again that there is no need for the EU to fully exercise its competence internally in order to claim its competence externally. Particularly when it does not involve a judgment on the nature but only on the existence of such external competence, the exercise of the competence has been decided in a rather more wide and general manner. Although in practice the EU institution did not clarify in detail which part of the mixed agreement it opted to exercise its external competence, as it could have done in theory, the Court took into account the related elements and materials, including the content of the Declaration of Competence and the relevant EU legislation in place, for instance, to determine whether the EU had opted to exercise its competence concerning certain provisions of the mixed agreement when it concluded the agreement with its Member States.

On the other hand, the stretch of such external competence leads to a possible extended result that more provisions of an external agreement hence become an integral part of EU law. This inclusion further gives rise to the need for maintenance of autonomy of the EU legal order and the exclusive jurisdiction of the CJEU. The CJEU considered the exclusive jurisdiction of the interpretation and application of the EU law as a key element of the maintenance of the autonomy of the EU legal order, a specific obligation that can be derived from the duty of co-operation.

Nonetheless, the MOX Plant Case was one in which all the relevant parties concerned, including the EU institution and the EU Member States— Ireland and the UK— were subject to the EU legal order and the jurisdiction

¹⁴⁹ Ibid., paras 178-182

of the CJEU. If the risk of a tribunal other than the CJEU ruling on the scope of obligations imposed on the Member States pursuant to Community law is one key element to determine whether the autonomy of EU law can be maintained,¹⁵⁰ the MOX Plant Case scenario is probably on the rather clearer and easier side of the whole picture—despite it being criticised as putting undue restriction on the sovereign right of the Member States to select the dispute settlement of their choice.¹⁵¹

3.2. Limitation of this doctrine—when a non-EU State is involved

More difficult situations may come about if such a dispute is not between EU Member States, but between a third State and an EU Member State. When a third State claims the EU and/or its Member States are competent for carrying out the obligations under specific provisions of a multilateral agreement and are responsible to the failure of performing such obligations, the third State claimant inevitably asks a tribunal other than the CJEU to decide the allocation of competence between the EU and its Member States. This would be based on the relevant provisions of the multilateral agreement and the relevant instrument— in many cases the Declaration of Competence— to determine the allocation of competence and the consequence thereafter.¹⁵² In these scenarios, the third State is under no obligation to submit such a dispute concerning the allocation of competence between the EU and its Member States to the CJEU. As a matter of law, the CJEU is not even available to the third State for settling the dispute, and the number of the adjudicatory fora available to the third State may also be

¹⁵⁰ Ibid., para 177

¹⁵¹ Nikolaos Lavranos, “Protecting its exclusive jurisdiction: the *MOX Plant* Judgment of the ECJ”, 5 *LPICT* (2006) 479

¹⁵² For the issue of who should respond should such dispute arise, can See Frank Hoffmeister, “Litigating against the European Union and Its Member States – Who Responds under the ILC’s Draft Articles on International Responsibility of International Organisations?”, 21(3) *EJIL* (2010) 723

reduced due to the EU's lack of standing before the ICJ.¹⁵³ It is comprehensible that a tribunal other than the CJEU may not share the same view as the CJEU, and this inherently contributes a possible risk of inconstant interpretation and application of the allocation of competence between the EU and its Member States, and adversely affects the autonomy of the EU legal order. Theoretically it can be argued that the autonomy of the legal order can still be well-preserved because the external tribunal is judging the case based not on the law of the EU, but on the provisions of the external agreement and the instruments submitted accordingly by the EU and/or its Member States. Therefore the tribunal rules only on the interpretation and application of the external agreement, not the law of the EU. Furthermore, the Declaration of Competence and the relevant mechanism should be able to provide clear guidance about whether it is the EU or the Member State competent for bearing the obligation of a specific provision of a mixed agreement, and is liable for the violation. Should that be the case, it would leave no room for a discrepant or even conflicting interpretation and application of the issue of the allocation of competence between the EU law and the external agreement.

In practice, however, when such a scenario happens, the issue is more complicated for many reasons. Firstly, as we will see in the later case study chapters,¹⁵⁴ in practice many of the declarations of competence are termed in wording that is identical to that of the EU Treaties. The external tribunals' interpretation and application of the identical wording may nevertheless be different from that within the EU, as the external tribunal is not bound by the internal legal order of the EU and the CJEU's ruling on it. Furthermore, in many cases up-to-date declarations are not provided despite the rules of multilateral fora requiring otherwise, the declared allocation of competence may not fully reflect the actual and current allocation of competence between

¹⁵³ Karen N. Scott, "Current Legal Developments, European Court of Justice, The MOX Case before the European Court: C-459/03 *Commission v. Ireland*", 22(2) *IJMCL* (2007) 314

¹⁵⁴ See Chapter 4 Section 5, Chapter 6 Section 5; Chapter 7 Section 3.1

the EU and its Member States within the EU legal order. The “time-difference” between the two sets of rules leaves room for potential discrepancy of their interpretations and applications.¹⁵⁵ Secondly, the Declaration of Competence is commonly phrased in an ambiguous manner so as to reflect the evolving nature of the allocation of competence between the EU and its Member and to preserve room for further interpretations. This flexibility intentionally left in the two sets of rules also contributes to the potential inconsistency of their interpretations and applications. Both accounts make it highly possible for the decision of the allocation of competence by an external tribunal based on the text of the Declaration of Competence, even provided by the EU and the Member States themselves, not to be in line with the actual allocation of competence under the EU legal order.

It is therefore comprehensible why, in these scenarios, the autonomy of the EU legal order may still be adversely affected regardless third States not being bound by EU law and not under the jurisdiction of the CJEU. The decision of the external tribunal will nonetheless be binding on the parties involved and will also function as part of the case law that will guide the future interpretation and application of that same tribunal should the issue of allocation of competence re-emerge. Furthermore, Article 216.2 TFEU provides that “[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States.” An interpretation and application by an external tribunal, even if theoretically argued as a ruling not on the EU law but on the external agreement, may possibly cause conflict between the external agreement and the EU law, and is likely to adversely affect the autonomy of EU legal order.¹⁵⁶

The involvement of third States in disputes concerning the allocation of competence under EU law may also come from a different direction. If a EU Member State and/or the EU consider a third State to have violated the

¹⁵⁵ For example, the DoC the EU submitted to the UNCLOS has not been updated for decades. *See* Chapter 4 Section 5.

¹⁵⁶ For the conflict of international agreement and the EU law, *see, e.g.* Jan Klabber, *Treaty Conflict and the European Union* (CUP 2008)

provisions of a multilateral instrument that falls within the area of shared competence, can the Member State bring in the dispute alone against that third State within an external tribunal even without prior consultation with the EU, and vice versa? Considering the effect of the ruling would involve a decision on who bears the right to make such claim, involving the allocation of competence between the EU and its Member States under the external agreement, such a dispute may as a result still adversely affect the autonomy of the EU legal order. A plausible conclusion would be that the duty of co-operation would require whenever the EU or the Member State intend to bring in a case against a third State based on a provision that may fall within the area of shared competence, a prior coordination will be necessary, as the MOX Plant Case suggests.¹⁵⁷

The MOX Plant Case also indicated the need for co-operation and coordination between other tribunals and the CJEU, or the lack of it. The Arbitral Tribunal took into account comity and decided to yield the issue of internal matter on the allocation of competence under EU law to be decided by the CJEU. It is argued that courts or tribunals other than the CJEU should be forced to decline to hear the case if the case happened between the EU Member States considering no reasonable interest of the EU Member States worthy to be protected in having their case heard by courts or tribunals other than the CJEU.¹⁵⁸ Nevertheless, as the ITLOS has shown, an external tribunal may not share the same view, particularly, when the dispute exists between third States and the EU and/or its Member States. Third States are not bound by the EU legal order and have no standing to bring the dispute before the CJEU. To claim the need for comity and yield the jurisdiction to the CJEU would also be unreasonable and impractical. It may even be argued that the CJEU must show some more respect and comity towards the jurisdiction of the other international courts and tribunals instead,¹⁵⁹ yet the CJEU has very

¹⁵⁷ Case C-459/03, paras 175-182

¹⁵⁸ Tobias Lock, "The European Court of Justice: What are the Limits of its Exclusive Jurisdiction?" 16(3) *MJECL*(2009) 312

¹⁵⁹ Nikolaos Lavranos, (note 110) 296

little room for doing so under the principle of maintenance of the autonomy of the EU legal order.

The CJEU case law has established, as Piet Eeckhout concluded, that

“[t]he autonomy of the EU legal order is clearly not threatened by accession to an independent international organisation with a dispute-settlement system of its own [...] [p]rovided such an organism does not rule on pure questions of EU law, such as the division of powers between the EU and its Member States, the powers of the institutions, or provisions of the founding Treaties or of EU legislation, there can be no objections to such submission, which is an inherent feature of participation in international law-making”.¹⁶⁰

Nonetheless, as shown above, when a multilateral forum governs matters that fall within the areas of shared competence between the EU and its Member States, if that multilateral forum is equipped with a dispute-settlement system of its own and provided no alternative for its parties, it is inevitable that the external tribunal will rule on those questions of EU law exemplified above, and hence adversely affect the autonomy of the EU legal order. It is almost certain that a conflict between the participation in the external multilateral relations and the maintenance of the autonomy of the EU legal order will appear from time to time, and the scope of this principle needs to be further clarified and limited.

4. *Concluding remarks*

Amid the complexity of the allocation of competences between the EU and its Member States, the practice and law of the EU tried to develop an overarching legal mechanism— the duty of sincere co-operation— to ensure the complex and difficult outcomes of the allocation of competence would not obstruct a consistent and coherent presence of the EU and its Member States in the international arena. The Lisbon Treaty followed Article 10 ex-TEC and the case law, explicitly providing the legal basis of such a duty by laying down the principle of sincere co-operation as part of the general provisions

¹⁶⁰ Piet Eeckhout, (note 129) 241

governing the EU and its Member States in Article 4.3 TFEU. However, the substantive rules of practicing the principle, including the scope and timing for operating such a principle, still largely rely on the case law established by the CJEU, and leaves uncertainty and potential inconsistency. Moreover, it has been observed by this thesis that, by interpreting the duty of sincere co-operation broadly, the CJEU's interpretation of the duty of co-operation between the EU and its Member States seemed to address more the Member States' duty to act or remain silent, but less so the part of the EU. Nonetheless, as will be shown in Chapter 7, the need for the Member States to exercise their external competence through the EU may still potentially exist, the duty of sincere co-operation shall be not be addressed only one-way.

The CJEU, through the interpretation of the duty of co-operation, endorsed the legal effect of internal arrangements adopted by the EU and its Member States for co-ordinating their activities in multilateral fora. This provides an opportunity for the EU and its Member States to further facilitate this mechanism to provide clearer and more certain guidelines to more consistently shape their positions for their participations in the decision-making of multilateral fora. Nevertheless, as the General Arrangements suggested, the EU and its Member States seemed to be rather sensitive of being legally bound by any internal arrangement, and therefore became more reluctant to further shape a more detailed, consistent, and clearer arrangement that could be applied more generally.

The exclusive jurisdiction of the CJEU— a specific duty derived from the duty of co-operation in the CJEU's words— and the principle of maintenance of autonomy of the EU legal order underlying it, further set the borderline for external participation— the Member States' freedom in exercising their external rights is further limited by this doctrine. However, in areas where a shared competence and a mixed participation are involved, how far the autonomy of the EU legal order can be maintained, as shown in the previous section, is highly doubtful.

All the ambiguities and difficulties seemed to point to the same organ— the Court of Justice of the European Union— to provide the actual but case-by-case solution. Instead of largely altering the case law through treaty reform,¹⁶¹ the Member States chose to codify or crystallise the CJEU developed case laws concerning the internal mechanisms governing the participation of the EU in external relations into the Lisbon Treaty. This move may be considered as the Member States' endorsement of the credibility of the CJEU's rulings in the area of external relations. Although the CJEU's jurisdiction over external actions is limited, for example, it has no jurisdiction over the areas related to CFSP,¹⁶² it is certain that the CJEU will continue to play an important role as it has in this area. Yet the nature of the CJEU— a judicial organ set up purely for the EU and its Member States— has its inherent shortcomings in dealing with issues concerning participation in external relations. When a non-EU Member State is involved in the dispute, very little can be done through this approach. The same applies to the doctrine of maintenance of the autonomy of the EU legal order and the exclusive jurisdiction of the CJEU. When a dispute involves an area that internally falls into the shared competence that exists between the EU/Member State and a third State, no choice of the dispute settlement procedure will be available for the parties. The exclusive jurisdiction of the CJEU and the scope of the maintenance of the autonomy of the EU legal order currently drawn by CJEU case law is very unlikely to be maintained. This would put the EU and its Member States in a problematic position – by entering or not entering into the dispute settlement procedure voluntarily or passively, they will be in breach of the obligations either under the EU law or the law of the external regime. These doctrines will hence become the barrier for advancing the EU and its Member States' participation in the multilateral fora.

¹⁶¹ For more details of the reform of the procedure of concluding international agreements and the restrictive measures, *see e.g.* Jan Wouters and others, *The European Union's External Relations after the Lisbon Treaty* (Springer 2008) 181-196

¹⁶² Article 24.2 TEU and Article 275 TFEU

The Lisbon Treaty endeavoured to clarify and reform the internal legal mechanisms governing the EU's external participation in multilateral fora. Nevertheless, the Lisbon Treaty is not binding on third States and international organisations. How the reform brought by the Lisbon Treaty will affect, or not affect, the interaction between EU, third countries, and other international organisations will not be answered by the Treaty itself, but by further analysing the practices in the post-Lisbon context. Furthermore, as many of the external legal mechanisms established under multilateral fora predate the entry into force of the Lisbon Treaty, it also raises doubts as to whether the external mechanisms provided for under multilateral fora are still consistent and compatible with the internal mechanisms reformed by the Lisbon Treaty. In the following part, this thesis will move to the external sphere to look into selected case studies of the EU's external participation in the decision-making of multilateral fora in the field of maritime affairs to further demonstrate the ambiguity, uncertainty, and inconsistency, and to seek possible solutions.

Part II

The external dimension of the legal mechanisms and their interactions with the internal mechanism

Chapter 4

The EU's formal and mixed participation in a multilateral fora in the field of maritime affair: the 1982 United Nations Convention on the Law of the Sea (UNCLOS) as a prototype

1. Introduction

The international legal regime of the law of the sea is shaped with a complex web of laws; no single legal text with universal acceptance contains all of the governing laws. Nonetheless, the 1982 United Nations Convention on the Law of the Sea (UNCLOS or the Convention), a product of lengthy negotiation, is still widely considered as an achievement in developing the legal regime governing the seas and codifying many parts of the law of the sea.¹ Inevitably, when the governance of the law of the sea in the multilateral context is taken into consideration, the UNCLOS provides the basic document for understanding and discussing the legal framework that covers most of the maritime affairs. Although not all States have been Parties to the Convention, and the United States, a major maritime State, has not ratified the Convention, the Convention is steadily getting almost universal acceptance by States.²

The UNCLOS is also crucial for researching the issue of the EU's participation in the governance of maritime affairs in a multilateral context, and offers an ideal point of departure for the case studies for several reasons.

¹ Tullio Treves, "The United Nations Law of the Sea Convention of 1982: Prospects for Europe", in *Conference Papers Greenwich Forum IX, Britain and the Sea* (Scottish Academic Press 1984) 166; R. R. Churchill and A. V. Lowe, *The law of the sea* (3rd edn, Juris Publishing 1999) 22; Sonja Boelaert-Suominen, "The European Community, the European Court of Justice and the Law of the Sea", 23 *IJMCL*(2008) 644

² As of the time of writing, 166 States or entities have become the Parties to the UNCLOS, see <http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTSO&no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#Participants> <last access: 07.09.2013>

Firstly, the negotiation for the UNCLOS to accommodate the EU, the then European Economic Community (EEC), to become a formal Party to the Convention reflected the concerns of different actors in the multilateral context from different perspectives. Secondly, issues and difficulties concerning accommodating an entity like the EU to participate in a multilateral Convention constructed largely following the classic State-centric approach were highlighted and some solutions were offered throughout the negotiation. Thirdly, the model provided for by the UNCLOS as a product of the negotiation not only responded, to a certain extent, to the concerns raised throughout the negotiation, but also provided a basic framework for the EU's participation in the multilateral context, which has more or less been followed later in other multilateral agreements or international organisations concerning maritime affairs in order to accommodate the EU's participation as a formal Party/Member.³ It to some extent functions as a model for mixity as regards other multilateral instruments in the areas of transport, environmental protection, and fisheries,⁴ and therefore becomes crucial for understanding the EU's participation in the multilateral fora concerning maritime affairs.

The structure of this chapter is set as the following to show the above-mentioned uniqueness. Section 2 will be an overview of the role of the UNCLOS in the international legal regime concerning the law of the sea. After grappling with the role of the UNCLOS in governance of the law of the sea, the chapter will concentrate on the issues raised in the negotiation concerning the EU's participation as a formal Party to the UNCLOS in order to highlight the difficulties and possible solutions addressed and shared by different actors, including the EU, its Member States, third States, and other international organisations, throughout the negotiation. Then we will see how the model was designed and adopted in the UNCLOS to allow the EU to participate in the Convention as a formal Party, and how such a model, successfully or unsuccessfully, responded to the concerns raised during the

³ See *e.g.* the FAO model discussed in Chapter 6

⁴ Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 219

negotiation. Through this structure, this chapter aims to locate major issues that would be possibly raised in circumstances concerning the EU's participation in a multilateral treaty or international organisation, to evaluate the advantages and shortcomings of the model provided by the UNCLOS, and to lay down the basis for the later case studies of the EU's participation or non-participation in other multilateral fora.

2. *The role of the UNCLOS in the international legal regime of the law of the sea: an overview*

The third United Nations Conference on the Law of the Sea (the Conference) held its first session in 1973 and worked for several months each year. The product of the lengthy negotiation, the UNCLOS, was adopted in 1982 and came into force in 1994. There are 166 Contracting Parties to the Convention to the date of writing.⁵ The Convention sets out “the legal framework within which all activities in the oceans and seas must be carried out” and “is of strategic importance as the basis for national, regional and global action and co-operation in the marine sector”.⁶ Within one Convention, it includes important features covering maritime affairs, including: navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, marine research, and settlement of disputes. The universal and unified character of this Convention makes it distinct from the previous Conventions concerning the law of the sea. It is considered as “an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean”, and was described as “[p]ossibly the most significant

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http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en <Last access: 07.09.2013>

⁶ Resolution on “Oceans and the law of the sea”, UNGA Res (10 March 2010) UN Doc A/RES/64/71

legal instrument of [the] century" by the Secretary-General after the signing of the Convention.⁷

The bindingness of the Convention goes beyond the Contracting Parties. Some parts of the Convention reflected pre-existing customary international law; some other parts of the laws created by the Convention have later passed into customary international law.⁸ In both ways those provision may be binding on States as customary international law, even if they are not Parties to the Convention.⁹ This is not to suggest, however, that non-Contracting Parties are bound by all the provisions of the Convention. For example, provisions in Part IX of the Convention that concern deep seabed mining had raised many concerns especially from industrialised States. These provisions were not supported by consensus when adopted, and were not later followed by sufficient State practice and *opinion juris*, and therefore cannot be considered as binding for non-Party States as customary international law.¹⁰ Other provisions concerning the set up of institutions or procedures, for example, the set up of the International Seabed Authority or the dispute settlement procedure in the Convention, are not binding to the non-Party States either, as the creation of institutions and procedures can only be done by the conclusion of the Treaty.¹¹ These procedures and institutions set up by the Convention are only binding to the parties to the Convention.

At the time when the UNCLOS was under negotiation, the Community had already focused on maritime affairs, especially on the fisheries sector, and certain competence on the matters concerned had been transferred from

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http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm <Last access: 15.02.2012>

⁸ R. R. Churchill and A.V. Lowe, (note 1), 24

⁹ Article 38.1.(b) of the Statute of the International Court of Justice

¹⁰ James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 57

¹¹Ibid., 57-59

the EU Member States to the EU.¹² When the internal conferral of competence, which enabled the EU to exercise competence on maritime affairs both internally and externally, met the international attempt to codify the law of the sea within one single instrument, the need for the Community to be able to participate in the Convention as a formal Party emerged, and this need was reflected throughout the negotiation process.

3. *Negotiating for a formal Party status for the EU: identifying the issues and possible responses*

3.1. Early years

The EU, then the EEC at the time of the negotiation of the Convention, realised the need for the participation in negotiation as well as the possible Convention adopted thereof at very early stage. As early as 1974, the EU was able to participate in the Conference for the negotiation for the Convention as an observer,¹³ under which the EEC could, upon invitation, attend the main committees and subsidiary organs, but had no right to vote in the Conference.¹⁴

Internally, the EEC identified the main subjects to be discussed at the Conference which are of special interest to the Community, including: 1) the breadth of the zone contiguous to the territorial sea, and definition of the rights and obligations of coastal States; 2) the management of resources beyond the zone by an international authority; 3) protection of the marine environment, and developing the arrangements for coordination at the very

¹² For the detail of the competence the EC enjoyed relating to the law of the sea at the time of the Convention was drafted, see Albert W. Koers, "Participation of the European Economic Community in a New Law of the Sea Convention", 73 *AJIL* (1979) 430-438; Johannes Føns Buhl, "The European Economic Community and the Law of the Sea", 11 *ODILJ* (1982) 191-197

¹³ UNGA Res 3208 (XXIX) (11 October 1974); UNGA Res 3209 A (XXVII) (18 December 1978) paras 8,9; Kenneth R. Simmonds, "The European Community and the New Law of the Sea", 218 *Recueil des Cours* (1989) 110

¹⁴ Johannes Føns Buhl, (note 12) 182-183

beginning.¹⁵ During its session of 4 June 1974, the Council agreed the arrangements required for the Community and its Member States to present a *common attitude* during the Conference; this joint approach applied both to matters subject to Community authority and to economic issues or questions likely to affect the common policies.¹⁶ Nonetheless, this coordination was observed very weakly, especially concerning matters under shared competence.¹⁷ The Council and the Commission also disagreed on who should be responsible for introducing the common position in matters falling in the EEC's exclusive competence. The Commission proposed that the common position would be presented by the Commission, on the understanding that Member States could also make individual contributions as long as the established common guidelines were followed.¹⁸ However, the Council decided that the common position should be delivered by the Member State holding the Presidency, mostly on behalf of the Member States. Only at a later stage— and mainly in matters concerning fisheries— were the common positions introduced on behalf of the EEC.¹⁹ This “who should speak for what under what heading” issue, is a lasting issue even after three decades.²⁰ Nonetheless, even though there were disagreements between different institutions and the coordination process did not always produce common positions, such a process was able to make all delegations participating in the Conference aware of the Community's position.²¹

¹⁵ Commission, “Communication regarding the Third Conference on the Law of the Sea”, SEC (74) 862 final (Brussels, 20 March 1974) 14

¹⁶ “Conference on the Law of the Sea”, *EC Bulletin* (6-1974) point 2326; Commission, (note 15)

¹⁷ Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea* (Brill 2007) 151

¹⁸ Commission, (note 15) 30

¹⁹ Veronica Frank, (note 17) 151; Albert W. Koers, (note 12) 439

²⁰ See “EU Statements in multilateral organisations - General Arrangements” in Annex to the Note from the General Secretariat of the Council to the Delegations on the Council's endorsement of the General Arrangements for EU Statements in multilateral organisations, (24 October 2011) 15901/11; Chapter 3 Section 2.3.

²¹ Albert W. Koers, (note 12) 439

The Community was aware of the possible need for its participation in the coming Convention as a Contracting Party.²² The effort to insert proper clauses to allow the EEC to participate in the Convention started at a rather early stage. The difficulty of accommodating the EEC into the Convention, however, was also reflected at the same time. In the draft alternative texts of the preamble and final clauses prepared by the Secretary-General in 1976, the Secretary-General only proposed the Conventions to be open for signature by “intergovernmental organisations”,²³ but was unable to provide detailed arrangements for participation of this kind. The Secretary-General noted that several Conventions concluded under the auspices of the United Nations were open to signature, ratification, etc., by certain intergovernmental organisations; however, after examining those cases, including the 1972 International Cocoa Agreements,²⁴ the 1975 International Tin Agreement,²⁵ the 1976 International Coffee Agreement,²⁶ the 1976 Convention for the Protection of the Mediterranean Sea against Pollution,²⁷ and the 1976 Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character,²⁸ he admitted that considering 1) the wide diversity among such organisations, 2) the absence of any indication of how the eligibility of such organisations is to be established, and 3) the very wide scope of the Convention on the law of the sea, none of the precedents appeared to be fully appropriate in the event that the

²² Commission, (note 15) 30

²³ Draft alternative texts of the preamble and final clauses prepared by the Secretary-General, Document A/CONF.62/L.13 (dated 26 July 1976), in UN, *Official Records of the Third United Nations Conference on the Law of the Sea* (Volume VI) 125

²⁴ 882 UNTS 67, particularly Article 4

²⁵ 1014 UNTS 43, in particularly Article 54

²⁶ 1024 UNTS 3, particularly Article 4.3, 4.4, and 4.

²⁷ 1102 UNTS 45. It specifically used the term “by the European Economic Community and by any similar regional economic grouping at least one member of which is a coastal State of the Mediterranean Sea Area and which exercise competences in fields covered by this Convention, as well as by any protocol affecting them” in Article 24 (Signature), which was referred to by other relevant articles of the Convention concerning the arbitration

²⁸ UN Doc. A/CONF.67/16

Conference decides to open the Convention to participation by organisations.²⁹

In the same year, the Community and its Member States decided to initiate at the negotiation the inclusion of a clause to enable the EEC to become a Contracting Party to the Convention drafted by the Conference.³⁰ Statements were made in the plenary meetings during the seventh and eighth sessions by the delegation representing the presidency of the EEC Council of Ministers.³¹ The representative of the Netherlands addressed a letter to the President of the Conference to bring attention the need for the future Law of the Sea Convention to contain appropriate provisions to allow the EEC to become a Contracting Party to the Convention.³² The letter briefed the nature, structure, pertinent powers and functions of the Community, and stated that the Member States of the Community had transferred certain of their competences to the Community to be exercised both internally and externally in those fields, and had therefore concluded agreements with a very large number of States represented at the Conference. It claimed that the Member States of the Community cannot undertake engagements with respect to third States in respect of matters over which the Community has competence and it is accordingly necessary that these engagements should be undertaken by the Community and this requires that it should become a Party to the future Convention with its Member States jointly.³³

The Community then proposed a clause of a generic character in order to allow other regional groupings that exercise, or may come to exercise, competences in their own name in some of the domains covered by the Convention:

²⁹ Draft alternative texts of the preamble and final clauses prepared by the Secretary-General, Document A/CONF.62/L.13 (dated 26 July 1976), in UN, (note 23) 125

³⁰ Johannes Føns Buhl, (note 12) 188; Commission, "Communication on the Third United Nations Conference on the Law of the Sea", COM(76) 170 final, 7

³¹ Johannes Føns Buhl, (note 12) 188

³² Letter dated 10 September 1976 from the representative of the Netherlands to the President of the Conference, Document A/CONF.62/48, in UN, (note 23) 119

³³ *Ibid.*

“Customs unions, communities and other regional economic groupings exercising powers in the areas covered by this Convention may be parties to this Convention.”³⁴

The Community also proposed a clause to explicitly allow the Member States of such regional grouping to implement the internal law of that grouping to grant the nationals of such States national treatments or any other special treatment— a clause which, at a later stage, raised third States’ serious concerns about the non-Contracting Member States taking advantage of it:

“Nothing in the present Convention shall prevent the Member States of such customs unions, communities or other regional economic groupings from implementing provisions relating, in accordance with the rules governing such customs unions, communities or other regional economic groupings, to the mutual granting to the nationals of such States of national treatment or any other special treatment.”³⁵

The text proposed by the EEC in 1976 was not discussed in the year because the discussion of the final clauses had not been undertaken. In 1977 the representative of the UK again addressed a letter to the President of the Conference to reiterate the need to insert provisions to allow the EEC to become a Party to the Convention under the model of joint participation, and re-proposed the same text proposed in the previous year to be inserted in the future instrument.³⁶ The text prepared by the EEC and its Member States reflected the most important issues concerned by the EEC and its Member States regarding their participation in the multilateral Convention, namely, the maintenance of the autonomy of the internal legal order of the EEC.³⁷ Yet this was far from covering the whole issue surrounding the participation of the EEC or any other like entity in the Convention. The concerns shared by other States, including questions about the extent of and the mechanism for the participation, were not covered in detail by the text proposed by the EEC

³⁴ *Ibid.*, 120

³⁵ *Ibid.*

³⁶ Letter dated 6 June 1977 from the representative of the United Kingdom of Great Britain and Northern Ireland to the President of the Conference, Document A/CONF.62/54, in UN, (note 23)(Volume VII) 48-49

³⁷ See Chapter 2 Section 2.3.

at the time.³⁸ As commented by Switzerland in 1977, it would be necessary first to establish to what extent such bodies could assume the rights and obligations arising from the Convention— a question that required further study in order to dispel the serious doubt that the EEC and other economic groupings should be allowed to accede to the Convention.³⁹

In the discussion of the preamble and final clauses of the Convention in the plenary meeting of the seventh session 1978, many objections to the insertion of provisions to allow the EEC and its Member States to jointly become the Contracting Party had emerged in detail. Czechoslovakia and Yugoslavia emphasised that complex legal and political implications were involved, and called for closer examination of such a proposal.⁴⁰ The representative of Czechoslovakia reflected the view of some States who were not ready to accept international organisations of any kind enjoying the right to sign the Convention on the same footing as States. In the view of the objecting State, a delegation of powers from States to an international organisation in some matters governed by the Convention does not necessarily lead to the permission of such organisations to participate in the Convention on the same footing as States. Alternatively, by adding an article under which the provisions of the Convention would apply not only to States but also to international organisations having competence in matters governed by the Convention, and specifying that the organisations would notify the depositary of their acceptance— within the limits of their competence— of the rights and obligations arising from the Convention would be sufficient and acceptable.⁴¹

States did not object to the participation of international organisations, but were not ready to fully accept the text proposed by the EEC either. Israel

³⁸ Shabtai Rosenne and Louis b. Sohn (eds), *Volume V of United Nations Convention on the Law of the Sea 1982: A Commentary* (Brill 1989) 185 (para 305.12)

³⁹ 98th Plenary meeting on 15 May 1978, Document A/CONF.62/SR.98, in UN, (note 23) (Volume IX) 42 (para 15)

⁴⁰ 95th Plenary meeting on 5 May 1978, Document A/CONF.62/SR.95, in UN, (note 23)(Volume IX) 31-32

⁴¹ *Ibid.*, 32 (paras 43-45); Shabtai Rosenne and Louis b. Sohn (eds), (note 38) 188

raised the issue of the capacity to bear international responsibility for the consequences of any breach of the Convention, and stated it would take it as the criteria to examine any proposal of this kind concerning the Convention.⁴² The issue that the Community should not be entitled to become a member of the Authority or of its organs was also raised.⁴³ Worries that the EEC Member States or potential EEC Member States would take advantage of the benefits accruing from the participation of the Community while avoiding the obligations under the Convention by not becoming a Contracting Party themselves were shared by the negotiating States.⁴⁴ Issues including: to what extent the Member States of the Community had transferred their competence in certain matters; what if the competence is further transferred in the future; how to reflect that in the design of the participation of the Community and its Member States, etc. were also brought into discussions.⁴⁵ This, to a certain extent, reflected the design of the mechanism provided externally by multilateral fora inevitably being affected by the evolving nature of the conferral of competence within EU law.⁴⁶ Other questions relating to the financial obligations and the voting in different organs were also raised in the process.⁴⁷

In response to the issues raised in the discussion, the representative of the Federal Republic of Germany proposed on behalf of the EEC and its Member States an amended text adding provisions on deposition of the instruments of approval or accession.⁴⁸ The draft text clarified the extent of the rights and obligations the entity enjoys after becoming a Contracting Party to the Convention, that is, the same rights and obligations as State Parties under the provisions of the Convention to the extent that these rights

⁴² Ibid.

⁴³ Document A/CONF.62/SR.98, (note 39) 46 (para 73)

⁴⁴ Shabtai Rosenne and Louis b. Sohn (eds), (note 38) 186-187

⁴⁵ Ibid.

⁴⁶ See Chapter 2 Section 2.1.

⁴⁷ Shabtai Rosenne and Louis b. Sohn (eds), (note 38) 186-187

⁴⁸ Letter dated 11 September 1978 from the representative of the Federal Republic of Germany to the President of the Conference, Document A/CONF.62/L.32, in UN, (note 23) 187

and obligations relate to an area where powers have been given to it by their Member States.⁴⁹ Nonetheless, this amended proposal fell short of clearing other States' doubts. It did not set the mechanism to clarify the competence the international organisation has been transferred by its Member States, nor did it prevent Member States of the international organisation taking advantage of the Convention but circumventing the obligation under it by simply choosing not to become parties to the Convention themselves. Issues of accommodating the EEC into the dispute settlement mechanism and clarifying its responsibility with its Member States were not reflected in the amended proposed text either. Not surprisingly, the amended proposed text was not later included in the Convention.

The discussion of the final clauses of the Convention was later undertaken in the informal plenary meetings with the assistance of a group of legal experts established to consider the technical aspects of the clauses. The President categorised the relevant subjects and issues concerning the final clauses to be examined into two categories: those likely to be considered uncontroversial and those not.⁵⁰ The participation of the Convention, including the participation of the EEC in the Convention, was listed in the category of controversial, but was not able to be considered by the legal experts group within the limit of time.⁵¹

In 1980, on the one hand, the representative of Italy, on behalf of the EEC and its Member States, addressed a letter to the President of the Conference to signal willingness to negotiate an arrangement of the dispute settlement procedures that would ensure third States could take action against either a Member State or the Community or both, as the case may be.⁵² On the other hand, in the discussions in the 126th Plenary Meeting 1980, Belgium pushed the consideration of the insertion of a clause to allow the

⁴⁹ Ibid.

⁵⁰ Report of the President on the work of the informal plenary meeting of the Conference on final clauses, Document A/CONF.62/L.44, in UN, (note 23)(Volume XII) 109-110

⁵¹ Ibid., 109-110

⁵² Letter dated 29 March 1980 from the representative of Italy to the President of the Conference, Document A/CONF.62/98, in UN, (note 23)(Volume XIII) 74

EEC to become a Party to the Convention by stating that “[i]n the absence of such a clause, Belgium's eventual signature of the Convention would not commit his country in matters falling within the competence of that Community”⁵³, implicating the ineffectiveness of a Convention without the EEC becoming a Party. Nonetheless, objection to the idea that an intergovernmental organisation could become a Party to the Convention was still expressed by the Ukrainian Soviet Socialist Republic, who stated that, as an alternative, “such an organisation could, however, declare that it had assumed responsibility for matters over which the States concerned had given it jurisdiction, and it would then enjoy the rights accorded under the Convention in respect of such matters.”⁵⁴ This was considered as a hint at a probable modification of the stronger position previously held by the Eastern European Socialist States on this issue.⁵⁵

The search for a possible compromise was advanced later in 1980 in the resumed ninth session. The representative of the Netherlands, on behalf of the Community and its Member States, answered concerns that had been expressed, by guaranteeing that “[...] while it was impossible for practical reasons to give an exhaustive description of the competence of the Community, they would be willing to answer any specific questions concerning the Community's competence in the spheres to be covered by the Convention.”⁵⁶ They were also committed to solve the problems that might arise if the Community itself, but not all its Member States, ratified the Convention, and stated that the relevant clause of the final text could be included to guarantee that the Community's participation in the Convention would not entail an increase in representation in any domain by comparison with that enjoyed by its individual Member States.⁵⁷ The representative also

⁵³ 126th Plenary meeting on 2 April 1980, Document A/CONF.62/SR.126, in UN, (note 23)(Volume XIII) 23 (para 178)

⁵⁴ 127th Plenary meeting on 3 April 1980, Document A/CONF.62/SR.127, in UN, (note 23)(Volume XIII) 31 (para 87)

⁵⁵ Shabtai Rosenne and Louis b. Sohn (eds), (note 38) 188 (para 305.15.)

⁵⁶ 138th Plenary meeting on 26 August 1980, Document A/CONF.62/SR.138, in UN, (note 23)(Volume XIV) 58 (para 108)

⁵⁷ *Ibid.*

expressed willingness to draw up precise provisions that would ensure that interested third States could always find a responsible Party and that no such State would be deprived of any of the guarantees offered by the Convention as a result of the division of jurisdiction between the Community and its members, and offered that an assurance could also be given in the Convention that such community treatment as the Community might institute among its Member States would not include any provision that was incompatible.⁵⁸

3.2. The emergence of solutions to the key issues

The Member States proposed in 1981 another text reflecting the extent of the progress that had been made in resolving the outstanding issues at the time. This text was the basis for the discussion on the question of participation as a Contracting Party to the future Convention by entities other than States in the first part of the tenth session, which devoted a considerable time to the discussion.⁵⁹ The text was much more detailed than the previous EEC proposals,⁶⁰ and reflected the efforts of the EEC and its Member States to be responsive to the issues that had been raised throughout the negotiation. However this proposal would on the one hand entitle a wide range of international organisations, including custom unions, communities, and other regional economic integration groups, but at same time still touched on very limited issues concerning such participation. At the end of the spring session of 1981, the progress of the negotiation and the questions which needed to be given attention were summarised by President Koh. These questions, as quoted in Chapter 1,⁶¹ outlined the controversies involving not only the EEC's participation as a Contracting Party in the Convention but also the EEC's participation in almost all multilateral fora. Based on the questions outlined, the President was able to prepare a draft text, which proposed

⁵⁸ Ibid., 58 (para 109)

⁵⁹ Johannes Føns Buhl, (note 12) 189

⁶⁰ FC/22 of 27 March 1981, as reproduced in Johannes Føns Buhl, (note 12) 189-190

⁶¹ Chapter 1 Section 1.3.

including the principle of participation in the body text of the Convention and to formulate the details of its application in an annex, a feature later adopted in the UNCLOS and its Annex IX.⁶² When the questions had been outlined and the text became more detailed, the debate on whether and how to allow the EEC or other international organisations to be Contracting Parties to the future Convention was further focused. A revised text, based on the discussions on an article-by-article basis of the President's draft text, was contained in annex I to the Report prepared by the President after holding many informal meetings and consultations on the question of participation in the Convention.⁶³

The report summarised the revised text concerning the participation of international organisations in the Convention in parts covering "intergovernmental organisations", "signature of the Convention", "definition of intergovernmental organisations", "application of part XVII of the Convention", "amendments", "denunciation", "majority requirement", "the position of Member States which are not Parties to the Convention", "granting of the national treatment", "declarations and notifications", "presumption of competence", "settlement of disputes".⁶⁴ This draft text was widely discussed and was found generally acceptable in the 1982 eleventh session. Some States reiterated that there could not be a privilege reserved for a particular legal entity but the applicable provisions must have a general character which would make it possible to regulate suitably the present and future situations of the international organisations to be established.⁶⁵ Many States still shared the concern about the right or benefit a non-Party State Member of the participating international organisations may directly or

⁶² Contained in the annex 2 of document FC/27, Report of the President on the question of participation in the convention, Document A/CONF.62/L.86, in UN, (note 23)(Volume XVI) (Summary Records, Plenary, First and Second Committees) 197

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Statement by the delegation of Colombia dated 1 April 1982, Document A/CONF.62/WS/18, in UN, (note 23)(Volume XVI) 257; 161st Plenary meeting on 31 March 1982, Document A/CONF.62/SR.161, in UN, (note 23)(Volume XVI) 39 (Ecuador)

indirect enjoy while avoiding the obligation.⁶⁶ Mali even considered the proposal as “attempts by certain countries to frustrate the work of the Conference through regional agreements and unilateral legislation which would give them the lion's share of the benefits”.⁶⁷ Out of this concern, some States preferred that all, instead of the majority, of the State members of an international organisation would have to become parties to the Convention before the organisation could deposit its instrument of formal confirmation or accession.⁶⁸ For the requirement of majority, Ukraine argued that it should also apply to denunciation so as not to allow an international organisation to continue to participate even when only one of its Member States remained a Party to the Convention,⁶⁹ a proposal that was not later realised in the UNCLOS.

Whilst the EEC and its Member States emphasised keeping the provision that would enable the internal granting of national treatments or other special treatments compatible with the legal order of the Convention since the very early stage of the negotiation, the issue of a potential conflict between the internal and external legal order also attracted many discussions. States considered the adjustment of the proposed article, which would provide for the supremacy of the obligations of an organisation under the Convention over its obligations based on its internal law, appropriate.⁷⁰ Nonetheless, Cape Verde based its argument on the detailed rules of the law of the EEC and questioned the value and the effectiveness of Article 4

⁶⁶ For example: Document A/CONF.62/SR.161, (note 65) 32 (Mali), 33 (Yugoslavia; Sao Tome and Principe), 38 (Pakistan); 41 (Uganda); 164th Plenary meeting on 1 April 1982, Document A/CONF.62/SR.164, in UN, (note 23)(Volume XVI) 62 (Cape Verde), 69 (Oman); Statement by the delegation of Colombia dated 1 April 1982, Document A/CONF.62/WS/18, in UN, (note 23)(Volume XVI) 257 (Columbia)

⁶⁷ Document A/CONF.62/SR.161, (note 65) 32

⁶⁸ Ibid., 33, 41; “U.S. policy and the Third United Nations Conference on the Law of the Sea : hearings before the Committee on Foreign Affairs”, House of Representatives, Ninety-seventh Congress, first session, April 29 and May 14, 1981, 66-67

⁶⁹ Document A/CONF.62/SR.161, (note 65) 37

⁷⁰ Document A/CONF.62/SR.161, (note 65) 33 (Yugoslavia); 164th Plenary meeting on 1 April 1982, Document A/CONF.62/SR.164, in *Official Records of the Third United Nations Conference on the Law of the Sea* (Volume XVI) 61 (Morocco), 69 (Oman)

paragraphs 3 (the extent of the right and the obligation of an international organisation) and 7 (conflict of obligations under different legal orders) of the draft text, arguing that the Court of Justice of the EEC might not feel bound by Article 4 paragraph 7 of the proposal but by the laws of the Community, in the event of a violation of the principle of non-discrimination of natural or legal persons of non-contracting Member States. The delegation stated its willingness to reach a compromise on the question, on the understanding that the EEC would agree to alter its own laws to bring them into line with the Convention,⁷¹ an expectation that has not happened.

3.3. The adoption of the current arrangements under the UNCLOS

On 10 December 1982, after almost ten years of negotiations, the Convention was adopted and opened for signature.⁷² The provisions concerning the participation of international organisations provided in the adopted Convention stayed largely unchanged compared with the draft articles provided in the President's Report. Some articles were slightly adjusted in the wording so as to clarify their meanings. Only one proposed paragraph was deleted— Article 4 paragraph 6 of the proposed Annex IX concerning the compatibility of international organisations to implement internal provisions relating to the mutual granting to the nationals of its State Members of national treatment or any other special treatment of such international organisation. This was a rather unusual move as the “implementation of internal rules on national treatment” clause was the only clause other than the “entitlement of participation” clause that had been proposed and had been insisted on by the EEC and its Member States; but it was also proposed by them to delete the clause at the very last stage of the

⁷¹ Document A/CONF.62/SR.164, (note 66) 62 (Cape Verde)

⁷² 182nd Plenary meeting on 10 December 1982, Document A/CONF.62/SR.182, in UN, (note 23)(Volume XVI) 154-155. Among the Member States of the EEC at that time, only Denmark, France, Greece, and Ireland voted in favor of the Convention, while other six Member State abstained.

negotiation.⁷³ It was then for the third States to ask to keep the paragraph so as to make sure that no right of third States would be limited and non-Party Member States of an international organisation would not benefit from the participation of the international organisations it belongs to.⁷⁴ Article 4 paragraph 6 was a provision proposed to bridge the legal order established by the Convention with that of an international organisation, providing a Member State of such an international organisation the ability to implement the internal rules of the international organisations to grant national treatment or other special treatment to other States that may not be a Party to the Convention, not incompatible with the Convention. However, this is where third States raised serious concerns about Member States of an international organisation who may choose not to become a Party to the Convention but take advantage of it through the provision. Article 4 Paragraphs 5 (no right for non-Party Member States of the Party-organisation) and 7 (prevalence of the Convention) of the President's draft text were introduced to establish the supremacy of the Convention and no non-Party Member States of an international organisation may enjoy the right provided by the Convention by any means. The existence of Article 4 paragraph 6 of the President's proposed text was considered to create difficulties and lead to misinterpretation as to whether it was implementing an internal rule of such an international organisation to grant Member States national treatment or other special treatment that confers benefits to non-Party Member States, that would not constitute a conflict of obligations and still be compatible with the Convention, and hence become unnecessary.⁷⁵

From the EEC and its Member States' side, the set of rules governing the participation of international organisations in the Convention did not meet all the expectations of what the EEC had proposed, and it would yield

⁷³ Belgium: amendment, Document A/CONF.62/L.119, in UN, (note 23)(Volume XVI) 226

⁷⁴ 159th Plenary meeting on 30 March 1982, Document A/CONF.62/SR.159, in UN, (note 23)(Volume XVI) 19; 170th Plenary meeting on 16 April 1982, Document A/CONF.62/SR.170, in UN, (note 23)(Volume XVI) 103

⁷⁵ 160th Plenary meeting on 30 March 1982, Document A/CONF.62/SR.160, in UN, (note 23)(Volume XVI) 26

the supremacy of the internal legal order to that under the Convention. From the third States' side, these rules allow an international organisation to participate in the Convention jointly with its Member States but leave the uncertainty about how the mechanism would work and whether there would be Member States of the EEC that chose not to become Member State Parties to the Convention. Both sides are not fully satisfied with the result. Nonetheless, this set of rules was an acceptable compromise to the parties, as was so often the case in the Convention.⁷⁶

4. *The REIO model provided by the UNCLOS*

4.1. Article 305.1(f) of the UNCLOS: an REIO that has been transferred the competence by its Member States

As the product of a lengthy negotiation and discussion on the issue of participation of international organisations in a Convention that covers a wide range of matters, Article 1 paragraph 2(2) of the Convention provides that the Convention applies *mutatis mutandis* to the entities which become Parties to this Convention in accordance with the relevant conditions, and to that extent "States Parties" refers to those entities. Article 305.1(f) and Annex IX of the UNCLOS outline the basic rules regarding the participation of international organisations in the Convention, which the EU's formal participation as a Contracting Party or a member in the Convention and its relevant fora are based on.

