UNIVERCITY OF TWENTE

Bachelor Program European Studies

Bachelor Thesis

Participation of the European Community in International Organizations

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23/04/2009

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List of Abbreviations:

CEMTE	European Conference of Ministers of Transport
CND	Commission on Narcotic Drugs
CSD	Commission on Sustainable Development
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECAC	European Civil Aviation Conference
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
ESA	European Space Agency
EUROCONTROL	European Organisation for the Safety of Air Navigations
FAO	Food and Agricultural Organisation
GATS	General Agreement on Trade in Services
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organisation
ICJ	International Court of Justice
IFF	Intergovernmental Forum on Forests
ILO	International Labour Organisation
IMO	International Maritime Organisation
IMF	International Monetary Found
ISO	International Organisation for Standardisation
ITU	International Telecommunication Union
NAFO	Northwest Atlantic Fisheries Organisation
NASCO	North Atlantic salmon Conservation Organisation

NEAFC	Northeast Atlantic Fisheries Commission
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
OIE	Office International des Epizooties (World Organisation for Animal Health
OIML	International Organisation of Legal Metrology
OIM	International Organisation for Migration
TRIPS	Trade Related Aspects of Intellectual Property Rughts
WCO	World Customs Organisation
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WMO	World Meteorological Organisation
WTO	World Trade Organisation
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDCP	United Nations International Drug Control Programme
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNIDCP	United Nations International Drug Control Programme
UNIDO	United Nations Industrial Development Organisation
UNWTO	World Tourism Organisation

Introduction

"We are being propelled in a global order that no one fully understands but which is making its affects felt upon all of us" [1]

One of the main driving forces behind the European integration is the increasing interdependence between the states, to better be able to face the challenges of globalisation and act as one stronger political actor in the world, rather than as many different, less powerful States. The struggle between, on the one hand, the need to act as one, facing other relevant world political powers, solving world-wide spread issues, and the need of the Member States to protect and safeguard their sovereignty, on the other hand, makes the realm of international relations of the EU very complicated legal area, with various legal and political issues arising. Therefore, in an increasingly globalised world, the need to map and understand the position of the European Union becomes even more important and interesting.

This is one of the main reasons the research area of external relations of the European Union appears interesting to me. It appears challenging to unfold the curtain, analyse the factual developments and see the arising issues more clearly in order to better understand and eventually give some recommendations for the future developments in this area.

Traditionally, the international law was seen as the law of co-existence**.** Increasingly though, throughout history, the co-existence of the states was being replaced by the need for cooperation which was seen as necessary in order to tackle the arising international problems. The effects of globalisation are constantly calling for the need for world-wide integration, creating the international political arena in which the states, as governing actors, are being more and more replaced by international organisations.[2]

In the world increasingly governed by various large scale international organisations it is very important to better understand the ways the European Union (more precisely the European Community)[3] participate in those organisations. The focus of my research within the area of external relations of the European Union therefore is the *Participation of the European Community in other international organisations.*

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[1] A Giddens, *Runaway World: How Globalisation is Reshaping Our Lives*, (London, Profile Books, 2002) p.7

[2] J. Klabbers, *An Introduction to International Institutional Law*, (Cambridge, Cambridge Univ. Press, 2002) pp. 16-41, at p.16

[3] Due to the limited length of the bachelor assignment, the focus will be on the European Community (first pillar) and it's participation in other international organizations. Also, at the moment only the EC participates fully in other IOs

The fact is indeed that, in order to function as an external actor on the international arena, the EC has been given the legal personality, but even within the domain in which the Community has exclusive competencies (conferred to it by the Treaty) it is hard for the EC to actually put that power into action when it comes to participation in international organisations. The complexity of the legal rules and issues, arising from the international law as well as from the EU law makes this participation very difficult role to accomplish.[4]

Given the introduction into the research area and the topic of the Bachelor thesis, my intention in this research, is to narrow the topic down and analyse the role that the European Community has in other international organisations, particularly in relation to the fact that in all cases Member States of the Community are also still a member. More precisely, the main question of this research paper is: ***To which extent does the European Community participate in other international organizations (through membership or otherwise) and how does this affect the participation of its Member States?***

The method used to answer the questions of this research is documents-literature review. In this descriptive analysis of the participation of the Community in international organisations, I made use of primary sources-relevant documents, European Court of justice case law, Statutes of the international organisations, and Treaty articles as defining indicators of the main concepts in my research. Furthermore, extensive secondary literature sources were used, relevant scientific academia in this field, hence analysis, articles and books.

In order to analyse the question of participation of the EC in international organisations it was first necessary to outline and describe the main developments in the international legal scene caused by globalisation, to answer the question of status and role that international organisations have in that scene; this is the topic of the first chapter. The second chapter deals with the developments in the area of external relations law of the European Community, it answers the question of the legal personality, capacity and competence of the Community to participate in international organisations and how the competences are divided between the Community and Member States. The second part of this research is dealing with analysis of the specific cases of EC participation in international organisations, it examines in which international organisations the EC participates, and how does that affect the participation of its Member States; it deals with different modes of participation on the contrasted examples of Community observer status in International Labour Organisation, and its membership status in Food and Agricultural Organisation, and World Trade Organisation. This will lead to answering the main research question in the conclusion in which some recommendations will be phrased as to improvement of the Community representation in international organisations.

[4] J. Sack, 'The European Community's Membership of International Organizations', 32 CML Rev. 1995, pp.1227-1256

I International Legal Order, the Role and Status of International Organisations:

In order to approach the question of the relations between the European Community and the international organisations, it is useful to reflect upon some important developments in the international legal order and the role and status of the international organisations in that order. By doing that, the EC is being put in a broader international context, where the main developments, and therefore the problems that the EC faces in international scene (due to the complexity of international legal order, its main actors and their interconnectedness), when it comes to its participation in international organisations, are being outlined. Even though the main focus of this research is the realm of EC external relations law, the reflections from this chapter serve to understand the importance of the interaction between international organisations, possibilities and restrictions for the participation of the EC, as still some sort of international organisation in its own, in other international organisations, and the challenges it may face due to the nature of international legal system. Therefore, by outlining the main characteristics and current developments in the international legal order, we can better understand the environment in which the EC is to participate, and the obstacles the EC faces within that environment.