Article 305.1(f) of the UNCLOS provides that the Convention shall be open for signature by international organisations in accordance with Annex IX, which limits the application to not all international organisations but only an intergovernmental organisation constituted by States to which its Member States have transferred competence over matters governed by the Convention, including the competence to enter into treaties in respect of those matters.⁷⁷

⁷⁶ 191st Plenary meeting on 09 December 1982, Document A/CONF.62/SR.191, in UN, (note 23)(Volume XVII) 111

⁷⁷ Shabtai Rosenne and Louis b. Sohn (eds), (note 38) 184 (para 305.11.)

This article was set to be of a general nature so as to allow not only the Community but any qualified international organisation to become a Contracting Party. The term “intergovernmental organisation” might not be precise for the situation of the Community, considering its intergovernmental-supranational *sui generis* nature, but this was not raised as a burden to reject the participation of the EEC in the Convention.⁷⁸

4.2. Annex IX of the UNCLOS

Eight articles were adopted in Annex IX of the UNCLOS to deal with the issue of an international organisation becoming a Contracting Party.

4.2.1. *Majority-must-in requirement*

Regarding the signature, formal confirmation and accession of the Convention, Article 2 of Annex IX of UNCLOS stipulates that only when the majority of its Member States are signatories of the Convention may an international organisation sign the Convention. Article 3 adopts the same “majority of Member States of the international organisation must in” format with regard to the formal confirmation and accession of the Convention. The rejection of adopting an “all Member States must in” requirement could avoid the situation that only one specific Member State of the participating international organisation could block the participation of such an international organisation.

Nevertheless, if we further observe the rules of denouncement set out in Article 8.(c) of Annex IX, we can conclude that this “majority of the Member States of the international organisation must in” is not an absolute rule for the UNCLOS. Article 8.(c)(i) provided that an international organisation may not denounce the UNCLOS “if *any of* its Member States is a State Party and if it continues to fulfil the qualifications specified in *article 1*

⁷⁸ *C.f.* Chapter 5 Section 3.6 concerning treating the EU as an intergovernmental organisation in the IMO

of this Annex”(emphasis added). Article 8.(c)(ii) provided that an international organisation shall denounce the UNCLOS when “*none of its Member States is a State Party or if the international organisation no longer fulfils the qualifications specified in article 1 of this Annex. [...]*” (emphasis added) For the reasons that, firstly, the “majority of the Member States must in” rule was put in Article 2 instead of Article 1 of Annex IX; and secondly, the usage of “any of” and “none of” by the provisions in Article 8.(c) suggested that whether there is one Member State Party remaining is a threshold to decide whether a Party organisation may/shall denounce the UNCLOS. We can conclude that the “majority of the Member States of the international organisation must in” rule only applies at the time of signature and accession.

4.2.2. Mechanism concerning the clarification of the delimitation of competence

Article 2 of Annex IX UNCLOS dealt with the clarification of delimitation of competence between an international organisation and its Member State signatories. It requested the international organisation to make a declaration specifying the competences which have been transferred to the organisation by its Member State signatories, and the nature and extent of that competence. Article 3, Article 5.1, and 5.2 further stipulated the duty of an international organisation and its Member State signatories to include a declaration specifying the matters governed by the UNCLOS in respect of which competence has been transferred to the organisation by its Member State Parties in the instrument of formal confirmation or of accession. In case of any change of the distribution of competence, the international organisation and its Member States which are State Parties shall promptly notify the depositary of this Convention.⁷⁹ The organisation and the Member State Party concerned may on their own initiative or at the request of any State Party provide information as to which, between the

⁷⁹ Article 5.4 Annex IX

organisation and its Member States, has competence in respect of any specific question which has arisen.⁸⁰

Regarding the substantive issues of competence, Article 5.3 of Annex IX presumes not the organisation but the State Parties of an organisation have competence over all matters governed by the Convention unless the transfer of competence has been specifically declared, notified or communicated accordingly by those States. An international organisation shall exercise the rights and perform the obligations that its Member State Parties have under the Convention on matters relating to which competence has been transferred to it by those Member States. The Member States of that international organisation *shall not exercise* competence which they have transferred to it.⁸¹ This is a key provision that leads to the incompatibility of including the shared competence under EU law as a transferred competence under the UNCLOS, a point we will come back to in a later section.

4.2.3. Rights and obligations of a REIO

The extent of participation and rights and obligations of an international organisation are dealt with in Article 4 of Annex IX. The instrument of formal confirmation or of accession of an international organisation shall contain an undertaking to accept the rights and obligations of States under this Convention in respect of matters relating to which competence has been transferred to it by its Member States which are Parties to this Convention.⁸² An international organisation shall be a Party to the Convention to the extent that it has competence in accordance with the declarations, communications of information or notifications.⁸³ The participation of such an international organisation shall in no case entail an increase of the representation to which its Member States that are State Parties would otherwise be entitled, including rights in decision-making. Nor

⁸⁰ Article 5.5 Annex IX

⁸¹ Article 4.3 Annex IX

⁸² Article 4.1 Annex IX

⁸³ Article 4.2 Annex IX

shall it confer any rights under the Convention on Member States of the organisation which are not State Parties to the Convention.⁸⁴ In the event of a conflict between the obligations of an international organisation under the Convention and its obligations under the agreement establishing the organisation or any acts relating to it, the obligations under the Convention shall prevail.⁸⁵

4.2.4. Distribution of responsibility—joint and several responsibility

Article 6 of Annex IX deals with the distribution of responsibility and liability. Parties which have competence shall have responsibility for failure to comply with obligations or for any other violation of the Convention.⁸⁶ The organisation and the Member State Parties shall provide information as to who has responsibility in respect of any specific matter on the request of any State Party. Failure to provide this information within a reasonable time or the provision of contradictory information shall result in joint and several liabilities.⁸⁷ The notion of joint and several liability was only mentioned in one other provision— Article 139.2— under the UNCLOS. It provided that “[...] damage caused by the failure of a State Party or international organisation to carry out its responsibilities under [Part XI: the Area] shall entail liability; State Parties or international organisations acting together shall bear joint and several liability. [...]” In a later advisory opinion issued by the ITLOS concerning the interpretation of Article 139.2 in a slightly different scenario, the Tribunal stated that “joint and several liability arises where different entities have contributed to the same damage so that full reparation can be claimed from all or any of them.”⁸⁸ As an interpretation of the same concept under the same Convention, the same interpretation should apply to

⁸⁴ Article 4.4 and Article 4.5 Annex IX

⁸⁵ Article 4.6 Annex IX

⁸⁶ Article 6.1 Annex IX

⁸⁷ Article 6.2 Annex IX

⁸⁸ Advisory Opinion of the Seabed Disputes Chamber of the ITLOS on Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area, Case No. 17 [2011] para 201

the case of a breach of Article 6.2 of Annex IX— both the Member State Parties and the Party international organisation; full reparation can be claimed from all or any of them.

Although the joint and several liability is still an under-developed issue in international law,⁸⁹ it is observed as getting significant support, even with limited cases in practice, when more than one breaching State owes a duty of compensation.⁹⁰ It is also adopted by several of the multilateral environmental agreements to deal with the responsibility shared between the EU and its Member States for non-performance of obligations.⁹¹ This joint and several liability is significant for accommodating the EU and its Member States to participate in the multilateral fora for several reasons. Firstly, it could protect third States, which may find it difficult to identify which Party is responsible for what. Joint responsibility would allow third parties to present a claim to the EU, to one or more Member States, or both, and leave it to them to sort out the consequence internally.⁹² From the third States point of view, to require them to identify and prove whether it's the EU, a specific Member State or Member States, or all of them that are liable for the non-compliance and the apportion the liability is to impose on third States the external cost for the complex and evolutionary allocation of competence under the EU law. To adopt the joint and several liability would adjust the burden of proof and shift this external cost back to the EU and its Member States. It also may lessen the difficulty of pursuing the responsibility in a tribunal such as the ICJ that only has jurisdiction over sovereign States but

⁸⁹ Roger P. Alford, "Apportioning Responsibility Among Joint Tortfeasors for International Law Violations", 38 *PLR* 233 (2011) 238; Andre Nollkaemper, "Joint responsibility between the EU and Member States for non-performance of obligations under multilateral environmental agreements", in Elisa Morgera (ed), *The External Environmental Policy of the European Union: EU and International Perspectives* (CUP 2013) 308; See also ACIL, Research Project on Shared Responsibility in International Law (SHARES), <<http://www.sharesproject.nl/> Last access: 20.09.2013>

⁹⁰ John E. Noyes and Brian D. Smith, "State Responsibility and the Principle of Joint and Several Liability", 13 *YJIL* 225 (1988) 226, 267; Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 457-458

⁹¹ Andre Nollkaemper, (note 89) 304

⁹² Andre Nollkaemper, (note 89) 305-306

not the EU. From the EU and its Member States' perspective, the mechanism of joint and several liability could draw a boundary between the external legal order under a multilateral regime and its internal EU legal order. The claiming third States and the tribunal in charge of the dispute settlement only need to establish whether the counterpart, be it the EU and/or the Member States, are liable for the non-compliance; yet they do not need to go further to seek to rule on whether specific competence falls on the EU or the Member States, a result that may be in conflict of the decision internally made by the EU institutions. Such a mechanism would be a key for the maintenance of the autonomy of the EU legal order, one of the key legal doctrines that govern the EU's external relations.⁹³

Secondly, a joint and several liability mechanism provides an incentive for the EU and its Member States to clarify which actor is responsible for what.⁹⁴ On the one hand, if a competence has not been conferred on the EU, as the default responsibility lies in the Member States, the EU would not be inclined to declare otherwise and hence keep the Declaration of Competence coherent to the actual allocation of competence within the EU; on the other hand, once if the competence has been conferred on the EU, the Member States would be inclined to clarify the conferral in order not to be held responsible for any non-compliance.⁹⁵ Furthermore, if there is any ambiguity the EU and its Member States would seek to sort the issue out so as to avoid being held liable jointly and severally. This would also ensure that should there be any difficulty in sorting the issues out internally among the EU and its Member States, the disadvantage will be borne by themselves but not third States, who could do nothing except request the EU or its Member States to clarify the issue.

4.2.5. The ambiguity and complexity caused by the declaration of competence based approach

⁹³ See Chapter 2 Section 2.3

⁹⁴ Andre Nollkaemper, (note 89) 306

⁹⁵ See Ibid.

The mechanism set up by Article 3 to Article 6 concerned the undertaking of rights and obligations as well as clarification of the distribution of competence in order to respond to several key issues summarised by President Koh in his report. It aimed to clarify issues including the extent of the participation of the organisation, the rights and obligations the international organisation may or may not enjoy, and the responsibilities the international organisation or its Member States shall have, all of which are based on the concept of “competence transferred to the international organisation”, and largely rely on the provision of information concerning the distribution of competence with regard to the areas of competence transferred by members to the organisation with respect to matters falling within the sphere of the Convention in different stages of the participation of the international organisation. A comparison and summary can be found in the Table 1. Nonetheless, the ambiguity and imprecision of these articles may leave more than one possible interpretation and further cause confusion in their application.

Article 4.2 Annex IX states that an international organisation shall be a Party to the Convention “to the extent that it has competence” in accordance with the information provided accordingly by such an international organisation. This may be a simple and direct way to rule out the possibility of dual-representation, a worry that third States had shared throughout the negotiation. This is not, however, to suggest that an international organisation is not a Party to the Convention beyond the extent of the declared transferred competence. For example, because the provisions provided that both the Member State Party and the Member Organisation are obliged to provide a Declaration of Competence in due course, but does not require them to provide identical ones, it is imaginable that in extreme cases the declarations of competence submitted by the Member State Party may be inconsistent with that submitted by the Party Organisation. Several possible contradictions caused by the declarations of competence submitted by different Parties may exist. Firstly, the Member State Party declares the competence of a specific provision has been transferred to the Party

Organisation, but the Party Organisation stated otherwise. Secondly, the Member State Party declares the competence of a specific provision has not been transferred to the Party Organisation, but the Party Organisation states otherwise. Thirdly, different Member State Parties state the transfer of competence differently, for example, some Member State Parties state the competence has been transferred to the Party Organisation, whilst others state otherwise, which may or may not be in line with that declared by the Party Organisation. All of which result in the provision of different declarations of competence that conflict one with another.

In cases where the Member States concerned and the international organisation provide contradictory information of who has competence and responsibility in respect of any specific matter, Article 6.2 of Annex IX indeed provides that both the Member States and the international organisation are in joint and several liability, and third States may still take them as Parties to the Convention and resort to Article 7 of Annex IX to settle the dispute, even if the international organisation is later found to have no competence on that specific matter.

Yet, as we can see from Table 1, the duty to provide information of the distribution of competence of the international organisation and/or its Member States are set in many stages so as to ensure that the information about the transfer of competence is as precise and up-to-date as possible, both on general matters governed by the Convention and on specific matters when questions arise. The consequence of failure to provide the information on the distribution and transfer of competence and of the provision of contradictory information, however, is only dealt with in Article 6.2 of Annex IX concerning the provision of the information as to who has responsibility in respect to specific matters, stipulating that such failure or contradiction shall result in the international organisation and the Member States concerned being jointly and severally liable. What is the consequence of the failure to provide, or the provision of contradictory, declarations, notifications and communications of information under other articles of Annex IX? Shall it

directly result in the joint and several liability of the international organisation and its Member States?

One possible interpretation is to consider the provision of information concerning the distribution of competence as one of the obligations the Parties shall comply with, and the Party being asked to provide such information shall presumably be held responsible for the failure to comply with such obligation, as Article 6.1 suggests, regardless of whether third State Party has requested the provision of information or not. Therefore, for situations where the obligation to provide the information on distribution of competence is addressed to the international organisation— for instance, Article 5.1 of Annex IX- the international organisation shall have responsibility directly for the failure to comply with the obligation. In the situation where the obligation to provide the information on distribution of competence is addressed to the international organisation and its Member States, Article 4.5 of Annex IX for instance, the international organisation and its Member States shall be held responsible and result in joint and several liability, as a result of Article 6.2 of Annex IX.

Yet another possible interpretation exists. From the structure of the mechanism concerning the provision of the information regarding the distribution and transfer of competence set in Annex IX, we can see that such an obligation is set to be performed in two stages— firstly by the international organisation and its Member States to declare general information on the transfer of competence on matters governed by the Convention in the early stage, and secondly by providing information specifically when a change or specific question has arisen afterwards. In the latter circumstance, Annex IX provides third State Parties the right to request the precise information if a specific question on the transfer of competence and the responsibility thereof arises. Therefore, if an international organisation and its Member States fail to provide the Declaration of Competence or provide contradictory information, they will not be held jointly and severally liable unless the request for clarification has been made by the third States in accordance with Article 6.2 and the condition set in Article 6.2 is met. The practice of the

provision of the information concerning the transfer of competence regarding the participation of the EU and its Member States in the UNCLOS, as will be discussed later in this chapter, may suggest that this probably is the view at least taken by the EU and its Member States.⁹⁶

The provision of information upon third State Party's request stipulated in both Article 5.5 (using the term "may request an international organisation *and* its Member States[...]”(emphasis added)) and Article 6.2 (using the term "may request an international organisation *or* its Member States[...]”(emphasis added)) of Annex IX also contain uncertainty about whether such a request can be addressed only to the international organisation or to all, or one or part of, the Member States of the international organisation, and the legal consequence thereof. This may be controversial in the scenario when a third State Party requests an international organisation and its Member State X for the information as to who has responsibility in respect of any specific matter: whilst Member States Y and Z of the international organisation have not been requested by the third States to provide such information. Shall they still be held jointly and severally liable for the consequence of non-provision or mal-provision of such information caused by Member State X or the international organisation they belong to? The provisions seem to leave room for the answer in both directions, and lay the uncertainty unsettled.

The adoption of this arrangement that covered the key issues of the participation of a REIO finally enabled the Community to become a Contracting Party to the Convention with its Member States later. Yet as this text was a result of compromise, the shortcomings of the model set by the UNCLOS— some of them had been shown throughout the negotiation— further surfaced after the formal participation of the Community and its Member States.

⁹⁶ See also, Marise Cremona, "External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law" (EUI Working Paper LAW No. 2006/22) 21

5. *The European Union as a Contracting-Party to the UNCLOS jointly with its Member States*

The EC was not able to sign the Convention right after the adoption of the Convention due to the strong opposition of the Federal Republic of Germany and the United Kingdom to Part IX on the deep sea mining regime of the Convention.⁹⁷ Right after both States declared that they would not obstruct the Community's accession, the Community signed the Convention after all its Member States, except the Federal Republic of Germany and the United Kingdom, had signed it.⁹⁸ The Community deposited a Declaration of Competence specifying competence which had been transferred to it by its Member States in accordance with Article 2 of Annex IX in the second part of its Declaration upon signature of the Convention.⁹⁹

5.1. The Declarations of Competence

In the Declaration of Competence, entitled "Competence of the European Communities with regard to the matters governed by the Convention on the Law of the Sea (Declaration made pursuant to Article 2 of Annex IX to the Convention)", the Community pointed out that its "Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence, in the field of sea fishing it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and to enter into external undertakings with third States or competent international organisations"¹⁰⁰. The elusive and laconic fashion, in Veronica Frank's words, of the declaration reflected not only the difficulty of providing a precise and detailed Declaration of Competence, as the EU and its Member States expressed throughout the

⁹⁷ Kenneth R. Simmonds, (note 13) 135

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*; *United Nations Law of the Sea Bulletin*, No. 4 (1985), 16-19; Veronica Frank, (note 17) 160

¹⁰⁰ *Bulletin*, No. 4, (note 89) 17

negotiation, but also the EC's general dislike for declarations of competence.¹⁰¹

With regard to rules and regulations for the protection and preservation of the marine environment, the Community declared that the Member States have transferred to the Community competences “as formulated in provisions adopted by the Community and as reflected by its participation in certain international agreements”.¹⁰² It provided in the Declaration an Annex with the “*Community texts* applicable in the sector of the protection and preservation of the marine environment and relating directly to subjects covered by the Convention” (emphasis added) and the related Convention the Community had concluded.¹⁰³ This is to declare competence by providing the measures adopted by the EC as well as the Conventions it concluded implicitly reflected the ERTA doctrine from the jurisprudence of the CJEU,¹⁰⁴ as these matters covered by the EC legislation or international agreements indicated the competence the Member States had transferred to the EC. Nonetheless, the ERTA doctrine is merely a doctrine developed by the CJEU within the internal legal order of the EC and has no external effect on third States. Without the ERTA or a like doctrine found in the Convention, it is doubtful whether a mere indication of the “Community text” – without even indicating the nature or legal effect of these instruments— and the Convention concluded by the EC had satisfied the requirement of “specifying the matters governed by this Convention in respect of which competence has been transferred to the organisation by its Member States which are Parties to this Convention”, by which third States could base an understanding and recognise the areas of competence transferred by members to the organisation with respect to matters falling within the sphere of the Convention and the scope of the rights and duties of the organisation. This impreciseness and lack of clarity are even more

¹⁰¹ Veronica Frank, (note 17) 161

¹⁰² *Bulletin*, No. 4, (note 89) 17

¹⁰³ *Bulletin*, No. 4, (note 89) 18-19

¹⁰⁴ See Chapter 2 Section 2.1.

obvious with regard to the Declaration of Competence the Community made on provisions of Part X (Right of Access of Land-locked States to and from the Sea and Freedom of Transit), which stated that the Community “has certain powers” as its purpose is to bring about an economic union based on a customs union. And the declaration on the provisions of Part XI (deep seabed mining) by stating the Community enjoys competence in matters of commercial policy, including the control of unfair economic practices.¹⁰⁵

In order to reflect the evolving nature of the competence of the Community, it concluded the Declaration of Competence by stating that “[t]he exercise of the competence that the Member States have transferred to the Community under the Treaties is, by its very nature, subject to continuous development”, and reserved the right to make new declarations at a later date.¹⁰⁶ This catchall phrase indeed elaborated on the evolving nature of the delimitation of competence between the EU and its Member States, and has been a common feature adopted by the EU in providing its Declaration of Competence to many multilateral fora,¹⁰⁷ but it has no legal effect under the UNCLOS. Nor does it provide any clarification toward third States. Only when an updated Declaration of Competence has been submitted would the delimitation of competence be considered changed under the UNCLOS.

The disagreement of the Member States on the provisions of Part XI of the Convention concerning deep seabed mining had caused the issue of the Community’s formal confirmation of the Convention to remain unsettled for a decade. After the adoption of the 1994 Agreement relating to the Implementation of Part XI of the Convention, the obstacle was removed and the EC was finally able to deposit its instrument of formal confirmation

¹⁰⁵ *Bulletin*, No. 4, (note 89) 17

¹⁰⁶ *Ibid.*, 17

¹⁰⁷ *See e.g.* FAO DoC [1991] OJ C 326/238; DoC to the UN Convention Against Transnational Organised Crime [2004] OJ L261/70 and Stockholm Convention on Persistent Organic Pollutants [2006] OJ L209/2

concerning both the Convention and the 1994 Agreement on 1 April 1998.¹⁰⁸ A Declaration of Competence was provided by the Community in accordance with Article 5.1 of Annex IX specifying the matters on which competence had been transferred by its Member States.¹⁰⁹ The Declaration of Competence began by stating the basic treaties establishing the Community, the Member States of the Community, and the territories in which the Treaty establishing the European Community is applied. It again stated that “[t]he scope and the exercise of such Community competence are, by their nature, subject to continuous development, and the Community will complete or amend this declaration, if necessary, in accordance with article 5, paragraph 4, of Annex IX to the Convention.”¹¹⁰ The Declaration of Competence then continued to state that the Community has “exclusive competence for certain matters and shares competence with its Member States for certain other matters”. With regard to the exclusive competence, it declared that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources except measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, where competence rests with the Member States whilst respecting Community law.¹¹¹ The Community also declared it has exclusive competence in respect of those provisions of Parts X and XI of the Convention and of the 1994 Agreement which are related to international trade by virtue of its commercial and customs policy.¹¹² The Community then declared the matters for which the Community shares its Competence with its Member States, including:

“- With regard to fisheries, for a certain number of matters that are not directly related to the conservation and management of sea fishing resources, for example research and technological

¹⁰⁸ Tullio Treves, “The European Community and the Law of the Sea Convention”, in E. Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International 2002), 282; Veronica Frank (note 17), 162

¹⁰⁹ United Nations Law of the Sea Bulletin, No. 37 (1998) 7-13

¹¹⁰ *Ibid.*, 8

¹¹¹ *Ibid.*, 8-9

¹¹² *Ibid.*, 9

development and development cooperation, there is shared competence.

- With regard to the provisions on maritime transport, safety of shipping and the prevention of marine pollution contained inter alia in Parts II, III, V, VII and XII of the Convention, the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the Community to act in this field. Otherwise competence rests with the Member States.

A list of relevant Community acts appears in the Appendix. The extent of Community competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules.

- With regard to the provisions of Parts XIII and XIV of the Convention, the Community's competence relates mainly to the promotion of cooperation on research and technological development with non-member countries and international organisations. The activities carried out by the Community here complement the activities of the Member States. Competence in this instance is implemented by the adoption of the programmes listed in the Appendix."¹¹³

In the Appendix, the Community listed the Community Acts which refer to matters governed by the Convention and the Agreement in four categories: Those in the maritime safety and prevention of marine pollution sectors; those in the field of protection and preservation of the marine environment (Part XII of the Convention); those in the marine environment research and scientific and technological co-operation sector; and the Convention to which the Community is a Party.¹¹⁴

5.2. The incompatibility of the Declaration of Competence: the scope of "transferred competence" under the UNCLOS

¹¹³ Ibid., 9

¹¹⁴ Ibid., 10-13

This Declaration of Competence is considered much more elaborate and precise compared to the one made upon signature,¹¹⁵ however, this declaration seemed not to be fully compatible with the Convention. From the EU law perspective, to categorise competence into “exclusive competence of the EU”, “shared competence between the EU and its Member States”, and “competence rests on the Member States” closely followed the law and practice of the EU, as illustrated in the previous chapter.¹¹⁶ However, can the concept of “shared competence” be found in the Convention, and should it be declared in the instrument, in order to specify the extent of participation, and the rights and obligations of the international organisation?

Article 5 paragraph 1 of Annex IX stipulates that the Declaration of Competence provided by an international organisation at the time of its formal confirmation or accession shall specify the matters governed by the UNCLOS “in respect of which competence *has been transferred to the organisation* by its Member States which are Parties to this Convention.”

(emphasis added) Article 4 paragraph 3 stipulates that

“[s]uch an international organisation shall exercise the rights and perform the obligations which its Member States which are Parties would otherwise have under this Convention, on matters relating to *which competence has been transferred to it* by those Member States. The Member States of that international organisation *shall not exercise competence which they have transferred to it.*” (emphasis added)

According to these provisions, the competence regarding an international organisation and its Member States can only be found in two categories—transferred competence, which is to be *exclusively* exercised by the international organisation, and un-transferred competence, which is to be exercised by the Member States. An asymmetry of the rules governing the issue of competence between the legal orders seems to exist.

For the exclusive competence enjoyed by the EU, the Member States shall not exercise the competence both internally and externally, under the

¹¹⁵ Veronica Frank, (note 17) 163

¹¹⁶ See Chapter 2 Section 2

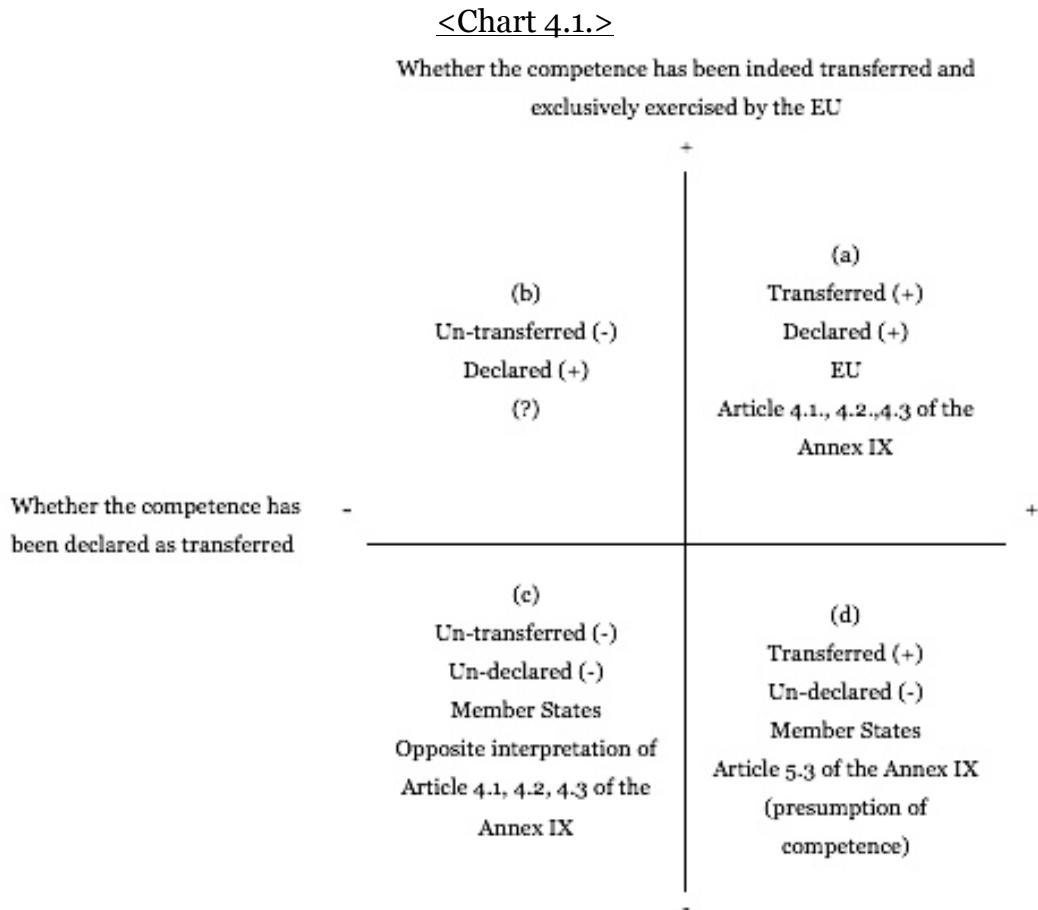
EU legal order.¹¹⁷ In this regard, the exclusive competence can be considered as the transferred competence under the UNCLOS, as the Member States are not permitted to exercise the competence they have transferred to the EU as well. However, for the shared competence of the EU and its Member States, according to Article 2.2 TFEU, those matters fall in the shared competence unexercised by the EU, the Member States are still able to exercise the competence to the extent that the Union has not exercised its competence under EU law, an effect equivalent to that of the un-transferred— rather than the transferred— competence under the UNCLOS.

Article 5.6 of Annex IX probably is the cause of the confusion, as it stipulates that declarations, notifications and communications of information shall “specify the nature and extent of the competence transferred”, implying different nature and extent of transferred competence may exist, and this is probably the grounds for the EC to provide the Declaration of Competence in the “exclusive/shared competence” pattern. Nonetheless, it is arguable that under the UNCLOS provisions, only the exclusive competence and the exercised shared competence of the EU under EU law are considered competence that has been “transferred” to the EU under the UNCLOS, as the Member States are not permitted to excise the competence. And it is these competences being required to be declared in the relevant instruments. Following this rationale, the different nature and extent of competence refers not to the “exclusive/shared” nature but to the “ceaseable/non-ceaseable” nature i.e. whether the international organisation may cease to exercise such transferred competence and the Member States were able to re-exercise the competence, as the effect of exercised shared competence stipulated in Article 2.2 TFEU.¹¹⁸ It could be further argued that the EC’s inclusion of the shared competence, without specifying which ones are exercised ones, in the

¹¹⁷ See Chapter 2, particularly Section 2

¹¹⁸ For the irrevocability and exclusivity of the concept of “transfer of power” in international law, see, Dan Sarooshi, *International Organisations and their Exercise of Sovereign Powers* (OUP 2007) 29-32, 66-69

Declaration not only does not fully comply with the Convention, but also causes confusion to third States.

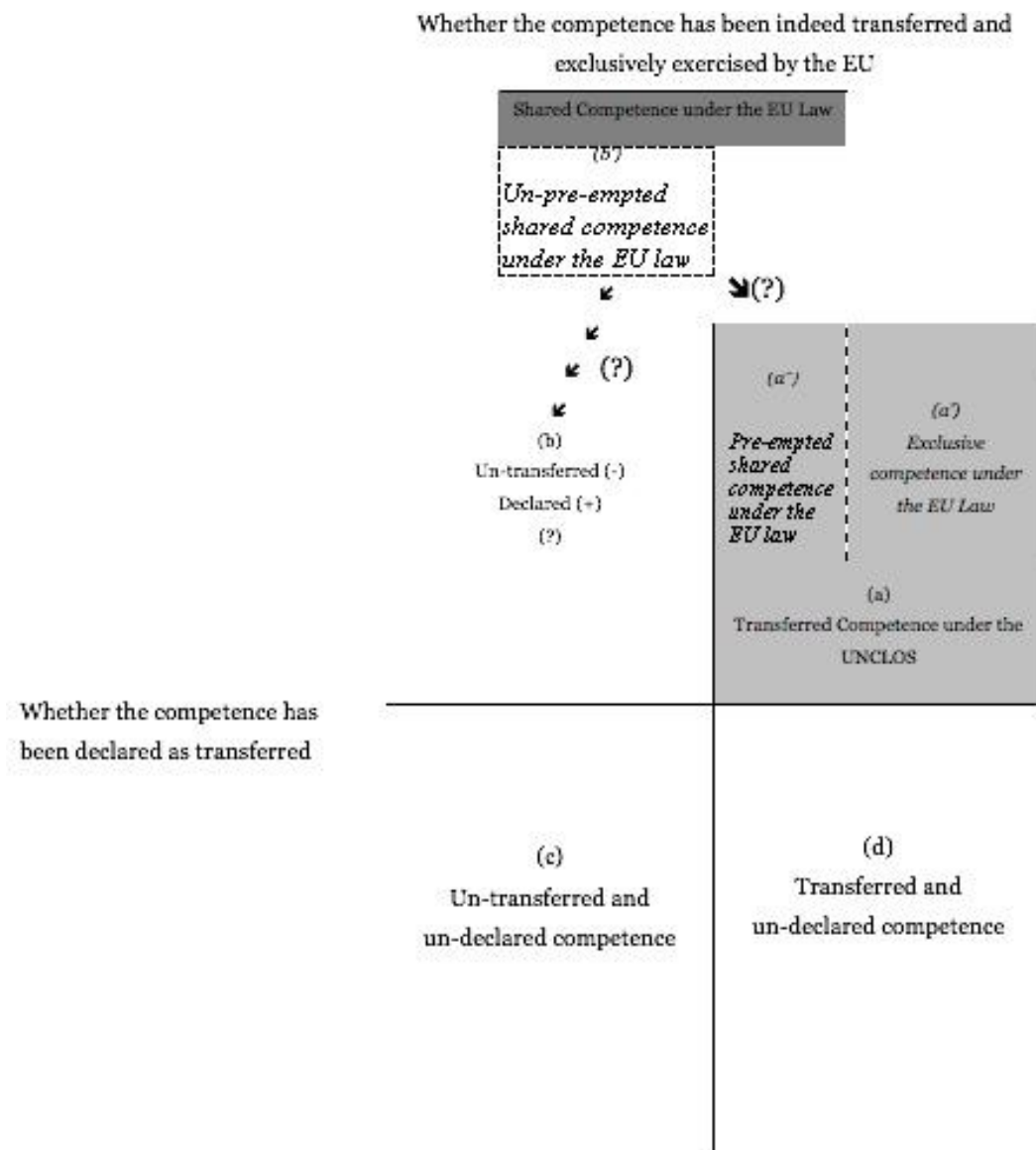


This further leads us to the issue of the relation between the rule of competence under the internal law of an international organisation and the Declaration of Competence provided by such an international organisation or its Member States. It is rather clear from Article 4.1, 4.2, 4.3, and Article 5.3 of Annex IX that the competence transferred and declared accordingly (quadrant (a) of Chart 4.1) is to be exercised by the EU under the UNCLOS, whilst the un-transferred competence not being declared as transferred competence (quadrant (c) of Chart 4.1) is to be exercised by the Member States under the UNCLOS. It is also clear that if a competence has been transferred to the EU, but is not declared as such accordingly under UNCLOS

(quadrant (d) of Chart 4.1), the competence is treated as an un-transferred one and is to be exercised by the Member States, because Article 5.3. provides that in case that transfers of competence to the organisation have not been specifically declared, notified or communicated by those States accordingly, the State Parties of the Member States are presumed to have competence over all matters governed by the Convention.

Circumstances falling in the quadrant (b) of Chart 4.1, where the competence has not transferred from the Member States to the international organisation, but is declared as transferred competence, is more complicated. With the internal coordination and the duty of co-operation under EU law, this is situation rather unlikely to happen to the EU and its Member States. If an un-transferred competence is indeed declared as a transferred competence by the EU without contradicting that submitted by its Member States, the competence shall be treated as a transferred competence according to Article 4.1, 4.2, and 4.3 of Annex IX. In other words, under the UNCLOS, as long as a competence is declared as transferred (the upper quadrants, (a)+(b) of Chart 4.1), such declaration should take effect regardless whether such competence has been indeed transferred under the internal legal order. From the EU perspective, should this circumstance happen, the EU and its Member States shall utilise Article 5.4 and Article 5.5 to promptly provide an updated Declaration of Competence to correct it. From the third States perspective, they may rely on the provided Declaration of Competence to treat the competence as transferred, or they may resort to Article 5.5 and Article 6.2 of Annex IX to request the EU and its Member States provide information on whether a specific competence has been transferred and who has responsibility on that specific matter. If contradictory information regarding the transfer of competence is found, a joint and several liability between the Member States and the EU shall be the result in accordance with the last sentence in Article 6.2 of Annex IX.

<Chart 4.2.>



From this understanding, it is then more obvious why the Declaration of Competence provided by the EU at the time of ratification is somehow confusing. As Chart 4.2 above shows, to provide the Declaration of Competence in the “exclusive/shared” pattern instead of the “transferred/un-transferred” pattern may include in the declaration the un-pre-empted shared competence under the EU law e.g. the shared competence unexercised by the EU, which the Member States shall exercise such competence under the EU law((b’) in Chart 4.2). On the one hand, even for the EU and its

Member States, it has been difficult to draw the line between “pre-empted shared competence” ((a”) in Chart 4.2) and “un-pre-empted shared competence”((b’) in Chart 4.2), because of the evolving nature of the competence under the EU law. On the other hand, it is doubtful whether such an area of un-pre-empted shared competence shall be considered as “transferred”((a) in Chart 4.2) or “un-transferred but declared as transferred” ((b’) in Chart 4.2) under the UNCLOS, in which case both would be considered to be exercised— exclusively— by the EU, a result that would conflict with that under the EU legal order.

This rationale is not purely novel, it has been briefly touched upon by the EU and its Member States before the CJEU. In *Case 459/03 MOX Plant Case*, Ireland argued before the CJEU that

“Article 4(3) of Annex IX to the Convention, in particular the notion of ‘transfer of competence’ which features there, and the Declaration of Community competence must be construed as meaning that, *in regard to shared competence, the only areas of competence transferred and exercised* by the Community when it became a party to the Convention are those which have become exclusive as a result of having been affected, within the meaning of the principle set out in paragraph 17 of the AETR judgment.”¹¹⁹ (emphasis added)

Ireland claimed that this is a particular feature of the Convention, which allows only the *transfer of exclusive competence* of the Community, the other areas of competence and the relevant responsibilities remaining within the purview of the Member States.¹²⁰ From the aforementioned arguments we can see that Ireland held the similar view that a transfer of competence under the UNCLOS only permits the competence exclusively exercised by the EU, not the un-pre-empted shared competence; therefore the inclusion of the un-pre-empted shared competence in the Declaration of Competence is incompatible with the UNCLOS. This view is in line with the aforementioned rationale.

¹¹⁹ Case C-459/03, para 100

¹²⁰ Ibid., para 101

The Commission argued from a different approach, claiming that the Declaration of Community competence must be understood as meaning that the areas of shared competence in question *are transferred and exercised by the Community even if they relate to matters in respect of which there are at present no Community rules.*¹²¹ (emphasis added) This is rather an extension of the notion of exercised shared competence under the EU law, implying that a shared competence can be understood as transferred and exercised by the EU once it has been declared in the Declaration of Competence. This argument nonetheless may find its base according to Article 4.1, 4.2, and 4.3 of Annex IX of the UNCLOS, namely, if the competence has been declared transferred (the upper quadrants, (a)+(b) of Chart 4.1), such a declaration should take effect regardless whether such competence has been indeed transferred under the internal legal order of the EU. During the procedure, AG Poiares Maduro also disagreed with Ireland's view by arguing that 1) the Council Decision concluding the UNCLOS was based *inter alia* on the provisions of the environmental policy (Article 130(s) ex-TEC), and 2) the Declaration of Competence included not only matters of exclusive competence but also the matters of non-exclusive competence.¹²² To him, when concluding the UNCLOS, the Community, exercised the competence both in fields where it is exclusive and where it is non-exclusive.¹²³

The CJEU ruled against Ireland, but it took an approach different from that argued by Ireland or the Commission. It concluded that the Declaration of Competence concerning the provisions of the Convention relating to the prevention of marine pollution provided that “[w]hen Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence,

¹²¹ Ibid., para 103

¹²² Opinion of AG Poiares Maduro delivered 18.01.2006 to Case C-459/03, paras 26-36

¹²³ Ibid. para 33

without prejudice to the competence of the Community to act in this field”¹²⁴. It understood the declaration as a confirmation that a transfer of areas of shared competence, in particular in regard to the prevention of marine pollution, took place within the framework of the Convention within the terms of the principle set out in the ERTA judgment.¹²⁵ In other words, the Court considered that the Declaration of Competence allows the dynamic and evolving nature of the shared competence under EU law, which has been developed from the ERTA judgment, to transform into the framework of the Convention. It therefore upheld the way the shared competence— regardless of it being a pre-empted or un-pre-empted one— was listed in the Declaration of Competence of the UNCLOS in practice. The CJEU’s view in the MOX Plant Case may find its ground in EU law, but it is hardly well grounded in the UNCLOS rules, which allowed a transferred competence only to be exclusively exercised by the EU.¹²⁶ Nor does the CJEU judgment guarantee that third State Parties and other tribunals will share the same view and understand the Declaration of Competence in the same way, which seems less plausible from the UNCLOS perspective following the aforementioned rationale.

The ambiguity and uncertainty caused by both the complex EU law on the distribution of competence and the Declaration of Competence made by the EU upon its ratification of the UNCLOS caused difficulty for third States to clearly understand which competence, and the responsibility there from, has been transferred to and exercised by the EU under the UNCLOS. To

¹²⁴ Case C-459/03, para 104

¹²⁵ *Ibid.*, para 105

¹²⁶ *But see* Robin Churchill and Joanne Scott, “The Mox Plant Litigation: The First Half-Life” 53(3) *ICLQ* (2004) 663 (argued that “it would be possible to make a credible argument to the effect that concurrent competences have not been ‘transferred’ to the EC. Such an argument would be credible but by no means watertight. On the contrary, it would be possible to argue that the verb ‘to transfer’ may also be used in a looser sense to relate also to those cases where Member States have conferred competence on the EC, including cases where Member States also retain competences.”) Yet considering the effect that a competence declared as transferred has to be exclusively exercised by the REIO regardless its internal rule, as provided by Article 4.1., 4.2, 4.3 Annex IX, it is doubtful whether there is indeed room for this looser interpretation of the concept of “transfer” under UNCLOS

declare shared competence within the Declaration of Competence does not indeed provide a clear answer as to whether such competence has been “transferred” and exclusively exercised by the EU as required by the UNCLOS. It may further become confusing and mislabelling if we consider that EU Member States may still in many cases be forbidden to act individually even in areas of shared competence where the EU has not exercised, as indicated by the CJEU in *Case C-246/07 Commission v Sweden*.¹²⁷

To require the EU and its Member States to promptly provide an updated Declaration of Competence or to provide such information upon request by third State Parties is the mechanism for compensating for such circumstances.¹²⁸ Considering the role of the Declaration of Competence in the context of multilateral Conventions like the UNCLOS, such a mechanism for prompt notification or clarification of the delimitation of competence may be important for many reasons. Firstly, a Declaration of Competence in a multilateral Convention links the allocation of competence directly with the obligation of specific provision under the multilateral Convention, and those who are obliged to perform such obligations will bear the responsibility for non-compliance. This differentiates it from a Declaration of Competence to a multilateral organisation, particularly one that governs making statements and the exercise of voting rights. The latter may only clarify what position or statement the EU and the Member States will take or make, or who will exercise the voting right in the decision-making process, but no obligation/responsibility will be assumed directly from making such a declaration. On the contrary, once a Declaration of Competence of a multilateral Convention has been made, no voting, statement, or any further action will be necessary. The obligation and responsibility under specific provisions of a Convention will hence fall on those who are declared to be competent on the specific matter. Secondly, as discussed in the previous and later chapters, based on the duty of cooperation, the EU and its Member States have developed general or specific internal arrangements to govern

¹²⁷ See Chapter 2 Section 2.1.

¹²⁸ Article 5.4, 5.5, and Article 6.2 Annex IX

their internal coordination for their external participations in international organisations. Such internal arrangements do not address the issue of the shaping of the Declaration of Competence that will assign the obligation and responsibility of a Convention to the EU and its Member States. Rather, as Andrés Delgado Casteleiro argued, “[...] most of the problems that the declarations of competence create could be avoided if the EU effectively spoke with one voice during the negotiations of a multilateral Convention. Declarations of competence seem to be the price to pay for the lack of coordination during the negotiations.”¹²⁹ To promptly notify or update the Declaration of Competence to a multilateral Convention becomes crucial to compensate for such shortcomings.

Nevertheless, such duty of prompt notification has not been closely followed by the EU and its Member States, no updated Declaration of Competence has been made by the EU or its Member States after the last Declaration of Competence was made at the time the Convention was formally confirmed by them. Nor has any third State Party requested the EU or its Member States to provide such information.¹³⁰ In view of the ambiguity and impreciseness of the Declaration of Competence provided by the EU and its Member States, and considering that the law and practice concerning the issue of competence have evolved and developed within the context of the EU throughout the years, this is rather a surprising development. Theoretically, the role of the Declaration of Competence may clearly reflect the difficulty of providing a precise and up-to-date Declaration of Competence, but on the other hand it raises doubts as to whether the mechanism of Declaration of Competence is indeed effective or necessary.¹³¹

¹²⁹ Andrés Delgado Casteleiro, “EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?”, 17(4) *EFAR* (2012) 509

¹³⁰ Personal communication with Veronika Veits, the Head of Unit B1 (International Affairs, Law of the Sea, Regional Fisheries Management Organisations) of DG MARE of the European Commission dated 22 March 2013

¹³¹ See Andrés Delgado Casteleiro, (note 129) 502

6. *Concluding remarks*

As a product of lengthy negotiation involving almost all States that covers the basic legal framework of the matters concerning the sea, the UNCLOS can be considered as a ground breaking success from the view of the development of both international law making and the international law of the sea. Although the design of relevant provisions in the UNCLOS reflected an attempt to draw a general basis for the EU to participate in the multilateral forum concerning maritime affairs, how these provisions should be interpreted and applied and how the EU can participate in the relative bodies set up by the Convention have encountered considerable difficulties over time, and no clear solution has been found. The UNCLOS cannot be considered flawless considering the compromised character it has been borne with. The introduction of the REIO clause adopted in Article 305.1.(f) and Annex IX of the UNCLOS is no exception. On the one hand, the negotiation process and the UNCLOS therefrom successfully accommodated the EU and its Member States' joint participation not only in the negotiation but also in the adopted Convention. On the other hand, through the negotiation process, different concerns of the EU, its Member States, and third States were able to be shared and exchanged, and a compromise acceptable for all of them was reached as a result.

The interpretation and application of the REIO model provided by the UNCLOS leaves uncertainties and difficulties both in general to any possible candidate considering participating in the UNCLOS as a REIO and in specific to the situation with regard to the EU and its Member States. The REIO clause based the extent of the participation, rights, obligations, and responsibilities of the Party international organisation on the concept of "transferred competence", and set up the mechanism of declaring the information of the distribution of competence between the international organisation and its Member States in different stages as a means to clarify the issues concerned. However, the content of the obligation and the consequence of failure to comply with such obligation remain unclear,

implying that the whole model may be based on a shaky ground. This difficulty is even more obvious and complicated for the situation of the participation of the EU and its Member States. As the Community shared in the negotiation, it is impossible for practical reasons to give an exhaustive description of the competence of the Community for the reason that such specification would not be accurate in all cases and might mislead third States. Moreover, this chapter has shown that an un-pre-empted shared competence under EU law is not considered as transferred competence under the UNCLOS, therefore the Declaration of Competence provided by the EU a long time ago is unlikely to be compatible with the UNCLOS rule. It is doubtful whether the un-updated declarations can indeed function as a clear guiding map for third States to understand the transfer of competence, the extent of the participation, the rights and obligation, and the responsibilities therefrom between the EU and its Member States. The EU and its Member States shall consider compensating for this ambiguity, impreciseness, and possible incompatibility of the Declaration of Competence provided by the EU and its Member States by providing an updated Declaration of Competence accordingly.

After being a formal Party to the UNCLOS for more than a decade, the participation of the EU and its Member States in the UNCLOS regime is still developing and leaves many uncertainties. Not only the EU and its Member States but also third States are still searching for the answer to the question of properly accommodating the participation of the EU on many occasions. The model provided in the UNCLOS has not opened the gate for the EU's formal participation in all multilateral fora concerning maritime affairs either. The participation of the EU in the multilateral fora concerning maritime affairs remains complicated, as the later chapters will show.

Chapter 5

Participation without a member status: The participation of the European Union in the International Maritime Organisation (IMO)

1. Introduction

The legal mechanisms provided by the UNCLOS to enable the EU to become a formal Contracting Party did not lead the way for the EU's wide participation in multilateral fora in the field of maritime affairs as a formal Party/Member. The EU has still struggled for its formal membership in other multilateral fora. Among the multilateral relations governing maritime affairs in which the EU participates without a formal member status, the case of the EU's participation in the IMO is chosen as the core case for the discussion for several reasons. First, the IMO is a specialised agency with a typical structure for a UN-related organisation governing maritime affairs, in particular over shipping issues. It therefore provides a typical example of the institutional structure as well as the function of an international organisation that resonates the State-centric approach, and illustrates the difficulties for the participation of the EU in such an organisation, and the cause of difficulties. Secondly, as will be shown later in this chapter, with the entry into force of the UNCLOS and the rule of reference provided thereof, the role the IMO plays in the making the law of the sea has been further strengthened.¹ The way the law of the sea is made and changed through the functioning of the IMO shows the flexibility of the making and changing of the law of the sea; yet it poses the question of how the status of the EU as a Contracting Party of the UNCLOS might still be somehow insufficient in areas covered by the IMO,

¹ For the rule of reference under the UNCLOS and its relation with the rules setup under the IMO regime, see James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 165-179

as the inflexibility of the member status of the IMO remains, and poses difficulty for the EU in participating in the IMO as a formal member.

From the EU perspective, although the Commission has proposed within the EU a recommendation to seek the EU's formal membership of the IMO for many years, there has been no authorisation following the proposal.² The reluctance of the Member States to support the EU's formal member status of the IMO presents the typical difficulties for the EU in participating in an international organisation as a formal member. It may arise not only externally from third States or international organisations but internally from the EU Member States, presenting the internal causes that obstruct the EU's participation. How the EU has endeavoured to participate in the IMO on its own or through its Member States through several legal mechanisms to remedy the EU's limited status in the organisation shows the possibility and the shortcoming for the EU to participate as a non-member, and provides a fine comparator for the later analysis.

Based on this understanding, this chapter will illustrate and analyse the mechanisms developed by the EU in relation to its participation in the IMO under the limited status provided thereof. It will begin with the institutional design of the IMO, especially the various but limited status provided for participation. It will consider the role and the function of the IMO in governance of maritime affairs, especially the role it plays beyond the institutional design of its constitutional instrument. It will then turn to the EU perspective to see the internal attempt of the EU to seek a further degree of participation in the IMO, and the mechanism it adopts as an interim solution. It will show that even with the entry into force of the Lisbon Treaty, due to the internal and external difficulties, the attempt for the EU to participate in the IMO as a formal member is unlikely to succeed in the near future. The interim mechanism as well as the duty of co-operation under EU law will continue to serve as practical tools for the EU to make its participation and influence in the IMO beyond that available with observer

² European Sea Ports Organisation, "EU not yet with single voice at IMO: Member States not in favour of full IMO-membership for EU", 11.06 *ESPO NEWS* (2005)

status. The effectiveness of these tools available for the EU further minimises the interest of the EU Member States, and the IMO and its Member States to grant the EU a formal membership of any kind. But this leaves issues, such as those of attribution of responsibility and dispute settlement, unsolved. As complementary alternatives, the EU shall seek to become parties to IMO-related regulatory treaties as well as to sign an agreement with the IMO so as to settle the framework to enhance the EU's engagement with the IMO.

2. *The IMO in the governance of maritime affairs*

The IMO, founded as the Intergovernmental Maritime Consultative Organisation (IMCO) by the Convention of the Intergovernmental Maritime Consultative Organisation (IMO Convention) in 1948, is an international organisation which aims to provide an international forum for the discussion and coordination of matters concerning safety and efficiency of maritime navigation and shipping. Its purpose is set out in Article 1 of the IMO Convention as “to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships”³.

2.1. The structure of the IMO

On the surface, the IMO has a structure typically seen in UN-related organisations. Its Assembly consists of all Member States and meets every two years. Aside from making decisions on the basic function of the organisation, such as the election of the President and the Vice-presidents, the election of the Members to be represented in the Council and other

³ Article 1 of Convention of the Intergovernmental Maritime Consultative Organisation (adopted 6 March 1948, entered into force 17 March 1958) 1520 UNTS 197

Committees, the establishment of subsidiary bodies, the budget and other financial arrangements, and the reference of certain matters to the Council for considerations or decisions etc., the Assembly also makes recommendations to Member States for the adoption of regulations and guidelines concerning maritime safety and pollution, which is considered as the most important rule-making function it performs.⁴

The Council functions as the executive organ of the IMO. It is composed of forty members elected by the Assembly. Ten of the members are elected from States with the largest interest in providing international shipping services; ten are elected from other States with the largest interest in international seaborne trade; twenty are elected from States not elected under the categories above which have special interests in maritime transport or navigation, and whose election to the Council will ensure the representation of all major geographic areas of the world.⁵ The Council is in charge of supervising the work of the Organisation. It performs the functions of the Assembly between sessions of the Assembly, except the function of making recommendations to Governments on maritime safety and pollution prevention, which is reserved for the Assembly by Article 15(j) of the Convention.⁶ Its functions include: 1) to coordinate the activities of the organs of the Organisation; 2) to consider the draft work programme and budget estimates of the Organisation and submit them to the Assembly; 3) to receive reports and proposals of the Committees and other organs and submit them to the Assembly and Member States, with comments and recommendations as appropriate; 4) to appoint the Secretary-General, subject to the approval of the Assembly; 5) to enter into agreements or

⁴ Part V of the IMO Convention. Frederic L. Kirgis Jr., "Chapter Fifteen: Shipping" in Oscar Schachter and Christopher C. Joyner (eds), *United Nations Legal Order: Volume 2* (CUP 1995) 715

⁵ Article 17 IMO Convention

⁶ Article 26 IMO Convention

arrangements concerning the relationship of the Organisation with other organisations, subject to approval by the Assembly.⁷

The responsibilities for regulatory developments in the IMO are divided into different Committees, including the Maritime Safety Committee (MSC),⁸ the Marine Environment Protection Committee (MEPC),⁹ the Legal Committee,¹⁰ the Technical Co-operation Committee,¹¹ and the Facilitation Committee.¹² The MSC and MEPC are also assisted in their work by sub-committees.¹³ All these Committees and sub-committees consist of all the Members of the IMO. The roles these Committees play in the making of the law of the sea are far beyond what is stipulated in the IMO Convention, the Committee system is considered a noteworthy feature in the IMO's structure,¹⁴ and will be further elaborated on in the later sections.

2.2. The role of the IMO in the making of the law of the sea

From a direct observation of the IMO Convention, the role of the IMO is rather limited and of a non-binding nature. The IMO Convention authorises the IMO Assembly a non-delegatable competence to make recommendations to Members for adopting regulations and guidelines concerning maritime safety, the prevention and control of marine pollution from ships and other matters concerning the effect of shipping on the marine environment assigned to the Organisation by or under international

⁷ Part VI IMO Convention. *See also*

<http://www.imo.org/About/Pages/Structure.aspx> <last accessed 09.09.2013>

⁸ Part VII IMO Convention

⁹ Part IX MO Convention

¹⁰ Part VIII IMO Convention

¹¹ Part X IMO Convention

¹² Part XI IMO Convention

¹³ Including Sub-Committee on Human Element, Training and Watchkeeping (HTW); Sub-Committee on Implementation of IMO Instruments (III); Sub-Committee on Navigation, Communications and Search and Rescue (NCSR); Sub-Committee on Pollution Prevention and Response (PPR); Sub-Committee on Ship Design and Construction (SDC); Sub-Committee on Ship Systems and Equipment (SSE); and Sub-Committee on Carriage of Cargoes and Containers (CCC). *See* IMO, (note 7).

¹⁴ Frederic L. Kirgis, Jr., (note 4) 716; Article 15(j) and 15(m) IMO Convention

instruments, or amendments to such regulations and guidelines which have been referred to it.¹⁵

Yet the mere observation of the IMO Convention only provides part of the picture. The roles the IMO plays in the making of the law of the sea, according to Bernard H. Oxman's analysis, include a standard-setting role, an approval role, as well as a forum-providing role, in which to bring together states in order to develop and achieve generally accepted international rules and regulations.¹⁶ One of the law-making techniques adopted by the IMO is indeed treaty-based, however, it does not flow only from the IMO Convention, but also from other Treaties or Conventions, such as the 1973/78 International Convention for the Prevention of Pollution by Ships (MARPOL),¹⁷ the 1974 International Convention for the Safety of Life at Sea (SOLAS),¹⁸ or the 1982 UNCLOS. The IMO is now responsible for nearly 50 international Conventions and agreements and has adopted numerous protocols and amendments.¹⁹ Most of these agreements and Conventions are initially prepared by and negotiated through the specialised committees and subcommittees of the IMO.²⁰

Nonetheless, the adoption of a treaty is a beginning rather than an end of the IMO's role as a law-maker or standard setter. These regulatory treaties recognise the IMO as a forum for the drafting and adoption of technical amendments to treaty standards,²¹ and the Parties of the regulatory treaties, whether an IMO Member or not, are eligible to participate in the meetings of the Committee, where modifications to the major regulatory treaties are

¹⁵ For a examination of the nonbinding codes and other norms as a law-making techniques of the IMO, can see Frederic L. Kirgis, Jr., (note 4) 727-732; Article 15.(j) and 15.(m) IMO Convention

¹⁶ Bernard H. Oxman, "Environmental Protection in Archipelagic Waters and International Straits—The Role of the International Maritime Organisation", 10(4) *IJMCL* (1995) 468. See also James Harrison, (note 1) 165

¹⁷ 1340 UNTS 184

¹⁸ 1184 UNTS 278

¹⁹ For a comprehensive list of the conventions and protocols, can See, IMO, <http://www.imo.org/About/Conventions/ListOfConventions/Documents/2011%20Convention%20titles.doc> <last access: 09.09.2013>

²⁰ Article 2.(b) IMO Convention

²¹ Article VIII SOLAS Convention; Article 16. MARPOL Convention

frequently considered.²² Moreover, in many cases, such as the MARPOL, the SOLAS, or the 1965 Convention on Facilitation of International Maritime Traffic (Facilitation Convention),²³ the key provisions for the regulations are found not in the text of the Conventions but in the Annex, which was originally included with the Convention.²⁴ In order to meet the need to amend the standards and regulations in the Annex from time to time to respond to the rapid development of relevant technology and techniques in the affairs governed by the IMO-related treaties, many of these treaties followed the model developed earlier by the International Civil Aviation Organisation (ICAO) to introduce a “tacit acceptance” mechanism, a mechanism that allows the adoption of an amendment of the Annex not going through the formal amendment procedure, which normally sets a high threshold, for example, two-third of the parties’ acceptance to an amendment, for it to be adopted.²⁵

The tacit acceptance mechanism adopted by the IMO-related treaties not only makes a more or less timely amendment of the standards and regulations possible, but also enhances the importance of the role of the IMO and its committees in the governance of maritime affairs. The details of the design of the mechanism may differ from treaty to treaty, but commonly each one involves the use of an IMO organ as at least one option for initial adoption of an eligible amendment, and entry into force for all parties that do not opt out in a timely fashion. If a specified number do opt out, the amendment remains not in force.²⁶ In each instance, parties to the relevant Convention are entitled to participate in the IMO organ’s decision-making process, even if they are not a member of the IMO²⁷. This mechanism makes

²² See e.g. Article VIII(b)(iii) SOLAS Convention, Rule 1 of the RoP MSC (for the non-IMO Member Contracting Parties, they participate as “other Participants”)

²³ 591 UNTS 265

²⁴ Frederic L. Kirgis, Jr., (note 4) 719

²⁵ Z. Oya Ozcayir, “IMO Conventions: the tacit consent procedure and some recent examples” 10(2) *JIML* (2004) 204-211

²⁶ See e.g. MARPOL 73/78 Article 16.2.(f); Article VIII.(b); Frederic L. Kirgis, Jr., (note 4) 721-722

²⁷ See e.g. MARPOL 73/78 Article 16.2.(c)

the amendment of the standards or regulations stipulated in the Annexes of these treaties easier and more frequent by the decisions made by the IMO organs, in most cases, the Committees such as MEPC and MSC.²⁸

Along with the authorisation of different treaties and the tacit acceptance law-making techniques adopted by many of them, the “rule of reference” adopted by the 1982 UNCLOS that leads the standards or regulations adopted by an IMO-related treaty in certain cases to become the “generally accepted international standards” binding beyond parties who accepted that treaty, further widening the importance of the role the IMO plays. The IMO is only explicitly mentioned in the UNCLOS in its text in Article 2 of Annex II concerning the Lists of Experts in the field of navigation, including pollution from vessels and by dumping. Nonetheless, the UNCLOS provides that co-operation between States at the global, regional and subregional levels in areas such navigation, the conservation and utilisation of living marine resources,²⁹ the protection and preservation of the marine environment,³⁰ the conduct of marine scientific research,³¹ and the development and transfer of marine technology,³² should be undertaken particularly thorough competent international organisations concerning the activities. For affairs in connection with the adoption of international shipping rules and standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from vessels and by dumping, the IMO has even been claimed to be the exclusive “competent international organisation” governing these affairs.³³ With the entry into force of the UNCLOS calling upon the

²⁸ For the analysis of the strengths and weaknesses of this streamlined amendment procedure, can see Alan Boyle and Christine Chinkin, *The Making of International Law* (CUP 2007) 132-133; Frederic L. Kirgis, Jr., (note 4) 722-723; James Harrison, (note 1) 163

²⁹ For example: Article 61 and 118 UNCLOS

³⁰ Part XII UNCLOS

³¹ For example, Article 200 and Part XIII UNCLOS

³² Part XIV UNCLOS

³³ See Division for Ocean Affairs and the Law of the Sea (Office of Legal of the United Nations), “A. ‘Competent or relevant international organisations’ under the United Nations Convention on the Law of the Sea”, 31 *Law of the Sea Bulletin* 79 (1996);

competent international organisations to progressively develop aspects of the law of the sea relating to maritime safety and the protection of the marine environment, adopting the rules of reference that have the effect of incorporating the generally accepted international standards into the global framework for the law of the sea, the role of the IMO as one of the principal, and in some cases exclusive, competent international organisations is further widened.³⁴

The interactive relationship between the IMO-related regulatory treaties, the 1982 UNCLOS, and the IMO and its organs poses issues for entities like the EU, which is not a Party/Member of all of them. On the one hand, a non-member of the IMO but a Party to the IMO-related treaties has the opportunity to participate in the relevant committees when such treaties are concerned. On the other hand, a Party of the UNCLOS but a non-member to the IMO or a non-Party to the IMO-related treaties can on many occasions be bound by the standards or regulations generated by the IMO organs because of the rule of reference in the UNCLOS. The latter is the situation the EU faces, and leaves a possible disadvantage for the EU to be further examined later.

3. The participation of the EU in the IMO

3.1. Maritime affairs of the EU concerning the IMO

In the EU context, maritime matters covered by the IMO largely fall within the competence at the Union level. Maritime navigation, shipping, and related environmental protection fall into policy areas where the Union enjoys competences with different natures including exclusive competence—

IMO, *Implications of the United Nations Conventions on the Law of the Sea for the International Maritime Organisation* (IMO 2008) 7

³⁴ For the incorporation of shipping standards through the rule of reference, see e.g. W. Van Reenen, “Rules of Reference in the new Convention on the Law of the Sea in particular connection with the pollution of the sea by oil from tankers”, 12 *NYIL* (1981) 3; James Harrison, (note 1) 165-179

for example, in common commercial policy;³⁵ and shared competence— for example, in environment, transport, energy, and the area of freedom, security and justice.³⁶ Some areas in the shared competence where the EU has exercised its power further exempted the Member States to exercise theirs. According to the Commission, the EU has powers in several areas, for example, areas concerning “establishment and enforcement of criteria and technical standards which Member States are required to adopt, e.g. in the area of marine equipment; establishment of rules and safety standards for passenger ships; enforcement by the port State of international standards for ship safety, pollution prevention and shipboard living and working conditions in respect of ships using Community ports and sailing in the waters under the jurisdiction of the Member States; establishment of harmonised rules addressed to Member States' maritime inspection authorities and classification societies”³⁷, and the EU has covered these areas by legislation at the Union level.³⁸

In the declaration made by the EU to the UNCLOS in accordance with Article 5 of Annex IX of the 1982 UNCLOS, the EU declared that these matters are in the competence shared between the EU and its Member States:

³⁵ Article 3.1. (e) TFEU

³⁶ Article 4.2.(e), (g), (i), (j) TFEU

³⁷ Commission, “Recommendation from the Commission to the Council: in order to authorize the Commission to open and conduct negotiations with the International Maritime Organisation (IMO) on the conditions and arrangements for accession by the European Community”, SEC(2002)381 final, 36

³⁸ Commission, (note 37) Annex I (Community legislation relevant to the work of the IMO). More legislations came after the 2002 Recommendation of the Commission, including the so-called Erika legislation packages intended to improve safety in the shipping industry and thereby reduce environmental damage to the seas etc. *See* Jan Wouters and others, *Study for the Assessment of the EU's Role in International Maritime Organisations: Final Report* (LCGGS 2009) 46-47. The Commission later in its staff working paper also listed the IMO issues covered by the competence of the EU. *See* Commission, “Commission Staff Working Document: Procedural framework for the adoption of Community or common positions for IMO related issues and rules governing their expression in the IMO”, 6-10 (listed the issues included in the agenda of MSC, MEPC, FAL and relevant EU legislations covered by the EU); *see also* Uwe Jenisch, “The European Union as an Actor in the Law of the Sea: The Emergence of Regionalism in Maritime Safety, Transportation and Ports”, in 48 *GYBIL* (2005), 239

“- With regard to the provisions on maritime transport, safety of shipping and the prevention of marine pollution contained *inter alia* in Parts II, III, V, VII and XII of the Convention, the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the Community to act in this field. Otherwise competence rests with the Member States. A list of relevant Community acts appears in the Appendix. The extent of Community competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules.

- With regard to the provisions of Parts XIII and XIV of the Convention, the Community's competence relates mainly to the promotion of cooperation on research and technological development with non-member countries and international organisations. The activities carried out by the Community here complement the activities of the Member States. Competence in this instance is implemented by the adoption of the programmes listed in the Appendix.”³⁹

As the Declaration of Competence made by the EU showed, the competences concerning the provisions of maritime transport, safety of shipping and the prevention of marine pollution contained *inter alia* in Parts II, III, V, VII and XII of the Convention, which are closely related to affairs covered by the IMO, no longer fall solely within the competence of the EU Member States. Nevertheless, as discussed in the previous chapter, the way the EU included a wide range of shared competence in the Declaration of Competence caused confusion.⁴⁰ Moreover, on the surface, it seemed to be consistent and reasonable that the EU Member States shall not exercise the transferred competence in the UNCLOS sphere and on these occasions only the EU, who have the competence, should be held responsible for the failure to comply with obligations or any other violations, according to Article 4.3 and Article 6.1 Annex IX UNCLOS. However, when the participation of the

³⁹ Declaration made by the EC to the 1982 UNCLOS, (1998) 2011 UNTS 231. For the DoC under the 1982 UNCLOS, See Chapter 4 Section 5

⁴⁰ See Chapter 4 Section 5.2

IMO and its related regulatory treaties and the rule of reference adopted by the UNCLOS come into play, it becomes problematic. It is argued that the rule of relevance cannot imply that parties of the UNCLOS are bound by concrete rules to which they themselves did not properly adhere.⁴¹ As summarised and concluded in the Final Report of the Committee on Coastal State Jurisdiction relating to Marine Pollution of the 2000 International Law Association London Conference, the rule of reference has stretched the element of consent of the principle of *pacta tertiis* to its maximum. An international rule or standard developed by the IMO and its organs according to the IMO-related regulatory treaties may become binding to UNCLOS parties— regardless of whether they are members of the IMO or parties to the IMO-related treaties or not— if the rule or standard is considered as “generally accepted” under the UNCLOS.⁴² Despite this, the effect of the generally accepted international rule or standard may vary depending on the phrasing of the provision of UNCLOS the rule or standard is linked with. From the EU’s perspective, the EU has been unable to fully participate in the IMO either directly by having formal membership of it or indirectly by becoming a Party to the related treaties, even when it has exclusive competence in the affairs covered by the IMO or its related regulatory treaties. Nonetheless, as a Party of the UNCLOS, it may still be bound by or held responsible for the rules or standards generated by the IMO or its organs as a result of the rule of reference of the UNCLOS. On the other hand, from the EU Member States’ perspective, as members of the IMO and parties to the IMO-related regulatory treaties, it is not the EU but the Member States being held responsible for compliance with the obligations under those treaties, regardless that the Member States may no longer have competence over the affairs concerned. All these circumstances leave a possible gap between the

⁴¹ Liu Nengye and Frank Maes, “The European Union and the International Maritime Organisation: EU’s External Influence on the Prevention of Vessel-Source Pollution”, 41 *JMLC* (2010) 593

⁴² Erik Franckx (ed), *Vessel-Source Pollution and Coastal State Jurisdiction: the Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000)* (Springer 2000) 117-124

right to participate in the law-making and the obligations flowing from the law made, and lead to the need for the EU to participate in the IMO. It is in the interest of the EU and its Member States to remedy the imbalance between the rights and obligations, as well as to prevent infringements by the Member States against their Union obligation and guarantee consistency of the position of the Union.⁴³

3.2. The Membership of the IMO—a State-only approach

The EU has nevertheless struggled for its goal to participate in the IMO with a full member status. The membership of the IMO is stipulated in Part III of the IMO Convention; it is open to all States.⁴⁴ Currently the IMO has 170 Member States; all EU Member States are Members of the IMO.⁴⁵ Article 9 IMO Convention also provides for the status of Associate Member, allowing territories or group of territories to be an Associate Member of the Organisation through the Member having responsibility for its international relations, or through the United Nations.⁴⁶

The IMO Convention also has provisions governing the relations between the IMO and the United Nations and other Organisations. Article 61 IMO Convention provides that the IMO may, on matters within its scope, cooperate with other intergovernmental organisations which are not specialised agencies of the United Nations, but whose interests and activities are related to the purposes of the Organisation. This provides the basis for other international organisations to work *with* the IMO, yet no provision is provided for international or regional organisations of any kind to become members to fully participate in the activities *in* the IMO. To include provisions to allow the EU to be a member of the IMO requires an amendment to the Convention, which must be adopted by a two-thirds vote

⁴³ Commission, (note 37) 35

⁴⁴ Article 5, 6, 7, and 8 IMO Convention

⁴⁵ <http://www.imo.org/About/Membership/Pages/MemberStates.aspx> <last accessed 10 May 2013>

⁴⁶ Article 9 IMO Convention

of the Assembly.⁴⁷ It will only come into force twelve months after the acceptance of two-thirds of the Members of the IMO is reached.⁴⁸ Such a high threshold indicates the procedural difficulty of incorporating any new provision for the EU's formal membership.

3.3. The observer status of the Commission of the EU in the IMO

The Commission of the EU, not the EU or the then Community itself, managed to have observer status since the signature on 28 June 1974 of a co-operation and collaboration agreement between the Commission and the then IMCO,⁴⁹ providing reciprocal consultations on topics of common interest and exchange of information on planned projects and work programs.⁵⁰ Although the observer status allowed the Commission to participate in meetings of the IMO and the Commission was observed having played its active role in many areas,⁵¹ the Commission identified many shortcomings. The observer status does not allow the Commission to negotiate directly, speak for the Member States, effectively use the coordination mechanism, and make a concrete, visible contribution to the Union safety policy in the IMO.⁵² The fact that it is the Commission, not the Community or the EU having the observer status, further makes the case more complicated. It indicated that the classic controversy over the international personality of the Community or the Union, which has been internally settled by the Lisbon Treaty, might not precisely reflect the assorted way the EU participates in the multilateral fora under different identities externally. In the IMO, for instance, the EU does not even participate in the organisation as an observer under its own name and identity, but rather under the name of one of its institutions— the

⁴⁷ Article 52 IMO Convention

⁴⁸ *Ibid.*

⁴⁹ Commission, (note 37) 37

⁵⁰ *Ibid.*, 49

⁵¹ See Uwe Jenisch, (note 38) 253

⁵² Commission, (note 37) 37-38

Commission, which arguably does not possess legal personality either internally or externally, even though its functions are a key role in the procedure of negotiation and conclusion of international agreements.⁵³

The practice in the IMO showed that at times the presentation of the Commission on behalf of the Community/Union was refused for the reason that the Community/Union itself is not recognised in the IMO. For example, in the 54th session of the MEPC it refused to accept a submission to the Subcommittee of the Bulk Liquids and Gases (BLG Sub-committee) presented by the Commission on behalf of the Community. The Commission later responded with a submission on behalf of the then 25 Member States and the Commission using the formula of phrasing the proposal in the following way: “[i]t is therefore the view of the above mentioned submitting Contracting Parties – which are all members of the European Community, to which these states have transferred the competence regarding this particular matter- that [...]”,⁵⁴ which was later known as the “BLG formula”. Interestingly though, the way the Community/Union is being presented in the IMO is quite diverse, and the IMO and its Members have not always refused the Commission’s presentations or actions on behalf of the Community/Union by resorting to the reason that the Community/Union itself not recognised by the IMO. The way the EU has been presented in the IMO or its organ is not unified and somehow confusing. For example, in 2002, the Commission submitted for consideration a Draft Protocol to Amend the 1974 Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea “on behalf of the European Commission and its Member States.”⁵⁵ In 2003, the Commission made a submission for the

⁵³ Article 218 TFEU

⁵⁴ Veronica Frank, *The European Community and marine environmental protection in the international law of the sea: implementing global obligations at the regional level* (Brill 2007) 265; Commission, (note 37) 37 (in the footnote 48)

⁵⁵ IMO International Conference on the Revision of the 1974 Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, “Consideration of a Draft Protocol of 2002 to Amend the Athens Convention relating to the Carriage of Passenger and their Luggage by Sea, 1974” (Agenda item 6, submitted by the

consideration of a Draft Protocol to the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage “on behalf of the European Community and its Member States”.⁵⁶ On other occasions, it is the EU Member State which holds the Presidency of the EU at that time, presents to the IMO “on behalf of the European Community Member States”⁵⁷, or “on behalf of the European Union Member States”⁵⁸, or even “on behalf of the European Union countries and the European Commission”⁵⁹, or “on behalf of the European Union and the European Commission”⁶⁰, showing the inconsistency of the way the EU has been presented in the IMO. The observer status in the IMO not only cannot fully reflect the competence the EU enjoys under EU law, nor can it provide for the EU being represented under a consistent identity for its external presence.⁶¹ From a third State perspective, receiving statements coming under different titles also causes confusion as to whether such statements are coming from IMO Members (EU Member States), an IMO observer (the

European Commission on behalf of the European Commission and its Member States), LEG/CONF.13/7(2002) 1

⁵⁶ IMO International Conference on the Establishment of a Supplementary Fund for Compensation for Oil Pollution Damage, “Consideration of a Draft Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution, 1992”(Agenda item 6, submitted by the European Commission on behalf of the European Community and its Member States), LEG/CONF.14/7 (2003) 1

⁵⁷ MEPC, “Report of the Marine Environment Protection Committee on its Forty-six Session”, MEPC 46/23(2001) 22

⁵⁸ MEPC, “Report of the Marine Environment Protection Committee on its Forty-six Session”, MEPC 43/21(1999), Annex 16; IMO International Conference on Ballast Water Management for Ships, “Record of Decisions of the Plenary: Second Meeting”, BWM/CONF/RD/2/Rev.1 (2004) 2 and Annex

⁵⁹ IMO Sub-Committee on Flag State Implementation, “Report to the Maritime Safety Committee and the Marine Environment Protection Committee”, FSI 15/18 (2007) 22

⁶⁰ Ibid.

⁶¹ Similarly, in two other UN agencies, the International Fund for Agricultural Development (IFAD) and the World Food Programme (WFP), where the EU is not a member but only an observer in IFAD and WFP, various Member States led by the UK (in the second half of 2010) resisted the implementation of the Lisbon Treaty for the Commission to represent the EU on the grounds of its limited observer status. See Michael Emerson and Others, *Upgrading the EU’s Role As a Global Actor: Institutions, Law and the Restructuring of European Diplomacy* (Centre for European Policy Studies 2011) 77

European Commission), and/or a non-member/observer entity (the European Union), and whether they should be treated equally as statements coming from an IMO Member.

3.4. Seeking the Membership for the EU in the IMO

The EU has realised the shortcomings of participating in the IMO through the observer status of the Commission. In the White Paper presented by the Commission in 2001, “White Paper: European transport policy for 2010: time to decide”, the Commission projected “managing the globalisation of transport” as one of the major transport policies to be achieved and stated

“[i]t is paradoxical that the European Union, which is the world’s leading commercial power and conducts a large part of its trade outside its own borders, has so little say in the adoption of the international rules which govern much of transport. *This is because the Union as such is excluded from most intergovernmental organisations, where it has no more than observer status. This situation needs to be remedied without delay, by having the Community accede to the inter-governmental organisations which govern transport so that the thirty-odd members of the enlarged Union not only speak with a single voice but, above all, can influence those organisations’ activities in the common interest and in support of sustainable development.*” (emphasis added)⁶²

Following the White Paper, the Commission submitted a Recommendation to the Council in order to authorise the Commission to open and conduct negotiations with the IMO on the conditions and arrangements for accession by the European Community.⁶³ In the Recommendation, the Commission briefed the Community on competence and common interest in matters dealt with in the IMO,⁶⁴ analysed the shortcomings of the status of the European Commission in the IMO, and

⁶² Ibid., 98

⁶³ Commission, (note 37)

⁶⁴ Ibid., 36

argued the need to be given the due position, in its view, including a full membership of the IMO, on the international scene.⁶⁵

The projected arrangement sought to adapt the participation of the then European Community and its Member States in the IMO arranged by the degree of harmonisation of the attributed powers between the EU and its Member States: 1) in areas where the EU enjoys the exclusive power, the Commission speaks and votes on behalf of the Member States; 2) in areas which fall into national competence, Member States express their individual views and vote individually; 3) in areas where powers are shared and a common position has been established, the common position is to be presented by the Council Presidency or by the Commission.⁶⁶ If a common position has not been agreed, Member States will express their own views and vote individually, with due regard to the duty of co-operation.⁶⁷ It is unclear how the third position shall be realised externally in the IMO rules, though, as the UNCLOS and other multilateral fora have not adopted the mechanism to base how the exercise of competence on whether a common position has been adopted. It is doubtful how the issue of shaping a common position between the EU and its Member States, a matter under EU law, can be transformed into the matter of the IMO rule. Furthermore, as discussed in Chapter 3, this proposed arrangement may not be consistent with the CJEU case law, which limited the Member States' freedom to express their own views and exercise their own rights even when a common position has not been agreed. A possible solution is to interpret and apply this arrangement narrowly, nonetheless, this would further cause ambiguity and uncertainty in determining when and how the Member States are able to express their views and exercise their rights in an area of shared competence.

The proposed means to secure the accession of the EU is to amend the IMO Convention by inserting a clause to allow REIOs to become parties to

⁶⁵ Ibid., 36-38

⁶⁶ Ibid., 40. Here the usage of "power" instead of "competence" is to reflect the terminology the Commission used in the original text

⁶⁷ Ibid., 39

the Convention and by adapting all the relevant provisions of the Convention affected by this clause, including the Rules of Procedure.⁶⁸ The proposed status should allow the EU, in matters of its competence and on an equal footing with States which are members of the IMO, to: “(a) express its views during negotiations, or at any meetings of the IMO bodies, (b) for matters that have to be decided through a vote, have a voting weight equivalent to that of those of its Member States represented in the relevant IMO body and bound by Community legislation from which external competence arises, (c) express consent in its own name to assume the rights and obligations stemming from the instruments concluded in the framework of the IMO.”⁶⁹ In order to achieve the objective of the accession of the EU to the IMO and to realise the arrangement, both internal steps, meaning the procedural rules under the EU Treaties,⁷⁰ and the external procedures, meaning the procedural rules of the IMO concerning the amendment of the IMO Convention,⁷¹ have to be followed.

In the Recommendation, the Commission also included several strategies for negotiation toward the accession by the EU to the IMO.⁷² As regards budgetary issues, it stated that it does not consider an additional financial contribution from the EU appropriate, but could envisage a solution based on that adopted for the Community accession to the FAO, i.e. contributing a sum to cover administrative and other expenses of its membership of the IMO that is mutually agreed by the IMO and the EU, as a compromise and fallback position.⁷³

The preferred place to include the arrangements for the EU accession and participation, according to the Commission, for the reason of legal certainty, is in the IMO Convention. Nonetheless, the Commission envisaged the preference of the IMO to include some of them in the Rules of Procedure

⁶⁸ *Ibid.*, 39

⁶⁹ *Ibid.*, 42

⁷⁰ *Ibid.*, 39-40. In particular, according to Article 207.5 TFEU, the procedure requirement under Article 218 TFEU and Title VI of Part Three TFEU.

⁷¹ Commission, (note 64), 40. In particular, Part XVII IMO Convention

⁷² Attachment 2 of the Annex: Negotiating Directives of the Recommendation

⁷³ Commission, (note 64), 42

and did not oppose the latter option.⁷⁴ This latter option is rather a practical approach for at least two reasons. Firstly, the arrangement normally involves not only the rules on membership for the EU or like entities, but also the miscellaneous detailed rules and provisions concerning their participation in the activities of the international organisation. To put them all in the main text of the IMO Convention may occupy a disproportionate part of the Convention and turn the Convention into a bulky document. Secondly, considering the high threshold required for the amendment of the IMO Convention, to amend the Rules of Procedure is relatively easy.⁷⁵ To put the detailed rules in the Rules of Procedure would provide more flexibility for further adjustment of the arrangement. This shall be particularly crucial considering the arrangement is yet to mature. The Commission also envisaged a possible preference of the IMO to include a generic provision referring to the participation of REIOs. In that case, it would suggest to the IMO use of the definition incorporated into the Statute of the FAO.⁷⁶

The need to seek membership in international organisations and to overcome the difficulty traditional intergovernmental organisations face in trying to accommodate the specificity of the EU in order to pursue maximum participation and full membership of the EU has been expressed by the Commission in the 2002 Recommendation and other documents.⁷⁷ However, the Recommendation has not been supported by the Member States,⁷⁸ and no

⁷⁴ *Ibid.*, 42

⁷⁵ For example, Rule 57 RoP of the Assembly (Article 15.b IMO Convention); Rule 53 RoP of the Council (Article 19.a. IMO Convention; Rule 45 RoP of the MSC (Article 30 IMO Convention); Rule 49 RoP of the Legal Committee (Article 35 IMO Convention); Rule 47 RoP of the MEPC (Article 40 IMO Convention) and Rule 49 RoP of the Facilitation Committee all provide that an amendment of the RoP requires only the majority of the Members present and voting, as contrast to Article 66 IMO Convention requires a two-thirds majority vote for amending the IMO Convention

⁷⁶ Commission, (note 64) 42

⁷⁷ Commission, “Developing the international dimension of the Integrated Maritime Policy of the European Union” COM(2009) 536 final, 7

⁷⁸ Veronica Frank, (note 54) 268 (noting that the EC’s membership of the IMO has been included on the agenda of the Transport Council under the item “any other business”, and has been only briefly discussed and was only supported by France)

action has been taken by the Council upon the Recommendation since then.⁷⁹ This result did not imply that the proposed arrangements were significantly incomplete or inappropriate, as these proposed arrangements are largely following the model of the UNCLOS and the other multilateral fora where mixed-participation models are adopted. It more or less reflected the difficulty the EU would firstly face when dealing with the issue of accession by the EU to an international organisation— the reluctance of the Member States to yield their individual representation in an international organisation to the EU, and their fear of the “domino effect”, which might open the door to accession by other international organisations afterwards.⁸⁰ Even if the EU and its Member States can reach a consensus to begin their negotiation for the membership of the EU in the IMO, it is still a long road to persuading the IMO and its Member States to consider that the amendment is necessary and is in their interests. The Commission acknowledged in the Recommendation, even the process of ratifying an IMO Convention itself takes from eight to ten years on average, not to mention the uncertainty of the negotiation and the lengthy internal and external procedures to be followed.⁸¹ It is predictable that it will take several years for accession by the Union to come into effect. Seeking the full membership of the EU in the IMO might remain the ultimate goal of the EU, but a goal that is difficult to realise at least in the near future. It is therefore the established practice and a possible interim arrangement, at least between the EU and its Member States, to enable the EU to coordinate the actions of its Member States in the IMO with its limited status in the IMO.

Based on this understanding, the Commission in the Recommendation also suggested the transitional measures for “formalising the procedure which already functions correctly for Community coordination in the IMO technical committees and subcommittees”⁸², by which the EU and its Member States can seek their coordinated actions in the IMO.

⁷⁹ Jan Wouters and others, (note 37) 48

⁸⁰ Veronica Frank, (note 54) 268

⁸¹ Commission, (note 37) 40

⁸² *Ibid.*, 41

3.5. Transitional measures: Internal arrangement of the coordination mechanism

Since 2005, based on a previous proposal,⁸³ the Commission worked out a draft of internal arrangements for the adoption and expression of the Community's common or coordinated positions in the IMO (Draft IMO Arrangement)⁸⁴. This allows for the preparation of either common or coordinated positions, and the presentation of common submissions on matters of EU competence or interest applied through a coordination process prior to meetings of the IMO.⁸⁵ The draft arrangement is more or less in use despite its informal character.⁸⁶ This Draft Arrangement provides an overview of how the EU participates in the IMO through its Member States by using their internal coordination mechanism.

The framework of the internal arrangement of the EU coordination mechanism is based on an approach of three different positions: Community position, common position of the Community and its Member States ("common position") or coordinated position of the Member States of the Community ("coordinated position"). This three-position approach largely follows the internal allocation of competence between the EU and its Member States.⁸⁷

3.5.1. Community position

⁸³ Commission, "Commission Staff Working Document: Procedural framework for the adoption of Community or common positions for IMO related issues and rules governing their expression in the IMO", SEC(2005) 449

⁸⁴ Annex "Draft: Internal arrangements providing guidance for the adoption and expression of Community, common or coordinated positions in the IMO" to "Procedural framework for the adoption of Community or common positions for IMO related issues and rules governing their expression in the IMO: Presidency suggestion", Council Doc. 11892/05, 6.9.2005

⁸⁵ Commission, (note 77) 7-8

⁸⁶ Jan Wouters and Others, (note 37) 49

⁸⁷ For the detailed illustration and comparison of the arrangement of the coordination procedure in the Table 2

A Community position is a position defined by the Council on the basis of a proposal by the Commission on an issue of exclusive Community competence dealt with in the IMO.⁸⁸ The adoption of a Community position is stipulated in detail in Point 3.1 of the Draft IMO Arrangement, including how the decision should be initiated by the Commission and made by the Council.⁸⁹ It also considered the unique character of the technical meetings of the IMO, and provided a procedure for an expedited endorsement for a Community position made that way.⁹⁰

In cases where the Council is unable to adopt a Community position, it requires the representatives of the Member States and of the Commission to abstain from expressing any position on the matter concerned except where necessary to defend the Community *acquis*. Nevertheless the Member States and the Commission can still, without expressing a position, contribute to the debate with information or factual comments. They will not introduce on their own behalf submissions containing positions on issues of exclusive Community competence. They may however provide information or factual comments after having consulted each other as far as practicable in the course of the coordination process.⁹¹

These choices made in the arrangement when facing a situation when a Community position is unable to be achieved are rather limited. It essentially excludes the EU and its Member States from actively participating in the discussion, forwarding any position, or making any submission. On the surface this arrangement seemed to prioritise the exclusiveness of the EU competence over the best interest of the EU, because it could be argued that even if a Community position cannot be achieved no matter for what reason, if actively participating in the discussion, furthering the position, or making submissions can be in the interest of the EU, those participations should not be restricted in order to advance the best interest of the EU.

⁸⁸ Point 1.1 Draft IMO Arrangement

⁸⁹ Paras 1-2 Point 3.1 Draft IMO Arrangement

⁹⁰ Para 3 Point 3.1 Draft IMO Arrangement

⁹¹ Paras 5-6, Point 3.1 Draft IMO Arrangement

Nonetheless, several considerations may lead to rejecting this more active stance. Firstly, if the position has been thoroughly discussed internally through the coordination procedure, presumably all possible positions have been raised through the process. Being unable to reach a Community position implies that none of them is considered serving the best interest of the EU. To allow any position or submission made outside the scope of the coordination position implies that a position or submission not adopted through the coordination procedure, which does not serve the best interest of the EU, may still later be raised externally. Moreover, to provide the Member States with an opportunity to bring up a proposal that has not been adopted through the procedure may provide the Member States with an incentive not to reach a Community position internally through the coordination procedure so as to preserve themselves the freedom to express their own position externally later in the IMO. Secondly, the fact that the Member States and the EU are unable to reach a Community position does not necessarily mean the discussion or coordination has come to an end. On the contrary, the discussion may continue to develop internally regardless of whether a Community position has been reached at a specific time. To allow the Member States to put forward any of their own positions or submissions externally, even if claiming to act in the interest of the EU, may adversely affect the possibility for the EU to submit its own position through its Member States and get the concerted support of its Member States at a later date.⁹² Under these considerations, the arrangement's limitation on the Member States' activities in cases where no Community position can be reached may superficially look passive, but it is necessary in order to achieve a consistent and coherent EU position in the IMO.

According to the Draft IMO Arrangement, the submission and introduction of the Community position generally rely on the Presidency. The Arrangement provided that the statements would be made under a specific heading, stating the document is submitted by “[the Presidency], [the list of

⁹² See Case C-246/07 *Commission v Sweden* [2010] ECR I-3317, para 94

Member States except the Presidency], and the European Commission”⁹³. In addition, a paragraph mentioning that the Member States have transferred their competence to the European Community on the issue concerned will be included in the text of the submission.⁹⁴ This may help in solving the inconsistency issue of how the position or submission is to be submitted to the IMO as above mentioned. Nonetheless, as neither the European Union nor the European Community is formally recognised in the IMO regime and no arrangement has been made within the IMO regime concerning the effect of the transfer of competence, a statement about “the Member States have transferred their competence to the European Community” does not solve any puzzle that arises from the conferral of competence on the EU from the Member States and there being no membership for the EU. Neither does it clarify the relationship between the European Commission, the nominal institution participating as an observer in the IMO, and the European Union itself within the IMO regime.