There are certain fundamental characteristics of international legal order worth mentioning here. Traditionally, the primary actors of the international legal order are states. Within the international scene, states are independent, they enjoy and protect their sovereignty; they are concerned with the rule making, but also with execution, implementation and enforcement of those rules. Furthermore, given the horizontal nature of the international legal system, the balance between the law making, law determination and the enforcement, is not well defined as in national legal systems. The freedom of choice when it comes to the way the sates are implementing international law in their own legal system (monist or dualist) is another important feature of sovereignty of the states within the international arena.[5]

However, the international relations law, as well as the international regulatory processes have changed considerably throughout the 20th century. The change from traditional law of co-existence of states to the law of cooperation brought about the rise in number of international

[5] A. Cassese, *International Law* (New York, Oxford Univ. Press, Sec. Ed., 2004) pp. 46-65; for an extensive work on international legal order and the institutional law of international organisations see: H.G Schermers and N.M Blokker, *International Institutional Law: Unity within diversity*, (4th Ed) The Hague: Martinus Nijhof Publishers, 2004.

organisations and their role in international relations. The international organisations became one of the main means of the international cooperation; they arose as new actors in the international arena where they gradually acquired a special status.[6] Nowadays, the international organisations are subjects of international law and they are "independently bearing rights and obligations under international law".[7] The possibility of having a legal personality as an international organisation has been dealt with and recognised already in 1948, by the International Court of Justice, in the case known as *Reparation for Injuries*.[8]

The changes from traditional international order are nowadays being increasingly intensified due to the effects of globalisation. As observers point out, at the present time, the international relations reality, affected by globalisation, looks even more complex.[9] The globalisation processes are changing the structure of the international law, the number of international organisations has grown, and it is still growing, along with their regulatory and enforcement power. There is an increasing recognition of the effects of the international law making on the developments of the states and their sovereignty.[10] The division line between various regulatory forums is becoming more and more blurry and interactions between the actors in them are more and more diversified. The interactions between these various regulatory forums; global, international, European and national ones are widely recognised by scholars of political science and public administration and it is often referred to as the concept of multilevel governance.[11]

In the light of this phenomenon, the interaction between the international organisations is a natural consequence of the developments of the international legal order. Nevertheless, the international law is still a law that originally applies to states, and even though the international organisations have legal entities somewhat independent of the states that made them, still the international organisations are not taking part in international scene in the same way the states do. The role they have is still limited in comparison with the role of the state, particularly when we take into account the gap between the law making and accountability for law making, hence the implementation and enforcement, in the international law space.[12] As Frid argues, when it comes to the participation of International Organisations in other International Organisations

[6] Klabbers, (see *supra* n. 2), at p. 28
[7] Ibid, p. 42
[8] More extensively on the international legal personality, and theories see A. Cassesse, (see supra n. 5) Chapter 3, pp. 52-59
[9] A. Follesdal, R.A. Wessel and J. Wouters, 'Multilevel Regulation and the EU: A Brief Introduction' in A. Follesdal, R. Wessel and J. Wouters (eds.) *Multilevel regulation and the EU: Interplay between Global, European and National Normative Processes*, (Leiden, Boston: Martinus Nijhoff Publishers, 2008) pp. 1-6, at p.1
[10] R.A. Wessel and J. Wouters, 'The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres', in A. Follesdal, R.A Wessel and J. Wouters (eds.) (see above n. 9), pp. 9-47, p.10
[11] Ibid, at p. 11; cf. H.G. Schermers and N.M. Blokker, (see *supra* n. 5), pp. 2-17.
[12] Cassesse, (see *supra* n. 5)

they are still treated as second rate actors, and the common legal situation is that the right of the membership in an international organisation is still reserved for the States. [13]

These profound global changes are naturally having an effect on the European Union and its Member States. Acknowledging these developments is especially important in order to understand and map the position of the EU in the world, and analyse the role that the EC can play in international forums, and the way this can affect its Member States. The fact that the international law is still applying to the States creates problems when it comes to membership of the EC in other international organisations. Traditionally, most international organisations (as the UN and its specialised agencies) allow membership only for States; therefore if the Community is to join the organisations, the statute of the host organisation has to be changed, which can be a quite complicated legal issue and a concern for third parties[14].

Against this background, on the one hand, the European Community as a supranational body with the powers conferred to it by the Member States, by means of the Treaty, is supposed to be participating freely in the global and international scene in matters of its exclusive competence. On the other hand however, the fact that the EC could still be seen as a certain form of an international organisation, where the Member States are still sovereign states, and as those they are still important primary actors on the international scene, makes the participation of the EC as an actor in the international scene a difficult right to accomplish. Due to the nature of the international legal order, and the importance of the external representation as one of the crucial forms of sovereignty, as Frid points out, there is a risk that the principles of the EC might be undermined, when Member States of the Community have a more prominent position than the Community has.[15]

Finally, due to all these developments, nowadays the range of international regulatory forums varies significantly.[16] There are various types and forms of the international organisations through which the international relation issues are being tackled. There are those with the very broad mandate (UN, WTO, OECD) and those with very specific, technical agendas (International Civil Aviation Organisation, The International Telecommunication Union, etc)[17] The EC is bound

[13] R. Frid, *The relations between the EC and International Organizations: Legal Theory and Practice*, (The Hague: Kluwer Law International, 1999) p.1-2, for examples that the author is giving see footnote 2, also cf. D. Vignes, 'La Participation aux organisations Internationales' in R.J Dupuy, *A Handbook on international organizations,* (Hague Academy of International Law, 1988) pp. 58 et seq. pp.70-74

[14] P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations*, (New York: Oxford Univ. Press, 2004), at p. 201

[15] Frid, (see *supra* n. 13), at p.3

[16] A. Follesdal, R.A. Wessel and J. Wouters, (see *supra* n. 9), at p. 1

[17] R.A Wessel and J. Wouters, (see *supra* n. 9), at p. 9

to find its way and place in the variety of international forums, being competent to act externally; however not without the Member States. As a supranational organisation empowered by its Member States the EC has competences to act in fields of work of those organisations. Member states have, by creating the Community, by principle of attribution of powers, given up their sovereign right of representation in the matters of exclusive competence of the Community (ex. Trade). In these matters Member States are no longer competent to act, and the Community should act on behalf of them. In the matters of shared Community/Member States competence, however, the Community has the right to act next to its Member States. Nevertheless, since the area of work of international organisations is in many cases very broad, part of the competences within the agenda of the organisations, fall on Member States only, or they are shared between the Community and Member States.