When introducing the position, the Presidency will make clear that the Community submission is presented on behalf of the European Community and supported by all EU Member States. Where appropriate and in particular when this has been agreed as a negotiating strategy, Member States and Commission representatives will actively avail themselves of the right to support and/or develop the Community position by using methods including providing additional information material preliminarily submitted to and approved by the Council during the coordination process. In this context the Presidency can request that a Community position is also presented, supported or developed by a representative of another Member State or of the Commission taking into account his/ her specific technical expertise, if agreed during the coordination process.⁹⁵

3.5.2. Common position

⁹³ Para 1 Point 3.2 Draft IMO Arrangement

⁹⁴ Para 2 Point 3.2 Draft IMO Arrangement

⁹⁵ Point 3.3 Draft IMO Arrangement

A common position is a position defined within the Council on an issue of mixed Community and Member States competence dealt with in the IMO framework.⁹⁶ Point 4.1 of the Draft IMO Arrangement provided the procedure for coordinating a common position adopted by the Council by common agreement based on the proposal, usually in the form of a staff working document, from the Commission.⁹⁷

If, after a meeting of the COREPER, the Council is unable to adopt a common position, the representatives of the Member States retain their freedom to express their position on the matter concerned, in as far as it does not conflict with Community *acquis*. They may also act jointly in the IMO in order to achieve the policy objectives of the Community and its Member States, as suggested to be more beneficial by the Arrangement.⁹⁸

Similar flexibility is provided in delivering the position. Point 4.1 provided that Common positions adopted by the Council can either be included in a written submission to the IMO and/or be voiced within the IMO. Member States and the Commission may use any other means to most effectively achieve an acceptable result.⁹⁹

Like the Community position, the common position is generally to be submitted by the Presidency, using a specific form of heading provided by the Arrangement, stating the document is submitted by “[the Presidency] and by [the list of Member States except the Presidency], as well as by the European Commission”. This means that whether a position is a Community position or a Common position cannot be told from the heading of the statement. What is different with the Community position is that the Presidency might also be replaced by another Member State showing a particular interest and/or expertise in the matter concerned, if agreed during the coordination process.¹⁰⁰

⁹⁶ Point 1.2 Draft IMO Arrangement

⁹⁷ Para 1-2, Point 4.1 Draft IMO Arrangement

⁹⁸ Para 4 Point 4.1 Draft IMO Arrangement

⁹⁹ Para 3 Point 4.1 Draft IMO Arrangement

¹⁰⁰ Point 4.2 Draft IMO Arrangement

When the Presidency is introducing the common position, if it is deemed appropriate and has been decided when defining the negotiating strategy, the Presidency will make it clear that the common submission is presented on behalf of the EU Member States. Where appropriate and in particular when this has been agreed as a negotiating strategy, Member States and Commission representatives will actively avail themselves of the right to support and/or develop the common position by using measures including submitting additional material preliminarily submitted to and approved by the Council during the coordination process. In this context the Presidency can request that a common position is also presented, supported or developed by a representative of another Member State or of the Commission taking into account his/ her specific technical expertise, if agreed during the coordination process.¹⁰¹

3.5.3. Coordinated position

A coordinated position is a position defined among Member States of the Community on an issue of exclusive Member States competence dealt with in the IMO framework.¹⁰² Any Member State or the Commission may bring forward an issue of exclusive Member States competence with the view to obtaining Member States' support. Coordinated positions are adopted by common agreement by the Member States meeting within the Council.¹⁰³

As the coordinated position concerns the exclusive competence of the Member States, the involvement of the EU is minimal, and the approach is different from the other two positions—the objective of this position is for a Member State to get other Member States' support for its own position that falls within its own exclusive competence, or to shape a collective position they commonly agree on. Therefore it is very different from the other two positions, where a competence and a position of the EU are involved. This is essentially an intergovernmental approach and the coordination procedure

¹⁰¹ Point 4.3 Draft IMO Arrangement

¹⁰² Point 1.3 Draft IMO Arrangement

¹⁰³ Point 5 Draft IMO Arrangement

rather provides a platform for the Member States to seek support horizontally. The EU's involvement is minimal, any further involvement of the EU may alter the nature of exclusive competence of the Member State, and shall be avoided. This is also the reason that Point 5 emphasised that “[d]ue care should be taken to ensure that positions are flexible enough to allow in the course of the negotiation process the introduction of necessary changes in order to achieve the given objective.”¹⁰⁴

3.5.4. Timetable

The Draft IMO Arrangement also sets the timetable of the coordination process, arranged by timescale approaching the IMO meeting concerned, from: a) preliminary phase: an overview on a yearly basis; b) early warning: after the agenda is published at least 20 weeks before the IMO meeting concerned; c) preparation for a submission: from 10 to 18 weeks prior to the IMO meeting concerned; d) preparation for IMO meetings and definition of Community, common or coordinated positions: preferably at least three weeks before the IMO deadline; e) on the spot coordination: process during the meetings in London.¹⁰⁵ A flow chart of the timetable set by the IMO Draft Arrangement can be seen in Table 3. It should be noted that whilst the Draft IMO Arrangement stated that its definitions of different types of documents, including bulky and non-bulky documents, are connected to a specific instrument within the IMO, namely, the “Guidelines on the organisation and method of work of the Maritime Safety Committee and the Marine Environment Protection and their subsidiary bodies,”¹⁰⁶ it did

¹⁰⁴ Para 2, Point 5 Draft IMO Arrangement

¹⁰⁵ In practice, on the spot meetings are usually held at lunchtime on the starting day of the relevant IMO meeting. See, for example, Communication from the General Secretariat, Council of the European Union, CM 2552/06, Notice of the first EU coordination meeting, (Date: Monday, 17 July 2006; Time : 12.30; Place : International Maritime Organisation (IMO), meeting room 3). See also, Jan Wouters and Others, (note 37) 49

¹⁰⁶ Footnote 9 of the Draft IMO Arrangement, referred to MSC/Circ.1099 - MEPC/Circ.405 dated 2 September 2003 on the Guidelines on the organisation and method of work of the Maritime Safety Committee and the Marine Environment

not explicitly connect the time limits set in the Draft IMO Arrangement with the relevant instruments within the IMO. For instance, in the “Guidelines on the organisation and method of work of the Legal Committee”, it is required that principal documents containing proposals for inclusion of unplanned outputs or documents (including information documents) containing more than six pages of text (bulky documents) should be received by the Secretariat not later than nine weeks before the opening of any session of the Committee.¹⁰⁷ This implies that in spite of the time limits set internally by the Draft IMO Arrangement, the EU and its Member States are also externally required to observe the relevant instruments governing their submissions in different Committees and their subsidiary bodies. As the IMO instruments related to the time limits for submissions and other actions are reviewed from time to time, the fixed time limits set by the Draft IMO Arrangement, which required actions to be taken only before a period of time that connected only to the time of IMO meetings, may lose track of the other time limits set by the IMO instruments. A better way for the internal arrangement to deal with the time limit issue may be to require the EU and its Member States to take action at a certain period of time prior to those time limits set by the IMO instruments instead of setting the fixed time limits for taking actions only in accordance with the time of IMO meetings. The model adopted by Point 2.4 of the Draft IMO Arrangement, which stated that “the Commission will communicate the relevant official Commission documents sufficiently in advance, preferably three weeks before the IMO deadline, to allow for a meeting of the Shipping Working Party, as well as possibly COREPER and Council, within the time limits prescribed by IMO deadlines” should be a preferable option.¹⁰⁸

Protection Committee and their subsidiary bodies, as amended, or any revision thereof. The guidelines have been amended by the MSC-MEPC.1/Circ.4/Rev.2, which is available to the public

¹⁰⁷ Point 6.6. of the Guidelines on the organisation and method of work of the Legal Committee, LEG.1/Circ.7 (11 May 2012)

¹⁰⁸ Point 2.4. Draft IMO Arrangement

3.5.5. How the internal measure affected the practice?

As participating in the IMO as a full member is still a final aim that can hardly be achieved in the near future, to develop an interim arrangement between the EU and the Member States so as to ensure a coordinated action and to enhance the role of the EU within the IMO seem to be a practical option. Nonetheless, even promoting such an internal non-binding interim arrangement seems not to be an easy task. The Draft IMO arrangement has never been formally adopted despite the fact that it is more or less in use.¹⁰⁹ The content of the Draft IMO Arrangement prepared by the Commission covered more details and used wordings of a more binding nature i.e. “shall” in the original draft of “Procedural framework for the adoption of Community or common positions for IMO related issues and rules governing their expression in the IMO”¹¹⁰ in the beginning; but the Draft IMO Arrangement was later reduced to a smaller scale with less binding wordings after several rounds of meetings and discussions in the Shipping Working Party, and revisions.¹¹¹ It was also reiterated in each version of the draft as well as the Presidency suggestion that the internal arrangements constitute an informal guide intended to serve as a practical tool. It was emphasised that the draft arrangement cannot be read as affecting in any way the respective competences of the EU and the Member States, nor can it be prejudice to possible negotiating directives or any other ongoing or future negotiations in other international fora. These more or less reflect the sensibility and reluctance of the Member States to even putting forward such an internal interim arrangement. Furthermore, the internal arrangement, as noted, is not always strictly followed by some EU Member States.¹¹²

¹⁰⁹ Jan Wouters and Others, (note 37) 49

¹¹⁰ Commission, (note 83) 449

¹¹¹ *See*, for example: Council of the EU, “Procedural framework for the adoption of Community or common positions for IMO related issues and rules governing their expression in the IMO: Presidency suggestion” 9676/05 MAR 89 (3.6.2005); 11530/05 MAR 119 (11.8.2005)

¹¹² Jan Wouters and Others, (note 37)

Yet the effectiveness of an interim internal arrangement cannot be under-evaluated. The Member States and the Commission are bound by a duty of co-operation as set out in Article 4.3 of TEU and the relevant case law, particularly Case C-25/94, which endorsed the legal effect of the internal FAO Arrangements,¹¹³ Case C-45/07 *Commission v Greece* and Case C-246/07 *Commission v. Sweden*,¹¹⁴ which elaborated and endorsed a strong version of the duty of sincere co-operation that reinforced the effectiveness of the internal interim arrangement— regardless of its informality. These arrangements, as well as any agreed submissions and positions developed, should be interpreted and applied in good faith so as to ensure that the obligations under the Treaty are met.

Yet from a plain reading of the Draft IMO Arrangement, something seemed to be missing— the Draft IMO Arrangement did not mention voting in the IMO. If we compare the internal arrangement to the coordination of the EU and its Member States in the FAO, which we will discuss later in Chapter 6, this omission is rather vital. One possible explanation for this omission is that, contrary to that in the FAO, the EU does not possess a formal membership and voting right in the IMO, therefore there is no room for the EU to coordinate the exercise of its voting power with its Member States. Nevertheless, it is exactly the same reason that the exercise of the Member States’ voting rights are necessary to be considered within the coordination procedure, as the EU’s position on matters that fall within its exclusive competence can only be channelled through its Member States, should a vote for decision making be involved. If the Member States are required to observe the coordination procedure and the positions produced out of it, but are free to exercise their own voting rights, the effort to coordinate inevitably would be in vain. Whilst an amendment of the internal arrangement should be the primary answer to this issue, a possible way out under the current draft arrangement is to interpret that a “position” referred

¹¹³ See Chapter 3 Section 2; Case C-25/94 *Commission v Council* [1996] ECR I-1469

¹¹⁴ Case C-45/07 *Commission* [2009] ECR I-701 and Case C-246/07 (note 92). See Chapter 3 Section 2.1

to in the arrangement includes the position regarding voting on a specific issue, particularly when the matter is within the exclusive competence of the EU. Hence a direction on the Member States' exercise of their voting rights concerning a specific issue can be included in the position formed through the coordination procedure. This way the shortcomings of the EU's observer status without a voting right could be minimised before the formal membership for the EU is achieved.

As mentioned in the previous chapter, the EU has introduced the General Arrangement to internally arrange the delivery of statements in multilateral organisations,¹¹⁵ however, the General Arrangement will not largely alter the arrangements set by the Draft Arrangement, nor will it clarify the shortcomings identified above, for many reasons. Firstly, the General Arrangement is very limited in scope, it only touched upon the delivery of EU statements in multilateral organisations, it did not include the arrangements for coordinating other activities, particularly the exercise of voting rights. Secondly, the General Arrangement reinforced arrangements agreed by the Member States on a case-by-case approach,¹¹⁶ under this approach the IMO Draft Arrangement, as the internal arrangements largely followed by the EU and its Member States, is likely to be upheld instead overridden. Thirdly, the arrangements set by the General Arrangements are not fully applicable to the situation of the EU's participation in the decision-making of the IMO, not only because the EU has no formal membership in the IMO, but also because the observer status is under the name of the European Commission Therefore, for example, requiring representation to be made behind an EU nameplate or the statement to be made under the heading of "on behalf of the European Union" will not be applicable for the EU's participation in the IMO.

3.6. The way forward

¹¹⁵ Chapter 3 Section 2.3

¹¹⁶ Point 3 General Arrangements

As indicated in the Commission's "Strategic goals and recommendations for the EU's maritime policy until 2018" (Strategy 2018),¹¹⁷ which aimed to present the main strategic goals for the European maritime transport system up to 2018 and to identify key areas for action where action by the EU will strengthen the competitiveness of the sector while enhancing its environmental performance,¹¹⁸ working together on the international scene is still one of the main strategic goals to be achieved until 2018. It stated the importance of a concerted action at the European level in many multilateral fora, and reaffirmed the key strategies to move forward in the coming years, including "increasing the effectiveness of EU involvement in the IMO and reinforcing international co-operation with EU trading and shipping partners, promoting a shared maritime safety culture and common efforts"¹¹⁹ and "enhancing the recognition and visibility of the EU within the IMO by formalising the EU coordination mechanism and granting formal observer status, if not full membership, to the EU within this organisation"¹²⁰. The steps to move forward seemed to remain largely unchanged after years of efforts of formalising the coordination mechanism and seeking a full membership for the EU in the IMO. It seemed that the EU even drew one step backward by indicating that a formal observer status of the IMO to the EU is also an acceptable alternative.¹²¹ Having being a non-member with limited status in the IMO for a long time and facing the internal and external difficulty of putting forward the status or formalising the coordination mechanism, the EU seemed to struggle with a situation that has not largely changed or been solved. Nonetheless, the EU did not limit itself in the IMO context to achieving all the objectives of the EU maritime safety and security policy. As stated in Strategy 2018, "the Commission and the Member States should strive for and cooperate towards achieving all the objectives of the EU

¹¹⁷ Commission, "Strategic goals and recommendations for the EU's maritime transport policy until 2018", COM(2009) 8 final

¹¹⁸ Ibid., 2

¹¹⁹ Ibid., 7

¹²⁰ Ibid., 10

¹²¹ Ibid.

maritime safety and security policies by means of international instruments agreed through the IMO. If IMO negotiations should fail, however, then the EU should take the lead in implementing measures on matters that are of particular importance for the EU, as a first step, pending wider international agreement and taking the international competitive environment into consideration.”¹²² This multi-task approach and the attempt to become a frontrunner of the law-making of the international governance of maritime affairs is yet to succeed.¹²³

The way to move forward for the EU to participate in the affairs governed by the IMO may have other alternatives. As discussed in the earlier section, being a Party of certain IMO related regulatory treaties, it can participate formally in the relevant law-making process of the IMO.¹²⁴ The flexibility offered by the IMO, being one of the IMO’s uniquenesses and advantages, has turned the IMO into a forum provider that accommodates actors other than the IMO State Members to participate in the shaping of key rules governing maritime affairs. If a general membership of the IMO for the EU is unavailable in the near future, to seek to become Party to these IMO related regulatory treaties can further materialise the EU’s role in the law-making process of the IMO and bridge the gap between the EU’s right to participate in law-making and the EU’s obligations generated from these regulatory treaties. To compare with granting IMO member status to the EU, this alternative may mitigate the EU Member States’ or third States’ concerns about the implications of sovereignty they are reluctant to support. The developed theory and practice of multilateral mixed treaties, which allow both the EU and its Member States to become parties to the same treaty and clarifies the related issues concerning the EU’s participation among parties, may also provide fine reference for the EU, its Member States, and third

¹²² Ibid.

¹²³ Frank Hoffmeister, “Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organisations and Treaty Bodies”, 44 *CMLR*(2007), 41-68 (concluding that the EU is no longer a pure outsider nor has it become a frontrunner in the multilateral arena)

¹²⁴ (note 22)

States to accommodate the EU to become Party to an IMO related regulatory treaty.

This approach is not ungrounded under the current IMO regime. Article 2(b) of the IMO Convention provided that one of the key task for it to achieve its purposes is to “[p]rovide for the drafting of conventions, agreements, or other suitable instruments, and recommend these to Governments and to *intergovernmental organisations*, and convene such conferences as may be necessary”¹²⁵. (emphasis added) It provided the legal basis for intergovernmental organisations to become parties in the Conventions, agreements, or other instruments as well as to participate in the conferences facilitating those instruments. Arguably whether the EU could resort to this provision to seek its formal participation in these instruments and occasions is not clear for two reasons, Firstly, whether the EU could still be qualified as an intergovernmental organisation is doubtful, considering its supranational character. Secondly, unlike the FAO Constitution, which provided in its Article XIV 3.(b) that Conventions, agreements, and supplementary Conventions and agreements under the FAO shall contain an REIO clause so as to allow REIOs to become parties thereto,¹²⁶ no similar provision is available in the IMO Convention. Nevertheless, the practice suggested that the EU is indeed treated as one intergovernmental organisation under the IMO Convention. Article 61 IMO Convention provided that “[the IMO] may, on matters within its scope, co-operate with other intergovernmental organisations which are not specialised agencies of the United Nations, but whose interests and activities are related to the purposes of the Organisation”¹²⁷. The observer status of the European Commission in the IMO was precisely established on the co-operation

¹²⁵ Article 2.(b) IMO Convention

¹²⁶ FAO, Basic Texts of the Food and Agriculture Organisation of the United Nations, Volume 1, (2013 edn, FAO 2013) 11-12

¹²⁷ Article 61 IMO Convention

agreement signed based on this provision.¹²⁸ It is therefore self-contradictory to refuse the participation of the EU in these Conventions, agreements, instruments, or the conferences shaping them by arguing that it is not an intergovernmental organisation.

On the other hand, to participate “in” the IMO is not the only option for the EU to engage with international organisations. Article 220.1 TFEU provides “The Union shall establish *all appropriate forms of cooperation with* the organs of the United Nations and its specialised agencies[...].” (emphasis added). The EU may conclude an agreement with an international organisation¹²⁹, or establish an association involving reciprocal rights and obligations, common action and special procedures.¹³⁰ To develop an appropriate relation to work *with* the IMO, a UN specialised agency, is envisioned by the EU Treaty and can be complementary to seeking membership in order to participate *in* the IMO. An analogy can be made with the ICAO, the UN specialised agency governing air transport. The ICAO’s role in international law-making and the techniques adopted by its related treaties, as well as the status of the EU in the ICAO, are similar to that of the IMO. In the same Recommendation made by the Commission to recommend the Council to authorise opening and conducting negotiations for the EU’s accession in the IMO, the Commission did adopt a similar approach to seek to participate in the ICAO with a formal membership.¹³¹ However, similarly, the efforts of the EU to seek a formal membership of the ICAO have not been achieved. Alternatively, after almost ten years of effort, the Commission took an alternative and recently successfully signed a Memorandum of Cooperation with the ICAO to provide a framework for enhanced cooperation with the ICAO and the basis for stronger EU involvement with it (Memorandum of cooperation between the European Union and the

¹²⁸ See Section 3.2 this Chapter. See also

<http://www.imo.org/About/Membership/Pages/IGOsWithObserverStatus.aspx>
<last access: 19.05.2013>

¹²⁹ Article 216.1 TFEU

¹³⁰ Article 217 TFEU

¹³¹ Commission, (note 37)

International Civil Aviation Organisation providing a framework for enhanced cooperation, MoC-ICAO).¹³² This provides an ideal and practical model path to be followed by the EU to enhance its engagement with the IMO. The MoC-ICAO advanced the role of the EU in many ways: 1) the MoC-ICAO offered various forms of co-operation, including: (a) establish mechanisms for consultation, coordination and co-operation and exchange of information; (b) facilitate the harmonisation of performance requirements and interoperability of new technologies and systems; (c) coordinate respective audit and inspection programmes and results and technical assistance activities; (d) exchange information on compliance with ICAO Standards; (e) establish arrangements for the EU to offer expertise and resources to ICAO; (f) allow participation by one Party in the activities of the other Party relating to audit and inspection programmes and training programmes, as appropriate; and (g) share electronic information, data and official publications and provide mutual access to databases and strengthen links between them.¹³³ 2) It set up a Joint Committee to be responsible for the functioning of the co-operation.¹³⁴ 3) It provided the procedure for dispute resolution should a difference arising from the co-operation under the MoC-ICAO exist between the ICAO and EU.¹³⁵ These arrangements strengthened the EU's position in participating in the activities concerning the ICAO, despite its non-member status. If this approach of co-operation can be made available for the co-operation between the EU and the IMO, accompanied by close internal coordination between the EU and its Member States governing the activities within the IMO, the EU may mitigate the shortcomings arising

¹³² Press Release of the Commission, "Commission signs Memorandum of Cooperation with the International Civil Aviation Organisation", IP/11/540 (Brussels, 4 May 2011); *Memorandum of cooperation between the European Union and the International Civil Aviation Organisation providing a framework for enhanced cooperation*, OJ L 232/2 (9.9.2011)

¹³³ Article 4 MoC-ICAO. Article 5 MoC-ICAO further specified the activities that both Parties should engage in so as to facilitate the co-operation.

¹³⁴ Article 7 MoC-ICAO

¹³⁵ Article 8 MoC-ICAO

from its lack of membership in the IMO, or may even benefit from the flexibility of the “participate-in or cooperate-with” forms available to it.

4. Concluding remarks

The case of the EU’s participation in the IMO showed that to allow the EU to become a full member in an international organisation faces difficulties both internally and externally. Internally, the EU Member States are reluctant to support a joint membership in an international organisation. A Recommendation in order to authorise the Commission to open and conduct negotiations with an international organisation on the conditions and arrangements for the accession by the EU in that international organisation can be pending for years. Externally, it normally requires a lengthy procedure and a high voting threshold for an amendment of the relevant rules of an international organisation to be adopted. The ratification of an amendment by the Member States of the international organisation may also be time-consuming. For a case like the IMO, although the international organisation plays a crucial role in the governance of the international maritime shipping and related issues, with the reluctance of the EU Member States as well as lack of strong interests of the international organisation and its Member States to promote the EU’s participation as a full member, such an amendment could hardly be realised in the near future.

Facing this situation, developing a coordination mechanism that allows the EU and its Member States to adopt different positions towards matters of different natures of competence through different procedures may function as an alternative or interim measure, providing a practical solution to the bottleneck. With the duty of sincere co-operation under the EU legal order underlying the coordination between the EU and its Member States, a coordination mechanism can possibly still be legally binding and function effectively, even though it is claimed to be an internal and informal one. It is even argued that a reinforced coordination mechanism seems to be the most

realistic way for the EU to improve the effectiveness of its involvement in the IMO, even more preferable than granting a full membership to the EU.¹³⁶

The effectiveness of a coordination mechanism further poses a dilemma concerning advancing the status of the EU in the international organisation. Aiming to obtain full membership of an international organisation for the EU, a coordination mechanism has emerged and developed as an interim arrangement so as to allow the EU to effectively exercise its external competence through its Member States amid its limited status in the international organisation. However, if the coordination mechanism keeps developing and is generally considered effective enough, or even considered to be preferable to participation as a full member, the incentive for the EU Member States, the international organisation, and third States to further amend the existing rules to allow the EU to become a formal member of the international organisation could hardly increase. This further hampers the possibility of the EU becoming of a formal member in the international organisation.

Possible incentives might come from the need for legal certainty and accountability or responsibility. The interim coordination mechanism has two characteristics: internal and informal. Unlike the arrangements made by the UNCLOS or the FAO, discussed in the other chapters,¹³⁷ which provided clearer guidance, despite still under criticism, on the key issues,¹³⁸ an internal arrangement between the EU and its Member States falls short of providing guidance on these important issues concerning the EU's participation in international organisations. In fact, such an internal arrangement provides almost nothing concerning these issues. On the other hand, despite the duty of co-operation and the case law developed by the CJEU underlying the coordination mechanism which may compensate for the informal character of the internal arrangement, less legal certainty can be maintained under this

¹³⁶ Liu Nengye and Frank Maes, (note 41), 581

¹³⁷ See Chapter 4 Section 4 and Chapter 6 Section 4.1

¹³⁸ As being summarised by President Koh. See Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn (eds), *Volume V of United Nations Convention on the Law of the Sea 1982: A Commentary* (Brill 1989) 189, see also Chapter 4 Section 3.2

approach as the arrangement is still only followed on a case-by-case basis and subject to possible ex post checks from the CJEU afterwards. Furthermore, the binding effect only exists between the EU and its Member States, neither can the arrangement be binding on the international organisation or third States, nor can the external issues involving the international organisation and third States result from the participation of the EU in the international organisation be solved through this approach. Nonetheless, if the EU and its Member States keep being “good guys” or loyal rule followers instead of rule-breakers in affairs governed by the international organisation, there will be no pressing interest or incentive for the international organisation and its Member States to seek an amendment to include the EU to participate as a formal member in the international organisation so as to solve possible but un-happened issues.

Whilst a formal membership for the EU in the IMO is not to be achieved in the near future, there are examples showing that potential alternatives can be made to complement the effort of seeking a formal membership for the EU in an international organisation. These alternatives are at the same time likely to be more practical and worth adopting. For instance, the EU shall make use of the flexible participation provided by the IMO and seek to become Contracting Parties of the IMO-related regulatory treaties. It also shall consider following the model used to enhance its engagement with the ICAO, an international organisation similar to the IMO in many ways, to sign a Memorandum with the IMO to establish a clearer framework for the EU’s engagement with the IMO.

The mixed-participation model adopted by the UNCLOS did not lead the IMO to adopt a similar model to accommodate the EU’s participation in it as a formal and full member. Nevertheless, it did indeed lead the EU to be able to participate in another UN specialised agency— the FAO— as a formal member in a mix-participation model with its Member States. This will be discussed in the next chapter.

Chapter 6

Participation in an international organisation with the mixed-membership: the case of the EU in the Food and Agriculture Organisation (FAO)

1. Introduction

Unlike the case of the UNCLOS discussed in Chapter 4, where the EU participated in the negotiation for its participation for the multilateral fora from the very early stage of the shaping of the Convention, the EU's participation in the Food and Agriculture Organisation of the United Nations (FAO) would show how an existing international organisation founded on a State-centric basis accommodated the participation of the EU through tailoring and amending the institutional design. As the default setting for participation of multilateral relations in the international community largely remains State-centric, the participation of the EU in the FAO, a specialised agency of the UN, is rather exceptional. It is the only international organisation under the UN system concerning maritime affairs where the EU enjoys a formal membership together with its Member States. Therefore it provides a good comparator with other international organisations where the EU participates in with different forms. The main purpose of this chapter is to study how the EU achieves its aim of participating in the FAO as a formal member, and the external and internal arrangements accommodating the EU's participation with its Member States in the organisation. It will also identify the advantages and disadvantages of this model, providing this thesis the basis for comparison and analysis in other chapters concerning different models of the EU's participation in different multilateral fora.

This chapter will begin with a brief introduction, including the objectives, the structure, and the functions of the FAO, and will continue to see its role in the governance of maritime affairs in the global and multilateral context. The discussion of the development of the participation

of the EU in the FAO i.e. the process beginning from a non-member to an observer then to becoming a formal member will follow. This chapter will then concentrate on the relations between the EU and the FAO, nonetheless, as the main objective of this thesis concentrates on the EU in exercising its State-like power, and to compare it with that of a State Member within the international organisation, it will focus on the EU's participation in the decision-making of the FAO. The collaboration, co-operation, or partnership approach established between the two organisations, which is based on the EU's inter-organisational relations with the FAO rather than the intra-organisational relations, will be only briefly touched on in the discussion when necessary.¹ Based on the understanding of the relative information, this chapter will then identify the shortcomings shown from the case of the EU's participation in the FAO before moving the research to the participation of the EU in selected RFMOs.

2. The role of FAO in the governance of international maritime affairs

2.1. The FAO: an overview

The FAO, established in 1945 on the Constitution of the Food and Agriculture Organisation of the United Nations (FAO Constitution), is a specialised agency under the United Nations aiming to promote common welfare by raising levels of nutrition and standards of living of the peoples under their respective jurisdictions; to secure improvements in the efficiency of the production and distribution of all food and agricultural products; to better the condition of rural populations; and thus contribute to an expanding world economy and ensure humanity's freedom from hunger.² In

¹ FAO Resolution No. 69/59, Guiding lines regarding relationship between FAO and intergovernmental organisations, in FAO, *Basic Texts of the Food and Agriculture Organisation of the United Nations*, Volume 2, (2013 edn, FAO 2013) 161

² Preamble of the FAO Constitution, in FAO, *Basic Texts of the Food and Agriculture Organisation of the United Nations*, Volume 1, (2013 edn, FAO 2013) 3

order to fulfil the objectives of the FAO, it functions to collect, analyse, interpret and disseminate information relating to nutrition, food and agriculture.³ Even though nominally it is an organisation of “food” and “agriculture”, the term "agriculture" and its derivatives include fisheries, marine products, forestry and primary forestry products in the FAO Constitution.⁴ It promotes and recommends national and international action with respect to a wide range of matters in the field of food and agriculture.⁵ It also furnishes technical assistance requested by governments; to organise, in co-operation with the governments concerned, such missions as may be needed to assist them to fulfil the obligation arising from their acceptance of the recommendations of the UN Conference on Food and Agriculture and of this Constitution; and generally to take all necessary and appropriate action to implement the purposes of the Organisation as set forth in the Preamble.⁶

The Membership of the FAO is stipulated in Article II of the FAO Constitution. Initially, the FAO Constitution only opened its Membership to a State and Associate Membership to a territory or a group of territories that meets certain criteria. The Member Nations are distinguished between original members and additional members by the FAO Constitution, as the former includes the forty-five States that were in the Interim Commission listed in Annex I of the FAO Constitution while the latter are those who joined in subsequent years by admission to the Conference of the FAO through the due procedure⁷. An amendment to expand the Membership to a regional economic integration organisation was later adopted in order to allow the EU to participate in the FAO as a formal member, which will be later discussed in detail. As to the date of writing, the FAO consists of 192

³ Article I.1 FAO Constitution

⁴ Article I.1 FAO Constitution

⁵ Article I.2 FAO Constitution

⁶ Article I.3 FAO Constitution

⁷ Article II FAO Constitution

Member Nations, two Associate Members and one Member Organisation, the European Union.⁸

The major organs of the FAO include the Conference, the Council, and the Director-General and the Secretariat. The Conference is the highest governing body composed of delegates of all Member Nations and Associated Members. Associate Members have the right to participate in the deliberations of the Conference but do not hold office or have the right to vote.⁹ The Conference meets once every two years in regular session and may meet in special session on certain occasions.¹⁰ It determines the policy and approves the budget of the Organisation and exercises the other powers conferred upon it by the FAO Constitution. The Conference adopts General Rules and Financial Regulations for the FAO. It makes recommendations to Member Nations by a two-thirds majority of the votes cast and to Associate Members concerning questions relating to food and agriculture, for consideration by them with a view to implementation by national action. It may make recommendations to any international organisation regarding any matter pertaining to the purpose of the FAO. It may review any decision taken by the Council or by any commission or committee of the Conference or Council, or by any subsidiary body of such commissions or committees. The Conference may also establish Regional Conferences and adopt rules governing the status, functions and reporting procedures of the Regional Conferences.¹¹

The Council of the FAO consists of 49 Member Nations elected by the Conference.¹² Each Member of the Council has one representative and one vote. Each Member of the Council may appoint alternates, associates and advisers, who may not vote in its capacity, to be its representative under the

⁸ <http://www.fao.org/countryprofiles/overview/en/><Last access: 11.09.2013>

⁹ Article III.1 FAO Constitution

¹⁰ Article III.6 FAO Constitution

¹¹ Article IV FAO Constitution

¹² Article V.1 FAO Constitution

conditions it determines. The Chairperson of the Council is appointed by the Conference.¹³

The Council exercises the power the Conference delegates, as well as the powers specified in the FAO Constitution itself.¹⁴ The decisions of the Council are taken by the majority of the votes cast unless otherwise provided.¹⁵ In performing its functions, the Council is assisted by a Programme Committee, a Finance Committee, and a Committee on Constitutional and Legal Matters, which shall report to the Council; and by a Committee on Commodity Problems, a Committee on Fisheries, a Committee on Forestry, and a Committee on Agriculture, which shall report to the Council on programme and budget matters and to the Conference on policy and regulatory matters.¹⁶

Among the Committees, the Committee on Fisheries (COFI) of the Fisheries and Aquaculture Department of the FAO is the most important one concerning maritime affairs, mainly relating to fisheries. The COFI is open to all Member Nations of the Organisation and is composed of those Member Nations which notify the Director-General in writing of their desire to become Members of the Committee and of their intention to participate in the work of the Committee.¹⁷ COFI attendance is also open to non-Members eligible to be observers of the Organisation.¹⁸ Representatives of the UN, UN bodies and specialised agencies, regional fishery bodies, international and international non-governmental organisations participate in the debate, but without the right to vote.¹⁹ The functions of the COFI include: a) to review the programmes of work of the Organisation in the field of fisheries and their implementation; b) to conduct periodic general reviews of fishery problems of an international character and appraise such problems and their possible

¹³ Article V.2 FAO Constitution

¹⁴ Article V.3 FAO Constitution

¹⁵ Article V.5 FAO Constitution

¹⁶ Article V.6 FAO Constitution

¹⁷ Rule XXX.1 General Rules of the Organisation (FAO General Rules), in FAO, (note 2) 51

¹⁸ Rule III RoP of the Committee on Fisheries, in FAO, (note 2) 110

¹⁹ Rule XVII.1, 2, and 3 FAO General Rules

solutions with a view to concerted action by nations, by the FAO and by other intergovernmental bodies; c) similarly to review specific matters relating to fisheries referred to the Committee by the Council or the Director-General, or placed by the Committee on its agenda at the request of a Member Nation in accordance with the Rules of Procedure of the Committee, and make recommendations as may be appropriate; d) to consider the desirability of preparing and submitting to Member Nations an international Convention under Article XIV of the Constitution to ensure effective international co-operation and consultation in fisheries on a world scale; e) to report to the Council or tender advice to the Director-General, as appropriate, on matters considered by the Committee.²⁰ The recommendations adopted by the Committee which affect the programme or finances of the Organisation are reported to the Council with the comments of the appropriate subsidiary committees of the Council. The reports of the Committee should, as in the case of certain other committees established under Article V of the Constitution, also be placed before the Conference.²¹ The COFI may establish sub-committees on certain specific issues,²² for example, the COFI Sub-Committee on Trade and COFI Sub-Committee on Aquaculture.²³ Based on the composition and its mandate, the COFI provides a global forum where major international fisheries and aquaculture problems and issues are examined. Its recommendations are addressed to not only governments, but also regional fishery bodies, NGOs, fishworkers, the FAO and the international community. The COFI has also been used as a forum in which global agreements and non-binding instruments were negotiated.²⁴ Before grappling the EU's relation with the FAO concerning the governance of maritime affairs, the role of the FAO in the making of the law of the sea can be further illustrated by the following.

²⁰ Rule XXX.6 FAO General Rules

²¹ Rule XXX.7 FAO General Rules

²² Rule XXX.10 FAO General Rules

²³ <http://www.fao.org/fishery/about/cofi/en> <Last access: 30.09.2011>

²⁴ James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 206

2.2. The FAO and the making of the law of the sea

At least 51 occasions where the “competent or relevant international organisations” under the 1982 UNCLOS refer to the FAO, according to the Office of Legal Affairs of the Division for Ocean Affairs and the Law of the Sea of the United Nations, while only one of them – Article 3(e) of Annex VIII (to be consulted during the constitution of special arbitral tribunal) – expressly names the FAO.²⁵ The articles referring to the FAO are related to a wide range of issues,²⁶ however, these articles referring to the FAO are mostly about the function of facilitating the development of research and collecting data as well as providing a forum to collect and exchange relevant information or data. They do not contain the most remarkable mechanism that enables a competent international organisation to establish generally accepted international rules – a more stringent version of the rule of reference - which enables the IMO to play the important role of law-making in maritime affairs.²⁷ The rule of reference related to the making of international fisheries law and the FAO is rather weaker, it only requests the States to, for example, “take into account” any generally “recommended” international “minimum” standards.²⁸ On the other hand, as the mandates of the COFI, stipulated in the Rules of Procedure of the Fisheries Committee,

²⁵ Division of Ocean Affairs and the Law of the Sea, UN, *Bulletin* 31 (1996), 81-95

²⁶ Including, for example, to cooperate and to exchange fisheries data and information for the conservation of the living resources in the Exclusive Economic Zone and the High Seas (Article 61, Article 119 UNCLOS); duty of States to cooperate through, to notify, to report to the FAO respectively in order to protect and preserve the marine environment (Articles 197-206 and 223 UNCLOS); to conduct and to promote and facilitate the development and conduct of marine scientific research, and the relevant rights, obligations, responsibilities and liabilities concerning the conduct of research (Article 238, 239, 243, 244, 246-249, 251-254, 256, 257, 262, 263, 265 UNCLOS); to develop and transfer marine technology (Article 266, 268-272, 275, 276, 278 UNCLOS)etc.

²⁷ See Chapter 5 Section 2.2

²⁸ Article 119.1.(a) UNCLOS. For the discussion of the mechanism of rule of reference concerning fisheries instruments in the UNCLOS and the arguably stronger provision of the rule of reference in the Fish Stock Agreement see James Harrison, (note 24) 224-226

show, the COFI functions as a global international forum to assess a wide range of issues relating to fisheries and aquaculture, however, the COFI has no power of decision-making but reports to the Council or the Conference to take appropriate action when necessary. Despite the organs of the FAO being capable of adopting decisions and resolutions on particular subjects, the FAO is not a legislative body and it cannot adopt decisions that are ipso facto binding on FAO Members.²⁹ According to Article IV of the FAO Constitution, the Conference may make “recommendations” to Member Nations and Associate Members concerning questions relating to food and agriculture, “for consideration by them with a view to implementation by national action”³⁰. The Conference may make “recommendations” to any international organisation regarding any matter pertaining to the purpose of the Organisation. In a short conclusion, the FAO’s function is mostly advisory, recommendatory then regulatory.

While the recommendations are expressly made non-binding, the FAO’s influence in the law-making of the law of the sea is nonetheless broader than recommendation-making. Article XIV of the FAO Constitution provides the basis for the FAO functions in its role in treaty-making. The Conference may approve and submit to Members, Conventions and agreements concerning questions relating to food and agriculture. The Council may approve and submit to Members: a) agreements concerning questions relating to food and agriculture which are of particular interest to Member Nations of geographical areas specified in such agreements and are designed to apply only to such areas; b) supplementary Conventions or agreements designed to implement any Convention or agreement which has come into force under Article XIV.1 or 2.(a).³¹ The drafting of these Conventions, agreements, and supplementary Conventions and agreements is prepared and assisted through the consultation of experts in technical meetings or conferences, comprising Member Nations which have assisted in

²⁹ James Harrison, (note 24) 207

³⁰ Article IV.3 FAO Constitution

³¹ Article XIV.1 and 2 FAO Constitution

drafting the Convention or agreement and have suggested that it be submitted to the Member Nations concerned for acceptance.³² Proper consultation with governments and adequate technical preparations prior to consideration by the Conference or the Council of proposed Conventions, agreements, supplementary Conventions and agreements and the due procedure to be followed are further laid down by the Conference in the FAO General Rules.³³

In order to ensure a real contribution to the achievement of its objectives through a general acceptance, these Conventions, agreements, and supplementary Conventions and agreements are required to contain provisions so as to allow not only the Members of the FAO, but also non-Member States which are members of the United Nations, any of its specialised agencies or the International Atomic Energy Agency, and REIOs meeting certain criteria, to become parties of such Conventions, agreements, and supplementary Conventions and agreements.³⁴ The Conventions, agreements, supplementary Conventions or agreements approved by the Conference or Council for submission to Member Nations are neither binding nor come into force directly for the Members but for each Contracting Party as the Convention, agreement, supplementary Convention or agreement prescribe³⁵. This is significantly different from the extended effect an IMO regulatory agreement may have based on the rule of reference of the UNCLOS.³⁶

Important treaties and instruments concerning fisheries have been adopted by the FAO,³⁷ for example, the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,³⁸ the 1995 Code of Conduct on Responsible Fisheries and the 2009 Agreement on Port State Measures to Prevent, Deter

³² Article XIV.3 FAO Constitution

³³ Rule XXI FAO General Rules

³⁴ Article XIV.3.(b) FAO Constitution

³⁵ Article XIV.4 FAO Constitution

³⁶ See Chapter 5 Section 2.2

³⁷ James Harrison, (note 24), 208-224

³⁸ 2221 UNTS 91 (adopted 24 November 1993, entered into force 24 April 2003)

and Eliminate Illegal, Unreported and Unregulated Fishing.³⁹ The EU, with its competence in maritime affairs, especially its competence on fisheries, inevitably has to engage with the FAO. Before we further discuss the EU's participation in the FAO, a brief picture of the competence on the fisheries between the EU and its Member States needed to be discussed.

3. The governance of fisheries in the EU

Fisheries at the EU level are governed by the Common Fisheries Policy (CFP), which is stipulated together with the Common Agriculture Policy in Title III of the TFEU. In 2002, the Council adopted a Regulation on the conservation and sustainable exploitation of fishery resources under the Common Fisheries Policy to lay down basic rules concerning the Common Fisheries Policy and adjusted and repealed the Regulation that established the Community system for fisheries and aquaculture.⁴¹ Article 1.1 of the Regulation states that the CFP covers conservation, management and exploitation of living aquatic resources, aquaculture, and the processing and marketing of fishery and aquaculture products where such activities are practiced on the territory of Member States or in Community waters or by Community fishing vessels or, without prejudice to the primary responsibility of the flag State, nationals of Member States. The conservation of marine biological resources under the CFP, according to Article 3.1.(d) TFEU, is expressly within the exclusive competence of the EU, while fisheries excluding the conservation of marine biological resources is stipulated as a shared competence between the EU and its Member States.

Nonetheless, the nature of the competence i.e. whether exclusive or shared concerning the CFP is still somehow unclear and inconsistent. This is not only because the scope of the “conservation of marine biological resource”

³⁹ [2011] OJ L 191/3 (adopted 22 November 2009, pending)

⁴¹ Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture [1992] OJ L389/1

itself provides some flexibility for different interpretations,⁴² but also because of the pre-emptive nature of the shared competence designed by EU treaty law. The uncertainty also comes from the implied external competence developed by the CJEU case law and endorsed by the Lisbon Treaty, as analysed in the earlier chapter.⁴³ The external competence may still be exclusive even though the EU has not internally exercised it, as long as the conclusion of an international agreement is “provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.”⁴⁴

As the common rules on fisheries have been extensively adopted by the EU, it can be argued that the EU’s treaty-making competence in relation to fisheries is exclusive in most of the areas. However, the distinction of the division of competence between the EU and its Member States on their external activities concerning fisheries is still unclear. As summarised and analysed by Robin Churchill and Daniel Owen, the model of mixed participation as well as the practice of the Declaration of Competence provided by the EU and its Member States to many multilateral fisheries organisations or multilateral agreements suggest that the external competence concerning fisheries are not always considered by the EU and its Member States as an exclusive competence of the EU.⁴⁵ Indeed, the uncertain and dynamic development of the division and the nature of the competence between the EU and its Member States result in difficulty in providing clear and consistent details of the division and the nature of the competence either internally or externally. The content of the Declaration of Competence provided by the EU and its Member States toward respective multilateral fora, which is supposed to provide an up-to-date list of the competence allocated

⁴² For a discussion on the possible different interpretations of the scope of “the conservation of marine biological resources under the common fisheries policy” and the uncertainty it leaves, see Robin Churchill and Daniel Owen, *The EC Common Fisheries Policy* (OUP 2010) 130, 312

⁴³ See Chapter 2 Section 2

⁴⁴ Article 3.2 TFEU

⁴⁵ Robin Churchill and Daniel Owen, (note 42) 301, 306

between the EU and its Member States, might have evidential value in this regard. Nonetheless, to use the Declaration of Competence to prove the allocation of the competence may also become a tautology. The content and the language used in the Declaration of Competence are often similar to that used in the EU Treaties and are not indeed updated as frequently as required, further lessening the evidential value of using the Declaration of Competence as a method to clarify the allocation of the competence in areas concerning fisheries.⁴⁶

Even if the competence issues of the fisheries in the EU may be clarified, in cases like the EU's participation in the FAO, the challenge remains. International organisations, especially a global one like the FAO, often cover issues on more than a single policy area delimited within the EU. In the case of the FAO, the activity covers not only fisheries. Even if the competence of the fisheries falls fully in the exclusive competence of the EU, the power of the EU in the fields of activity of the FAO concerning other areas, for example, commercial policy, agricultural policy, policy on research and technological development, environmental policy, development policy,⁴⁷ are different in their natures of competence. For the exclusive competence of the EU in some area, the EU demands a formal membership to reflect its competence and to fully exercise its power in the international forum to remedy the insufficiency of a mere observer status. Nonetheless, to grant the EU a formal and exclusive membership, as other Member Nations enjoy, to reflect the exclusive competence it enjoys in the EU context can at the same time cause problems when a concerned issue falls within the shared or Member States' exclusive competence. The path of the EU's participation in the FAO reflected, and to a certain degree responded to, this dilemma.