The competences of the Community to act externally will be the topic of the following chapter, for now it is important to stress that the above described situation results in the dual membership of Community and its Member States in the international organisations which creates all sorts of complications for the international as well as inter-European actors. From the international actor's point of view, in cases of Community/Member States dual membership, the third parties are concerned with questions of exercising and managing dual membership and voting (how will the voting be organised to make sure that the Community is not over represented), but also with liability. Third countries may be concerned that internal rules within the Community, between the Community and the Member States may lead to the conclusion that the EC does not have the competence for external action in a certain matters.[18] Observers also mention the concerns coming out of the before mentioned gap between the accountability and enforcement in international legal order; here the parties are concerned whether the Community will be able to enforce the rules on its Member States.[19]

From the European side, the questions are numerous as well, as to the internal division of competences (exclusive, shared), or inter-institutional struggle (who is to represent the Community, what is the role of the Commission, Council and the Parliament). These questions will be raised and answered to some extent for the specific cases, in the following chapters.

After putting the EU and its Member States in the wider context of global international regulatory scene, and outlining the problems arising from the international scene in this chapter, the next chapter will deal with the European legal frame, and describe the legal base, capacity and competences to act in this scene.

[18] Sack, (see supra n. 4), at p.1235
[19] Ibid

2 Legal Base and Competences of the European Community for External Action: Personality, Capacity, Competence

2.1 International Legal personality

In order to participate in an International Organisation, by means of membership or otherwise; the Community should meet certain basic criteria. It should possess international legal personality, be recognized by relevant third actors, and have the capacity and competences to act externally.

The first predisposition of acting in international legal order is the international legal personality; it represents the ability to act on the international scene on its own[20]; "the capacity to bear legal rights and duties under international law".[21] The legal personality is something that goes undisputed for the states, since they are primary and traditional subjects of the international legal order; it is a part of their constitution.[22] For other subjects of international legal system, however, this is something that has not always been the case, and it could at least be said that it makes it easier for an Organisation if its legal personality is explicitly pointed out[23].

Indeed, the Treaty makers of the European Community were clear about the legal personality. The EC has been attributed with legal personality explicitly by the Treaty (TEC). Namely the Art 281 TEC states:

"The Community shall have legal personality"[24]

The Treaty goes further explaining what this means for the Community domestic legal order. (Art. 282 EC)

This article 281 was referred to by the ECJ to establish important doctrines which would give the Community a special status in the international legal order and attribute an 'objective legal personality' (enter into legal agreements with non Member States) to the Community[25]. Through case law the European Court of Justice established the doctrine of supremacy and

[20] P. Gautier, 'Reparation for Injuries Case Revisited: The Personality of the European Union', in J.A Frowein and R. Wolfrum (eds.) Max Plank Yearbook of United Nations Law, (The Hague: Kluwer International Law, 2000) pp. 331-361.

[21] J, Klabbers, 'Presumptive Personality: The European Union in International Law', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague, Kluwer International Law, 1998), pp. 231-53

[22] Klabbers, (see *supra* n. 2), pp. 53-59

[23] Ibid

[24] Art. 281 TEC

[25] A. Ott and R.A. Wessel, 'The EU's External Relations Regime: Multilevel Complexity in an Expanding Union' in S. Blockmans and A.Lazowski (eds.), *The European Union and its Neighbours* (The Hague, TMC Asser Press, 2006), pp. 19-59, at p. 23

direct effect. For the purpose of this paper, cases worth mentioning are the Costa/ENEL case and ERTA case[26]. In the Costa/ ENEL case the Court stated that:

"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 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."[27]

The court clearly supports the capacity of the Community for the international representation, and points out the fact that Member States transferred their powers over to the Community and limited their sovereignty. This means that EC, provided that it has the competence to do so, has the legal base to act on the international legal scene. The Court furthermore confirmed the capacity to enter into international agreements in ERTA case in 1971. [28] However, it stated that this capacity could be exercised only when it has competence to do so ('attribution principle'- art. 5 paragraph 1 TEU)[29]

From the point of view of international legal order as well, the Community meets the criteria defined by the ICJ in *Reparation for Injuries* Opinion for international legal personality in which the Court states that international organisation, to which rights and obligations are different from those of the Member States, has international legal personality and the capacity to operate on the international scene. As a principle of attribution of powers, the Court also states that the rights and duties of an organisation depend on 'its purposes and functions as specified or implied in its constituted documents and developed in practice'.[30]

In fact, by means of the Treaty the Member States have attributed exclusive powers for the Community, as well as powers shared with the Member States. Nevertheless, as Koutrakous points out, despite the Treaty provisions, the scope and exercise of Community's external powers has been a part of institutional, political and legal debate, due to various tensions between the institutions of the Community, balance of powers on the international scene, practical problems of the international negotiations etc. He argues that this struggle is still to settle. [31]

[26] ECJ, Case 22/70 *Commission v. Council (ERTA)* [1971] ECR 263
[27] ECJ, Case 6/64 *Costa v ENEL* [1964] ECR 585 at 593
[28] ECJ, Case 22/70 (see *supra* n. 26), paras. 15-16
[29] Ibid
[30] Reparation for Injuries Suffered in the service of the United Nations [1949] ICJ Rep 174, at 179-180
[31] P. Koutrakos, *EU international Relations Law*, (Oxford: Hart Publishing, 2006), at p. 8

As to the recognition by other actors in the international arena, this is no longer a matter of dispute. Nowadays, the individual states and international organisations recognise and accept the EC as an actor in the international legal sphere.[32] However, if the EC is to join formally or participate in international organisation, the third parties are concerned with liability issues, but also with the question whether the EC will be able to oblige its Member States to keep the international commitments.[33]

As previously mentioned, the relations of the EC and international organisations, depend mainly on the division of competences between the EC and the Member States on the one hand, and on the other hand on the rules and regulations of the target organisations. This chapter will further focus on the EC legislation and provisions in the matters of external action. The rules, limitations and related issues derived from international legal system and target organisations, will be examined in the following chapters, as part of the analysis of the specific cases of EC participation in international organisations.

2.2 The Absence of a Treaty Provision on Participation in International Organisations

In the absence of any Treaty provisions for the participation/membership of the European Community in international organisations, the following analysis of the EC regulation focuses on more general rules of external competences of the EC which is used as a legal base also in the matters of participation in international organisations.[34] More precisely the focus will be on those provisions that involve the treaty-making power of the Community and those that prescribe for relations between the Community and other international organisations.[35] Following the division of competences between the EC and its Member States, the Treaty provides rules for acting externally, namely developing close cooperation with third parties, negotiating and concluding agreements with third states and international organisations (Articles 300, 302, 303). The scope of the provisions attributed by the Treaty (explicit/express external competences) were further broadened and developed by the case-law of the ECJ in several case rulings and opinions (implied powers) some of which will be outlined below.

It is worth mentioning here, that the former article 116 EEC (which was omitted by the TEU) provided for, as observers point out, an 'effective procedure for co-ordinating Member States

[32] M. Cremona, 'The Question of Legal Personality', in A. Ott, K. Inglis (eds.), *Handbook on European Enlargement*, (Cambridge: Cambridge University Press, 2002) pp. 7-13, at p.7
[33] Sack, (see *supra* n. 4) pp. 1235-1236
[34] Sack, (see *supra* n. 4), at p. 1228; also R. Frid, (see *supra* n. 13), Chapter 3:EC Competence to Conduct Relations with International Organizations, pp.119-167
[35] Frid, *op. cit.* p. 121

action in international organisations of economic character'.[36] Sack argues that the decision to delete this article was 'unconsidered and anachronistic act' especially because this provision has not been replaced by a 'new rule governing Community and Member State membership in international organisations'.[37] The fact that the article was deleted, in relation to principle of attribution of powers, raises questions about the willingness of the Member States to compromise their external representation and by doing so, undermine their sovereignty. This tension is reflected throughout the whole practice and development of Community participation in international organisations. Still, the practise of the Community's participation in International Organisation shows, despite the reluctance to codify the subject matter by the Treaty, wide variety of established Community relations with various International Organisations which will be analysed in the following chapters. As observers point out the development of external powers of the Community proves that the 'Community policy emerges within an international context and increasingly that international context is helping to define the content of that policy, while Community policy and institutions contribute to the development of international norms and standards.[38] Therefore there is a need for great amount of flexibility in this field.

In the following sections of this chapter I will not go into detail over the complex division of powers, but briefly outline the main developments of ECJ on the scope of external competences of the Community. The division of powers for the specific cases of participation in international organisations will be touched upon in the following chapters.

2.3 Explicit External Competences – Attributed powers:

The following Articles are the most relevant ones for this subject-matter. Originally the Treaty of Rome provided the exclusive external competence for the Community in the matters of Common Commercial Policy as stated in Art 133 TEC on the implementation of commercial policy. Furthermore, the following subjects were added by SEA and future amendments of the Treaties (Amsterdam, Nice), to Community's external competence: agriculture and fisheries policy (Art. 37) transport policy (Art. 71), competition policy (Art. 83), harmonisation of indirect taxation (Art. 93), general approximation of legislation and administrative practices (Art. 94), research and technological development (Art. 170), environmental policy (art. 174(4) and 175) development cooperation (art. 181), monetary matters, cooperation powers with third states

[36] Sack, (see *supra* n. 4), at p.1228
[37] Ibid
[38] M. Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy' in P. Craig and G. De Búrca, *The Evolution of the EU Law* (Oxford, Oxford University Press, 1999) pp. 137-176, cited in A. Ott and R.A Wessel (see supra n. 25)

(related to education, culture, health, and trans-European networks) plus article 181a as a new legal base for economic, financial and technical cooperation.[39]

The Article 300 provides the Community with competence to conclude international agreements and sets out the general procedural arrangements, Article 302 prescribes the Commission with the duty to maintain appropriate relations with the UN, GATT organs and other international organisations; according to Article 303 the Community (note: not the Commission[40]) should establish close cooperation with the Council of Europe, and Article 304 prescribes so for the OECD. Art. 310 provides for power to conclude association agreements.[41]

In the absence of a treaty provision prescribing the rules for an accession to an international organisation, the procedure for negotiating and concluding international agreements needs to be followed: the Commission is submitting a proposal about the negotiations, and it is entitled to conduct the negotiations on behalf of the Member States, after the authorisation of the Council, with the consultation of the Special Committee appointed by the Council. The Council acts by qualified majority within the scope of this article, except for the fields of competences where unanimity is required and for the association agreements. The role of the parliament is quite passive, it is mainly just informed of the proceedings and decisions, its role does however depend on the content of the agreement, and hence it either consults or gives its assent. The Council is the one that finally concludes the agreement.[42]

In the case of WTO, where the Community is a founding member on an organisation (given that it is basically a conclusion of international agreement-treaty making), the provision of article 300 are being implemented without any difficulties. In case of an EC accession to an already existing organisation, however, the situation is somewhat different, so the application of the treaty making rules from the treaty (Art. 300) is sometimes difficult. For example, normally parties submit two independent statements of intent (on application to join and acceptance), therefore there is no official prior treaty-making negotiations.[43]

Furthermore paragraph 6 (Art. 300) apart from preliminary ruling procedure, allows the Court of Justice to give the opinion on the compatibility of the agreements with the Treaty provisions. Therefore the agreements are subject to the review of the court. This is very important feature

[39] A. Ott, R.A Wessel, (see supra n. 25), at pp. 25-26

[40] This creates problems related to the institutional struggle inside the EC on which institution is entitled to act (the Commission, the Council, what is the role of the Parliament?)