4. The participation of the EU in the FAO

⁴⁶ See Chapter 4 Section 5

⁴⁷ Commission, "Proposal for a Council Decision on the accession of the European Community to the FAO at the 26th session of the FAO Conference", COM(91) 387 final, 15; Approval of the Council [1991] OJ C326/238

The participation of the EU in the FAO started with a non-permanent observer status through an exchange of letters signed between the President of the European Commission and the Director-General of the FAO, aiming to facilitate the coordination of the two institutions' activities in 1962.⁴⁸ Beginning from as early as 1971, the Commission informed the Council in a note about the insufficiency of the Community's observer status in the FAO, stating that it could not table any proposal and take part in the policy making of the organisation, nor could they fully participate in technical bodies established in the framework of the FAO.⁴⁹ At that time, the EU was considered to enjoy a privileged observer status as far as the right to speak was concerned, for the reason that with the permission of the chairperson, the presidency of the EEC Council could intervene for the representative of the Commission without waiting for all the members to speak, on most occasions.⁵⁰ This observer status is not a permanent one but upon the regular invitation of the FAO Secretariat with the express or tacit approval of its deliberative body.⁵¹

This situation remained until the early 1990's. In 1991, the EU and the FAO signed a framework co-operation agreement, which repeated the wording of the 1962 exchange of letters and structured a broader and more concrete framework for the co-operation.⁵² The framework co-operation agreement was considered part of the intensified relations between the organisations heading towards the accession of the EEC to the FAO with expectations of an extended co-operation and for the EEC to increase its financial participation in FAO projects.⁵³ The discussion and negotiation of

⁴⁸ Jørgen Mærsk Pedersen, "FAO-EU Cooperation: An Ever Stronger Partnership" in Jan Wouters and others (eds), *The United Nations and the European Union: An Even Stronger Partnership* (CUP 2006) 64

⁴⁹ Rachel Frid, "The European Economic Community: A Member of a Specialized Agency of the United Nations", 4 *EJIL* (1993) 241

⁵⁰ Rachel Frid, *The relations between the EC and international organisations: legal theory and practice* (Brill 1995) 230

⁵¹ Jan Wouters and Others, *Study for the Assessment of the EU's Role in International Maritime Organisations: Final Report* (LCGGS 2009) 36

⁵² Rachel Frid, (note 50) 231

⁵³ Rachel Frid, (note 50) 232

amending the FAO Constitution and relevant rules so as to allow the EU to participate in the FAO reached its conclusion later and the EU became a full member of the FAO on 26 November 1991.⁵⁴ The arrangement of the EU's participation in the FAO has many similarities with the design allowing the EU to participate in the 1982 UNCLOS, and can be illustrated by the following.

4.1. The arrangements for participation made by the FAO Instruments

a) Generic but tailored definition and the requirement of transferred competence and concurrent membership:

According to Article II.3 and 4 of the FAO Constitution, a Member Organisation refers only to a REIO constituted by sovereign States, a majority of which are Member Nations of the Organisation, and to which its Member States have transferred competence over a range of matters within the purview of the Organisation, including the authority to make decisions binding on its Member States in respect of those matters. During the negotiation process, different views on how flexible or restrictive the definition of the REIO that should be adopted were shared,⁵⁵ reflecting different views on whether to allow more or less REIOs in their different stages of development to be able to participate in the activities of the FAO. In the end, despite the current provision being adopted so as to provide a more general definition of REIO to allow possible membership of other REIOs in the future, it was observed to be tailor-made for the EU,⁵⁶ and even after two decades 'til now, the EU remains probably the only entity to meet the requirements and still be the only REIO member in the FAO.

⁵⁴ Jan Wouters and others, (note 51) 37. For the details of the negotiations between the FAO and the EC in amending the Basic Texts of the FAO, see Rachel Frid, (note 50) 237-243

⁵⁵ For the discussion of a restrictive or a more general definition of REIO during the negotiation process, see Rachel Frid, (note 50) 243-245

⁵⁶ Rachel Frid, "European Community, Membership in International Organisations or Institutions", in *MPEPIL* (OUP online, August 2009) para. 5

b) Alternative exercise of membership rights with its own Member States:

The FAO adopted an approach that differentiates the legal status of a member and the exercise of that status. Article II.8 FAO Constitution provides that a Member Organisation shall exercise its membership rights on an alternative basis with its Member States that are Member Nations of the Organisation in the areas of their respective competences and in accordance with rules set down by the Conference. Article II.10 provides in principle with a few exceptions that a Member Organisation may exercise on matters within its competence, in any meeting of the Organisation in which it is entitled to participate, a number of votes equals to the number of its Member States which are entitled to vote in such a meeting. Whenever a Member Organisation exercises its right to vote, its Member States shall not exercise theirs, and conversely.

It should be noted that, to compare with UNCLOS, which provides that “[t]he Member States of that international organisation shall not exercise competence which they have transferred to it”,⁵⁷ this alternative exercise of rights without presumptively excluding the Member States to exercise their competence which they have transferred to the Member Organisation is significantly different from that of the UNCLOS, and hence leads to a different conclusion on the compatibility of the EU’s Declaration of Competence in the FAO, which will be further discussed in detail later in this chapter.

c) Presumption of competence and duty to make declaration of the distribution and nature of competence:

A REIO applying for membership of the Organisation shall, at the time of such application, submit a Declaration of Competence specifying the matters in respect of which competence has been transferred to it by its

⁵⁷ Article 4.3 Annex IX of the UNCLOS

Member States. Competences over matters which have not been specifically declared or notified as being transferred are presumed that of Member States.⁵⁸ The Member Organisation or its Member States shall notify the Director-General of any change regarding the distribution of competence between the Member Organisation and its Member States. The Director-General shall circulate such information to the other Member Nations of the Organisation.⁵⁹ What is worth noting is that the General Rules of the FAO further deals with the insufficiency of a general Declaration of Competence required by the FAO Constitution. The duty to make declarations of competence is hence designed to be exercised on a ‘day by day’ basis⁶⁰: Para. 2 of Rule XLI stipulates that the Member Organisation or its Member States shall supply an ad hoc declaration on competence specifying: 1) who is competent for each agenda point and; 2) who is going to exercise the relative voting rights before each FAO meeting.⁶¹ This also makes the mechanism significant and different from that of the UNCLOS, which generally requires only the up-to date Declaration of Competence specifying the matters governed by the UNCLOS in respect of which it has transferred competence to the organisation⁶², and to further clarify it upon the request of third States⁶³. A plausible rationale is that the FAO is more about facilitating the EU’s participation in decision-making and the day-to-day activities of the organisation, whilst the UNCLOS dealt with which Party carries the rights, obligations, and responsibilities of specific provision of the UNCLOS. This “day-to-day” approach however has caused the discussion on the clarification of competence occupying significant part of the preparation for the EU and

⁵⁸ Article II.5 and II.6 FAO Constitution

⁵⁹ Article II.7 FAO Constitution

⁶⁰ Sergio Marchisio, “EU’s Membership in International Organisations”, in Enzo Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International 2002) 248-249

⁶¹ Ibid.

⁶² Article 4.1., 4.2, 5.1., and 5.2 Annex IX, UNCLOS

⁶³ Article 5.3, .5.5, and 5.6. Annex IX, UNCLOS

its Member States,⁶⁴ as will be further discussed in the later section concerning the internal arrangement between the EU and its Member States.

Two other arrangements made by the FAO Constitution, which distinguish a Member Organisation from Member States, are also worth mentioning: 1. the financial aspect: a Member Organisation does not pay a full membership contribution to the budget but only the administrative costs caused by their participation as a member of the FAO. It may not vote on the budget;⁶⁵ 2. the “institutional life” aspect: the Member Organisation’s participation in the operation of FAO organs is restricted in principle, it is able to act on economic or technical issues but not general policy issues of the FAO.⁶⁶ It shall not hold office in the Conference or the Council, or any subsidiary body of the Conference or the Council.⁶⁷ It also shall not participate in voting for elective places accordingly, nor shall it participate in the Programme Committee, the Finance Committee and the Committee on Constitutional and Legal Matters.⁶⁸ The EU is not satisfied with this limitation, claiming that “[c]onsidering the financial weight of the EU in the FAO, and the strong link between governance and thematic questions since the reform, this situation hampers the EU's ability to participate fully in all aspects of FAO work and needs to be addressed. The more general question of a formal role for the EU in Committees (chair, co-chair) also needs to be addressed in the near future to achieve coherence with the Lisbon Treaty.”⁶⁹

Even though a Member Organisation does not pay a full membership contribution to the budget but only the administrative costs caused by their participation as a member of the FAO,⁷⁰ the EU nonetheless has been among

⁶⁴ Commission, “The role of the European Union in the Food and Agriculture Organisation (FAO) after the Treaty of Lisbon: Updated Declaration of Competences and new arrangements between the Council and the Commission for the exercise of membership rights of the EU and its Member States”, COM(2013) 333 final (29.05.2013) 4

⁶⁵ Article XVIII.6. FAO Constitution

⁶⁶ Rachel Frid, (note 56), para. 25

⁶⁷ Rule XLIII.3 and XLIV FAO General Rules

⁶⁸ Rule XLV.2 and Rule XLVI FAO General Rules

⁶⁹ Commission, (note 64) 5-6

⁷⁰ Article XVIII.6. FAO Constitution

the largest financial contributors for the extra-budgetary contributions, which consist of all the voluntary financial contributions that FAO Member States are willing to devote in order to finance some specific project, often through trust funds. The EU remains in 2011 the first donor, with US\$ 147 million, well ahead of the other important extra-budgetary donors.⁷¹ These voluntary financial budget contributions, however, are mostly operated through the EU-FAO co-operation mechanism, which began with the first Framework Cooperation Agreement reached between the FAO and the European Commission. Such co-operation was further strengthened with the signature in 1993 of the Arrangement on Procedures for Technical Cooperation, covering the collaboration between the EU and the FAO. In 2003, an exchange of letters was signed between the EU and the FAO for the FAO accession to the Financial and Administrative Framework Agreement (FAFA), which was established between the EU and the UN for all UN organisations in 2002 and replaced the old EU/FAO Arrangements of 1993. In 2004 the EU and the FAO established a Strategic Partnership Agreement aiming to enhance the effectiveness of both partners in their efforts to achieve common goals and objectives in the field of development and humanitarian affairs.⁷² This shows that despite obtaining a full membership of the FAO, the EU continues to accomplish its external involvement in the FAO affairs through diverse approaches other than the “membership” approach.⁷³

4.2. The Declarations of Competence made to the FAO

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http://www.eeas.europa.eu/delegations/rome/eu_united_nations/work_with_fao/ec_financial_contribution_fao/index_en.htm <Last access: 12.09.2013>

⁷² http://www.europa-eu-un.org/articles/en/article_2560_en.htm <Last access: 11.11.2011>;

http://www.eeas.europa.eu/delegations/rome/eu_united_nations/work_with_fao/ec_fao_cooperation/index_en.htm <Last access: 08.12.2011>

⁷³ For the co-operation between the EU and the FAO, see e.g. Jørgen Mærsk Pedersen, (note 48) 64

4.2.1. The Declaration of Competence made at the time of the accession of the EU

The EU made its Declaration of Competence accordingly upon its accession to the FAO,⁷⁴ the Declaration of Competence specified the Community's competence in matters covered by the Constitution. It began by stating the legal basis for providing the Declaration of Competence as well as the founding of the European Community. It then used a catchall sentence to state the transfer of competence— "The scope of the competence which the Member States have transferred to the Community pursuant to the Treaty is, by its nature, subject to continuous change. The Community will make further declarations whenever the need arises."⁷⁵ The use of this catchall phrase in order to reflect the evolving nature of the distribution of competence within the EU legal order, has become a pattern that has been followed by the EU and the Member States in providing their Declaration of Competence for other multilateral fora.⁷⁶

⁷⁴ Declaration of Competence by the European Community in respect of matters covered by the Constitution of the Food and Agriculture Organisation of the United Nations in the approved proposal for a decision on the accession of the European Community to the FAO at the 26th session of the FAO Conference [1991] OJ C 326/238 ("FAO DoC")

⁷⁵ Ibid.

⁷⁶ For example, The DoCs to: 1994 International Tropical Timber Agreement [1996] OJ L 208/4; Cartagena protocol on biosafety to the convention on biological diversity [2002] OJ L 201/50; Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade [2003] OJ L 63/29; WHO Framework Convention on Tobacco Control [2004] OJ L 213/9; United Nations Convention Against Transnational Organised Crime [2004] OJ L 261/70; Convention on access to information, public participation in decision making and access to justice in environmental matters [2005] OJ L 124/4; Protocol on Pollutant Release and Transfer Registers [2006] OJ L 32/56; Stockholm Convention on Persistent Organic Pollutants [2006] OJ L 209/2; Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime [2006] OJ L 262/34; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime [2006] OJ L 262/51; Convention on international interests in mobile equipment - Protocol to the Convention on international interests in mobile equipment on matters specific to aircraft equipment [2009] OJ L121/8(Convention), 25(Protocol); Convention on the Rights of Persons with Disabilities [2010] OJ L 23/37; Protocol on Strategic Environmental Assessment to the Convention on

The Declaration of Competence then stated that “[i]n some matters the European Community has exclusive competence and in other matters competence is shared between the European Community and the Member States. The Member States remain competent for matters in respect of which no competence has been transferred to the European Community.”⁷⁷ The latter sentence is a repeat of Article II.6 FAO Constitution, whilst the former, again included the shared competence under EU law into the Declaration of Competence, as the Declaration of Competence to the UNCLOS did. Does this again face the criticism of asymmetry as shown previously in the discussion on the UNCLOS?⁷⁸

A short answer is: No.⁷⁹ The key is that the exclusiveness of the “transfer of competence” required by the FAO is different from that of the UNCLOS. The last sentence of Article 4.3 Annex IX of the UNCLOS provided that the Member States of that international organisation shall not exercise competence which they have transferred to it. In other words, it requires that once the competence is “transferred”, such competence needs to be exclusively exercised by the REIO. The FAO law provides no identical provision or requirement. The omission of the provision is revealing, and the non-exclusiveness of the transfer of competence under the FAO law is further evidenced by other provisions. Article II.4 of the FAO Constitution indeed provides that an REIO must be one constituted by sovereign States, a majority of which are Member Nations of the Organisation, and to which its Member States have transferred competence over a range of matters within the purview of the Organisation, including the authority to make decisions

Environmental Impact Assessment in a Transboundary Context [2008] OJ L 308/35; Statute of the International Renewable Energy Agency (IRENA) [2010] OJ L 178/18; The 2006 International Tropical Timber Agreement [2007] OJ L 262/8; United Nations Convention against Corruption [2008] L 287/3

⁷⁷ FAO DoC (note 74)

⁷⁸ See Chapter 4 Section 5

⁷⁹ *But see*, Joni Heliskoski, , “Adoption of Positions under Mixed Agreements” in Christophe Hillion and Panos Koutrakos, *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010) 153 (stating the UNCLOS expressly provides for the principle of alternative exercise of rights as that of the FAO Constitution)

binding on its Member States in respect of those matters so as to qualify to become a Member Organisation. Article II.8 FAO Constitution further provides that a Member Organisation shall exercise membership rights on an alternative basis with its Member States that are Member Nations of the Organisation in the areas of their respective competences and in accordance with rules set down by the Conference, they do not, however, presumptively equal the “transfer of competence” to the “exclusive exercise of competence”, but only require the membership rights to be exercised on an alternative basis to ensure that right not to be dually exercised. Article II.10 then provides that in principle “[...] a Member Organisation *may* exercise on matters within its competence, in any meeting of the Organisation in which it is entitled to participate, a number of votes equal to the number of its Member States which are entitled to vote in such meeting. Whenever a Member Organisation exercises its right to vote, its Member States shall not exercise theirs, *and conversely.*” (emphasis added), this provision indicates room for the transferred competence to not necessarily be a competence that is exclusively exercised by the REIO when it is transferred.

If the FAO regime does not require the exclusiveness of “transfer of competence”, and hence leaves room for a shared competence conferred on the EU under the EU law to be declared as a “transferred competence with the shared nature” under the FAO law, then a different issue comes in. If a shared competence is transferred to the EU, and the EU has exercised its competence externally under the FAO regime—hence under the EU law the competence may become exclusively exercised by the EU,⁸⁰ would the Member State still have the right to vote later on the same matter declared as transferred shared competence?

The internal/EU law and the external/FAO law may provide different answers. Externally, as the FAO law only requires an alternative exercise of the voting right, the answer seemed to be positive. Nevertheless, internally under EU law, the EU’s exercise of such shared competence may hence pre-

⁸⁰ Article 2.2 TFEU

empt the Member States from exercising that competence.⁸¹ If the Member States indeed exercise their voting rights on that pre-empted area of competence in the FAO, it will internally constitute a breach of its obligation under EU law, yet arguably the result of the exercise of such rights externally is still valid in principle. As such a controversy over whether or not a shared competence shall be exclusively exercised by the EU can hardly be considered as manifest and concerns a rule of its internal law of fundamental importance.⁸²

The Declaration of Competence the EU provided at the time of the accession then made a list of areas of competence under two different types.

1) Where the Community has exclusive competence— in two areas: a) all matters relating to commercial policy, in accordance with Article 113 of the EC Treaty; b) all matters concerning fisheries which are aimed at protecting the fishing grounds and conserving the biological resources of the sea.⁸³

2) Where the Community has competence shared with the Member States—in the following matters which come under the FAO's field of activity (with detailed description under each title): a) development cooperation; b) policy on research and technological development; c) environmental policy; d) agricultural policy including the harmonisation of standards of animal and plant health; e) the approximation of provisions laid down by law, regulation or administrative section by the Member States, in particular with regard to the establishment of the internal market; f) other Community policies which may concern the activities of the FAO: vocational training, public health, consumer protection.⁸⁴

⁸¹ Article 2.2 TFEU, *See also* Chapter 2 Section 2.1

⁸² Article 46 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (adopted 21 March 1986, not yet in force) Doc. A/CONF.129/15 (but note that this Convention is not yet in force and only part of the EU Member States and the FAO have signed and ratified the Convention, *See*:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en <Last access: 12.09.2013>)

⁸³ FAO DoC (note 74)

⁸⁴ FAO DoC (note 74)

It even included a category called “general recapitulation of the possible implications of other Community policies”, which stated that “[o]ther Community policies such as transport policy, economic and monetary policy, social policy, industrial policy and measures in the field of education may, in certain specific circumstances, concern the activities of the FAO” under the title g) of this category, and further stated that “[i]t is possible that these policies may be deemed areas of Community competence within the FAO. This may in particular be the case with economic and monetary policy and movements of capital, transport policy, industrial policy, social policy and education, vocational training and youth measures”⁸⁵.

Several observations can be drawn out from the Declaration of Competence. Firstly, the policy areas covered externally by one single international organisation may internally cover areas across different policy areas, which different institutions may internally be in charge of. Even if internally the EU attempts to adopt an integrated maritime policy,⁸⁶ it would not necessarily lessen the need for the cross-sector coordination, or simplify the procedure for coordination. Those in charge of the maritime policy, for example, the Directorate-General of Maritime Affairs and Fisheries of the Commission of the European Union (DG MARE), may be the key force internally in charge of the maritime policy, yet it does not occupy the whole area governed externally by the FAO, where the concerns of maritime affairs— mainly fisheries and marine productions— constitute only part of its functions.⁸⁷ The institutions that are correspondingly in charge of the major affairs covered by the international organisation may be different from those in charge of the maritime affairs— for instance, the Directorate-General of Agriculture and Rural Development (DG AGRI) or the Directorate-General of EuropeAid Development and Cooperation (DG DEVCO).⁸⁸ This exemplified

⁸⁵ FAO DoC (note 74)

⁸⁶ See Chapter 2 Section 3

⁸⁷ Article 1 FAO Constitution

⁸⁸ For example, the revision of the Internal Arrangement for coordination between the EU and the Member States in the FAO, which will be discussed later in the chapter, was not led by the DG MARE. Personal communication with Veronika Veits,

the need for coordination not only between the EU and its Member States, but also different institutions within the EU. Secondly, the Declaration of Competence only provided two categories of competence, and does not distinguish those competences that have no pre-emptive effect, or only in the support, coordinate or supplement nature, which were later expressly codified by the Lisbon Treaty.⁸⁹ For example, areas of development co-operation and research, and technological development are shared competence that do not have pre-emptive effect,⁹⁰ whilst education and vocational training, for example, is in the area where the EU has competence to carry actions to support, coordinate or supplement the actions of the Member States.⁹¹ Considering that, as previously analysed, the pre-emptive effect of the shared competence is provided under the EU law and no equivalence exists under the FAO, this distinction is rather more important for the EU and its Member States than for the FAO and the third States. Thirdly, even though the Declaration of Competence made an effort in making the list of the transfer of competence as detailed as possible, the evolving nature of the distribution of competence still resulted in the need for including more general and catchall phrases in the Declaration of Competence. It evidenced that using a general Declaration of Competence still falls short of providing a decisive, clear, and certain list for the actors to follow, and further supports the need for the Declaration of Competence to be provided in a day-to-day manner and complemented by other mechanisms such as the obligation to update, or to clarify upon request the Declaration of Competence by the REIO and its Member States, as required by Rule XLII.1 and Rule XLII.2 General Rules of the FAO.

4.2.2. The day-to-day Declaration of Competence: examples

the Head of Unit B1 (International Affairs, Law of the Sea, Regional Fisheries Management Organisations) of DG MARE of the European Commission dated 22 March 2013

⁸⁹ Article 4.3, 4.4, 5, and 6 TFEU

⁹⁰ Article 4.3, 4.4 TFEU

⁹¹ Article 6.e TFEU

It is then necessary to consider how the day-to-day Declaration of Competence— the Declaration of Competence required by Rule XLII.2 General Rules of the FAO functions in practice. Rule XLII.2 required that “[b]efore any meeting of the Organisation the Member Organisation or its Member States shall indicate which, as between the Member Organisation and its Member States, has competence in respect of any specific question to be considered in the meeting and which, as between the Member Organisation and its Member States, shall exercise the right to vote in respect of each particular agenda item.” In order to fulfil such an obligation, the EU and the Member States, following the internal arrangement for coordination between the EU and its Member States concerning the activities in the FAO (FAO Arrangements), a declaration or a statement of competence and voting rights would be submitted to the FAO by the European Union alone⁹² or with its Member States⁹³.

Generally, the Declaration of Competence is submitted in a way that connects to the items on the agenda of the meeting, as required by the General Rules. Under each agenda item, it would clarify the nature of competence of the matter, and who exercises the voting right. The combination of this declaration can be in various forms, be it, for example: “MS competence—MS vote”⁹⁴ or “Competence: MS; Vote: MS”⁹⁵, meaning the Member States have the competence and the Member States exercise the voting right over the matter; “Shared competence—MS vote”⁹⁶ or “Competence: shared; Vote: MS”⁹⁷⁹⁸, meaning the competence is shared

⁹² For example, the Declaration of Competence and Voting Rights submitted by the European Union for the 28th FAO Regional Conference for Europe (Baku, Azerbaijan, 19 and 20 April 2012) ERC/12/INF/11

⁹³ For example, the Statement of Competence and Voting Rights Submitted by the European Union (EU) and its Members States to the Technical Consultation on international Guidelines for Securing Sustainable Small-scale Fisheries (Rome, Italy, 20-24 May 2013) TC-SSF/2013/Inf.5

⁹⁴ Agenda item I.1 (note 92)

⁹⁵ Agenda item 1, (note 93)

⁹⁶ Agenda item II.8.a) (note 92)

⁹⁷ Agenda item 6 (note 93)

between the EU and the Member States but the Member States exercise the voting right; “Shared competence—EU vote”⁹⁹ or “Competence: shared; Vote: EU”¹⁰⁰, meaning the competence is shared between the EU and the Member States but the EU exercise the voting right; “EU competence—EU vote” or “Competence: EU; Vote: EU”, meaning that the EU has the competence and the EU exercises the voting right. This practice of declaring the nature of the competence and the exercise of voting right that may or may not be in line with the Declaration of Competence further evidenced the previous argument that the shared competence is compatible with the “transfer of competence” under FAO law.

The day-to-day Declaration of Competence to a large extent supplemented the more general Declaration of Competence; it provided third States and the FAO a clearer view on the distribution of competence between the EU and its Member States on specific issues. Nevertheless, on the one hand, to clarify each item on the agenda of every meeting through the international coordination procedure with the EU, which will be discussed in the later section, is time consuming.¹⁰¹ On the other hand, even after the time consuming effort, such a declaration can still fall short of responding in a timely manner if there is any change in an agenda item, and needs to be strengthened by on-the-spot coordination. The EU is in the process of installing a new mechanism and procedure of submitting the provisional “information note” to tackle this issue,¹⁰² which will be discussed in the later section concerning the new internal arrangements between the Council and

⁹⁸ The term “mixed competence” was also used, *see e.g.* Statement of Competence and Voting Rights submitted by the European Community (EC) and its Member States for the 124th Session of the FAO Council (Rome, 23-28 June 2003) CL 124/INF/6; Statement of Competence and Voting Rights Submitted by the European Community (EC) and its Member States for the 11th Regular Session of the Commission on Genetic Resources for Food and Agriculture (Rome, 11-15 June 2007) CGRFA-11/07/Inf.5

⁹⁹ Agenda item II.7 (note 92)

¹⁰⁰ Agenda item 4 (note 93)

¹⁰¹ Commission, (note 64) 4

¹⁰² *Ibid.*, 11 (2.2 of the New FAO Arrangements)

the Commission regarding the exercise of membership rights of the EU and its Member States in the FAO.

4.2.3. The Proposed Declaration of Competence after the Lisbon Treaty

Although Article II.7 FAO Constitution requires the Member Organisation and its Member States to update the Declaration of Competence when there is any change regarding the distribution of competence, the last Declaration of Competence offered by the EU and its Member States was submitted in 1994 and has not been updated since then,¹⁰³ regardless of the fact that internally the distribution of competence under EU law has evolved and to a large extent been codified by the Lisbon Treaty, which attempted to clarify the legal framework for the distribution of competence, as discussed in the earlier chapter.¹⁰⁴

More than three years after the entry into force of the Lisbon Treaty, the Commission proposed that the Council submit an updated Declaration of Competences (“updated Declaration”) in May 2013. The updated Declaration of Competences can be highlighted in the following points:

1) It keeps the general character of the Declaration of Competence in order to allow possible future evolutions of the division of competences between the EU and its Member States.

In the first part of the updated Declaration, entitled “General Principles”, it stated the replacement made by the Lisbon Treaty, including that of the EC by the EU, and of the Delegation of the European Commission accredited to the FAO by the Delegation of the EU. It then referred directly to Articles 2 to 6 TFEU, stating that “[w]here the competence is shared between the EU and its Member States and to the extent that the EU has not exercised its competence

¹⁰³ Ibid., 3-4 (Letter of the President of the Council of the European Union of 4 October 1994 (8406))

¹⁰⁴ See Chapter 2 Section 2

or has decided to cease exercising its competence, Member States shall exercise their competence. Competences not attributed to the EU by the Treaties fall within the competences of the Member States of the EU.”¹⁰⁵ After submitting the rather vague and general principles, it then committed to submit to the FAO, when required, before a meeting of an FAO body, an “information note relating to the exercise of the membership rights” by “either the EU or its Member States” with respect to the subject matters covered by that meeting,¹⁰⁶ based on the updated Declaration and in accordance with the relevant FAO rules. Then it set out the sub-categories of the competence in accordance with Article II.10 FAO Constitution, including “policy areas falling within the competences of the EU”, where the EU will exercise the membership rights; “policy areas where both the EU and its Member States have competences to act”, where either the EU or its Member States will exercise the membership rights of both the EU and its Member States. It also keeps the use of a catchall phrase, stating that “[t]he distribution of competences between the EU and its Member States, as set out below, is, by its nature, subject to change. Whenever changes arise which affect the list below, the EU reserves the right to amend this declaration accordingly, without this constituting a prerequisite for the exercise of its competences in matters covered by the FAO.”¹⁰⁷ This statement, however, is not compatible with the FAO rules, which will be revisited in the later paragraph.

2) It listed the “Competences of the EU” and the “Competences of the EU and its Member States” respectively.

Under the heading “Competence of the EU”, it directly referred to Article 3.1 TFEU (the listed exclusive competence of the EU) and

¹⁰⁵ Commission, (note 64) 7-8

¹⁰⁶ Ibid., 7

¹⁰⁷ Ibid.

listed those competences in the updated Declaration of Competence here. Additionally, it also referred to those listed shared competences in Article 4.2 TFEU directly, indicating that “only the EU may act in the FAO insofar as the EU has adopted common rules which may be affected by actions taken by the FAO or where external action of the EU is necessary to enable the EU to exercise its internal competences.”¹⁰⁸

Under the title of the “Competences of the EU and its Member States”, it listed the areas where both the EU and its Member States have competences to act in the FAO. The EU listed here those areas where the EU has been conferred shared competences without the pre-emption effect, or the competences of supportive, coordinative or supplementary nature. It particularly listed areas including: research and development and space, development co-operation, humanitarian aid, protection and improvement of human health, industry and tourism.¹⁰⁹ It further stated that as members of the FAO, both the EU and its Member States have competences to act in the FAO with regard to organisational and procedural matters, including legal and budgetary issues, election of chairpersons, adoption of agendas and reports. The EU’s competences over these organisational and procedural matters,¹¹⁰ however, are externally limited by the aforementioned relevant FAO rules.

The way the EU listed the competences in the updated Declaration leads to the impression that the “Competences of EU” category in the updated declaration referred to those competences that have been conferred on and exclusively exercised by the EU; whilst the “Competences of the EU and its Member States” referred to those competences that have been conferred on the EU but could be concurrently exercised by the Member States. What is worth noting here is that the most troublesome part of the competence under

¹⁰⁸ Ibid., 8-9

¹⁰⁹ Ibid., 9

¹¹⁰ Ibid.

the EU law, namely, the shared competences un-pre-empted by the EU, are not— or only vaguely— mentioned in this updated general Declaration. It is doubtful then whether such competences can be considered as competences that have been transferred to the EU under the FAO law? On the one hand, considering those parts of competences, if un-pre-empted by the EU, remain within the competence exercisable by the Member States, the non-listing of the un-pre-empted shared competence does not obstruct the Member States from exercising those competences in the FAO regime, as those competences are presumed to be exercised by the Member States.¹¹¹ On the other hand, the non-listing of the un-pre-empted shared competences as the competences that have been transferred to the EU may hamper the EU from exercising such competences, as they are not specifically declared accordingly to the FAO, and may be considered as competences that have not been transferred to the EU.

It is understandable that the EU and its Member States attempted to circumvent declaring this controversial area of competences by only vaguely mentioning them. They tried to rely on the statement phrased “the EU reserves the right to amend this declaration accordingly, *without this constituting a prerequisite for the exercise of its competences in matters covered by the FAO*”¹¹² (emphasis added) as well as claiming that a Declaration of Competences is of only “mere declaratory character”¹¹³ in order to keep the flexibility and ambiguity over the un-pre-empted shared competence. These claims are nevertheless incompatible with FAO law. Article II.6 FAO Constitution provides that Member States of a Member Organisation shall be presumed to retain competence over all matters in respect of which transfers of competence have not been specifically declared or notified to the Organisation. If a transfer of competence has not been specifically declared or notified accordingly, even if the EU has the competence within EU law, it does not flow externally to the FAO, unless it is

¹¹¹ Article II.6 FAO Constitution

¹¹² Commission, (note 64) 7

¹¹³ Ibid.

duly declared. This non-listing of the un-pre-empted shared competence not only failed to provide a clear guidance toward third parties, but also may be considered incompatible with FAO law, regardless of whether the EU and its Member States considered it otherwise. As the Commission stated in the Communication, the review and revision of the general and specific declarations of competences are still on-going¹¹⁴, the way the un-pre-empted shared competence is minimally stated should be revised.

Moreover, this updated general Declaration proposed to include the exact article number and paralleling the exact text of the EU Treaties governing the distribution of competences into the Declaration of Competences.¹¹⁵ This practice may aim to bridge the gap between the EU law and the external law under the multilateral fora by synchronising the texts used in the EU Treaties with those used in the Declaration of Competence. However, this practice, as the aforementioned paragraphs suggested, does not largely enhance the clarity of the Declaration of Competence for third states. It nonetheless unnecessarily will invite external tribunals to interpret and apply the same language of the EU Treaties' provisions in a manner that may be potentially different from what the CJEU would have done, and leads to possible conflict that may adversely affect the autonomy of the EU legal order.¹¹⁶ Avoiding this practice can also avoid a possible mismatch of the internal and external rules caused by the amendment of the EU Treaties. When the EU Treaties' provisions governing the distribution of competence are amended, whilst the amended EU Treaties' provisions shall internally govern the delimitation of competence between the EU and its Member States, it is nevertheless the previous EU Treaties' provisions which would still be taken as the effective ones, because they are externally provided in the Declaration of Competence to govern the issue of delimitation of competence between the EU, its Member States, if such a Declaration of Competence is not promptly updated accordingly. This would also unnecessarily introduce a

¹¹⁴ Ibid., 4

¹¹⁵ See e.g. Ibid., 7-9

¹¹⁶ See Chapter 2 Section 3

possible direct conflict between the internal and external rules governing the distribution of competence, and leaves no buffer zone for the mismatch of the rules.

5. *The internal arrangements for coordination between the EU and its Member States concerning the activities in the FAO*

5.1. The arrangement of the internal coordination between the European Commission and the EU Council of Ministers concerning the preparation of FAO meetings, statements and voting (FAO Arrangement)

The EU's participation in the FAO as a formal member enables the EU to play its role in the decision-making process, however, no rule is provided in the FAO Constitution or the relevant rules to give the EU legal means externally to prevent a Member State expressing a different view or voting differently as a Member Nation of the FAO. Internal coordination and control remains crucial for the EU even when it gains a formal membership in the FAO.¹¹⁷ An arrangement of the internal coordination between the EU (the European Commission) and its Member States (the EU Council of Ministers) concerning the preparation for FAO meetings, statements and voting has been adopted¹¹⁸. This follows the guidelines for Community co-ordination procedures regarding statements and voting in FAO meetings,¹¹⁹ right after the EU obtained its membership in the FAO. The arrangement aimed to make effective the alternative exercise of rights and of competences between the EU

¹¹⁷ As Rachel Frid observed, despite the FAO amendments detailed the exercise of the voting power to be exercised between the REIO and its Member States in the FAO, nonetheless, the decision made in the FAO are often through consensus and rarely resort to voting, voting rights are only part of the reason and solution for the EU's need to participate in the FAO as a formal member. *See* Rachel Frid, (note 50) 236

¹¹⁸ Document 10478/91

¹¹⁹ 9637/91 RELEX 61

and the Member States,¹²⁰ and was evaluated as an exceptional detailed set of rules on statements and voting in FAO meetings.¹²¹ According to the unpublished arrangement, which cancelled and replaced the previous procedure adopted by the Council in 1989,¹²² the EU and the Member States have to prepare for all meetings of the FAO governing bodies (Council and Conference), as well as their subsidiary bodies, in a coordinated manner so as to agree on joint positions and on statements on all substantive items of the agenda.¹²³

Under this arrangement, EU coordination meetings take place in Brussels in the Council Working Group AGRI-FAO, during which, for all FAO meetings and all agenda items, a common position must be reached by the EU and the Member States, which in practice translates into statements being negotiated, finalised and agreed to by all parties. EU coordination meetings also take place in Rome, amongst the EU Permanent Representatives to the FAO, at least on a monthly basis, and before meetings if needed, with further co-ordination meetings being called whenever necessary throughout the series of meetings.¹²⁴

The core initiator and preparer for the coordination and preparation is the Commission. On receipt of the agenda of the FAO meeting, the Commission sends it to the Council Secretariat for circulation to Member States, indicating therein the agenda items on which a statement should be made and whether this will be done on behalf of the Community or the Community and EU Member States. The Commission further gives an opinion with regard to agenda items which may necessitate a vote on whether the Community or EU Member States should exercise this right.¹²⁵ The

¹²⁰ Rachel Frid, (note 50) 255. The arrangement can be found at the Annex VI of the book

¹²¹ Joni Heliskoski, (note 79) 147

¹²² 7451/89 AGRI 31 RELEX 34

¹²³ "EU status in the FAO: the EU became a full FAO Member in 1991"

<http://www.eeas.europa.eu/delegations/rome/eu_united_nations/work_with_fao/ec_status_fao/index_en.htm> <last access: 15.10.2011>

¹²⁴ Ibid.; FAO Arrangement, para 1.1

¹²⁵ FAO Arrangement, para 1.2

Commission will then send draft statements to the Council to circulate to Member States in time for their examination; when the preparation for draft statements is impossible for the Commission to prepare in time, due to the non-availability of FAO documentation, the Commission will outline to the Member States, at least one week before the FAO meetings, the main elements for its statements¹²⁶. If holding a co-ordination meeting in Brussels prior to the FAO meeting is impossible, or is not considered necessary, co-ordination takes place only at the venue of the meeting.¹²⁷

The co-ordination meetings will decide on the exercise of responsibilities, on statements, and on voting in relation to each item of the FAO meeting agenda when a statement may be made or a vote is expected. The co-ordination meetings will agree on statements or the major content of statements to be made on behalf of the EU or on behalf of the EU and its Member States. It also aims to ensure the highest possible degree of cohesion in statements by Member States on matters within their competence.¹²⁸ In order to do so, the Commission will inform Member States in advance of co-ordination meetings through the Council Secretariat, its proposals regarding the exercise of responsibilities and/or the statements on a particular topic.¹²⁹

The co-ordination procedure reflects the nature of the competence on the issue concerned. In cases of *exclusive competence* of the EU, a *Community position* to be expressed and voted on by the Commission in the relevant FAO meeting. The Community position is established by consensus or, failing this, in accordance with the rules of the EC Treaty, and is expressed by the Commission. On matters of exclusive Member States' competence, the Member States adopt a position on which coordination takes place beforehand so as to ensure the highest possible degree of cohesion in the statements.¹³⁰

¹²⁶ FAO Arrangement, paras 1.3 and 1.4

¹²⁷ FAO Arrangement, paras 1.5 and 1.6

¹²⁸ FAO Arrangement, paras 1.9 and 1.10

¹²⁹ FAO Arrangement, paras 1.11

¹³⁰ FAO Arrangement, paras 1.10 and 1.12; Jan Wouters, (note 51) 39-40

If an agenda item contains elements of both national and Community competence, *a common position* shall be aimed at by consensus. If a common position can be achieved, it shall be expressed by the Presidency when the thrust of the issue lies in an area outside of exclusive competence of the EU. Member States and the Commission are allowed to speak in support and/or development of the Presidency statement. Member States will then vote in accordance with the common position. If the thrust of the agreement lies within the exclusive competence of the European Union, the Commission shall express the common position, with Member States having the occasion to support and/or add to the Commission's statement. The Commission votes in accordance with the common position.¹³¹

If it proves impossible to reach a common position, Member States shall exercise the respective voting and speaking rights. The Commission in such cases will be able to participate in the discussion according to FAO rules and procedures.¹³² Within the abovementioned framework, if an EU Member State has particular concerns regarding a dependent territory, and this concern cannot be reflected in the Community or common position, that Member State may speak and vote on its own behalf.¹³³

One thing is further worth noting: An Annex agreed by the Permanent Representative Committee to request the Council to enter the statement stating that “[t]his arrangement reflects the special circumstance of Community participation in the FAO and *has no implication regarding other international organisation including those of the United Nations system*” (italic added), is made by the Council and the Commission, in the minutes of the meeting.¹³⁴ This reflects that at the time this arrangement was made, even the EU and its Member States themselves were sensitive about any implication the model used for the participation in the FAO might offer

¹³¹ FAO Arrangement, para 2.3

¹³² FAO Arrangement, para 2.4

¹³³ FAO Arrangement, para 2.5

¹³⁴ Annex II to the Arrangement Between the Council and the Commission Regarding Preparation for FAO meeting and Statements and Voting, in Rachel Frid, (note 50) Annex VI

to their participation in other international organisations, either of the UN system or not.

5.2. The proposed new Arrangements between the Council and the Commission regarding the exercise of membership rights of the EU and its Member States in the FAO (new FAO Arrangements)

As discussed in the earlier chapter, the legal effect of the FAO Arrangements was endorsed by the CJEU in Case C-25/94 at a rather early stage of the EU's formal participation in the FAO.¹³⁵ Yet the internal arrangement has not been updated for more than two decades. In order to keep the internal arrangement consistent with the current EU law and to pursue a coherent, comprehensive and unified external representation of the EU, the Commission, alongside with proposing to submit to the FAO an updated Declaration of Competence, proposed new Arrangements between the Council and the Commission regarding the exercise of membership rights of the EU and its Member States in the FAO (new FAO Arrangements) to replace the long un-updated internal FAO Arrangement.¹³⁶

5.2.1. Scope and general principles of the new FAO Arrangements

Unlike the FAO Arrangement discussed in the previous section, which began directly with the detailed arrangements of the coordination procedure, these new FAO Arrangements began with stating the scope and the general principles. They apply to the preparation and exercise of membership rights of the EU and its Member States in all FAO bodies and agreements, including drafting committees. Yet they do not apply to bodies and agreements in which only the EU is member, or conversely, of those in which only the EU Member States are members or bodies for which specific arrangements

¹³⁵ Case C-25/94 Commission v Council [1996] ECR I-1469; see Chapter 3 Section 2.2

¹³⁶ Commission, (note 64) Annex 2

apply.¹³⁷ It reiterated the full respect for the principle of sincere co-operation under EU law, whilst stating that the new FAO Arrangements do not affect the distribution of competences between the EU and its Member States or the allocation of powers between the institutions under the Treaties.¹³⁸ Neither do they affect the decision-making procedures for the adoption of EU positions by the Council as set out in the Treaties. Furthermore, unlike the FAO Arrangement only including in a side document the clause trying to limit its effect,¹³⁹ this new FAO Arrangements stated that these arrangements do not prejudice future similar exercises for other international organisations in the main text.¹⁴⁰ It then clarifies that a matter is covered by an EU position either where this matter is subject to EU legislation or an EU policy established by other means (such as general guidelines, Council conclusions, EU strategies or EU concerted actions) or where such an EU position is established for the purpose of the relevant FAO meeting.¹⁴¹

5.2.2. Preparation of FAO meetings and interventions and casting of votes in FAO bodies

Point 2 of the new FAO Arrangements covered the arrangements for preparation for FAO meetings. It widened the fora for coordination, to include the relevant preparatory bodies of the Council (i.e. Coordination Working Party (FAO), Fisheries, Forestry or Phytosanitary Measures Working Parties) in Brussels as well as “local coordination meetings”, which aimed to address unforeseen issues.¹⁴²

Where an agreement cannot be reached in the Working Parties, the matter shall be submitted to COREPER and, where necessary, to the Council

¹³⁷ Point 1 para 1 new FAO Arrangements

¹³⁸ Point 1 paras 2-3 new FAO Arrangements

¹³⁹ Annex II to the Arrangement Between the Council and the Commission Regarding Preparation for FAO meeting and Statements and Voting, in Rachel Frid, (note 50), Annex VI

¹⁴⁰ Point 1 paras 2 and 3 new FAO Arrangements

¹⁴¹ Point 1 para 4 new FAO Arrangements

¹⁴² Point 2.1 paras 1 and 3 new FAO Arrangements

in due time before the relevant FAO meeting.¹⁴³ The on-the-spot local coordination meetings may take place in Rome or the location of the venue of the FAO meetings.¹⁴⁴ To reflect the reform brought by the Lisbon Treaty, the new FAO Arrangements provided that the coordination meetings shall be prepared and presided over by the EU Delegation accredited to FAO in principle.¹⁴⁵ Despite the coordination meetings functions as a mechanism to respond in a timely manner to unforeseen events on the spot, the new FAO Arrangements provided that these meetings cannot substantially alter EU positions, common positions, lines to take or statements which are established in accordance with the new FAO Arrangements.¹⁴⁶

The key innovation brought in by these new FAO Arrangements is the introduction of the “information note” and the mechanism related to it. The new FAO Arrangements integrated the information previously to be included with the FAO meeting agenda sent to the Council required by the previous FAO Arrangements¹⁴⁷ into a document called the “information note”. The new FAO Arrangements provided that, where required under Rule XLII.2 General Rules of FAO, the Commission shall upon the receipt of the agendas from the FAO submit to the General Secretariat of the Council a draft of the provisional “information note” with regard to the exercise of the membership rights of the EU and its Member States. This provisional information note shall set out the provisional distribution of tasks and, where applicable, the casting of votes in the FAO bodies concerned.¹⁴⁸ This provisional information note shall also be transmitted to the Delegation of the EU accredited to the FAO in Rome for further transmission to the FAO.¹⁴⁹ The new FAO Arrangements provided that “[t]he transmission of the provisional information note is without prejudice to possible subsequent modifications to be transmitted to the FAO. This may be the case, in particular, where EU

¹⁴³ Point 2.1 para 2 new FAO Arrangements

¹⁴⁴ Point 2.1 paras 1 and 3 new FAO Arrangements

¹⁴⁵ Point 2.1 para 3 new FAO Arrangements

¹⁴⁶ Ibid.

¹⁴⁷ Points 1.1.2 to 1.1.5 FAO Arrangements

¹⁴⁸ Point 2.1 paras 1 and 2 new FAO Arrangements

¹⁴⁹ Point 2.2 para 3 new FAO Arrangements

positions or common positions [...] are established only after the transmission of the provisional information note, and/or due to the late reception of background documents from the FAO”¹⁵⁰. This mechanism implies a significant difference made by the new FAO Arrangements. Considering that the new FAO Arrangements provided that in case a Member State disagrees with the Commission’s draft of the provisional information note, it shall explain its reasons in writing at the latest two working days before the relevant Working Party meeting, and the “provisional information note” takes its effect externally according to Article II.10 FAO Constitution and Rule XLII.2 FAO General Rules. This mechanism may be considered as an introduction of a tacit consent procedure for the preparation of the information note.