[41] The articles 302, 302 TEU that prescribe close relations with specific international organizations are used as a legal base for establishing administrative relations with them (exchange of information and conclusion of agreements), but cannot serve as a legal base for EC membership in those organizations, see R. Frid, The European Economic Community: A Member of a Specialized Agency of United Nations, European Journal of International Law 1993 4(1): 239-255; at p. 242

[42] Art. 300 TEC

[43] For more detailed explanation of this problem see Sack, (see *supra* n.4), pp. 1230-1231

since the external relations and division of competences between the EC and Member States were developed mainly trough the case law of ECJ.[44]

In addition the Article 300, paragraph 7 states that the agreements are binding on the institutions of the Community as well as on the Member States. This however, as mentioned before, does not automatically apply that the agreements have a direct effect.

2.4 Implied Competences[45]:

As seen in the previous section the external relations area is regulated only by a few treaty provisions which do not correspond to the growing needs of the Community external action, and the ECJ had a crucial role in broadening the scope and refining the division of competences.[46]

In the previously mentioned ERTA case the ECJ pointed to the broader source of external powers for the Community on the basis of the doctrine of parallelism (or otherwise defined as complementarity[47]) between the internal powers and external competences of the Community. On the argument of the Council that the Community was not given any direct provision in treaty to conclude agreements in the field of transport policy, the Court answered that the capacity of the Community to enter into agreements with third countries follows not only explicitly from the treaty but also implicitly from the provisions of the Treaty, and measures adopted within that framework, by the Community institutions.[48] The ECJ gave the Community the general capacity to enter into agreements with third parties over the whole field of objectives defined in Part One of the Treaty. However, it went on to still limit this by having the 'attribution principle' in mind, therefore that the Community has to be specifically authorised to deal with particular issue.[49]

This principle was further confirmed in the Opinion 1/76[50] where the Court concluded that the external competence can be exercised even when there was no previous internal community

[44] A. Ott, R.A Wessel, (see supra n. 25) p. 32, see footnote 49
[45] For the detailed analysis of implied competences, and related case-law see: Koutrakous, (*supra* n. 31) pp. 77-134; Eeckhout, (supra n. 14) pp. 58-94; A. Dashwood 'Implied External Competence of the EC' in M. Koskenniemi. (ed), (see *supra* n.21), pp. 113-125
[46] Frid, (see *supra* n. 13), p. 70
[47] For comment on the doctrine of parallelism/complementarity, A. Ott and R.A. Wessel, (supra n. 25) p. 24, see footnote 21
[48] ECJ, Case 22/70 (see *supra* n. 26) para. 16
[49] For discussion on the implications of this see A. Ott and R.A. Wessel, (*supra* n. 25), p. 23
[50] ECJ, Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] *ECR* 741, paras. 3-4. For the extensive analysis of this opinion see Eeckhout, (see *supra* n. 14) pp. 64-69; the same

legislation, so where there was no internal exercise of power on behalf of the Community. Namely, the court held that: "whenever community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has the authority to enter into commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion"[51] Furthermore, "the power to bind the Community flows by implication from provisions of the treaty creating the internal power and in so far as the international agreement is (…), necessary for the attainment of one of the objectives of the Community"[52] Moreover, in the paragraph 5 of this opinion the Court allows for the Community to exercise its external powers by accession to an international organization.[53]

This broad definition of implied powers was somewhat limited in the Opinion 2/94 where the Court pointed into the direction of respecting the attribution principle and said that 'the principle of conferred powers must be respected in the internal action and the international action of the Community.'[54]

Finally, particularly important for the subject matter of this analysis, the possibility for the Community to join an international organisation pointed out in the Opinion 1/76 was confirmed in Opinion 1/94, in which the court recognised the Community competence to create the WTO.[55]

These decisions are followed by extensive case law that deals with delimitation and scope of Community's external legal competence in various policy fields (ex. Opinion 2/92)[56]. Going through all these cases specifically would be too broad for the purpose of this assignment. For now, it is important to point out the evolutionary nature of the EC law on the external competences, and the fact that this is, as it was mentioned before a flexible subject, which develops on a case to case basis, within the context of international scene, influenced inter alia, by the inputs from international relations arena.

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principle is confirmed by the Court also in the *Kramer* Judgment, ECJ. Joined Cases 3, 4, and 6/76 *Cornelis Kramer and others* [1976] *ECR* 1279.

[51] ECJ, Opinion 1/76, *op.cit* n. 50, para. 3

[52] Ibid, para. 4

[53] Ibid, para 5

[54] ECJ Opinion 2/94 *Accession by the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] *ECR* I-1759, paras: 23-24

[55] ECJ, Opinion 1/94 *WTO* [1994] *ECR* I-5267, for an extensive analysis see Frid (see *supra* n. 13) pp. 119-132 and pp. 345-359

[56] ECJ, Opinion 2/92, *OECD* [1995] *ECR* I-521

2.5 'Mixity' and Duty of Co-operation:

The extensive case law provides the rules for the division of competences between the community and Member States on a case to case basis; however, as far as the participation in international organisations is concerned, even in areas of exclusive Community competence, the practice shows (almost) no examples of sole Community membership in those organisations.[57] Member States are still members of the same organisation that Community is (ex: WTO, FAO). As mentioned in chapter I, this results in mixed representation of Community and Member States. Some of the reasons for the 'mixity' principle in participation in international organisations were mentioned previously, they are political as well as legal, former being, as Sack argues, that Member States are reluctant to give away their sovereign right of external representation.[58] The later is related to the fact that the international organisations agendas are often quite wide, that it is difficult that the Community has the exclusive competence over the whole issue area; therefore the Member States are still competent to act externally on the matters of their own competence or shared competence.[59] Mixed participation in international organisations gives rise to many procedural and legal questions that third parties who are members of those organisations are concerned about. Liability questions, voting rules for the Community and Member States are some of the arising issues.

One other important principle governing the 'mixity' in relation to participation in international organisations was outlined in the case law of ECJ, namely the duty of co-operation.

It was first outlined by the Court in Ruling 1/78 EAEC[60], and further reconfirmed in Opinion 2/91[61] On ILO Convention No 170. The first time, which concerned the EAEC Treaty, the court pointed out that in accordance with the principle of loyalty (now article 10 EC), in their external action (when the competence is shared) the Member States should closely co-operate with the institutions of the Community. The close cooperation applies to process of negotiation, conclusion and implementation of the agreement. In the Opinion 2/91 On the ILO Convention 170, the court applied this principle to EC Treaty, and pointed to an even higher importance of the principle of duty of co-operation in the case of ILO Conventions, since the EC, due to internal structure of the ILO cannot become a member and exercise the powers given to it by

[57] P. Eeckhout, (see *supra* n. 14) pp. 199-225, at p.200; Sack (see *supra* n.4), pp.1240-1241, the examples of sole EC membership are bound to a second category of membership (treaty-related organizations, not fully fledged IOs), mainly fisheries organizations, he mentions: NAFO, NEAFC, NASCO, Fisheries Commission for the Baltic Sea and the Belts, International Olive Oil Council, International Sugar Council

[58] Sack, (see *supra* n.4) pp.1232-1233

[59] Eeckhout, (see *supra* n. 14) pp. 202-203

[60] ECJ Ruling 1/78 *re Convention on the Physical Protection of Nuclear Materials, Facilities and Transports* [1978] ECR 2151, paras 34-36

[61] ECJ Opinion 2/91 *re Convention no. 170 of ILO* [1993] ECR I-1061, paras 36-38

the Treaty. The duty of co-operation results from the requirement of unity in international representation of the Community (there is no mention of the Article 10 EC)[62] However, the court did not specify how this co-operation should be achieved; it just pointed that all the measures necessary need to be taken. It did not do so either in the Opinion 1/94 on the WTO Agreement, where in final part of the judgment referred to duty of co-operation, also saying that the problems of co-operation could not modify the question of competence.[63]

There was still no concrete meaning of the principle of duty of co-operation. In the case Commission v. Council[64] however, the Court went further in defining this concept. It recognised the possibility to have certain form of inter-institutional agreement (even informal) which would specify and materialise the duty of co-operation in cases of mixity in external action.[65]

This principle clearly is in service of unified external action, as it bounds Member States and Community to co-operate in joint external action. However, as Eeckhout argues, the question remains how legally strong this principle is, what is the legal base, or appropriate decision-making procedure of such inter-institutional agreement materialising duty of co-operation, and what happens if the Member States fail to comply with it. Another question, he argues is, whether there is some form of obligation for the institutions to conclude a binding agreement which specifies the duty of co-operation concerning the mixed participation in international organisations (WTO or ILO for example). Thus, the duty of co-operation principle is crucial for mixed external action, but as Eeckhout argues, the principle lacks clarity and there should be basic legal text (Treaty article) on how to conduct co-operation when it comes to participation in international organisations.[66]

Finally it is important to point out here, in relation to the main research question, that the duty of co-operation in principle limits the role of the Member States in international organisations, since it bounds Member States to follow the Community principles and act in external relations accordingly. This sometimes means that they need to put their own preferences aside.

After examining the main legal base, capacity and competences of the EC to participate in international arena, as well as the governing principles of that participation in this chapter, the next chapter will take a closer look on the examples of that participation, status and therefore the role that EC plays in International Labour Organisation (ILO), Food and Agricultural Organisation (FAO) and World Trade Organisation (WTO).

[62] Ibid; P. Eeckhout, (see *supra* n. 14), at p. 211
[63] P. Eeckhout, (see *supra* n. 14) at p.212; Opinion 1/94, (*supra* n.55) paras. 106-109
[64] Case C-25/94 *Commission v. Council* [1996] ECR I-1469, paras. 40-51
[65] Eeckhout, (see *supra* n. 14), at p. 214
[66] Ibid, at p.215

3 EC Presence in International Organisations

3.1 In Which International Organisations Does the Community Play a Role[67]?

Following the approach of Sack and Eeckhout, the International Organisations that the EC takes part in can be divided into two categories.[68] The first category includes the fully fledged organisations, the organisations with 'independent existence and genuine membership structure'[69]. The second category includes all cases where an international treaty creates an organisation in order to better implement its provisions.[70] The main focus of the analysis in this paper will be on the first category for various reasons. First of all, encompassing the latter category would be too broad for the purpose of this assignment (as Sack argues Community is a member to more than 60 international organisations of this type). Furthermore many of these organisations are of regional or very specialist nature; therefore they are of 'secondary political and legal importance'[71]. Lastly, it is difficult to distinguish between the second category and mixed agreements in general, as 'treaty-making, particularly at multilateral level, is increasingly accompanied by the creation of various institutions and bodies'.[72]

As mentioned before, the Community/Member States participation in international organisations follows their division of competence; therefore the Community is the most present in organisations dealing with the agendas that are mostly covered by its competence, commercial, agricultural and fisheries policy; however, the modes of participation that the EC can gain in these organisations are determined mainly by the rules of the target organisations to accept participants. The legal status of the Community therefore varies from traditional and the most usual observer status (the most usual status of one international status in another), through full participant (enhanced observer) status to membership status.[73]