Another reform worth noting brought by the new FAO Arrangements is the adoption of a “lines-based” approach instead of a “statements-based” approach so as to leave the external actors sufficient flexibility to represent the interests of the EU and/or its Member States in the most efficient way. Only where considered necessary, should positions be set out fully in statements.¹⁵¹

Unlike the FAO Arrangements, which spent rather limited space on the procedures for voting among the States in FAO meetings concerning matters of exclusive EU competences or of exclusive Member State competences.¹⁵² the new FAO arrangement proposed a more detailed procedure governing the preparation and adoption of lines to take and of voting intentions. It identified four different situations and applied different procedure respectively.

1) Drafting the “*EU lines*” for an existing *EU position*. For agenda items covered by existing EU positions, including agenda items which also contain ancillary elements not covered by an EU position, the Commission shall inform the Council of draft EU lines to take

¹⁵⁰ Point 2.2 para 5 new FAO Arrangements

¹⁵¹ Point 2.3.1 new FAO Arrangements

¹⁵² Point 2.1 and 2.2 FAO Arrangements

which shall reflect these existing EU positions. In accordance with the principle of sincere co-operation and in order to allow the Commission to draw on all available expertise, Member States may submit observations which the Commission shall take into account, when finalising the EU lines to take.¹⁵³

2) Establishing or adapting an EU position for no existing EU position or the existing EU position when necessary or appropriate. For agenda items not covered by existing EU positions, including agenda items which also contain ancillary elements already covered by an EU position, but where it is necessary or deemed appropriate to establish an EU position for that purpose, the Commission shall submit to the Council for endorsement a draft EU position. The same principles shall apply where existing EU positions have to be substantially adapted for the purpose of a position to be taken in the FAO.¹⁵⁴

For the above two situations, the EU Delegation and/or the Commission act on the basis of EU lines to take or deliver EU statements "on behalf of the EU" (and, where applicable, cast the respective vote).¹⁵⁵

3) Establishing the "*Common lines*" to take of the EU and its Member States. For agenda items involving the following, common lines to take by the EU and its Member States shall be established: 1) when the agenda items cover policy areas of co-operation with third countries and humanitarian aid (Part V, Title III of TFEU) and for which it is deemed appropriate that the EU and its Member States deliver joint statements referring to their respective actions in these areas;¹⁵⁶ or 2) the agenda items are partly covered by an EU position but, at the same time, are intrinsically linked to matters for which the

¹⁵³ Point 2.3.2 new FAO Arrangements

¹⁵⁴ Point 2.3.3 new FAO Arrangements

¹⁵⁵ Point 3.1 new FAO Arrangements

¹⁵⁶ Point 2.3.4.1 new FAO Arrangements

adoption of an EU position is excluded;¹⁵⁷ or 3) the agenda items cover organisational and procedural matters, such as election of chairpersons, adoptions of agendas and reports.¹⁵⁸ It further provided that drafts for the establishment of these common lines to take shall be submitted by the Commission or the Member State holding the rotating Presidency of the Council for the cases referred to on different occasions.¹⁵⁹

The EU Delegation and/or the Commission act on the basis of common lines to take or deliver common statements "on behalf of the EU and its Member States" (and, where applicable, cast the respective vote).¹⁶⁰ However, an entrusted Member State acts on the basis of common lines to take or delivers common statements "on behalf of the EU and its Member States" (and, where applicable, casts the respective vote) in the following cases: 1) in cases where the common position primarily contains elements not covered by an EU position; 2) for organisational and procedural matters, such as the election of chairpersons, adoptions of agendas and reports.¹⁶¹

4) Duty to inform for other situations. For agenda items not covered by EU or common positions, Member States inform each other as well as the EU Delegation and the Commission about their draft positions and voting intentions.¹⁶² Member States deliver statements on their own behalf (and, where applicable, cast the respective vote).¹⁶³

It is required that any drafts shall be submitted to the relevant preparatory body of the Council wherever possible 5 working days before the meeting of that body.¹⁶⁴

¹⁵⁷ Point 2.3.4.2 new FAO Arrangements

¹⁵⁸ Point 2.3.4.3 new FAO Arrangements

¹⁵⁹ Point 2.3 para 10 new FAO Arrangements

¹⁶⁰ Point 3.2 new FAO Arrangements

¹⁶¹ Point 3.3 new FAO Arrangements

¹⁶² Point 2.3.5 new FAO Arrangements

¹⁶³ Point 3.4 new FAO Arrangements

¹⁶⁴ Point 2.3.6 new FAO Arrangements

Regarding the three FAO committees with restricted membership (Finance Committee, Programme Committee and Committee on Constitutional and Legal Matters), which so far do not extend to the EU, the nominated member(s) from the EU Member State(s) that sit(s) in these committees shall be entrusted, where applicable, to deliver EU statements or common statements and cast the vote, if the need arises.¹⁶⁵

5.2.3. Other Practicalities

The new FAO Arrangements also included several arrangements that might be miscellaneous but of practical importance.

1) Nameplate issue: EU statements or common statements are delivered from behind the EU nameplate. EU statements are delivered “on behalf of the EU”. Common statements are delivered “on behalf of the EU and its Member States”¹⁶⁶.

2) Drawing upon experts of Member States to speak from behind the EU nameplate. In order to gain the best available expertise and reinforce, where necessary, their resources, the EU Delegation and/or the Commission may decide for specific meetings of the FAO, to draw upon experts of Member States who may be asked to take the floor to further elaborate on the statements, speaking from behind the EU nameplate.¹⁶⁷

3) Questionnaires. Questionnaires, which are sent to member countries periodically to collect basic information on their implementation of the relevant fisheries instruments, are import tools for the preparation of reports on the status of the implementation of the instruments for the FAO bodies. It is valuable feedback to the FAO in judging whether its objectives are being met, and helps fisheries administrations to address specific gaps in national implementation. It also provides a metric to member countries in judging their general

¹⁶⁵ Point 3.5 new FAO Arrangements

¹⁶⁶ Point 4.1 new FAO Arrangements

¹⁶⁷ Point 4.2 new FAO Arrangements

progress towards internationally-agreed initiatives.¹⁶⁸ According to the new FAO Arrangements, the Commission will reply to the Questionnaires that the FAO sends to the EU. Before the Commission returns the completed questionnaires to the FAO, it will send them to the Council for comments. Member States will have 10 days to react.¹⁶⁹ This provision may simplify the decision of who should reply to the questionnaires, nevertheless, it may also end up with the decision being made by whoever the FAO sends the questionnaire to, instead of who should be responsible for the matters covered by the questionnaire. A 10 day period exists in the FAO Arrangements to allow the Commission to “take the comments into account” the comments made by the Member States.¹⁷⁰

Several observations can be drawn out from examining the new FAO Arrangements. Firstly, as the legal effect of an internal arrangement for coordination has been endorsed by the CJEU, unlike the FAO Arrangement which tried to leave out those words with binding character, the new FAO Arrangements adopted terms normally used in more binding instruments i.e. “shall” in the text. Secondly, as the legal importance of an internal arrangement has been confirmed by the CJEU, it is observed that the Member States’ concerns on the scope of the internal arrangement may at the same time grow, which is reflected in the insertion of the clause to limit the possible general implication of the new FAO Arrangement. Nevertheless, this case-by-case approach with different arrangements applying to different coordination procedures for the participation in different international organisations may hamper the achievement of a coherent, comprehensive and unified external representation of the EU, which was set as the major

¹⁶⁸ See John F. Caddy (edited by J. Eric Reynolds and Gunilla Tegelskär Greig), “Using questionnaires based on the Code of Conduct for Responsible Fisheries as diagnostic tools in support of fisheries management”, 21 *FAO/FishCode Review* (2007) 1-3

¹⁶⁹ Point 4.3 new FAO Arrangements

¹⁷⁰ Point 4.2 new FAO Arrangements

objective for the introduction of these New FAO Arrangements. Thirdly, many of the arrangements for the practicalities, for example, who should speak for what behind what nameplate, may look minute, complicated, and miscellaneous; nonetheless it is sometime the practical issues that attract disagreements between the EU and the Member States. For example, it is observed that after the entry into force of the Lisbon Treaty, the Commission argued that it should now be the sole spokesperson on exclusive and shared competences, while Member States' diplomats argued that Lisbon changes nothing, and that the role of the rotating Council Presidency should remain.¹⁷¹ The adoption of new FAO Arrangement may assist in providing a clearer guideline for the EU and its Member States in dealing with these issues, and hence provide a legal basis for ensuring greater certainty, not only for the EU and its Member States, but also their international counterparts. It may also compensate for the lack of number or expertise of the EU delegation on the spot.¹⁷² Yet it should be further observed how the proposed New FAO Arrangements would be adopted and applied in practice in the future.

6. *Concluding remarks*

The case of the EU's participation in the FAO is considered as the area where the theory meets the practice, as “[t]heoretically it could be regarded as an example of a successful accession to an already existing international organisation. The situation in the FAO is, however, not completely satisfactory. Practical difficulties exist at both the EC and the international level.”¹⁷³ ¹⁷⁴ As this chapter showed, externally, the power the EU enjoys in the model adopted by the FAO following the 1982 UNCLOS prototype is still

¹⁷¹ Michael Emerson and Others, *Upgrading the EU's Role As a Global Actor: Institutions, Law and the Restructuring of European Diplomacy*, (Centre for European Policy Studies 2011) 76

¹⁷² *Ibid.*, 77

¹⁷³ Inge Govaere, Jeroen Capiiau, and An Vermeersch, “In-Between Seats: The Participation of the European Union in International Organisations”, in *EFAR* (2004) 165

¹⁷⁴ *See also*, Michael Emerson and Others, (note 171) 7, 44, 77

inferior to that of a Member Nation— it cannot hold office in certain bodies of the FAO, nor can it participate in the voting accordingly or participate in certain Committees.¹⁷⁵ The design of the Declaration of Competence is deemed to be a mechanism to clarify to the FAO and third States the delimitation of competence between the EU and its Member States. However, as the practice showed, due to the evolving nature of the distribution of external competence between the EU and its Member States, it is rather difficult to provide a clear and detailed list for the declaration of the competences. To provide an “up-to-date” Declaration of Competences as the FAO Constitution required, as the practice showed, may take years, if not decades. It also showed that even if internally the competence concerning maritime affairs for one international organisation may fall in one area that is clearer in its nature and scope— for the case of the FAO, it is observed that the Member States have transferred their powers in the area of fisheries to the EU, hence the issue of the division of competence does not normally arise.¹⁷⁶ Still the mechanism to deal with the distribution would be the key issue for the EU’s participation in that international organisation, because the purview that international organisation covers is often much wider than a single policy area, or several policy areas, that fall within the category of a single nature of competence in the EU. An updated Declaration of Competences corresponding to the Lisbon Treaty proposed by the Commission, as this chapter showed, would not fully solve the problem.

Internally, the case of the EU’s participation in the FAO again showed the governing role of the duty of sincere co-operation in external EU relations. Considered as a fulfilment of the duty of sincere co-operation, the internal arrangement concerning the coordination procedure concerning the preparation for the FAO meetings is not just an informal document but a binding procedure that both the EU and its Member States are committed to follow. The CJEU retains the key role in settling disputes between the EU

¹⁷⁵ Rule XLIII.3, XLIV, XLV, XLVI FAO General Rules

¹⁷⁶ Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea* (Brill 2007) 5

and its Member States concerning the participation in the activities related to the FAO, as Case C25/94 showed. However, as analysed in the earlier chapter, such an approach has its weakness and the limit, including the ex post facto, passive, and time-consuming nature of the judicial organ as well as the limited external effect, if any, of the internal arrangement.¹⁷⁷

Although the amendment of the FAO Constitution has enabled the EU to participate in the FAO as a formal member as well as becoming a member of the related agreements or Conventions accordingly, this breakthrough has not advanced the status of participation for the EU in other international organisation under the UN system. As the internal documents showed, even the EU and the Member States themselves have been reluctant to regard the model of participation in the FAO to have any implication regarding other international organisations including those within the UN system. Nonetheless, the participation of the EU as a formal member in the FAO has indeed lifted the barrier for the EU to participate in the decision-making of certain multilateral Conventions and regional fishery management organisations which are based on the FAO's statutes, and the EU can become parties to those multilateral Conventions within the framework of the FAO that previously, in the absence of the amendment, allowed only State members of the FAO to take part.¹⁷⁸ Therefore this has largely enhanced the EU's participation in the field of food and agriculture, especially the fisheries affair. This leads this thesis on to the study of the EU's participation in the decision-making of selected RFMOs, which will be discussed in the coming chapter.

¹⁷⁷ See Chapter 3 Section 2.2

¹⁷⁸ For example, the participation of the EU in the Indian Ocean Tuna Commission (IOTC), see Rachel Frid, (note 50) 232, 272-273. This is because the previous FAO Constitution provided in Article 14.3 limited the Parties of conventions, agreements, and supplementary conventions and agreements to the Member Nations of the FAO, and such non-Member States which are members of the UN

Chapter 7

Participation of the European Union in the Regional Fisheries Management Organisations (RFMOs)

1. Introduction

As discussed in the previous chapter, challenges facing the case of the EU's participation in the decision-making of multilateral fora in the field of maritime affairs remain. Although the amendment of the FAO Constitution has enabled the EU to participate in the FAO as a formal member as well as becoming the Contracting Party to the related agreements or Conventions accordingly, this breakthrough has not advanced the status of participation for the EU in other international organisations under the UN system. Furthermore, the management of fisheries at the international or regional level is not exclusively covered by the framework of the FAO, such an aim is at the same time being achieved through the co-operation between States and entities through many regional or sub-regional fisheries management organisations (RFMOs)¹, treaty bodies, agreements, or arrangements.² In this chapter the research will further look into the examples of the EU's participation in the RFMOs, where in many cases the EU enjoys not only formal but also exclusive and sole member status to participate in such multilateral relations. As will be shown, the model for the EU's participation in multilateral fora is not a choice between no membership, as is the case with the IMO, and a formal membership with all of the EU Member States, as is the case with the UNCLOS and the FAO; there exist many other models in

¹ In this Chapter, the term "regional fisheries management organisation" refers to a regional international organisations formed by governmental members with fishing interests in an area, with the mandate of management of fisheries

² Article 1.(d) Fish Stock Agreement stipulates that "arrangement" means a cooperative mechanism established in accordance with the Convention and this Agreement by two or more States for the purpose, inter alia, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks

between, and further causes of complexity for the EU's participation in the multilateral fora.

The structure of the chapter will be the following. It will begin with an overview of the role of regional co-operation on the management of fisheries under the international framework in order to demonstrate the need for the EU to participate in the RFMOs. Considering the scope of this thesis, after the overview, the research will not cover all of the EU's participation or involvement in the regional organisations, treaty bodies, agreements, or arrangements governing the fisheries, but will focus mainly on three selected practices of the EU's participation in the RFMOs, namely, the General Fisheries Commission for the Mediterranean (GFCM), the International Commission for the Conservation of Atlantic Tunas (ICCAT), and the North-East Atlantic Fisheries Commission (NEAFC) as examples. There are mainly three reasons to select these three RFMOs as the core examples in this section. Firstly, geographically speaking, these RFMOs cover the regions that are neighbouring or closer to the waters of the EU and its Member States, therefore the EU and its Member States have imminent interests in the activities covered by these RFMOs. Secondly, these three RFMOs have different relations with the FAO – the GFCM was established based on Article XIV of the FAO Constitution; the ICCAT was established outside the FAO framework, yet the Director-General of the FAO serves the depository function for the organisation;³ and the NEAFC was established outside the FAO framework. It may therefore be observed how the mechanism contained in the FAO influences the mechanisms of these RFMOs. Thirdly, and most importantly, the model of the EU and its Member States' participation in these RFMOs varies. The EU participates in the GFCM as a formal member under the term of REIO with some of its Member States; it participates in the ICCAT as a sole member under the generic term of “inter-governmental economic integration organisation” (IEIO); whilst it participates in the

³ Article XIV.2 International Convention for the Conservation of Atlantic Tunas (adopted 14 May 1966, entered into force 12 March 1969) 673 UNTS 64 (ICCAT Convention)

NEAFO as a sole member specifically under the name of European Community. With these examples, where different arrangements were made for the EU to participate, with or without its Member States, this chapter will further show the diversity and potential inconsistency of practice in the participation, and provides good material to further reflect on the legal implications and challenges of such practice. Nonetheless, this thesis also notes that differences and complexities exist in the EU's participation beyond these three RFMOs, and does not intend to exclude these influences from the practice of the EU and its Member States' participation in other RFMOs. Therefore, relevant practices of the EU and its Member States in other RFMOs or treaty bodies will also be referred to when necessary so as to further demonstrate the complexity of the practice and the legal issues surrounding the participation of the EU in RFMOs.

2. The role of the RFMOs in the governance of maritime affairs: an overview

As important binding and non-binding instruments concerning maritime fisheries, such as the 1982 UNCLOS,⁴ Agenda 21 of the United Nations Conference on Environment and Development (UNCED),⁵ the Fish Stock Agreement,⁶ the Code of Conduct for Responsible Fisheries,⁷ and the International Plans of Actions to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing⁸ have envisaged, the management of fish stock relies heavily on co-operation between States through sub-regional and regional fisheries organisations and arrangements. The picture of the governance of fisheries has largely changed. This is for both natural and legal

⁴ See e.g. Part VII Section 2 UNCLOS (Articles 116 to 120) , Article 63.2, and Article 64 of the UNCLOS

⁵ In particular, Chapter 17 para 49

⁶ In particular, Part III of the Agreement (Mechanisms for International Cooperation Concerning Straddling Fish Stocks and Highly Migratory Fish Stocks).

⁷ In particular, Article 7.3. Code of the Conduct (Management framework and procedures)

⁸ In particular Article 9.1. (Participation and coordination) and Article 28 (Cooperation between States)

reasons. Naturally speaking, fish stocks do not usually stay within the water of a single State but stay in the high seas or straddle or migrate between different zones created by the States. Legally speaking, the jurisdiction over fishing vessels on the high seas is in principle exercised by their flag State only. Any single coastal State cannot ensure measures that are compatible with those adopted in the Exclusive Economic Zones (EEZs). Therefore, the effective management of shared, anadromous, straddling, highly migratory, or high sea fish stocks cannot be done by one single State but only through regional or international co-operation.⁹ Whilst the FAO plays its important role in the management of fisheries, the FAO's function in the governance of fisheries is not exhaustive. The FAO acts rather as a global international organisation with mostly advisory, recommendatory functions. It generally does not perform as a regulator that concentrates only on matters concerning fisheries. It covers a wide range of mandates covering food and agriculture in general, and has no direct involvement in the adoption of conservation and management measures for particular area and fish stocks.¹⁰

RFMOs or treaty bodies have been set up in order to institutionalise the co-operation between interested States and entities specifically concerning fisheries in a frequent and regular manner so as to manage the fish stocks. These RFMOs provide fora within which representatives of the States meet to establish, using the best scientific data available,¹¹ arrangements for managing fish stocks. They provide a legal framework

⁹ Robin Churchill and Daniel Owen, *The EC Common Fisheries Policy*, (OUP 2010) 112-113; S.H. Marashi, "Summary Information on the Role of International Fishery and Other Bodies with Regard to the Conservation and Management of Living Resources of the High Seas", *FAO Fisheries Circular No.908 FIPL/C908*

¹⁰ James Harrison, *Making of the Law of the Sea: A Study in the Development of International Law*, (CUP 2011) 226

¹¹ For the difficulty and controversy over the definition and implementation of this concept, can see P. J. Sullivan and others, "Defining and Implementing Best Available Science for Fisheries and Environmental Science, Policy, and Management" 31(9) *Fisheries* (2006) 460-465

where the distinctive nature and characteristic features of the respective regions can be taken into account by virtue of their regional character.¹²

Currently, according to the FAO, there are about 44 regional fishery bodies (RFBs) worldwide that cover practically all the high seas.¹³ The institutional relationship of these RFBs with the FAO can be categorised into three different groups. Firstly, a group of RFBs were established under the FAO's constitution. There are two sub-types of RFBs in this category: those established under Article VI of the FAO Constitution, which are classified as subsidiary organs of the FAO, and those established under Article XIV of the FAO Constitution. The RFBs established under Article VI of the FAO Constitution (such as the Fishery Committee for the Eastern Central Atlantic (CECAF)¹⁴ and the Western Central Atlantic Fishery Commission (WECAFC)¹⁵) are less autonomous in terms of finance, mandate and autonomy than the RFBs established under Article XIV of the FAO Constitution (such as the GFCM, and the Indian Ocean Tuna Commission (IOTC)¹⁶).

Secondly, several RFMOs (such as ICCAT, the Southeast Atlantic Fisheries Organisation (SEAFO)) were established outside the FAO framework, but the Director-General of the FAO exercises depositary functions for such organisations, and they have close co-operation with the FAO.¹⁷

¹² Commission, "Community participation in Regional Fisheries Organisations (RFOs)", COM(1999) 613 final, 4

¹³ <http://www.fao.org/fishery/topic/16800/en> <last access: 12.06.2013>. For a survey on the fisheries organisations and other bodies see: Gail Lugten, "The Role of International Fishery Organisations and Other Bodies in the Conservation and Management of Living Aquatic Resources", *FAO Fisheries and aquaculture Circular*, No. 1054 (2010)

¹⁴ Preamble of Resolution 1/48 adopted by the FAO Council (48th Session, 1967)

¹⁵ Resolution 4/61 of the FAO Council (61st Session 1973)

¹⁶ Preamble of the Agreement for the Establishment of the IOTC

¹⁷ See e.g. Article XI, Article XIII, Article XIV.2, Article XIV.6, Article XV, Article XVI ICCAT Convention and Rule 4 ICCAT RoP, in ICCAT, *Basic Text* (5th revision 2007) 13; Agreement between the Food and Agriculture Organisation of the United Nations and the International Commission for the Conservation of Atlantic Tunas, ICCAT, *Basic Text* (5th revision 2007) 31; Jan Wouters and Others, *Study for the*

Thirdly, there are also RFBs established outside the FAO's framework, such as the Northwest Atlantic Fisheries Organisation (NAFO), the Western and Central Pacific Fisheries Commission (WCPFC), and NEAFC, where the FAO plays a limited role.¹⁸ Nonetheless, they have still been influenced by fisheries instruments adopted by the FAO.¹⁹

Although the majority of the RFMOs commonly have powers in relation to the conservation and management of resources, the focus of the mandate of the RFMOs varies. Some of them – the South Pacific Regional Fisheries Management Organisation (SPRFMO), NAFO, NEAFC, and GFCM for example – are concerned with all biological resources in the geographical area they are responsible for,²⁰ whilst others – the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) and ICCAT for example – focus on a stock or a group of stocks, mainly tuna and tuna-like species.²¹ Unlike some RFBs whose role is primarily advisory and who advise on the status of fish stocks within their region and make recommendations and/or other coordinating management measures that are not legally binding on their members, the RFMOs' management mandates allow them to adopt fisheries conservation and management measures, including, for example, technical measures and fixing the total allowable catches (TACs) and the rules for the share-out, that are binding on their members.²²

The effective governance over fishery through RFMOs is sought many different ways. Firstly, it is sought through the encouragement of active participation of concerned States and other interested entities in multilateral co-operation, and through the flexible design of membership or other forms

Assessment of the EU's Role in International Maritime Organisations: Final Report (LCGGS 2009) 32; James Harrison, (note 10) 228-229

¹⁸ <http://www.fao.org/fishery/topic/16918/en> <last access: 12.06.2013>

¹⁹ See James Harrison, (note 10) 230; For the relationship and co-operation between the FAO and regional fisheries bodies in general, see 226-233

²⁰ See e.g. Article 1.1.(f) SPRFMO Convention, Article 1.4 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Article 1(b) NEAFC Convention, Preamble GFCM Agreement. See also Joined Cases 3/76, 4/76 and 6/76 Cornelis Kramer and others [1976] ECR 1279, paras 30-33

²¹ See e.g. Article 1 CCSBT Convention and Preamble ICCAT Convention

²² Robin Churchill and Daniel Owen, (note 9), 113

of participation to enable such participation.²³ Such flexibility also reflects on the introduction of the concept “fishing entities” into the legal framework of fishery management. The Fish Stock Agreement, for example, requests States which are members of a subregional or regional fisheries management organisation or participants in a subregional or regional fisheries management arrangement to, individually or jointly, request the fishing entities that have fishing vessels in the relevant area to cooperate fully with such an organisation or arrangement in implementing the conservation and management measures it has established, with a view to having such measures applied de facto as extensively as possible to fishing activities in the relevant area. It also requests them to enable such fishing entities to enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the stocks.²⁴

Secondly, and may be more note-worthily, are the measures RFMOs may take against the mechanisms designed for non-members of the RFMOs.²⁵ Article 8.4 of the Fish Stock Agreement provides that only those States which are members of a regional fishery organisation or participants in such an arrangement, or which agree to apply the conservation and management measures established by such an organisation or arrangement, shall have access to the fishery resources to which those measures apply.²⁶ Article 7.7.5 Code of Conduct for Responsible Fisheries of the FAO also provides that States which are members of or participants in subregional or regional fisheries management organisations or arrangements should

²³ See e.g. Article 8.3 Fish Stock Agreement

²⁴ Article 1.3 and Article 17.3 ICCAT Convention; See, e.g. Andrew Serdy, “Bringing Taiwan into the International Fisheries Fold: the Legal Personality of a Fishing Entity”, *BYIL* (2004) 183; Yann-Huei Song, “The International Tribunal for the Law of the Sea and the Possibility of Judicial Settlement of Disputes Involving the Fishing Entity of Taiwan - Taking CCSBT as an Example”, *SDILJ* (2006) 37; Dustin Kuan-Hsiung Wang, “Taiwan's Participation in Regional Fisheries Management Organisations and the Conceptual Revolution on Fishing Entity: The Case of the IATTC”, *ODIL*(2006) 209

²⁵ Robin Churchill and Daniel Owen, (note 9) 117; Commission, (note 12) 8-9

²⁶ Article 8.4 Fish Stock Agreement

implement internationally agreed measures adopted in the framework of such organisations or arrangements and consistent with international law to deter the activities of vessels flying the flag of non-members or non-participants which engage in activities which undermine the effectiveness of conservation and management measures established by such organisations or arrangements. Some RFMOs, such as the WCPFC,²⁷ the CCSBT,²⁸ and the ICCAT,²⁹ introduced the concept of the “cooperating non-member”, allocated to those non-members that are prepared to cooperate and observe the management of the RFMOs concerned, adopting tougher measures than those non-members who are not willing to cooperate.³⁰ All of which leads to the growing importance of the RFMOs in the management of fisheries, and the need for the all entities, including the EU, to participate in the activities of the RFMOs.

3. European Union in the Regional Management Organisations: Three examples

Being one of the key concepts of the international management of fisheries, the aforementioned consolidated notions of strengthening regional co-operation through RFMOs and encouraging the wider participations of all concerned actors in the frameworks have made the EU’s participation in the RFMOs crucial for the EU, its Member States, and their international

²⁷ Resolution to Establish the Status of Co-operating Non Member, adopted at the Sixth Regular Session, 7-11 December 2009

²⁸ Resolution to Establish the Status of Co-operating Non-Member of the Extended Commission and the Extended Scientific Committee adopted at the Tenth Annual Meeting, 7-10 October 2003

²⁹ Recommendation by ICCAT on Criteria for Attaining the Status of Cooperating Non-Contracting Party, Entity or Fishing Entity in ICCAT, 2003

³⁰ Robin Churchill and Daniel Owen, (note 9) 117. Nonetheless, Ronald Barston also pointed out that shortcomings exist in this type of relation, for example, a non-member may still refuse to accept the effort to the reduction in its catch on the ground that such proposed measure is discriminatory and dual-standard. Ronald Barston, “The Law of the Sea and Regional Fisheries Organisations”, 14 *IJMCL*(1999) 351

counterparts.³¹ The rather flexible attitude toward the member status for participation provided by the RFMOs, which aims to accommodate more participants in regional co-operation, at the same time has provided more possibilities for the EU's participation in such RFMOs. All these factors together have made the cases of the EU's formal participation in the RFMOs relatively thriving. At the time of writing, the EU plays an active role in at least six tuna organisations and 11 non-tuna organisations, including: the Agreement on the International Dolphin Conservation Programme (AIDCP), the North Atlantic Salmon Conservation Organisation (NASCO), the South Indian Ocean Fisheries Agreement (SIOFA), the Convention on Conservation of Antarctic Marine Living Resources (CCAMLR), the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (CCBSP), CECAF, ICCAT, IOTC, WCPFC, IATTC, CCSBT, NEAFC, NAFO, SEAFO, SPRFMO, GFCM, and WECAFC.³² Generally, in cases where the EU enjoys formal member status in a RFMO, it was made possible through the EU becoming the Contracting Party to the constituting instrument of that RFMO.³³ By becoming a member of the RFMOs, the EU is able to participate in the works of the RFMOs, including, generally, an executive body (commission) mainly in charge of the decision-making, adopting measures for the management of fisheries; a scientific body responsible for providing scientific advice and recommendations for the preparation and adoption of the management measures; a secretariat to deal with the administrative affairs of the organisation; and subsidiary bodies for undertaking the works of the RFMOs.³⁴

Nevertheless, this does not mean the EU participates in these RFMOs in one single, simple and consistent form. On the contrary, the forms of EU participation in the RFMOs are more complicated and diverse than those in

³¹ Commission, Developing the international dimension of the Integrated Maritime Policy of the European Union, COM(2009)536 final, 8; *See also* Chapter 6 Section 3
³² http://ec.europa.eu/fisheries/cfp/international/rfmo/index_en.htm <last access: 12.06.2013>

³³ Robin Churchill and Daniel Owen, (note 9) 359

³⁴ Commission, (note 12) 7

most other areas. This complexity and diversity of the EU's participation in the RFMOs can be largely reflected by the following examples.

3.1. The participation in the GFCM: a partial mixed participation

The exploration of the examples of the EU's participation begins from the case of the General Fisheries Commission for the Mediterranean (GFCM), where the model for the EU's participation can be seen as a variation on the model adopted by the FAO, but somehow even more complicated.

The GFCM, originally the General Fisheries Council for the Mediterranean, was established by the Agreement for the establishment of the General Fisheries Commission for the Mediterranean approved by the FAO Conference in 1949. The agreement entered into force in 1952 under the provisions of Article XIV of the FAO Constitution,³⁵ and was last amended in 1997 as the Agreement for the Establishment of the General Fisheries Commission for the Mediterranean (GFCM Agreement).³⁶ It aims to promote the development, conservation, rational management and best utilisation of living marine resources, as well as the sustainable development of aquaculture in the Mediterranean, Black Sea and connecting waters (the Region) through its wide range of functions.³⁷ The GFCM has the authority to adopt recommendations for fisheries conservation and management in its Convention Area. These recommendations become binding on the Members after no objection is made by any of the Members within a set period.³⁸ It therefore plays a critical role in fisheries governance in the Region.

³⁵ Agreement for the Establishment of a General Fisheries Council for the Mediterranean (adopted 24 September 1949, entered into force 20 February 1952) 126 UNTS 239

³⁶ Agreement for the Establishment of the General Fisheries Commission for the Mediterranean (adopted 6 November 1997, entered into force 29 April 2004) 2275 UNTS 157

³⁷ Article III.1 and Article III GFCM Agreement

³⁸ Article V GFCM Agreement. For the legal status of recommendations in different international organisations, see, e.g. C. F. Amerasinghe, *Principles of the institutional law of international organisations*, (2nd edn, CUP 2005) 175-192

The membership of the GFCM is open to Members and Associate Members of the FAO and such non-Member States as are members of the United Nations, any of its Specialised Agencies or the International Atomic Energy Agency, that are: (i) coastal States or Associate Members situated wholly or partly within the Region; or (ii) States or Associate Members whose vessels engage in fishing in the Region for stocks covered by this Agreement.³⁹ A REIO clause, which provides that a regional economic integration organisations of which any State referred to above is a member and to which that State has transferred competence over matters within the purview of the GFCM Agreement is eligible to become a Party to the Agreement and a member of the GFCM, was adopted in 1997 to make possible the participation of the EU.⁴⁰ Nonetheless, unlike the model adopted by the 1982 UNCLOS or the FAO, there is no requirement on the majority of its Member States to be Contracting Parties to the GFCM for a REIO to be eligible to be a Party to the GFCM.

There are 24 Members, including the EU, in the GFCM at the time of writing.⁴¹ The EC became a Party to the GFCM Agreement and a member of the GFCM in 1998 after the 1997 amendment.⁴² There is no provision requesting the Member States of the EU that are also members of the GFCM to withdraw their membership upon the participation of the EU. Bulgaria, Croatia, Cyprus, France, Greece, Italy, Malta, Romania, Slovenia, and Spain are EU Member States that are also Parties to the GFCM Agreement and members of the GFCM.⁴³ This mixed participation of the EU with only part of its Member States is a rather rare case in the EU's participation within international organisations. Nonetheless, the reason for this mixed and

³⁹ Article I.2.(i) and (ii) GFCM Agreement

⁴⁰ Article I.2.(iii) GFCM Agreement

⁴¹ <http://www.gfcm.org/gfcm/about/en#Org-Mission> <Last access: 12.06.2013>

⁴² 98/416/EC: Council Decision of 16 June 1998 on the accession of the European Community to the General Fisheries Commission for the Mediterranean [1998] OJ L190/ 34-35

⁴³ <http://www.gfcm.org/gfcm/about/en#Org-OrgsInvolved> <Last access: 08.09.2013>

partial participation is not entirely clear.⁴⁴ A possible answer lies in the membership requirements of the GFCM. Article I.2 GFCM Agreement limited the membership of States to only specific States that are: (1) coastal States or Associate Members situated wholly or partly within the Region; (2) States or Associate Members whose vessels engage in fishing in the Region for stocks covered by this Agreement. Not all the EU Member States are eligible for membership, therefore even if a full mixed-membership is desirable for any of the GFCM actors, under the current GFCM Agreement it could only result in a status of partial mixed membership, as it is now.

It is not surprising that the mechanism adopted by the GFCM to accommodate the EU's participation is in many ways identical to that of the FAO, considering that the GFCM was established under the FAO according to Article XIV FAO Constitution. It has more detailed rules concerning the participation of the REIO than many other RFMOs, as will be discussed in the later sections. In principle, the decisions of the Commission are taken by a majority of the votes cast, and a majority of the total membership of the Commission shall constitute a quorum.⁴⁵ The REIO member is entitled to exercise in any meeting of the Commission or of any subsidiary body of the Commission a number of votes equal to the number of its Member States that are entitled to vote in such a meeting on an alternative basis. Whenever a REIO member of the Commission exercises its right to vote, its Member States cannot exercise theirs, and vice versa.

The GFCM Agreement also adopted the clause concerning the provision of the information about the distribution of competence in order to clarify the distribution of competence between the REIO and its Member States that are members of the Commission. The REIO Member or its Member States concerned shall provide, at the request of any member of the Commission, the information as to which, between the Member Organisation and its Member States, has competence in respect of any specific question.⁴⁶

⁴⁴ Robin Churchill and Daniel Owen, (note 9) 362

⁴⁵ Article II.2 GFCM Agreement

⁴⁶ Article II.5 GFCM Agreement

Before any meeting of the Commission or a subsidiary body of the Commission, a REIO Member of the Commission, or its Member States that are Members of the Commission shall indicate which, as between the REIO and its Member States, has competence in respect of any specific question to be considered in the meeting and which, between the REIO and its Member States, shall exercise the right to vote in respect of each particular agenda item. A REIO Member or its Member States that are Members of the Commission can also make a single declaration that shall remain in force for questions and agenda items to be considered at all subsequent meetings subject to such exceptions or modifications as may be indicated before any individual meeting.⁴⁷

The GFCM also adopted the clause identical to that of Rule XLII.3 of the FAO General Rules to deal with cases where an agenda item covers both matters in respect of which competence has been transferred to the REIO and matters which lie within the competence of its Member States. On these occasions, both the REIO and its Member States may participate in the discussions. In such cases the meeting, in arriving at its decisions, shall take into account only the intervention of the Member which has the right to vote.⁴⁸ Similar to Rule XLV.2 of the FAO General Rules, when determining a quorum of any meeting of the Commission, the GFCM Agreement provided that the delegation of a REIO Member of the Commission shall be counted to the extent that it is entitled to vote in the meeting in respect of which the quorum is sought.⁴⁹

The EC made a “single declaration”, which applies to all GFCM meetings unless a specific statement is made by the EC in respect of any meeting or agenda item, on the exercise of its competence and voting rights according to Article II.6 last sentence of the GFCM Agreement at the time of

⁴⁷ Article II.6 GFCM Agreement

⁴⁸ Article II.7 GFCM Agreement

⁴⁹ Article II GFCM Agreement

its accession to the GFCM in 1998.⁵⁰ The single declaration was later amended in 2004 in response to the entry into force of the amendments of the GFCM Agreement, aiming to establish an autonomous budget for the organisation.⁵¹

The single declaration specified the competence of the European Community and of its Member States in matters covered by the Agreement establishing the GFCM, including: 1. European Community's Competence: for agenda items dealing with conservation and management of living marine resources, the European Community has exclusive competence and voting rights;⁵² 2. Member States' Competence: for agenda items dealing with organisational matters (legal and procedural issues), the Member States of the European Community have competence and voting rights;⁵³ 3. Shared Competence: (a) for agenda items dealing with statistics and aquaculture, the competence is shared between the European Community and its Member States. The European Community has voting rights; (b) for agenda items dealing with research and development aid, the competence is shared between the European Community and its Member States. Member States have voting rights; (c) for agenda items dealing with consideration of reports and co-operation with other organisations, the competence is shared between the European Community and its Member States, in accordance with the same principles of distribution of competence as those set out above; (d) for agenda items dealing with budgetary issues, the competence is shared between the European Community and its Member States. The European Community has voting rights.⁵⁴ It is worth noting that unlike the proposed new FAO Declaration, which only declared that both the EU and its Member

⁵⁰ Single declaration by the European Community on the exercise of the competence and voting rights according to Article II(6) of the GFCM Agreement [1998] OJ L190/36 (Single Declaration)

⁵¹ Council Decision of 19 November 2004 amending the declaration by the European Community on the exercise of competence and voting rights submitted to the General Fisheries Commission for the Mediterranean [2004] OJ L357/31

⁵² Point 1 Single Declaration

⁵³ Point 2 Single Declaration

⁵⁴ Point 3 Single Declaration

States have the competence but did not specify the voting rights, between the EU and its Member States, in the area where the competence is concurrently exercised.⁵⁵ Here the Single Declaration assigned the voting rights to the EU and the Member States respectively.

It also has provision to supplement or modify the Declaration of Competence should there be any change in the distribution of competence. This Declaration of Competence will not be altered by the updated Declaration of Competences the Commission proposed to submit to the FAO, as it is clearly stated so in the text.⁵⁶ The Declaration of Competence also demonstrated that even if CFP is considered an area where the EU enjoys an extensive exclusive competence,⁵⁷ it does not necessarily guarantee that all the matters governed by an RFMO fall within the exclusive competence of the EU, particularly if that RFMO grants no or limited power concerning organisational matters to the EU.

The “day-to-day” statement made before any meeting of the Commission or a subsidiary body of the Commission by the EU and its Member States in accordance with Article II.6 GFCM Agreement in practice is similar to the day-to-day Declaration of Competence made by the EU and its Member States. Under each agenda item of the meeting, it is stated whether the agenda item is “EU Competence—EU Voting rights”, “Shared competence—EU Voting rights”, “Shared competence—MS Voting rights”, or “MS Competence—MS Voting rights”.⁵⁸

Another mechanism worth-noting provided by the GFCM is its provisions concerning the interpretation of the Agreement and dispute settlement. Any dispute regarding the interpretation or application of this

⁵⁵ Commission, “The role of the European Union in the Food and Agriculture Organisation (FAO) after the Treaty of Lisbon: Updated Declaration of Competences and new arrangements between the Council and the Commission for the exercise of membership rights of the EU and its Member States”, COM(2013) 333 final (29.05.2013) 9

⁵⁶ *Ibid.*, 7 (footnote 1); *See also* Chapter 5 Section 4.2.3

⁵⁷ *See* Chapter 5 Section 3

⁵⁸ *See e.g.* Statement of Competence and Voting Rights by the European Union and its Member States for the 37th Session of the Commission (Split, Croatia, 13-17 May 2013) GFCM:XXXVII/2013/Inf.3

Agreement, if not settled by the Commission, shall be referred to a committee composed of one member appointed by each of the parties to the dispute, and in addition an independent chairman chosen by the members of the committee. The recommendations of such a committee, while not binding in character, shall become the basis for renewed consideration by the parties concerned of the matter out of which the disagreement arose. If as the result of this procedure the dispute is not settled, it shall be referred to the International Court of Justice in accordance with the Statute of the Court. Nonetheless, in the case of a REIO Member involved, due to the fact that an entity other than a State is unable to be a Party before the ICJ,⁵⁹ such a dispute shall be submitted to arbitration unless the parties to the dispute agree to another method of settlement.⁶⁰

Internally there is no specific formal or informal arrangement governing the preparation and coordination for the GFCM.⁶¹ Similar to that of the ICAAT, which will be discussed in the later section, a decision of the establishment of Community position in the GFCM was adopted by the Council based on the proposal from the Commission, which set up the principles of the EU's position in the GFCM and those actions it shall endeavour to support.⁶² Article 218 TFEU, in particular Article 218.9, governs the cases where binding conservation and management measures are taken according to the provisions of the GFCM. Nonetheless, as Article 218.8. requires the Council to act by a qualified majority (QMV) throughout the procedure, it leaves questions as to how the provisions should be applied to participation in the GFCM. As has been shown above, although the model for the participation of the EU in the GFCM is a mixed-membership model, such

⁵⁹ Article 34.1 ICJ Statute provides that only states may be Parties in cases before the Court

⁶⁰ Article XVII GFCM Convention

⁶¹ Personal communication with Veronika Veits, the Head of Unit B1 (International Affairs, Law of the Sea, Regional Fisheries Management Organisations) of DG MARE of the European Commission dated 22 March 2013

⁶² Council Decision for the establishment of the Community position in the General Fisheries Commission for the Mediterranean (GFCM) of 06.03.2009, Doc . 7265/09, PECHE 52 LIMITE

mixed-membership includes not all but only part of the EU Member States together with the EU in the GFCM. Requiring a QMV internally in the decision-making, means that just the GFCM-participating Member States could not themselves acquire the majority— the number, the voting weight, and the population of these Member States fall short of meeting the voting counts required by the QMV under the EU law. This implies that even though the GFCM's membership is in principle open to the coastal or flag States that have specific interests in the GFCM Region, in the case of the EU and its Member States, all the EU Member States may indirectly be involved in the decision-making and other activities of the GFCM, because the internal decision-making procedure under EU law does not limit the power to only the Member States who are members of the GFCM. The partial mixed membership also raises concerns about the on-the-spot coordination. The on-the-spot coordination generally functions as an important coordination mechanism to prepare for the meeting when no sufficient time is left for the coordination to be conducted in Brussels, or to enhance the EU and its Member States to be responsive and flexible to any unexpected circumstance during the meeting. Nonetheless, in cases of this partial mixed-membership, where not all the EU Member States have their delegations for the meeting, it is doubtful in cases where an EU exclusive competence is involved, how a Union position can be adopted or adapted on the spot without the non-participating Member States involved.

Another problem with partial mixed-membership concerns accountability and responsibility. As we have seen in the previous cases of other mixed-membership participation models, a joint responsibility between the EU and its Member States is occasionally used by different international treaties and organisations to tackle situations including, for example, failure to clarify their distribution of competence accordingly or failure to perform an obligation concerning such un-clarified competence. It holds both the EU and Member States accountable should the situations happen.⁶³ However,

⁶³ See Chapter 4 Section 4

there is no clear rule concerning the distribution of responsibility provided by the GFCM. Furthermore, even if arguably that joint liability is applicable in the GFCM, the mechanism of joint responsibility and liability may still face certain difficulty— as only some of the EU Member States are members of the GFCM but all the EU Member States may be internally involved in the decision-making procedure. It is arguable that in cases where a joint responsibility indeed exists, those participating EU Member States may bear a heavier burden than the non-participating EU Member States in that the GFCM or the third State Members may address the responsibility directly to the participating Member States through the mechanism provided in the GFCM, whilst the non-participating EU Member States only indirectly bear responsibility behind the EU, which may result in an imbalance of accountability.

Although, as a RFMO, the GFCM has relatively detailed rules governing the participation of the REIO and its Member States, the participation of the EU and its Member States in the GFCM leaves no fewer questions. It incurred those problems a mixed-membership participation model may have. The fact that the EU participates in the GFCM under a partial mixed-membership model with only part but not all of its Member States adds even more problems. It should also be noted that despite the case of the GFCM being a rare case of a partial mixed-membership participation in the current practice, the mixed-membership model provided by other multilateral fora may still leave space for such problematic practice, as those treaties often require only the majority, not all, of the Member States to participate in the treaty or the international organisation together with the REIO, as the UNCLOS suggested.⁶⁴ Once, in the extreme case, one or more EU Member State leaves the mixed-membership multilateral forum, a partial mixed-membership may appear, and the aforementioned problems resulting from a partial mixed-membership may be replicated.