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[67] For a recent review of the factual developments as regards to EU's status in multilateral *fora* see: Hoffmeister, 'Outsider or Frontrunner? Recent Developments Under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies', Common Market Law Review, vol. 44, 2007, a pp. 41-68

[68] J. Sack, (see *supra* n. 4) pp. 1238-1240 ; P. Eeckhout (see supra n. 14), at p. 200

[69] J. Sack, (*supra* n. 4) p.1238

[70] Ibid, p.1239

[71] Ibid, p.1240; this is not to say that participation in these organizations is not relevant for the analysis of the role that the EC can play in international organizations, however, due to the length of this assignment it was necessary to chose to exclude them from the analysis

[72] P. Eeckhout, (*supra* n. 14), p. 200

[73] Hoffmeister, (see *supra* n. 67), p. 54; for more detailed description of notions of, observer and member status in international organizations in general see: H.G. Schermers and N.M Blokker, (see *supra* n. 5, for membership status: pp.55-137, for observer status: pp.119-137; for full participant status as well as member and observer status see: Dormoy: 'Le statut de l'Union europenne dans les organizations internationales' in Dormoy (Ed.) *L'Union européenne et les organisations internationales*, (Bruxelles: Bruylant: Université de Bruxelles, 1997), pp. 47-55

What follows is an attempt to illustrate the various types of organisations working in various policy fields that the EC takes part in, either by being an observer, full participant, or member. It should be noted that this is not an exhaustive list of all the examples of EC participation, as that would be very difficult due to the difficulties in numbering and classifying all the existing International Organisations (the fully fledged ones or otherwise); more detailed overview of the Community's participation in international organisations is given in the Appendix in the tables of Community' participation within and outside the UN System. Therefore the following paragraphs are in use of illustrating the variety of types of organisations that EC takes part in, and the modes of participation of the EC in those international organisations.

The observer status is typical for UN General Assembly and various UN Specialized Agencies and subsidiary bodies. Examples are from various policy sectors: financial (International Bank for Reconstruction and Development – IBRD), monetary (International Monetary Fund – IMF), telecommunications (International Telecommunication Union – ITU), industrial development (UN Industrial development organisation – UNIDO), intellectual property (World Intellectual Property Organisation – WIPO), meteorology (World Meteorological Organisation – WMO), trade and development (UN Commission on International Trade Law – UNCITRAL, UN Conference on Trade and Development – UNCTAD, and UN Development Programme – UNDP), environment (UN Environment Programme – UNEP)**.** Examples of EC having an observer status outside the umbrella of UN are: Office International des Epizooties (World Organisation for Animal Health), International Council for the Exploration of the Sea, International Organisation for Standardisation Joint Action.

EC is a full participant in UN Conferences, UN Commission on Sustainable Development (CSD), and Intergovernmental Forum on Forests (IFF). Its observer status is being enhanced in various organisations such as: International Civil Aviation Organisation (ICAO), World Health Organisation (WHO), United Nations Educational, Scientific and Cultural Organisation (UNESCO), and to a certain degree in International Labour Organisation (ILO). This enhanced observer status is also typical for certain regional organisations (OECD and Council of Europe)[74]

Within the above mentioned first category (fully fledged international organisations) the European Community is a full member only to FAO, WTO and EBRD. As for the WCO, the organisation accepted Community's application for membership in July 2007, in the meantime the Community's position is that of a *de facto* member until all the members ratify the changes in the constitution if the WCO.[75]

[74] Hoffmeister, (see *supra* n.67), p. 54
[75] Ibid, p. 44

Within the second category, EC is also a member to *Codex Alimentarius Commission* (subsidiary common body of FAO and WHO), UN Convention on the Law of the Sea (UNCLOS)[76]

3.2 Selection of Cases for the Analysis:

In order to give a more detailed view of the participation in international organisations, I will take a closer look at three cases, namely the International Labour Organisation (ILO), Food and Agricultural Organisation (FAO) and the World Trade Organisation (WTO). These cases were chosen as examples of Community status as an observer on the one hand (ILO) to illustrate difficulties that arise from this status, in comparison with rare cases of genuine membership status of EC in another international organisation (FAO and WTO) on the other.

3.3 EC as an Observer in International Organisation:

A traditional observer status, as granted to the UN subsidiary bodies and specialised agencies, in practice means that the Community can attend meetings of a body or an organisation, but it does not have the right to vote. Furthermore, the presence of an observer can be limited to formal meetings only, after all the formal and informal consultations have been conducted with members and relevant parties. In addition, the formal interventions are normally possible only at the end of all the interventions of formal participants, which as Hoffmeister and Kujper argue, implies less political weight for the Community.[77] The right to speak has been normally given on the basis of the Chairman's discretion.[78] On the basis of this, it can be said that the observer status for the Community poses serious limitations for participation within the organisation and may hinder practical exercise of explicit conferred competences. Nevertheless, it is also important to point out that the observer status may vary considerably from case to case up to a 'full participant' status. Full participants may have the right to attend formal, as well as informal meetings of an organisation; they may have the full right to speak and even make proposals and amendments. This status in practice comes down to a membership but without the right to vote or block consensus.

[76] Ibid

[77] F. Hoffmeister an P.J. Kujper, 'The status of the European Union at the United Nations: institutional ambiguities and political realities', in F. Hoffmeister, J. Wouters and T. Ruys (eds.) *The United Nations and the European Union: an Ever Stronger Partnership* (The Hague: T.M.C Asser Press, 2006), pp. 9-34

[78] Frid, (see *supra* n. 13) Appendix II, p. 380

3.3.1 EC Status in ILO[79]:

The International Labour Organisation is a good example of a fully fledged organisation which cannot accept the membership of the EC due to its internal decision making setup. Despite having the competences in the field of work of ILO[80], the EC is not a member of this organisation whose main task is the negotiation and adoption of international labour conventions, due the tripartite decision making setup of ILO, where each member has representatives from the government (two), as well as from the employers and workers (one representative each).[81]

Not being a member of ILO for the EC means it cannot participate in negotiations or the conclusions of those conventions.[82]Because of its competence in the subjects covered by ILO Conventions, the membership being impossible, the Community was granted the observer status (officially in 1989)[83]

Observer status within the practice of ILO means that the Community is present at the ILO Conferences (represented by the Commission), and that it has the right to speak and participate in discussions (ILC Standing Orders, art. 14(9)), furthermore it has the right to be present in the meetings of the Committees of the Conference, as well as participate in their discussions. (ILC Standing Orders, Art. 56(7)) It does not however, have the right to subscribe to amendments, and obviously it cannot vote. The observer status gives the EC presence also in the ILO Governing Body, where the Community can participate as an observer in the Plenary, committees and specific steering committees of the Governing Body of the ILO.[84]Only the Member States however, are allowed to ratify the ILO Convention and to be held accountable in case of failure of compliance.