⁶⁴ See Chapter 4 Section 4.2.1

3.2. The participation in the ICCAT: sole and exclusive membership for the EU

The case of the EU's participation in the ICCAT, as will be seen in this section, deviated further away from the mixed-participation established by the UNCLOS and the FAO— it adopted a mechanism that accommodates the EU as the sole and exclusive member without the EU Member States' formal participation. The ICCAT was established by the International Convention for the Conservation of Atlantic Tunas (ICCAT Convention), which entered into force in 1969.⁶⁵ Its area of competence covers all waters of the Atlantic Ocean, including the adjacent Seas.⁶⁶ The ICCAT covers species including the tuna and tuna-like fishes (the Scombriformes with the exception of the families Trichiuridae and Gempylidae and the genus *Scomber*) and such other species of fishes exploited in tuna fishing in the competence area as are not under investigation by another international fishery organisation.⁶⁷ The main objective of the Convention is to cooperate to maintain the populations of these fishes at levels which will permit the maximum sustainable catch for food and other purposes for the conservation of the resources of tuna and tuna-like fishes of the Atlantic Ocean.⁶⁸ To achieve this objective, the Commission is responsible for the study of the populations of tuna and tuna-like fishes,⁶⁹ and to carry out the study through a variety of tasks.⁷⁰ The conservation and management measures of the ICCAT are legally binding and are mandatory for Contracting Parties which have not exercised their right to object within the time limited provided by the Convention.⁷¹

⁶⁵ International Convention for the Conservation of Atlantic Tunas (adopted 14 May 1966, entered into force 12 March 1969) 673 UNTS 64; <http://www.iccat.es/en/introduction.htm> <last access: 12.06.2013>; Gail Lugten, (note 13) 39; Robin Churchill and Daniel Owen, (note 9) 359

⁶⁶ Article I ICCAT Convention

⁶⁷ Article IV.1 ICCAT Convention; Gail Lugten, (note 13) 40; <http://www.iccat.es/en/introduction.htm> <last access: 12.06.2012>

⁶⁸ Preamble of the ICCAT Convention

⁶⁹ Article IV.1 ICCAT Convention

⁷⁰ Article IV.2 ICCAT Convention

⁷¹ Article VIII.2 and VIII.3 ICCAT Convention

The rule for the membership of the ICCAT is stipulated in Article XIV of the ICCAT Convention. Originally, the Convention was open for signature by the Government of any State which is a Member of the UN or of any Specialised Agency of the UN. Any such Government which did not sign the ICCAT Convention may adhere to it at any time.⁷² In order to allow the EC's participation in the ICCAT, Article XIV was amended to open the Convention for signature or adherence by any "inter-governmental economic integration organisation" (IEIO)— a term slightly different from the REIO clause adopted in the 1982 UNCLOS or the FAO Constitution, implying a possible broader application that includes not only regional but also global economic integration organisations— constituted by States that have transferred to them competence over the matters governed by the ICCAT Convention, including the competence to enter into treaties in respect of those matters.⁷³ After the amendment concerning the ICCAT membership entered into force in 1997, the EC acceded the ICCAT accordingly. At the time of writing, there are 48 Contracting Parties to the ICCAT.⁷⁴ As a reflection of the "flexibility" provided by the RFMOs mentioned in the previous section, ICCAT can also grant the status of Co-operator following the procedures outlined in the 2003 Recommendation by ICCAT on Criteria for Attaining the Status of Cooperating Non-Contracting Party, Entity or Fishing Entity in ICCAT.⁷⁵

The rights and obligations of an IEIO as a Contracting Party of the ICCAT Convention are equal to those of other Contracting Parties. Such equivalence shall also reflect on the interpretation of relevant terms in the text of the Convention i.e. the term "State" in Article IX.3, and the term "government" in the Preamble and in Article XIII.1.⁷⁶ The most noticeable part of the participation clause dealing with the participation of the Member

⁷² Article XIV.1 and XIV.2 ICCAT Convention. The amendment was adopted in 1984 and entered into force in 1997. *See also* Robin Churchill and Daniel Owen, (note 9) 371

⁷³ Article XIV.4 ICCAT Convention

⁷⁴ <http://www.iccat.es/en/contracting.htm> <last access: 12.06.2013>

⁷⁵ At the time of writing, this status has been attained by the following: Chinese Taipei (Taiwan), Guyana, Curaçao, Colombia, and Suriname. *Ibid.*

⁷⁶ Article XIV.5 ICCAT Convention

States of the IEIO in the ICCAT is stipulated in Article XIV.6. ICCAT Convention— when an IEIO becomes a Contracting Party to the Convention, the Member States of that IEIO and those which adhere to it in the future shall cease to be parties to the Convention by transmitting a written notification to this effect to the Director-General of the FAO.⁷⁷ In accordance with this provision, Portugal, Spain, and Italy withdrew from the ICCAT after the EC participated in the ICCAT, and Cyprus and Malta withdrew from the ICCAT in 2004 after their accession to the EU.⁷⁸ Two exceptions are France and the United Kingdom; they are still Contracting Parties to the ICCAT, but only on behalf of their overseas territories, which are not governed by EU Treaties.⁷⁹ There is no specific rule concerning the right or duty of an IEIO member to differentiate it from that of a State member.⁸⁰ Each member is entitled one vote in the decision making of the ICCAT, whilst in principle the decisions of the ICCAT are taken by a majority of the members of the ICCAT.⁸¹ This means that when the EU votes in the ICCAT, its vote is not cast in the number of its Member States. This is significantly different from the mechanism adopted by other fora where the model of mixed-membership is adopted for the EU's participation, and as this thesis will later argue, may rather be a disadvantage for the EU and its Member States, preventing them from bringing their influences into full play.

The requirement of “transfer of competence to the IEIO” provided in the ICCAT Convention is similar to that commonly provided in other cases. Nonetheless, the difficulty caused by the incompatibility between the rule under EU law and that under the multilateral treaty provisions existing in the case of EU's participation in the UNCLOS does not much trouble the EU's

⁷⁷ Article XIV.6 ICCAT Convention

⁷⁸ Jan Wouters and others, (note 17) 33

⁷⁹ Ibid.

⁸⁰ Article XIV.5 ICCAT Convention; Paragraph 6 of the Final Act of the Conference of the Plenipotentiaries of the States Parties to the International Convention for the Conservation of Atlantic Tunas (Paris, July 9-10, 1984)

⁸¹ Rule 9 ICCAT RoP

participation in the ICCAT.⁸² This is mainly because the EU does not participate in the ICCAT together with its Member States in a mixed-membership model, but participates in the ICCAT as a sole and exclusive formal member. Yet the sole and exclusive membership status does not guarantee it is problem-free. The ICCAT adopted a one-way approach—once an IEIO like the EU participates in the ICCAT as a Contracting Party in accordance with the ICCAT Convention, the IEIO occupies the membership and the competence of all the affairs covered by the ICCAT, and the Member States no longer have any status or rights within the ICCAT. There is no explicit rule concerning the loss of membership of the IEIO when the IEIO no longer exclusively enjoys the competence. This approach has avoided several difficulties raised by mixed-membership participation. For example, the need for a mechanism to clarify the distribution of competence between the IEIO and its Member States, and the problem such a mechanism causes,⁸³ can be mitigated. The bearer of the right, obligation and responsibility is much clearer under this model of sole and exclusive participation. The EU is hence, under the ICCAT rules, considered as having been transferred full and exclusive competence over the matters governed by the ICCAT Convention, including the competence to enter into treaties in respect of those matters. Because the EU Member States are required to withdraw from the ICCAT when the EU participate solely in the ICCAT as an IEIO, there is no room for the EU Member States to claim a competence to be either a shared competence or a Member States' exclusive competence within the ICCAT regime. Nor can the EU claim that a matter covered by the ICCAT falls outside the competence it exclusively enjoys. As a result, the dynamic attribution of competence between the EU and its Member States— the source of many problems concerning the EU's participation in the decision-making of multilateral fora— is isolated from the competence enjoyed by the EU under the ICCAT regime.

⁸² For the incompatibility between the EU law and that of the UNCLOS, *see* Chapter 4 Section 5

⁸³ *See* Chapter 4 Section 5; Chapter 5 Section 4.2, and Section 3.1 this Chapter

Nonetheless, this design of the ICCAT Convention still leaves uncertainty. Firstly, as discussed in an earlier chapter,⁸⁴ the TFEU explicitly listed only “the conservation of marine biological resources under the common fisheries policy” as one of the EU’s exclusive competences.⁸⁵ On the one hand, it may be argued that the matters covered by the ICCAT fall fully under the competence of “the conservation of marine biological resources under the common fisheries policy” stipulated in the TFEU, or, on the other hand, it may also be argued that even though not all the matters covered by the ICCAT fall fully under the expressly listed exclusive competence of “the conservation of marine biological resources under the common fisheries policy” stipulated in the TFEU, those that fall outside the express exclusive competence are still exclusively exercised by the EU as a result of the EU’s effective exercise of its competence in the area of common fisheries policy, which pre-empts the Member States from exercising those competences.⁸⁶ Nonetheless, none of the approaches guarantees that the EU will always enjoy exclusive competence concerning the matters governed by the ICCAT as a State presumably does. The ICCAT Convention may be amended so as to cover a wider mandate which falls outside the exclusive competence currently enjoyed by the EU. The EU Treaties may be amended such that “the conservation of marine biological resources under the common fisheries policy” no longer falls within the exclusive competence of the EU,⁸⁷ or the EU may, as Article 2.2 TFEU provides, cease to exercise those competences over the common fisheries policy other than “the conservation of marine biological resources” and the Member States again are able to exercise such competence. All these possible developments lead to a potential incompatibility between the scope of the transferred competence governed by the ICCAT Convention and the competence conferred on the EU according to the EU Treaties.

⁸⁴ See Chapter 2 Section 2.1.2

⁸⁵ Article 3.1.(d) TFEU

⁸⁶ Article 2.2 TFEU

⁸⁷ The possibility of the EU having its exclusive competence removed is not something fanciful as it might sound, *see e.g.* House of Commons, “Bill to make provision for the withdrawal of the United Kingdom from the Common Fisheries Policy (Common Fisheries Policy (Withdrawal) Bill)”

Nonetheless, neither the ICCAT Convention nor the EU Treaties provide clear guidance when such scenarios happen.

Arguably, the requirement of “[an] inter-governmental economic integration organisation constituted by States that have transferred to it competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters” used by the ICCAT, which is identical to the wording used by the UNCLOS,⁸⁸ does not require an IEIO to be qualified as a Party only when competence over *all* the matters governed by the Convention have been transferred to it. Nevertheless, Article XIV.6 ICCAT Convention leaves no room for the EU Member States to seek mixed-participation in the ICCAT. Under the ICCAT regime, the position the ICCAT and its members can adopt toward the possible incompatibility is simple and straightforward— regardless of the incompatibility between the ICCAT Convention and EU law. Without any further arrangement, the EU shall remain the sole member as an IEIO in the ICCAT taking the duty, obligation, and responsibility under the ICCAT.

Nevertheless, to propose an amendment to introduce a mixed-participation mechanism similar to what has been adopted by other multilateral fora to respond to the possible incompatibility may not be a desirable solution, at least for the ICCAT Contracting Parties— the voting right is likely to be a key concern for them. Even though the IEIO clause in the ICCAT was phrased in a generic way, it was in fact specifically tailored with the EU’s sole and exclusive participation and one single vote in mind. In the Final Act of Conference of Plenipotentiaries of the States Parties to the ICCAT (Paris Protocol attached)⁸⁹, which adopted the text to be amended so as to incorporate the IEIO clause in the ICCAT, it expressly stated:

⁸⁸ Article 1 Annex IX, UNCLOS

⁸⁹ ICCAT, *Basic Texts* (5th revision 2007) 33. *Also note* point 7 stated: “The Conference took note of the explanations offered by the Japanese representative regarding the problems of a procedural nature which were not resolved during the course of the meeting. The representative, however, in a spirit of compromise, did not oppose the consensus reached in the Conference in order to ensure the early admission of the European Economic Community to the International Convention for the Conservation of Atlantic Tunas.”

“[t]he Conference also agreed that the [IEIO clause] will, upon their entry into force, be applicable to the European Economic Community *with the understanding that the European Economic Community will have the rights and obligations of a single Contracting Party, especially as concerns voting and contributions to the budget of the International Commission for the Conservation of Atlantic Tunas*”⁹⁰ (emphasis added)

From the third-State Contracting Party’s point of view, the need to restrain the voting power of the EU is not inconceivable. At the time the amendment was introduced, there were less than 20 Contracting Parties to the ICCAT. If a mixed participation was introduced at that time and the EU was allowed to cast its number of votes equal to the number of its Member State Contracting Parties, it would constitute an easy majority of the ICCAT, where decisions are taken by a majority of the Contracting Parties.⁹¹ Even though the number of Contracting Parties has grown to 48, the concern that the EU would dominate the RFMO remains largely unchanged, considering that the quorum of the ICCAT decision making is constituted by two-thirds of the Contracting Parties. This means that the even if the EU and its Member States would not constitute the majority of the Contracting Parties, they would still be able to dominate the decision-making of the ICCAT.

Other than seeking an amendment for the possibility of mixed-participation to be included in the ICCAT, which is seemingly impossible to be adopted by the ICCAT Contracting Parties for the aforementioned reason, the solution to mitigating the challenge resulting from the possible incompatibility, still largely lies with the EU and its Member States’ compliance to the duty of co-operation under EU law.⁹² As the CJEU held in its previous decisions, the EU’s lack of membership in an international organisation shall not prevent the external competence from being in fact exercised. It should be realised particularly through the Member States acting jointly in the EU’s interest.⁹³ The same doctrine shall apply to the Union in

⁹⁰ Ibid.

⁹¹ Article III.3 ICCAT Convention

⁹² For the discussion of duty of co-operation under the EU law, see Chapter 3 Section 2

⁹³ Case C-45/07, para 31; Opinion 2/91, para 5. See also Chapter 3 Section 2

the case when an incompatibility of competence exists but the Member States lack membership status of the ICCAT. The EU, as a sole and exclusive member of the ICCAT, shall fully fulfil its internal duty of co-operation and coordination with its Member States, whilst externally performing the right and duty under the ICCAT on behalf of the EU as well as in the interest of its Member States. This is most likely to happen in cases where the matter is internally categorised as an exclusive competence of the Member States, as even if a matter falls under the shared competence between the EU and its Member States and has not been exercised by the EU, once the EU decide to exercise such competence to the extent of pre-emption, the nature of the competence will shift upon the exercise of that competence from un-pre-empted shared competence to pre-empted shared competence and hence end such incompatibility. If a matter falls in the exclusive competence of the Member States, the EU shall refrain from acting externally in the ICCAT without internally coordinating with and obtaining further authorisation from its Member States.

Currently there is no specific formal or informal internal arrangement concerning the coordination procedure of the EU and its Member States to make preparation for the ICCAT internally within the EU and its Member States.⁹⁴ At the time when the EU started to participate in the ICCAT as a formal member, Article 300.2 of the ex-TEC (Article 218 TFEU) provided the legally required procedure governing those ICCAT meetings where binding conservation and management measures are taken according to the provisions of the ICCAT. Nonetheless, as Jan Wouters observed, such procedures were unable to be fully complied with for the reason that various ICCAT Committees were unable to submit the scientific information in a timely manner so as to allow sufficient time for the required procedure to be followed⁹⁵. The insufficient time allowed for the preparation resulted in the Commission only being able to produce a statement in the meetings broadly outlining the positions to be taken in the ICCAT meetings, and would

⁹⁴ Personal communication, (note 61)

⁹⁵ Jan Wouters and others, (note 17) 33

commence coordination meetings on the spot to further discuss related issues. Yet the lack of clear coordination was criticised whilst the Commission defended its position, arguing that following fully the procedural requirements of Article 300.2 of ex-TEC would only result in failure to reach any position between the EU and its Member States for the ICCAT meetings and being unable to protect the interest of the EU and its Member States.⁹⁶

Amid the disagreement on how the coordination procedure should be followed, in 2008, upon the proposal from the Commission, the Council based its decision in particular on Article 33, Article 37, and Article 300.2 paragraph 2 of the ex-TEC and decided to authorise the Commission to conduct negotiations within the ICCAT on behalf of the Community in both plenary ICCAT meetings, subsidiary ICCAT bodies, and working groups.⁹⁷ It reiterated that pursuant to the second subparagraph of Article 300.2 of the ex-TEC, the position of the Community in bodies set up by regional fisheries agreements which are called upon to adopt decisions having legal effects (but not modifying the institutional framework of the agreements concerned) must be adopted by qualified majority by Council decision, on a proposal from the Commission, and the decision made in accordance with the procedure attached with the Council Decision.⁹⁸ In view of preparing the EU's position, the Commission also adopted the method of sending Member States question papers in order to seek feedback from the Member States in particular on the published scientific advice. That feedback served as the basis for discussions at Council and enabled the Commission to gauge Member States' views.⁹⁹

⁹⁶ Jan Wouters and others, (note 17) 33-34

⁹⁷ Council Decision for the establishment of the Community position in the International Commission for the Conservation of Atlantic Tunas (ICCAT) decision of 11 November 2008 for the establishment of the Community position in ICCAT (14863/08). The established position set in the Annex of the Decision has been kept classified

⁹⁸ Point 3 of the Decision. However, the Annex, where the coordination procedure is stipulated, is not declassified

⁹⁹ See e.g. Memo for the Preparation Agriculture/Fisheries Council of October 2010, MEMO/10/518 (25.10.2010)

The Lisbon Treaty has formally adopted the abovementioned procedure in Article 218 TFEU. Article 218.9 provides that “[t]he Council, on a proposal from the Commission [...], shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.” Article 218.10 TFEU added that the European Parliament shall be immediately and fully informed at all stages of the procedure.

After the measures are adopted externally by the ICCAT, the EU transposes them into EU law, by means of EU Regulations in principle, so as to ensure the measures adopted by the ICCAT are effectively enforced by the EU Member States. The EU also annually adopts principal Regulations transposing the fishing opportunities and most of the technical measures adopted by the ICCAT.¹⁰⁰

Even though the EU enjoys extensive competence over the affairs of the ICCAT and has an exclusive member status in the ICCAT, the EU, especially the Commission, still meets with difficulty in promoting its position over the matters governed by the ICCAT both internally and externally from time to time through preparation and co-operation. In 2010, for example, the Commission adopted a proposal requesting a Council mandate for the EU position on a reduction of the total allowable catches of bluefin tuna and implementing other measures to promote the process of eliminating fishing overcapacity and to ensure that effective control measures are reinforced at the later meeting of the ICCAT.¹⁰¹ However, the Council was unable to reach a decision based on the Commission's proposal due to the disagreement among the Member States. The proposals the Commission

¹⁰⁰ For example, at the time of writing, the Council Regulation (EU) No. 44/2012 of 17 January 2012 fixing for 2012 the fishing opportunities available in EU waters and, to EU vessels, in certain non-EU waters for certain fish stocks and groups of fish stocks which are subject to international negotiations or agreements ([2012] OJ L 25/55)

¹⁰¹ Statement on the ICCAT Annual Meeting and bluefin tuna (09.11.2010)

tabled under the Council's adjusted mandate later in the ICCAT concerning the Bluefin tuna was adopted largely in line with the mandate, yet the EU could not get agreement on a number of the proposals tabled on sharks, bigeye tunas (in the Gulf of Guinea), and many other fish stocks and species.¹⁰² Considering that internally the TFEU requires a qualified majority throughout the decision procedure within the EU whilst externally the EU is only entitled one vote in the decision making of the ICCAT, where in principle decisions are taken by a majority of the 48 Contracting Parties, it is doubtful whether the EU and its 28 Member States' weight in the decision-making of the ICCAT, especially when voting is involved, is indeed maximised through the model of the EU's sole and exclusive membership. As mentioned in the previous paragraph, one single vote for the EU and its Member States may be more in the interests of the ICCAT Contracting Parties than the EU and its Member States.

This one single vote for the EU issue would be even more complicated if the ICCAT were a Convention concluded in accordance with Article XIV of the FAO Constitution. Article XIV 3.(b) of the FAO Constitution expressly provided that

“[w]here any convention, agreement, supplementary convention or agreement provides that a Member Organisation or a regional economic integration organisation that is not a Member Organisation may become a party thereto, the voting rights to be exercised by such organisations and the other terms of participation shall be defined therein. Any such convention, agreement, supplementary convention or agreement shall, where the Member States of the Organisation do not participate in that

¹⁰² Commission, “Summary of the results of the 2011 ICCAT annual meeting” (Press release on 28.11.2010). *Also note*, in 2009, the Commission's proposal to support a proposal to temporarily ban international trade of Atlantic bluefin tuna under the Convention on International Trade in Endangered Species (CITES) was rejected by the Member States (*See* Commission statement on the decision by Member States not to support Monaco's proposal to ban international trade in Atlantic bluefin tuna, 21 September 2009) In 2010 the Commission was unable to get sufficient support in the CITES meeting regarding the EU proposal for a listing in Appendix I of Bluefin tuna (*See* Statement by the European Commission on CITES vote on bluefin tuna, 18 March 2010), stating that it “look to ICCAT to take its responsibility to ensure that stocks are managed in a sustainable way. If action is not taken, there is a very serious danger that the bluefin tuna will no longer exist.”

convention, agreement, supplementary convention or agreement, and where other parties exercise one vote only, provide that the organisation shall exercise only one vote in any body established by such convention, agreement, supplementary convention or agreement [...]"

Any proposal on the revision of the voting right so as to reflect the EU's weight would further involve a need for an amendment of the FAO Constitution, thereby putting an even higher threshold on the EU and its Member States to introduce any reform on its voting rights in those fora, where the EU solely participates with one single vote, established in accordance with Article XIV 3.(b) FAO Constitution.

The case of participation of the EU within the ICCAT was assessed as "a correct reflection of its exclusive competence under the CFP and duly takes into account the importance of fisheries conservation".¹⁰³ Indeed on many occasions the EU has been able to play an ambitious role in the ICCAT as a major player, putting forward many progressive measures for the conservation and management of fish stock in the ICCAT. Nonetheless, this case also shows that even though an exclusive and sole membership may generally reflect the current allocation of competence under the EU Treaty while avoiding some difficulties emerging from the observer-only or mixed-membership models, this fixed model might be less flexible and responsive toward the dynamic allocation under EU law or any change of the scope of matters governed by the ICCAT. The sole membership with a single vote— compared with the accumulated votes of the number of the EU Member States— may lessen rather than strengthen the EU and its Member States' influence in the decision-making process.

3.3. The participation in the NEAFC: equal but the EU specified approach

¹⁰³ Jan Wouter and Other, (note 17) 35; *see also* Michael Emerson and Others, *Upgrading the EU's Role As a Global Actor: Institutions, Law and the Restructuring of European Diplomacy*, (Centre for European Policy Studies 2011) 88

The EU's sole and exclusive participation in the ICCAT as an IEIO is not the only model for the EU to participate in the RFMOs as a sole and exclusive member. The case for the EU's participation in the North East Atlantic Fisheries Commission (NEAFC) offered a distinctive example, different from the previous examples, which adopted a generic approach regardless of the EU's participation.¹⁰⁴ The NEAFC was established by the 1980 Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries (NEAFC Convention). The objective of this Convention is to ensure the long-term conservation and optimum utilisation of the fishery resources in the Convention Area, including in principle the Atlantic and Arctic Oceans and their dependent seas, as defined in the Convention,¹⁰⁵ to provide sustainable economic, environmental and social benefits.¹⁰⁶ The Commission may adopt recommendations, which may be binding to the Contracting Parties in accordance with the NEAFC Convention,¹⁰⁷ concerning measures of control and the collection of statistical information relating to fisheries conducted beyond the national jurisdiction of a member country.¹⁰⁸ It may also adopt recommendations concerning those measures relating to fisheries conducted within the national jurisdiction of a Contracting Party when the Contracting Party in question specifically requests and approves the recommendation.¹⁰⁹

Currently the Contracting Parties of the NEAFC Convention includes Denmark (in respect of the Faroe Islands and Greenland), the EU, Iceland, Norway, and the Russian Federation.¹¹⁰ The NEAFC accommodates both observer status and non-Contracting Party status, with no right to vote, in order to provide the flexibility necessary to enlarge participation in the

¹⁰⁴ Judith Swan, "Decision-making in Regional Fishery bodies or Arrangements: the Evolving role of RFBS and International Agreement on Decision-making Process", *FAO Fisheries Circular No.995* (2004), 51; Gail Lugten, (note 13) 47; Robin Churchill and Daniel Owen, (note 9) 364-365

¹⁰⁵ Article 1.(a) NEAFC Convention and Annex 7 NEAFC Convention

¹⁰⁶ Preamble and Article 2 NEAFC Convention

¹⁰⁷ Article 12.1 NEAFC Convention

¹⁰⁸ Article 5 and 8 NEAFC Convention

¹⁰⁹ Article 6 and 9 NEAFC Convention

¹¹⁰ <http://www.neafc.org/what-neafc/118> <last access: 12.06.2013>

decision and enhance the effectiveness of the measures adopted by the NEAFC.¹¹¹ The model provided by the NEAFC Convention to allow the EU to become a Party to the NEAFC Convention and a member of the NEAFC is an “equal but specific” approach— unlike most arrangements adopted for the participation of the EU in other multilateral fora, there is no specific clause concerning the participation of the EU or like entities in the NEAFC Convention or other instruments. The EU participates as a Party to the NEAFC Convention and as a member of the NEAFC on the same footing as all other State Parties/Members without distinction, except that Article 20.4. NEAFC Convention explicitly excludes the EU Member States’ eligibility to accede the Convention.¹¹² There is no generic term such as “REIO” being created in order to generalise the model for any other entity to follow later. Article 20 NEAFC Convention specifically names the “the European Economic Community” together with the other 12 States to which the Convention was open for signature,¹¹³ and the Convention has been open for later accession only to States but no other international organisations or entities.¹¹⁴ The dispute settlement procedure for the NEAFC is only briefly mentioned in Article 18 *bis* of the NEAFC Convention, assigning the Commission to make recommendations establishing procedures for the settlement of disputes arising under the Convention.

Internally, like the practice of the EU’s participation in other RFMOs, the EU has no specific arrangement on the preparation, co-operation, and coordination procedure specifically set for participation in the NEAFC.¹¹⁵ The preparation for the participation followed the same approach as for other RFMOs, namely, following the procedure stipulated in Article 218.8 and Article 218.9 TFEU, as discussed in the previous section. The Commission claimed that following this procedure for the preparation and coordination

¹¹¹ Chapter 8 RoP NEAFC, <http://www.neafc.org/fishing-licence-guide/124> <last access: 10.05.2012>

¹¹² Article 3.9 NEAFC Convention (The voting of the Contracting Party)

¹¹³ Article 20.1 NEAFC Convention

¹¹⁴ Article 20.4 NEAFC Convention

¹¹⁵ Personal communication, (note 61)

for participation in the NEAFC is “an approach that can ensure consistency.”¹¹⁶

This “specified and equal” approach has the advantage of avoiding many problems brought about by the “generic approach”— an approach that employs concepts like the REIO or IEIO in order not to imply such mechanisms are specifically tailored for the EU. For example, this “specified and equal” approach can avoid the difficulty of shaping a definition that could allow any entity that is identical to the EU to later become a member of the multilateral fora whilst worrying that such definition may be too broad to include too many international organisations, or too narrow to imply that only the EU is allowed to participate. It would not fall into the difficulty in clarifying the delimitation of competence between the EU and its Member States over a specific matter; neither would it encounter the difficulty in designing the voting rights, the accountability or responsibility and other mechanisms in order to fully reflect the distribution of competence under EU law.

However, this specified and equal approach still leaves potential problems. The rules provided by the NEAFC specifically allowed the EU to be a Contracting Party and at the same time excluded the EU Member States from acceding to the NEAFC Convention at any time. This was based on the assumption that the EU would in any case enjoy an exclusive competence over the matters covered by the NEAFC without considering any potential change in the future concerning the subject matter of the NEAFC or the allocation of competence under EU law.¹¹⁷ If at a later stage the EU no longer enjoys an exclusive competence over all the matters governed by the NEAFC for these reasons, this leaves no room for a mixed-participation for the EU and its Member States. This shortcoming is identical to those of other multilateral fora, where the EU enjoys a sole and exclusive membership, as

¹¹⁶ Commission, Proposal for a Council Decision on the establishment of the Community position to be adopted in the North East Atlantic Fisheries Commission Brussels, COM(2009) 484 final, 2 (Explanatory Memorandum)

¹¹⁷ Article 20.4 NEAFC Convention

discussed in the previous ICCAT section. Similarly, with only five Contracting Parties to the NEAFC, a mixed-participation of the EU and its Member States with the same number of voting rights would largely alter the nature and the operation of the NEAFC. The non-EU Contracting Parties are unlikely to agree with such a proposal. Similar to the argument made in the previous section, the EU and its Member States' compliance with the duty of co-operation under the EU law should govern such a situation when there is no mechanism of concurrent participation of an IEIO and its Member States provided in the NEAFC Convention.¹¹⁸

For a regional international organisation with only a very limited number of Member States, to grant all EU Member States full membership with one vote to each would make the EU Member States' total vote count outweigh the rest of the States in a vote-based decision-making process. This provides an incentive for third States to accept the EU's sole participation with a single vote. Still, it is very unlikely that this NEAFC model could be widely adopted in other RFMOs or other international organisations. As has been shown in other cases,¹¹⁹ one of the key concerns of the EU Member States and third States about the EU's participation in multilateral fora is avoiding any possible implication of statehood or sovereignty such an entitlement may bring. To adopt a "specified but equal approach" in an international organisation that allows in principle only a State to be a Member, and to specifically list the EU together with States but no other international organisations or entities in the provisions governing the membership in the constitutional instrument of a multilateral forum, may touch upon a sensitive nerve of the EU Member States and third States in this regard. It could almost be ascertained that the NEAFC's "specified and equal" model will remain a rare and isolated model of the EU's participation in multilateral fora.

¹¹⁸ See Section 3.2 this Chapter

¹¹⁹ See Chapter 4 Section 3

4. *Concluding remarks*

From the research in the previous chapters, it could be argued that the asymmetry between, on the one hand, the distribution of competence stipulated internally under the EU law and, on the other hand, the relevant provisions governing the membership and competence provided externally by the multilateral fora contributes largely to the problematic result for the EU's participation in the multilateral fora. The EU's competence over the fisheries, although not wholly and expressly listed as an exclusive competence by the EU Treaty, is widely considered one of the areas where the EU has exclusive competence over most, if not all, of the area after its exercise of that shared competence.¹²⁰ To compare with other policy areas in the field of maritime affairs, the area of fisheries is probably where the EU enjoys the most exclusive and extensive competence. This exclusiveness of competence enjoyed by the EU over the area of fisheries, together with the attempt to inclusively accommodate interested States and entities to participate in the international regime governing the fisheries through a number of flexible mechanisms, indeed has offered the EU sole and exclusive membership in a number of RFMOs. This exclusiveness of member status has been achieved in different ways. For instance, the ICCAT adopted an IEIO clause identical to the REIO clause commonly employed in other multilateral fora, but required the Member States of the IEIO to withdraw their membership once the IEIO becomes a formal member. The NEAFC, on the other hand, did not follow this generic approach. It specifically named the European Economic Community as one of its Contracting Parties with other States, and gave the EU the same rights as other State Parties. Nonetheless, this sole and exclusive EU member status approach is not adopted by all RFMOs. Even if the nature of competence over the fisheries is less controversial internally under EU law, as the practice suggests, it does not simplify the challenge or mitigate the problems of the EU's participation in the area of fisheries. As the case of the

¹²⁰ See Chapter 6 Section 3

EU's participation in the GFCM shows, the mixed-membership approach may still be adopted regardless the nature of competence over the fisheries under EU law. It may even lead to a more problematic partial mixed-membership participation, meaning that the EU participates in the RFMO as a formal member with only part, not all, of the EU Member States. Considering the approach adopted by different RFMOs still largely varies, it could hardly expect that the rules and their applications would be certain and consistent.

Furthermore, even if the EU enjoys the exclusive competence over fisheries and we consider that the sole and exclusive member approach can correctly reflect it, it does not guarantee that potential conflict between the EU internal legal order and the RFMO/external legal order can be permanently avoided. The status quo could be altered by any possible internal or external change of the law governing the scope of the EU's exclusive competence. Unlike a State that presumably has the effective and exclusive sovereignty and jurisdiction over any matter within its territory, the EU may lose its effective and exclusive exercise of competence over fisheries because of an amendment of the EU Treaties. The EU may lose it even by simply ceasing to exercise a shared competence that it has previously chosen to exercise. The mandate of a RFMO, by amending the basic instrument of the RFMO, may also be extended to areas where the EU enjoys no exclusive competence. These changes to the status quo could again lead to a result of asymmetry between the EU law and the RFMO rule. As all three examples suggest, very little solution is provided under the current mechanism to cope with the potential change and the asymmetry following it. When such asymmetry happens, the EU, as long as it remains a sole and exclusive member of the RFMO, should still be fully responsible to the RFMO and its members in accordance with the RFMO rules. At the same time, the EU is internally bound by the duty of co-operation. Under the duty of co-operation, the EU and its Member States are obliged to seek solutions when such asymmetry emerges. The duty of co-operation should, unlike other cases, address more the EU, who has the formal membership in the RFMOs, so as to ensure that the Member States' interests and competences can be fully

exercised through the EU when a matter involves a policy area where the EU does not enjoy the competence exclusively. The EU shall either act on behalf of its Member States or refrain from acting to ensure the EU and its Member States' interest in the RFMO. However, currently there is no clear internal arrangement governing the coordination, preparation and co-operation for the participation in the RFMO except the Treaty provisions governing the conclusion of legally binding acts, which do not necessarily cover all the activities within the RFMOs.

As the Commission indicated in its previous Communication, the number and the role of RFMOs as the primary fora for the conservation and management of international fish stocks have greatly expanded over recent years.¹²¹ The EU aims to step up its work to strengthen the work of RFMOs so as to improve their performance and the global coherence of their measures. It also aims to “ensure coherence and look for synergies between different fora”.¹²² It is doubtful, however, whether the EU and its Member States' influence over the decision-making of the RFMOs is indeed strengthened, or actually weakened, by pursuing the sole and exclusive member status with a single vote for the EU. For RFMOs with a very limited number of members, giving the EU votes equal to the number of the EU Member States in a RFMO may clearly outweigh the votes of the other members in the same RFMO. This would seem to be hardly acceptable for third States. On the one hand, this consideration may provide an incentive for third States to offer the EU a sole and exclusive member status, which may facilitate the EU's objective in achieving coherence and synergies between different fora. On the other hand, the EU and its Member States will seek alternatives for the “sole and exclusive member with a single vote” model to ensure its influence over decision-making is not weakened but fairly reflected.

¹²¹ Commission, (note 31) 8

¹²² Ibid.

Chapter 8

Conclusion

1. *Introduction*

Based on the preceding analysis, this chapter will draw some conclusions concerning the issues that have been discussed throughout the thesis. Firstly, it will summarise the internal and external sets of legal mechanisms that enable the EU to participate in the decision-making of multilateral fora concerning maritime affairs. Secondly, it will identify the shortcomings, including several sets of asymmetries and the limitations of the current approaches that underlie the potential ambiguity, inconsistency, and uncertainty in the existing legal mechanisms. It will continue to endeavour to point out the possible directions to overcome these shortcomings. Finally, it will consider the wider implications drawn from the research on the EU's participation in the decision-making of multilateral fora in the field of maritime affairs.

2. *The internal and external legal mechanisms that enable and safeguard the EU's participation in the decision-making of multilateral fora*

Internally, under EU law, the legal mechanisms that enabled the EU to participate externally in decision-making of multilateral fora began with the mechanism of conferral of competence, through which the EU can be conferred with exclusive or non-exclusive internal and external competences covering a wide range of policy areas.¹ This is an area that has undergone recent revision through the renegotiation of the founding treaties. However, rather than implementing a radical reform, the Lisbon Treaty simply followed the

¹ Chapter 2 Section 2

development of case law and practice closely in codifying the mechanisms and specifying the categories of competence of the EU.

Despite this codification, the nature of the mechanism of the conferral of competences can be described as complex and evolving. The ambiguity and uncertainty of the scope of the exclusive external competences²— particularly the implied ones— and the pre-emptive effect of the shared competences— both internally and externally—³ resulted in a non-static state of the delimitation of competence between the EU and its Member States under EU law. Such a complex and evolving nature of the conferral of competence is at the root of the underlying causes for the uncertainties, difficulties and challenges for the EU's participation in the decision-making procedure externally in multilateral fora. The concern expressed by the EU Member States at the time of negotiating the UNCLOS has remained largely unchanged after more than three decades, claiming that the provision of a full, clear and concrete list of the delimitation of competence between the EU and its Member States in a multilateral forum was difficult, if not impossible.⁴ As the member status of a multilateral forum is static— the EU can only be or not be a formal member— and only the rights and obligations coming with the status may be dynamic, it is therefore understandable that to pursue a status that could fully respond to the competence the EU enjoys is insufficient, the key lies in the rights and obligations the EU could enjoy under that status.

Two key legal mechanisms— the duty of sincere co-operation between the EU institutions and the Member States and the doctrine of maintenance of the autonomy of the EU legal order and the exclusive jurisdiction of the CJEU— have been developed to govern EU external relations. On the one hand, they compensate the shortcomings caused by the conferral of competence, as well as enhancing the EU's participation in multilateral fora amid the limited formal statuses and powers externally available to it. On the

² Chapter 2 Section 2.1

³ Chapter 2 Section 2.2

⁴ See Chapter 4 Section 3.2

other hand, those doctrines set the boundaries which restrain the exercise of the EU and its Member States' power externally. In practice, they restrain mostly the Member States but less the EU, as discussed in Chapters 3 and 7. As Case C-246/07 *Commission v Sweden* suggested, the Member States' room for entertaining their external power in the multilateral fora is curbed even in areas where the EU has only been granted a non-exclusive external competence.⁵

As a fulfilment of the duty of co-operation, the EU institutions and the Member States have in some areas developed or proposed internal mechanisms, commonly in the name of internal arrangements,⁶ to coordinate their participation in multilateral fora.⁷ In Case C-25/94 *Commission v Council*, even though the internal arrangement stated that it was informal and internal, the Court confirmed the internal arrangements' legal effect based on the duty of co-operation.⁸ Nevertheless, the EU and the Member States are not particularly in favour of an internal arrangement that can be considered legally binding. Regardless that such a mechanism may further ensure clarity, certainty, and consistency, it has not been able to be widely and commonly agreed by the EU and its Member States across multilateral fora. As Chapter 3 Section 2.3 showed, although the Council attempted to put forward "*General Arrangements*" concerning EU statements in multilateral organisations, the scope of the Arrangements is rather limited. It is far from being of general application. Neither does it cover all the matters that require coordination between the EU and its Member States.

Yet, as elaborated on in the concluding remarks of Chapter 5, the effectiveness of a coordination mechanism further poses a dilemma concerning advancing the status of the EU in the international organisation.

⁵ Chapter 3 Section 2.1.2

⁶ But other titles, for example, "Code of conduct", are also being used. *See e.g.* Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ C 340/11

⁷ Chapter 3 Section 2.2 and Section 2.3; Chapter 5 Section 3.5; Chapter 6 Section 5

⁸ Chapter 3 Section 2.2

In multilateral fora where the EU does not enjoy a full membership, a coordinate mechanism based on the duty of cooperation, as endorsed by the CJEU, may allow the EU to effectively exercise its external competence through its Member States amid its limited status in the international organisation. However, if the coordination mechanism keeps developing and can be generally considered effective enough, it may become difficult to evaluate whether granting the EU a formal membership in an international organisation works better or more efficiently than not granting it a formal membership. The incentive for the EU Member States, the international organisation, and third States to further amend the existing rules to allow the EU to become a formal Member of an international organisation could hardly increase. However, considering that an interim coordination mechanism is still only internal and informal, it is arguable that the EU's full membership is still preferable for the needs for legal certainty and accountability or responsibility.⁹

Externally, under the law of multilateral institutions, the formation of mechanisms that enable the EU's participation in decision-making of multilateral fora is influenced by the EU's status in the forum. If we imagine a spectrum of the different models of status providing for the EU's participation in multilateral fora, we can observe it starts at one end with the multilateral forum generally denying the EU's formal Party/Member status (as in the case of the IMO)¹⁰, whereas at the other end the multilateral forum specifically grants only the EU a sole and exclusive formal status (as in the case of NEAFC)¹¹. In between the two ends of the spectrum there exists a wide and varied range of situations and respective arrangements concerning the EU's participation. A "transfer of competence/power" clause, which provides that an international organisation could become a formal Party/Member to that multilateral forum, has been employed by multilateral fora to enable the EU to participate as a formal Party/Member. This most

⁹ Chapter 5 Section 4

¹⁰ Chapter 5 Section 3.3 and 3.4

¹¹ Chapter 7 Section 3.3

often applies to a regional economic integration organisation (REIO) constituted of States to which its Member States have transferred competence over matters governed by the multilateral forum, and is commonly based on the competence the EU enjoys to allow its participation either in the form of a mixed participation with all¹² or part¹³ of the EU Member States, or in the form of sole participation.¹⁴

The competence-based approach leads to multilateral fora, requiring a mixed participation of the EU and its Member States who have commonly resorted to mechanisms of Declaration of Competence. They endeavour to clarify, as within the purview of the multilateral forum, which competences, and what nature of competences, have been conferred on the EU by its Member States. One should not have the misperception that since different multilateral fora have commonly employed legal mechanisms, such mechanisms across different multilateral fora are identical and inter-referable. On the contrary, a slight difference in the details of the rules adopted by different multilateral fora may lead to a totally different interpretation and application of similar mechanisms. As this thesis has shown, although both the UNCLOS and the FAO adopted similar approaches to accommodate the participation of the EU, the degree of exclusivity required by the “transfer of competence” may be significantly different because of the language of the relevant institutional rules. Such a difference leads to the answer to the question of “whether the EU’s inclusion of non-exclusive competences in the Declaration of Competence is compatible with the external rules of a multilateral forum” being that it differs from one forum to another. Whilst such an inclusion complies with the FAO rules,¹⁵ the same conclusion cannot be made in the case of the UNCLOS.¹⁶

Moreover, to grant the EU a formal Party/Member status is not the same as granting it equal footing with other State Parties/Members in the

¹² Chapter 4 Section 4 (UNCLOS); Chapter 6, Section 4.1 (FAO)

¹³ Chapter 7 Section 3.1 (GFCM)

¹⁴ Chapter 7 Section 3.3 (ICCAT)

¹⁵ Chapter 6 Section 4.2.1

¹⁶ Chapter 4 Section 5.2

same forum. For example, the EU is not able to participate and vote on the “institutional aspects” of matters in the FAO.¹⁷ This thesis also argued that even if a multilateral forum adopts rules to accommodate the sole and exclusive Party/Member status of the EU, this does not simplify the issue. The need for a mixed-participation, which itself contains shortcomings, may still potentially exist.¹⁸

3. *Shortcomings*

3.1. Asymmetries between the different sets of mechanisms or rules

Asymmetries between different sets of rules are often the cause and at the same time the result of inconsistencies and uncertainties in their interpretation and application. This thesis identified several sets of asymmetries between the legal mechanisms, which caused inconsistency and uncertainty in the legal mechanisms that enable the EU’s participation in the decision-making of multilateral fora.

3.1.1. Between the existence and the nature of the internal competences and that of the external ones

Firstly, a set of asymmetries exists between the internal competences and the external competences conferred upon the EU. Under the principle of conferral, the EU’s internal competences are specifically listed in different Articles in the TEU,¹⁹ whilst a general provision is included in Article 3.2 TEU so as to allow the EU to be conferred exclusive implied external competences. Moreover, Article 216.1 TFEU further provides the possibility of the EU being conferred implied external competence. These provisions blur the line between the question of the existence of and the nature of the EU’s external

¹⁷ Chapter 6 Section 4.1; Chapter 7 Section 3.1

¹⁸ Chapter 7 Section 3.2 and 3.3

¹⁹ Article 3 to Article 6 TEU

competence.²⁰ The internal exclusive competences the EU enjoys may potentially be asymmetric to its external exclusive competences.²¹

3.1.2. Between the competence the EU enjoys internally and the status and power available for it to exercise that competence externally

Secondly, an asymmetry exists between the competence the EU enjoys under EU law and the status and power available for it to exercise that competence externally. Whilst internally the EU has been granted exclusive or shared competences, externally it does not always have Party/Member status corresponding to the competence the EU enjoys, let alone one that reflects the exclusive nature of some of the competences it enjoys.²² Different arrangements on the statuses and powers the EU could enjoy provided by different multilateral fora that concern the same policy area internally also contribute to this asymmetry, which was sufficiently illustrated in the discussion in Chapter 7 on the EU's participation in the RFMOs. Even if the subject matter concerns management of fisheries, due to the rules of different multilateral fora, one forum may allow a sole and exclusive Party/Member status for the EU, whereas others may only allow a mixed-participation of the EU with its Member States.²³ This asymmetry may cause a potential conflict of obligations between the laws of multilateral fora and EU law, as the one who has the Party/Member status to bear the rights and obligations in the multilateral forum may internally have no competence under EU law.²⁴

3.1.3. Between the concept of "conferral of competence" used internally and the concept of "transfer of competence" used externally

²⁰ Chapter 2 Section 2.1 and 2.2

²¹ Chapter 2 Section 2

²² Chapter 3 Section 3

²³ Chapter 7 Section 3

²⁴ See e.g. Chapter 3 Section 3, Chapter 7 Section 3

Thirdly, an asymmetry exists between the concept of “conferral of competence” used internally and the concept of “transfer of competence” used externally. Internally under EU law, the concept of “conferral of competence” allows the EU Member States to confer on the EU not only exclusive competence, but also competences that are non-exclusive in their nature.²⁵ Nevertheless, externally under the rules of the relevant multilateral forum, the concept of “transfer of competence” may not necessarily permit a competence being non-exclusively transferred and exercised by a REIO member, as the discussion in Chapter 4 on the UNCLOS suggested.²⁶ This particularly left doubt as to whether the Declaration of Competence submitted by the EU is compatible with the rules of UNCLOS.²⁷

3.1.4. Between the exclusivity of the concept of “transfer of competence” required by different multilateral fora

Lastly, following the third asymmetry above, a set of asymmetries exists between the exclusivity of the concept of “transfer of competence” required by different multilateral fora, as the analysis on the relevant provisions between the UNCLOS and FAO suggested.²⁸ This therefore leads to the result that a consistent provision of the declarations of competences by the EU may still lead to different issues of compatibility under different regimes.

3.2. Limitations of the current approaches

Alongside the different sets of asymmetries identified above, this thesis has also identified several limitations in the approaches currently adopted by the legal mechanisms that enable the EU’s participation in the decision-making of multilateral fora.

²⁵ Chapter 2 Section 2

²⁶ Chapter 4 Section 5.2

²⁷ Ibid.

²⁸ Chapter 6 Section 4.2.1

3.2.1. Limitation of legal mechanisms under EU law

The EU's participation in the decision-making of multilateral fora is generally based on a set of legal mechanisms developed from the EU legal order.²⁹ Nevertheless, there are inherent limitations in EU law. The law of the EU is only binding on the EU and its Member States after all. The mechanism governing the conferral and delimitation of competences internally developed by the CJEU and stipulated in the EU Treaties are not binding externally on third States; neither do the key doctrines and any internal arrangements governing the external participation of the EU and its Member States matter to third States, regardless of its legal effect internally. Externally, it is very unlikely that the EU may invoke its internal law as a justification for its failure to perform an external obligation or invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organisation regarding competence to conclude treaties to invalidate its consent.³⁰ As Case C-25/94 *Commission v Council* suggests,³¹ even if an external action of the EU or its Member States is later pronounced by the CJEU incompatible with EU law, the *fait accompli* externally caused by the action, particularly in a multilateral context, may be difficult, if not impossible, to amend. This leads to another limitation discussed in the later section concerning the role of the Court in safeguarding the mechanisms. Meanwhile, it is perceptible that the EU and its Member States attempted to bridge the gap between the internal and external legal orders by reflecting the provisions contained in the EU Treaties in the Declaration of Competence.³² Nevertheless, this practice leads to a potential conflict with the doctrine of maintenance of the autonomy of the EU legal order,³³ which will also lead to a limitation of the role of the Court, as detailed in the later section.

²⁹ Chapter 2, Chapter 3, Chapter 5 Section 3.5, and Chapter 6 Section 5

³⁰ See e.g. Article 27.2, Article 46.2 and Article 46.3 VCLT-IOs

³¹ Chapter 3 Section 2.2

³² Chapter 6 Section 5.2

³³ Chapter 3 Section 3

3.2.2. Limitation of the role of the CJEU

The CJEU has been entrusted with the key role of developing and safeguarding the relevant legal mechanisms governing the EU's external participation in multilateral fora on a case-by-case basis. Nevertheless, the CJEU's heavy role in guiding and clarifying these legal mechanisms has its inherent limitations. The CJEU is by nature a judiciary; its passive, case-by-case, and reactive approach could hardly serve the aim of providing timely responses— and timely correction if necessary. Such an approach also leaves uncertainty with regard to the participation of the EU in the multilateral fora. As Robert Y. Jennings pointed out decades ago, to rely the setting of international rules on judicial mechanisms may be considered a valuable method of attempting to reconcile those apparently irreconcilable essentials of law—certainty and change;³⁴ yet to substitute legislation with a judicial mechanism is to inadequately ask such mechanism to perform entirely different functions, calling for an entirely different kind of skills.³⁵

The Court's passive and reactive characteristics are not invariable. Article 218.11 TFEU indeed offers a Member State, the European Parliament, the Council or the Commission the opportunity to obtain the Court's prior opinion on the compatibility of an envisaged agreement with the Treaties. Yet such a mechanism is limited only to an envisaged agreement, not those that have been concluded. No mechanism for seeking the prior opinion of the Court on the issues arising out of a concluded agreement is currently available, meaning that the EU and its Member States are unable to seek the Court's prior opinion on whether the information about the delimitation of competence they propose to include in the Declaration of Competence is compatible with EU law, unless the Treaty is further amended.³⁶

³⁴ Robert Y. Jennings, "Judicial Legislation in International Law", 26 *Kentucky Law Journal* (1938) 127

³⁵ *Ibid.*

³⁶ Robin Churchill and Joanne Scott, "The Mox Plant Litigation: The First Half-Life" 53 *ICLQ* (2004) 663

This is however not the only limitation posed by the role of the CJEU. The maintenance of the autonomy of the EU legal order has to a large extent depended on the EU and its Member States' respect of the exclusive jurisdiction of the CJEU.³⁷ Nevertheless, even if the EU and its Member States fully observe and comply with the obligation, there are still limitations. On the one hand, not all the multilateral fora provide a wide range of options for dispute settlement available for the EU and its Member States, such as the UNCLOS. For example, disputes concerning the interpretation of the FAO Constitution shall be referred to the ICJ— an option not available for the EU— or such other body determined not by the EU and its Member States but the FAO Conference.³⁸ On the other hand, when a third State is involved in the dispute with the EU and/or its Member States, the CJEU, as the judiciary within the EU legal order, will not be available to third States. Inevitably an external tribunal will be involved in the disputes arising from these circumstances. Nevertheless, this may also invite an external tribunal to rule on issues like the allocation of competence between the EU and its Member States on the subject matter of the dispute, which may further lead the EU and/or its Member States in that dispute to potentially breach the doctrines of the maintenance of the EU legal order and the exclusive jurisdiction of the CJEU.³⁹ Judicial comity may offer the grounds for an external tribunal to yield its power to the CJEU when a dispute involves issues concerning the allocation of competence between the EU and its Member States. Nevertheless, as the ITLOS showed, an external tribunal is not bound to yield the issue to be decided by the CJEU. Particularly, when the dispute exists between third States and the EU and/or its Member States. Third States are not bound by the EU legal order and have no standing to bring the dispute before the CJEU. To claim the need for comity and yield the jurisdiction to the CJEU would also be unreasonable and impractical.⁴⁰

³⁷ Chapter 3 Section 3

³⁸ Article XVII.1 FAO Constitution

³⁹ Chapter 3 Section 3

⁴⁰ See Chapter 3 Section 3

3.2.3. Limitation of the competence-based approach— a “single but weaker voice”?

To design the external legal mechanisms for the EU’s participation based on the competences the EU enjoys under EU law has its limitations. This competence-based approach seemingly suggests that the EU’s mixed-participation with its Member States in areas where the competences are wholly or partly shared whilst the EU’s sole and exclusive participation with one single vote in areas where the EU enjoys exclusive competence are logical, consistent, and appropriate. Nevertheless, it is not necessarily so. It may result in inconsistent arrangements on the voting rights concerning the EU’s exclusive competence across different multilateral fora. In mixed-participation multilateral fora, when a matter falls under the exclusive competence of the EU, the EU is generally entitled to a number of votes equal to the number of its Member States which are entitled to vote.⁴¹ Yet in multilateral fora in which the EU exclusively participates because of its exclusive competence, the EU is entitled to only one vote.⁴² For example, for matters on fisheries where the EU enjoys exclusive competence, the EU may exercise 28 votes in the FAO, but only 1 vote in ICCAT and NEAFC on a similar matter. A sole Party/Member status for the EU in a multilateral forum may superficially seem to promote the EU’s status and influence in that multilateral forum, nevertheless its power in that multilateral forum may in fact be weakened, compared with the cases of non-participation or mixed-participation for the EU. Moreover, even in multilateral fora where the EU has no formal member status, such as the IMO, through facilitating an internal arrangement based on the duty of co-operation, the EU may still project its competence and influence externally into the decision-making. 28 votes is available for the EU in the IMO if the Member States agree to take unified action,⁴³ and even if some Member States do not follow the position,

⁴¹ Chapter 6 Section 4.1

⁴² Chapter 7 Section 3.2 and 3.3

⁴³ Chapter 5 Section 3.5

unless all the Member States refuse to exercise their vote accordingly, the EU's influence in the IMO will still be greater than, or at least equal to, one vote. From the EU's perspective, being conferred with an exclusive competence may ironically mean its external power in those multilateral fora is not strengthened but weakened because of this competence-based approach.⁴⁴ Imagine a hypothetical extreme scenario, if there was an international organisation whose structure and decision-making processes were identical to that of the UN, where the EU was not a formal member but having all its 28 Member States as formal members, among which two Member States had the veto power in the key decision-making body. Even if the EU had been transferred the exclusive competence covering all the mandates of that international organisation, acquiring a formal member status for the EU with the same rights as other members would be unlikely to increase the influence of the EU and its Member States in that forum.

3.2.4. Limitation of the EU-tailored approach

Attempting to design external legal mechanisms having the EU specifically in mind has its limitations. As the discussion of the RFMOs showed,⁴⁵ to grant the EU a formal Party/Member status may be a one-shot consideration. Nevertheless, neither the competence enjoyed by the EU nor the matters covered by a multilateral forum are static and unchangeable.⁴⁶ No matter whether adopting a generic approach or not, to design legal mechanisms that enable the participation of the EU specifically, particularly for the EU's sole participation in a multilateral forum, may provide insufficient flexibility to respond to any potential change in the scope of the competence the EU enjoys or the scope of the matters the multilateral forum governs.⁴⁷

⁴⁴ For a similar critic on the power perspective approach from a different angle, see Jan Klabbers, *Treaty Conflict and the European Union* (CUP 2009) 190

⁴⁵ Chapter 7 Section 3.2 and 3.3

⁴⁶ *Ibid.*, Chapter 2 Section 2

⁴⁷ *Ibid.*

4. *Improvements—some proposals to refine the identified shortcomings*

Based on the research in the previous chapters as well as the understanding of the aforementioned enablers and shortcomings, this thesis attempts to propose some refiners that may improve the legal mechanisms concerning the EU's participation in decision-making in multilateral fora.

4.1. Synchronise the notions of “conferral of competence”

As the “conferral of competence” or “transfer of competence” is still the key basis for both the internal and external legal mechanisms, the EU should endeavour to synchronise the concept not only between the internal and external mechanisms, but also between different external multilateral fora. Such synchronisation would aim to allow the concept of non-exclusive competence under EU law to be compatible with the requirement of “transferred competence” under external legal orders. This may be done by removing the “exclusive exercise” requirement from the latter through the amendment procedure. For example, if the EU prefers to leave room for a conferred competence still exercisable by the Member States, as EU law currently provides, the removal of Article 4 paragraph 3 of Annex IX of the UNCLOS, which provides that “the Member States of that international organisation shall not exercise competence which they have transferred to it”, will be necessary. Otherwise, although no third State has made a request to the EU or the Member States for clarification, the EU and its Member States need to update the Declaration of Competence and remove those non-exclusive EU competences from the list of transferred competence so as to avoid confusion or even a possible claim for non-compliance with the UNCLOS from third States.

4.2. Promptly update declarations of competence in a specific manner

The EU and its Member States should endeavour to make the declarations of competence required externally by multilateral fora as up-to-date and as specific as possible. On the one hand, this would lessen the uncertainty and ambiguity on the issue of the allocation of competence between the EU and its Member States; on the other hand, to frequently update the Declaration of Competence in a more specific way could create the opportunity— if there is a disagreement between the EU and its Member States on the allocation of competence stated in the Declaration of Competence— for the CJEU to consider the issue before an external action is actually taken based on the allegedly erred Declaration of Competence. A submission or update of a Declaration of Competence would require a Council decision and may therefore enable the EU and/or its Member States to ask the CJEU, based on Article 263 TFEU, to review whether the content of the Declaration of Competence correctly reflects the delimitation of competence under EU law. It would provide more room for the EU and its Member States to revise the Declaration of Competence in a timely manner according to the CJEU's ruling.

A specific and regularly updated Declaration of Competence could also reduce the risk of a matter concerning the allocation of competence being raised by third States in an external tribunal due to the ambiguity. This active attitude, including actively bringing cases before the CJEU, should also apply to the EU and its Member States in the implementation and application of other internal legal mechanisms that currently rely heavily on the clarification of CJEU case law. If shaping consistent, certain, and clear rules through legislative measures or through conventions derived out of consistent practices is unattainable, at least the EU and its Member States should aim to ensure certainty, clarity, and consistency by accumulating more cases to shape a clearer and more certain case law. All these advantages

could compensate for the limitations of the CJEU identified in the previous section.⁴⁸

4.3. Avoid quoting or referring to the relevant EU Treaty provisions directly in a declaration of competence

The EU and its Member States should avoid the practice of referring to the article number and quoting or paralleling the text of the relevant EU Treaties' provisions in the Declaration of Competence (such as in the case of the FAO DoC or the proposed new FAO DoC).⁴⁹ Such a practice may be considered an attempt to bridge the gap between the internal and external legal orders; nevertheless, this practice does not enhance the clarity of the Declaration of Competence for third States. It may however unnecessarily invite external tribunals to interpret and apply the same treaty provision in a manner that is potentially different from the CJEU, and lead to potentially conflicting results that may further adversely affect the autonomy of the EU legal order.⁵⁰ Moreover, considering the declarations of competence generally have not been updated, quoting or referring to relevant EU Treaty provisions or other EU legislations directly in a Declaration of Competence may lead to the result of a declaration carrying out-dated EU law and the possible conflict arising out of such a gap.⁵¹ To avoid this practice would also prevent a possible mismatch of the internal and external rules caused by amendment of the EU Treaties.⁵²

⁴⁸ *But see* Andrés Delgado Casteleiro, "EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?", 17(4) *EFAR* (2012) 508-509 (arguing that declarations of competence create more problems than they solve, instead of trying to clarify the complexities surrounding the internal division of competence and its dynamic nature, the EU should endeavor to present with a situation in which Contracting Parties may demand clarification and the EU will promptly give an univocal response)

⁴⁹ *See* Chapter 5 Section 4.2.3

⁵⁰ *See* Chapter 2 Section 2.3

⁵¹ *See* Chapter 5 Section 4.2.3. *See also* Andrés Delgado Casteleiro, (note 48) 508

⁵² *See* Chapter 5 Section 4.2.3

4.4. A joint and shared responsibility between the EU and its Member States may be preferable

Out of the concern of maintaining the autonomy of the EU legal order, even if it has only indirect or distant relevance to the decision-making of multilateral fora, a joint and shared responsibility between the EU and its Member States may be in the interest of not only third States but also the EU and its Member States. It therefore may be preferably considered. With the mechanism of joint and several responsibility, if the Declaration of Competence submitted by the EU and/or its Member States fails to further indicate who is indeed competent to bear the responsibility, third States or international organisations only have to establish that such responsibility exists in either the EU or its Member States. Hence, it could avoid third States requesting an external tribunal to determine the allocation of competence between the EU and its Member States based on the Declaration of Competence, which may lead to a result that may or may not be in line with EU law. Such an argument not only has merit for the EU and its Member States in terms of maintenance of the autonomy of the EU legal order, but also has merit for the third States. The provision of an ambiguous or uncertain Declaration of Competence by the EU and its Member States may imply that such an issue is not even clear and settled between the EU and its Member States, and it needs their Court to further clarify from time to time on a case-by-case basis. In these instances, it is unreasonable to expect third States to understand precisely and clearly, and the burden of clarifying the allocation of competence should not be put on third States when they are claiming a responsibility out of such ambiguity and uncertainty.

4.5. Review the influence of the EU in the decision-making of multilateral fora where it has a sole membership

The EU and its Member States should be cautious of the competence-based approach. Admittedly, a complete alternative for the competence-based approach is yet to be found, and a radical change to the widely adopted

competence-based approach may not be preferable considering it may further increase the potential inconsistency between the rules and practice adopted by different international organisations that follow different approaches. However, the model for the EU's participation in the multilateral fora should not be merely based on whether the external status could correspond to the internal competence it enjoys. The assessment of the appropriate model for participation should also be based on the actual power it could enjoy under that status, compared with the power the EU Member States could have collectively enjoyed through their formal Party/Member status. A sole formal Party/Member status of the EU for areas where the EU enjoys an exclusive competence internally is not necessarily a better option for the EU and its Member States to pursue.⁵³ Meanwhile, out of a similar concern, for multilateral fora where the EU has already participated as a sole and exclusive Party/Member with only one vote, whilst to propose a voting number equal to the number of the EU Member States is unlikely to be acceptable by the third States, it should seek to introduce a middle ground acceptable by both sides. Potential approaches may be considered. For example, to adopt a weighted voting right mechanism, which has been adopted by multilateral fora like the World Bank or the International Monetary Fund that allows the differentiation of weight of its Members according to different criteria, to more accurately correspond to the power the EU and its Member States should enjoy in the forum may be one possible option. Yet this proposal requires an amendment of the fora's constitutions in many cases.⁵⁴ The EU may also consider introducing a consensus decision-making process to balance its influence in the RFMOs where appropriate.⁵⁵

⁵³ Chapter 6 Section 3.2 and 3.3

⁵⁴ Article XIV 3.(b) FAO Constitution. For weight voting in international organisations, can see Elizabeth McIntyre, "Weighted voting in International Organisations", 8(4) *International Organisation* (1954), 484; William N. Gianaris, "Weighted voting in the International Monetary Fund and the World Bank", 14 *FILJ* (1990) 910

⁵⁵ Yet consensus decision-making is not un-controversial, it is suggested to re-introduce majority voting back to the WTO at least in some areas. See Jamie Tijmes-

5. *Implications*

5.1. Implications for the EU's participation in multilateral fora beyond the field of maritime affairs

Unique features provided by the law of the sea regime have played their important roles in offering more possibilities, or alternatives, for the EU's participation in the decision-making of multilateral fora in the field of maritime affairs. For example, a Party of certain IMO related regulatory treaties is entitled to formally participate in relevant activities in the IMO to shape key rules governing maritime affairs.⁵⁶ The international governance of fisheries also seeks to encourage the active participation of concerned States and other interested entities in multilateral co-operation through the flexible design of membership or other forms of participation to enable wider participation.⁵⁷ Nevertheless, this does not mean that the legal mechanisms, shortcomings, and possible improvements identified by this thesis are valid only to the EU's participation in the decision-making of multilateral fora in the field of maritime affairs. They have more general and fundamental implications for the EU's participation in multilateral fora in other fields. Firstly, the internal mechanisms that enable and safeguard the EU's participation in the multilateral fora, including the conferral of competence, the duty of sincere co-operation, and the maintenance of the autonomy of the EU legal order and the exclusive jurisdiction of the CJEU, are not just mechanisms that govern the EU's external participation in the field of maritime affairs, but external relations in general. Therefore the shortcomings of the mechanisms and approaches identified in the previous sections are very likely to exist in the EU's participation in multilateral fora in other fields.

Lhl, "Consensus and majority voting in the WTO", 8(3) *World Trade Review* (2009) 417

⁵⁶ See e.g. Article VIII(b)(iii) SOLAS Convention, Rule 1 RoP MSC (for the non-IMO Member Contracting Parties, they participate as "other Participants")

⁵⁷ See e.g. Article 8.3 Fish Stock Agreement. See Chapter 7 Section 2

Secondly, the REIO model and the mechanism of Declaration of Competence have now been often adopted for enabling the EU to participate in multilateral fora in other fields with its Member States.⁵⁸ As it has done in the FAO, the EU also referred to the article number and quoted the text of the relevant EU Treaty provisions directly within the declarations of competence it submitted to other multilateral fora in other fields.⁵⁹ This practice may need to be revised and adjusted, as suggested in Section 4.3 above. Moreover, as the EU occasionally included non-exclusive competences in a number of declarations of competence it submitted to other multilateral fora,⁶⁰ an uncertainty and asymmetry caused by different notions of “transfer of competence” adopted by different multilateral fora potentially exists. To include non-exclusive competences within a Declaration of Competence may be incompatible not only with the UNCLOS but also other multilateral instruments. Nevertheless, as this thesis has shown, the detailed arrangements for the EU to participate in the decision-making of multilateral fora are not consistently adopted across different multilateral fora and are still operated on a case-by-case basis. Even though this thesis offers some general benchmarks for reviewing the issues, to pinpoint the shortcomings of the EU’s participation in a particular multilateral forum in other fields and to propose the cure rests on further follow-up studies.

⁵⁸ For an inventory of the agreements that contains the REIO Clause, see Treaties Office of the EEAS, “Inventory of Agreements Containing the REIO Clause” (07.07.2011); for an inventory of the agreements with DoCs by the EU, see Treaties Office of the EEAS, “Inventory of Agreements with a Declaration of Competence by the EU”

⁵⁹ For example, the following pattern or the likes are often used—“The Community declares that, in accordance with the Treaty establishing the European Community, and in particular Article [X] thereof, it is competent for entering into international [Y] agreements, and for implementing the obligations resulting the reform, which contribute to the pursuit of the following objectives: [...]” see e.g. Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context [2008] OJ L308/35; Kyoto Protocol to the UN Framework Convention on Climate Change [2002] OJ L 130/4; Convention on access to information public participation in decision making and access to justice in environmental matters [2005] OJ L124/4

⁶⁰ See e.g. Convention on Nuclear Safety [1999] OJ L 318/21; Convention on the Protection and Promotion of the Diversity of Cultural Expressions [2006] OJ L 201/15; Convention on the Rights of Persons with Disabilities [2010] OJ L 23/37

5.2. The EU's participation/non-participation in the decision-making of multilateral fora for sovereignty, statehood, and sui generis entities in international law

This thesis has made a number of contributions to clarifying and critically analysing the mechanisms for the EU's participation in multilateral fora in the field of maritime affairs. Firstly, it has systematically identified the internal and external legal mechanisms that enable the EU's participation in the decision-making of the multilateral fora. Secondly, it has diagnosed several sets of asymmetries that underlie the potential uncertainty and inconsistency of the mechanisms. Thirdly, it has pinpointed several sets of limitations of the current approaches adopted by the legal mechanisms and it has recommended possible improvement thereto. In this section, the thesis will take one step further to consider what the findings may imply for the broader picture of international law concerning statehood and sovereignty.

The idea of examining the EU's impact on the concept of sovereignty is by no means novel in legal academia. Neil MacCormick, developing from his work "Sovereignty: Myth and Reality",⁶¹ famously addressed this issue by pointing out the uniqueness of the EU legal order and the intricate relationship between the EU and its Member States.⁶² Following an analysis of the interaction of the EU legal order and the legal order of its Member States, he argued:

"[I]t is clear that absolute or unitary sovereignty is entirely absent from the legal and political setting of the European Community. Neither politically nor legally is any Member State in possession of ultimate power over its own internal affairs. [...] Legally, Community legislation binds Member States and overrides internal state-law within the respective criteria of validity. So the states are no longer fully sovereign states externally, nor can any of their internal organs be considered to enjoy present internal sovereignty under law; nor have they any unimpaired political sovereignty. The Community on the other hand is plainly not a state. Nor does it possess sovereignty as a

⁶¹ Neil MacCormick, "Sovereignty: Myth and Reality", 11 *Scottish Affairs* (1995) 1

⁶² Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) 131-132

kind of Federation or Confederation. It is neither legally nor politically independent of its members. The German Constitutional Court in its decision on the Maastricht Treaty denied that the Union or Community and their organs of decision have the ultimate legal competence to determine their own competence. If so, this precludes sovereignty.”⁶³ (emphasis added)

MacCormick concluded that:

“[t]o the extent that the terminology of ‘divided sovereignty’ is found valuable either rhetorically or analytically, it can be applied here—the sovereignty of the Community’s Member States has not been lost, but subjected to a process of division and combination internally, and hence in a way enhanced externally. But the process of division and combination has taken us ‘beyond the sovereign state’, indeed, well beyond it. Despite the rhetoric of politicians, it cannot be credibly argued that any Member State of the European Union remains politically or legally a sovereign state in the strict or traditional sense of these terms. [...]”⁶⁴

Neil MacCormick exquisitely reflected on the issue of sovereignty by looking into the internal interaction, both politically and legally, between the EU and its Member States. Such an approach is not the only approach available for reflecting on the issue. Eli Lauterpacht, in his work “Sovereignty—myth or reality?” adopted a different approach by looking into the external interaction of a State— the United Kingdom— with other actors in the multilateral context, including that of the European Union, to consider the subject of sovereignty, and he concluded that:

“With regard to sovereignty on the international plane, that must be seen largely as myth—except when it is used as a word to describe a state’s title to territory. Whatever may have been the position in the nineteenth century and earlier, national sovereignty certainly does not now convey the idea of the same degree of power in the international sphere as is possessed within Britain by Parliament. *States have increasingly used their power to limit their power—in the various ways that have already been described above. But such limitations do not affect the quality of the state as such. The state remains a sovereign state in international law and continues to be able to guide its future*

⁶³ Ibid., 132

⁶⁴ Ibid., 133

*destiny within the limits that it has itself accepted.*⁶⁵ (emphasis added)

This thesis echoes the above views to reflect on the implications of the EU's external participation in the decision-making of multilateral fora for EU law and international law related to the issues concerning statehood and sovereignty through a niche in the existing approaches adopted by Neil MacCormick and Eli Lauterpacht. What implications of the legal mechanisms that enable the EU's participation in the multilateral fora could be drawn out from this thesis?

As the thesis showed, whilst the EU Treaty commanded the EU and its Member States to seek “appropriate” relations with international organisations and to ensure the coherency and consistency of its external representations,⁶⁶ what forms are available and what form may be *the* appropriate form for the EU's participation in the multilateral relations may be a more complex questions to answer in reality. To accommodate an entity with *sui generis* character to participate in multilateral relations according to international law, no matter how generically the definition for its status and power to participate are designed and phrased— the employment of the REIO clause, for example⁶⁷— requires flexibility. Unlike a State that is by default entitled to enjoy sovereignty and statehood and to participate in multilateral relations as such, a *sui generis* entity requires solutions tailored specifically for the entity on a case-by-case basis.⁶⁹ Similarly, in the EU context, this

⁶⁵ Eli Lauterpacht, “Sovereignty—myth or reality?”, 73 *International Affairs* (1997) 149. See Luigi Condorelli and Antonio Cassese, “Is Leviathan Still Holding Sway over International Dealings?” in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 15 (“still ultimately arise from the choice of the states: the choice to bind themselves, the sovereign choice to accept limits to their sovereignty. ”)

⁶⁶ Article 220.1 and Article 220.2 TFEU; Article 13.1, Article 16.6, Article 18.4, Article 21.3, Article 26.2 TEU and Article 7 TFEU

⁶⁷ Chapter 4 Section 4; Chapter 6 Section 4.1

⁶⁹ For the concept “fishing entity” being employed by international fishery law to accommodate the participation of Taiwan, see e.g. Brad R. Roth, “The Entity that Dare Not Speak its Name: Unrecognized Taiwan as a Right-bearer in the International Legal Order”, 4(1) *EALR* (2009) 91

need for flexibility is often required in the internal arrangements.⁷⁰ When flexibility is intrinsically necessary for accommodating the participation of the EU in multilateral decision-making, ensuring absolute consistency may not be a practical objective, or, we should say, the degree of consistency needs to compromise with flexibility.⁷¹

Such a tailored case-by-case approach may also have implications for the State-centric view of international law. Has the emergence of the EU and its participation in the international fora altered the State-centric international law and the concepts such as statehood and sovereignty under it? It is argued that the invention of mixed agreements could be considered as the EU's near-unique contribution to true federalism.⁷² The sensitive concern has also been shared that granting the EU a formal Party/Member status may lead to the unwanted implication of granting it statehood or sovereignty.⁷³ Nonetheless, this thesis observed that the process of designing the legal mechanisms and the way those mechanisms are applied in practice, seem to suggest otherwise. To enable the EU's participation in multilateral fora does not reinforce the argument that States are lessening their dominating power and influence in shaping the legal mechanisms in international law; it contrarily reinforces the predominance of the State in the discourse and shaping of international law. This can be illustrated in the following ways.

Firstly, as this thesis has shown, the external legal mechanisms that enable the EU's participation in multilateral fora are shaped under the consents of States.⁷⁴ Secondly, the statuses and the powers the EU could

⁷⁰ EEAS, "Report on EU Statements in Multilateral Organisations - Implementation of General Arrangements" (2013) 8

⁷¹ For the discussion of the certainty and clarity of law and the need for flexibility, see e.g. Alan Dashwood, "States in the European Union", 23 *ELR* (1998) 214; Antonio Cassese, "Introduction", in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) xviii

⁷² Joseph H. H. Weiler, "The External Legal Relations of Non-Unity Actors: Mixity and the Federal Principle", as reproduced in his *The Constitution of Europe* (CUP 1999) 130

⁷³ Chapter 4 Section 3.1

⁷⁴ See e.g. Chapter 4 Section 3

enjoy under the mechanisms do not necessarily equal that of a State.⁷⁵ Thirdly, even in cases where the EU can enjoy a sole and exclusive formal Party/Member status with the same rights and obligations as other States, a permanent status for the EU with the same rights on an equal footing is often not guaranteed. Internally, the legal basis that underlies its status could be ultimately altered by a change in the internal distribution of competence arising from an amendment to the EU Treaties— an option that is available with the consent of the EU Member States.⁷⁶ Externally, should any amendment to the treaty happen, even if the EU can claim that it is entitled to become a Party to the treaty as amended,⁷⁷ such entitlement does not guarantee that it can always become a formal Party to the amended treaty on the same footing as States.⁷⁸ This further leads to the key, and perhaps more fundamental difference— the difference between the mechanisms of reciprocity enjoyed by the States but not the EU or other entities in international law.

Here the mechanism of reciprocity does not refer to the mechanisms for the enforcement of international law that relate to the lack of effective enforcement mechanisms,⁷⁹ but rather to the reciprocal relations between the participants in shaping or amending the legal mechanism concerning their

⁷⁵ Chapter 6 Section 4.1

⁷⁶ Article 48.4 TEU

⁷⁷ Article 40.3 VCLT-IOs. *But note*, Article 19.3 NEAFC Convention provides that no amendment shall take effect for any Contracting Party if objected to by any of the Contracting Parties.

⁷⁸ *See e.g.* Article XX FAO Constitution

⁷⁹ For the general meaning of reciprocity in international law that particularly concentrates on enforcement, *see* Andreas Paulus, “Reciprocity Revisited”, in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 113; Andreas Paulus, “Whether Universal Values can Prevail over Bilateralism and Reciprocity”, in Antonio Cassese, *Realizing Utopia: The Future of International Law* (OUP 2012); Bruno Simma, “Reciprocity”, *MPEPIL* (online edn, OUP); Francesco Parisi and Nita Ghei, “The Role of Reciprocity in International Law”, 36 *Cornell International Law Journal* (2003) 93; *See also*, Robert O. Keohane, “Reciprocity in international relations”, 40 *International Organisation* (1986) 1; Deborah Welch Larson, “Exchange and Reciprocity in International Negotiations”, 3 *International Negotiation* (1998) 121 (discussing the reciprocity in the international context, but from the international relations perspective)

status and powers in participating the multilateral fora. The negotiation as well as the amendment of the legal mechanism for the participation of States is based on the mechanism of reciprocity. Statehood and sovereignty signal equality— with some exceptions, for example, the veto rights of the permanent members of the Security Council of the UN.⁸⁰ Based on this mechanism of reciprocity, it is ensured that if one State offers or refuses to install a legal mechanism for States, it is offering or refusing a consequence that will be reciprocally interpreted and applied to all States. When one State initiates the development or amendment of the legal mechanism concerning the participation of the State in a multilateral forum, no matter if it is to upgrade or downgrade the Party/Member status of a State, or to increase or lessen the power that the State could exercise within the forum, the result of the negotiation and bargain will in principle apply to the initiating or bargaining State as well as the counterpart States within the same multilateral forum.⁸¹ This mechanism of reciprocity is not available for the EU, or any *sui generis* entity, whose participation is based on a case-by-case tailored approach agreed by States. Even if the EU is able to participate in the shaping or amending of the external legal mechanisms that enable it to participate it in the multilateral fora, it is not based on the mechanism of reciprocity— not “if you deprive me this right or power, then you won’t have it either”; not “if you alter the scope of matters governed by this forum, then both of our power and status will be threatened.” In this sense, to enable the participation of the EU in multilateral fora, no matter with what status and in what capacity, does not entitle the EU to the mechanism of reciprocity that is enjoyed by the sovereign States in international law. In this sense, the whole

⁸⁰ Article 27.3 UN Charter

⁸¹ One exception to this principle is perhaps the WTO—the membership is negotiated on a case-by-case basis and protocols of accession can include variations from WTO rules. *See e.g.* Olivier Cattaneo and Carlos A. Primo Braga “Everything You Always Wanted to Know about WTO Accession (But Were Afraid to Ask)”, (World Bank, Policy Research Working Paper 5116, 2009) 16-22

legal mechanism under international law is, and will be, still shaped by sovereign States.⁸²

This implication vis-à-vis sovereignty and statehood may not be revolutionary, and can hardly overthrow the fruitful results of the existing discussion on the issue relating to sovereignty and statehood in international law. Nonetheless, as Robert Jennings correctly pointed out:

“[t]he question of sovereignty and debates about it have always been at the centre of the system of public international law. *Views about the nature and purposes of sovereignty and about its rightful place in international law have necessarily varied from time to time because changing times need different approaches.*”⁸³ (emphasis added);

Martti Koskenniemi also indicated that:

“[...] [t]he status of statehood can be associated with various sets of rights and duties. It carries no given, determinate, normative implications. Much has been written about the apparent puzzle that statehood is a quality enjoyed both by states that have entered into extensive integration obligations, as well as by states living in hermetic isolation. In other words, we cannot deduce the extent of a state’s freedom from the mere fact of its statehood. Sovereignty is, as the Permanent Court of International Justice noted in 1923, an ‘essentially relative question’—dependent on whatever law there is to curtail it.”⁸⁴

Nevertheless, without the mechanism of reciprocity available for the EU to deal with its relations with States, allowing the EU to participate in multilateral fora under different arrangements, grants the EU neither statehood nor sovereignty, nor does it undermine that belonging to States under international law. Sovereignty and statehood may not be a myth, yet the reality is that we are still at a time when even “who shall be competent to

⁸² See also, Luigi Condorelli and Antonio Cassese, (note 65) 15-16 (Observing that States are still the major international lawmakers creating the legal mechanisms, and it is the States that set up and strictly control intergovernmental organisations); For a similar argument of the lack of mechanism of reciprocity for the EU, but from the perspective of the availability of inter-state countermeasures, see William Phelan, “What is *Sui Generis* About the European Union? Costly International Co-operation in a Self-Contained Regime”, 14 *International Studies Review* (2012) 375

⁸³ Robert Jennings, “Sovereignty and International Law”, in Gerard Kreijen and others (eds), *State, Sovereignty, and International Governance* (OUP 2002) 27

⁸⁴ Martti Koskenniemi, “The Future of Statehood”, 32(2) *HILJ* (1991) 408

make what statement behind which nameplate following what heading” still occupies a significant core part of the controversy on legal mechanisms enabling the EU’s participation in the decision-making of multilateral fora. Concerns that allowing the EU’s participation in multilateral fora would significantly change the landscape of international law, or the underlying concepts of statehood and sovereignty, are premature.

Tables

Table 1. Comparison of the Declaration of Competence submitted upon different timing required by UNCLOS

Timing	Type of the information		Who shall provide	Content	Effect	Basis	
Upon the signature of the international organisation	Declaration of Competence		International organisation	1. the matters governed by the Convention in respect of which competence has been transferred to that organisation by its Member States which are signatories; 2. the nature and extent of that competence	N/A	Article 2 latter sentence	
Upon the formal confirmation or accession of the international organisation	Instruments	Undertaking of rights and obligations	International organisation	To accept the rights and obligations of States under the Convention in respect of matters relating to which competence has been transferred to it by its Member State which are Parties to the Convention	As the undertaking states	Article 3.2	Article 4.1
		Declaration of Competence		1. the matters governed by the Convention in respect of which competence has been transferred to that organisation by its Member States which are Parties to the Convention; 2. the nature and extent of that competence	1. the international organisation shall be a Party to the Convention to the extent that it has competence declared according to Article		Article 5.1

					<p>5 of the Annex (Article 4.2)</p> <p>2. the international organisation shall exercise the rights and perform the obligations which its Member States which are Parties would otherwise have under the Convention, on matters relating to which competence has been transferred to it by those Member States. (Article 4.3)</p> <p>3. The Member States of that international organisation shall not exercise competence which they have transferred to it. (Article 4.3)</p> <p>4. Parties which have competence under article 5 of the Annex shall have responsibility for failure to comply with obligations or for any other violation of the</p>		
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					Convention (Article 6.1)	
Upon the ratification or accession of the Member State or upon the international organisation deposits its instrument of formal confirmation or of accession; whichever is later	Declaration of Competence	Member State of the international organisation	1. the matters governed by the Convention in respect of which competence has been transferred to that organisation by its Member States which are Parties to the Convention; 2. the nature and extent of that competence	1. the international organisation shall be a Party to the Convention to the extent that it has competence declared according to Article 5 of the Annex (Article 4.2) 2. the international organisation shall exercise the rights and perform the obligations which its Member States which are Parties would otherwise have under the Convention, on matters relating to which competence has been transferred to it by those Member States. (Article 4.3) 3. The Member States of that international organisation shall not exercise competence which they have transferred to it. (Article 4.3)	Article 5.2	

				<p>4. Parties which have competence under article 5 of the Annex shall have responsibility for failure to comply with obligations or for any other violation of the Convention (Article 6.1)</p> <p>5. No provision on the effect of the provision of a contradictory declaration</p>	
Promptly upon any change to the distribution of competence	Notification	International organisation and its Member States	Any changes to the distribution of competence declared accordingly, including the nature and extent of the competence transferred	Parties which have competence under article 5 of the Annex shall have responsibility for failure to comply with obligations or for any other violation of the Convention (Article 6.1)	Article 5.4
Upon the request of third State Party	Communication of information	International organisation and the Member States	<p>1. which Party, as between the organisation and its Member States, has competence in respect of any specific question which has arisen;</p> <p>2. the nature and extent of the competence</p>	Parties which have competence under article 5 of the Annex shall have responsibility for failure to	Article 5.5

On the initiative of the international organisation and its Member States		concerned	transferred	comply with obligations or for any other violation of the Convention (Article 6.1);	
Upon the request of third State Party	Information	International organisation and the Member States concerned	Who has responsibility in respect of any specific matter	1. Parties which have competence under article 5 of the Annex shall have responsibility for failure to comply with obligations or for any other violation of the Convention (Article 6.1); 2. Failure to provide the information within reasonable time, or the provision of contradictory information result in joint and several responsibility (Article 6.2)	Article 6.1

Table 2. Comparison of the three positions under the Draft IMO Arrangements

		Community Position	Common Position	Coordinate Position
Definition	Nature of the matter	Exclusive competence of the EU	Shared/mixed competence between the EU and the Member States	Exclusive competence of the Member States
	Defined by	Defined by the Council, based on the proposal of the Commission	Defined within the Council	Defined by the Member States
Adoption of the position	Adoption	Based on the proposal of the Commission, on the basis of the majority laid down in the relevant Community law dealing with a subject matter under consideration.	<p>1. Based on the proposal Commission and adopted by the Council acting by common agreement.</p> <p>2. Member States should also bring forward any issue of mixed competence that they would like to raise with a view to reach a common position.</p>	Any Member State or the Commission may bring forward an issue of exclusive Member States competence with the view to obtaining Member States' support, adopted by common agreement by the Member States meeting within the Council.
	Alternatives	If the subject has already been debated in a technical meeting and an agreement has been found at that level, an endorsement of the	N/A	N/A

		Community position by the Council can be considered sufficient, possibly using an informal written procedure at the level of the Shipping Working Party.		
	Submission outside the position	<p>1. Member States and the Commission will not introduce on their own behalf submissions containing positions on issues of exclusive Community competence.</p> <p>2. They may however provide information or factual comments after having consulted each other as far as practicable in the course of the coordination process.</p>	N/A	N/A
	If unable to adopt the position	The representatives of the Member States and of the Commission <i>abstain from expressing</i> any position on the matter concerned except where necessary to defend the Community acquis.	The representatives of the Member States <i>retain their freedom</i> to express their position on the matter concerned, in as far as it does not conflict with Community acquis.	N/A

Expression	Means	Either be included in a written submission to the IMO and/or be voiced within the IMO	<ol style="list-style-type: none"> 1. Either be included in a written submission to the IMO and/or be voiced within the IMO. 2. Member States and the Commission may use any other means to most effectively achieve an acceptable result. 	N/A
	Written submission of the position	<ol style="list-style-type: none"> 1. By the Presidency, generally using the provided heading. 2. To include a paragraph mentioning that the Member States have transferred their competence to the EU on the issue concerned in the text of the submission 	<ol style="list-style-type: none"> 1. By the Presidency, generally using the provided heading. 2. The Presidency might also be replaced by another Member State showing particular interest and/or expertise in the matter concerned if agreed during the coordination process. 	If and when Member States agree that it is appropriate to present a coordinated position through a submission in the name of all Member States and the Commission, provided heading may be used.
	Oral presentation, suggestion and defense of the position	1. Usually be introduced by the Presidency, clearly stating that the Community submission is presented on behalf of the European Community and supported by all EU Member	1. Generally be introduced by the Presidency. <i>If it is deemed appropriate and has been decided when defining the negotiating strategy</i> , the Presidency will make clear that the common submission	N/A

		<p>States.</p> <p>2. Member States and Commission representatives will actively avail themselves of the right to support and/or develop the Community position.</p> <p>3. In this context the Presidency can request that a Community position is also presented, supported or developed by a representative of another Member State or of the Commission taking into account his/ her specific technical expertise, if agreed during the coordination process.</p>	<p>is presented on behalf of the EU Member States.</p> <p>2. Member States and Commission representatives will actively avail themselves of the right to support and/or develop the common position.</p> <p>3. In this context the Presidency can request that a common position is also presented, supported or developed by a representative of another Member State or of the Commission taking into account his/ her specific technical expertise, if agreed during the coordination process.</p>	
Draft IMO Arrangement		Point 3	Point 4	Point 5

Table 3. Flow chart of the coordination procedure under the Draft IMO Arrangement

Timing	Yearly	In due course after the agenda is published at least 20 weeks before the IMO meeting concerned	10-18 weeks before the IMO meeting concerned	Sufficiently in advance, preferable at least three weeks before the IMO deadline	During the meetings in London
Procedure	Preliminary phase	Early warning	Preparation of a submission	Preparation for IMO meetings and definition of Community, common or coordinated positions	On the spot coordination
Purpose	To overview the IMO activity for the coming year and indicate the respective deadlines for the various actions and tasks.	To decide whether and why a position is desirable for the relevant meeting	To prepare for a submission if a Community or common submission, or possibly a submission for a coordinated position, has been suggested	To prepare for the IMO meeting concerned and definition of the positions	To coordinate during the meetings, enabling an effective response of the Member States and the Commission to new situations resulting from the IMO deliberations

Main actors involved	General Secretariat of the Council	The Commission; The General Secretariat of the Council; The Shipping Working Party; The Member States	The Commission; The General Secretariat of the Council; The Member States; The Presidency	The Presidency; The Commission; Experts; The Shipping Working Party; The COREPER; The Council	The General Secretariat of the Council; The Presidency; The representatives of the Member States; The Commission
Tasks	Any suggestion for the inclusion of a new work programme item should be put forward and discussed as soon as possible, well in advance of the IMO meeting where this would be dealt with.	1. The Commission will, in due course after the agenda is published, communicate to the Secretariat the draft agenda of the meeting identifying for each agenda item whether and if so why the Commission considers that a Community or common position is necessary and desirable, and which type of	1. If a Community or common submission, or possibly a submission for a coordinated position, has been suggested, the Commission will communicate to the Secretariat a proposal for that submission as early as possible, preferably at the latest 10-18 weeks before the IMO meeting	1. The Presidency and the Commission will make sure that the appropriate tool is used to enable proper coordination in advance of IMO meetings. 2. A preparatory meeting of experts will usually be convened by the Presidency or the Commission to prepare for the IMO meeting.	1. The Secretariat, on request of the Presidency, will invite the representatives of the Member States and the Commission to the on the spot coordination process during the meetings in London, specifically mentioning the timing and venue of a first coordination meeting. 2. Further coordination

		<p>competence is covering the issue concerned. The Commission may also indicate issues on which a coordinated position may be desirable.</p> <p>2. The Secretariat will communicate this to the Shipping Working Party for agreement. This can be done by using an informal written procedure.</p> <p>3. In the two weeks following this communication, Member States will inform the Secretariat and the Commission if they consider it</p>	<p>concerned, depending on the submission is considered as a “bulky-paper”, a “non-balky paper”, or a “document commenting a paper already on the IMO table.”</p> <p>2. Member States will communicate to the Secretariat any draft submission they are contemplating on issues of mixed competence within the same time schedules. Member States may also do so on issues falling exclusively within their competence.</p>	<p>3. Technical discussions may be held in relevant existing technical meetings or, where appropriate, in technical meetings of Member States' experts convened by the Commission.</p> <p>4. Co-ordination by an exchange of e-mails could possibly be seen as sufficient.</p> <p>5. In respect of Community and common positions, the Commission will communicate the relevant official Commission</p>	<p>may be convened on the spot depending on the evolution of the work.</p> <p>3. When necessary to achieve the given objectives in a changing context, and operating within the limits that may be set out in the agreed position, Community, common and coordinated positions will be modified following the same decision making rules applied when initially defining the position.</p>
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		<p>important that a Community or common submission be made on issues of Community or mixed competence.</p> <p>4. Member States are invited to communicate also whether they are contemplating making a submission on issues of exclusive Member State competence, with a view to developing a coordinated position.</p>	<p>3. The Presidency and the Commission will make sure that the appropriate tool is used to enable sufficient co-ordination prior to timely submission to the IMO.</p>	<p>documents sufficiently in advance, preferably three weeks before the IMO deadline, to allow for a meeting of the Shipping Working Party, as well as possibly COREPER and Council, within the time limits prescribed by IMO deadlines.</p>	
Draft IMO Arrangement	Point 2.1.	Point 2.2.	Point 2.3.	Point 2.4.	Point 2.5.

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