Given the fact that, according to the ILO Constitution (from 1919), the Community cannot become a formal party to ILO Conventions, and given that it does have competences to act externally within the field of ILO, on behalf or next to its Member States, the Court in the Opinion 2/91 stated that in that case 'its external competence may, if necessary, be exercised

[79] For more detailed analysis of the EC actorness in ILO see: R. Kissack, 'EU Actorness in the International Labour Organsation: Comparing Declaratory and Voting Cohesion' (Global Society, 22:4, 2008), pp. 469-489

[80] Relevant policies in this matter are *inter alia* free movement of workers, coordination of social security schemes and equal treatment on pay between man and women, improvement of living and working conditions etc.

[81] Opinion 2/91, (see *supra* n. 61), section III-ILO, see this Opinion for more information on the decision-making setup of ILO

[82] Sack, (see *supra* n. 4), p. 1239, in particular footnote n. 15

[83] Hoffmeister, (see *supra* n. 67) footnote 60: Exchange of letters of 21 Dec. 1989 and 22 Dec.1989 between the European Commission and the International Labour Organisation, OJ. 1989, C 24/8, renewed by an exchange of letters of 14 May 2001, OJ 2001, C165/23

[84] Delarue, 'ILO-EU Cooperation on employment and social affairs' in F. Hoffmeister, J. Wouters and T. Ruy (eds.) (see *supra* n. 77) pp. 93-115, at p. 102

through the medium of the Member States acting jointly in the Community's interest'.[85] Therefore, the duty of co-operation governing the joint competence in external representation is especially important in this case. In this respect, the court states:

"In this case, cooperation between the Community and the Member States is all the more necessary in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO convention and must do so through the medium of the Member States."[86]

Given the limited status of the Community as an observer in ILO, the common positions of the Community are often represented by the Presidency, therefore the Member State holding the six months rotating Presidency.

Being limited by an observer status within the ILO is not the only difficulty EC faces when it comes to participation in ILO. In fact, the Community's competence in relation to participation in ILO was also a matter of dispute between the Member States and the Community in numerous cases (ex. in relation to Convention No 153-working hours and rest periods in transport, Convention No 162-safety in use of asbestos, and the aforementioned Convention No 170). These disputes serve as examples of the fact that the Member States are reluctant to give away their representation and competence in the ILO, and even though the Court did bound the Member States action by stressing the duty of co-operation principle in the case of ILO, their resistance in this matter is quite strong as observers point out. To support this argument, Eeckhout and Sack mention that Member States refused to make national ratifications of the conventions subject to a previous Council decision, and that the entire ratification of Convention No 170 was blocked.[87]

This example of participation clearly shows how present the struggle between the EC and Member States in external representation is, when it comes to participation in international organisations.

Nevertheless, it is worth mentioning that some observers argue that the Community coordination on ILO matters 'is slowly gaining ground both in Brussels and in Geneva and the Community raises its profile in ILO discussions on political level'.[88]

[85] Opinion 2/91, (*supra* n. 61), para 5
[86] Ibid, paragraph 37
[87] Eeckhout, (see *supra* n. 14), p.203, Sack (see *supra* n. 4), p. 1239, footnote 15
[88] Delarue, (see *supra* n. 84)

3.4 EC as a Member of International organisations:

3.4.1 EC Membership in FAO[89]:

The Community has been granted the explicit competence to act within the fields of operation of FAO.[90] Apart from Art.37 – Common agriculture policy, EC's competence flows from various other articles: Art.94 and Art.95 - Approximation of laws, Art. 163 – Research and technological development, Art.174(4), Art.176 – Environment[91], Art. 308, 310 – development, and others related to transport, economic and social policy[92]. Despite the extensive competences, joining the FAO was not easy, and the membership in this organisation together with its Member States does not reflect a happy state of affairs for the Community[93].

The EC joined the Food and Agricultural Agency of United Nations in the 1991, after the provisions of the FAO constitution have been amended. [94] In order for the Community to join the certain restrictions were placed on its membership rights. The Community plays more of an accessory membership role to its Member States based on alternative exercise of membership rights where the EC can use the rights as a member in areas with its competence.[95]The division of competences between the EC and Member States should be based on the declaration of competence that the EC had to submit at the time of the application for membership.[96] In addition to this, the Community has to give a statement before each FAO meeting, which includes clarifying competence for every item of the agenda of the meeting, as well as voting competence 'should the need for the voting arise'.[97] Without the statement, it would be presumed that the Member States have the competence not the EC.[98]Furthermore if the Community is entitled to vote, its vote is worth the number of votes of its Member States.[99]

As observers argue, the alternative voting rights, and the weight of Community vote is not a problem per se.[100] What complicates the things are the requirements of constant statements of competence, which creates constant drawbacks and complications within the Community,

[89] For detailed analysis, also for the arrangements before membership status see Frid, (see *supra* n. 41)
[90] Ibid, p. 242
[91] Council Decision of 25 April 2002 Concerning the Approval, on Behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the Joint Fulfillment of Commitments Thereunder, *OJ* 2002 L 130/1
[92] Frid, (see *supra* n. 67), p.242, footnote n. 12
[93] Sack (see *supra* n. 4), pp. 1244-1246, Eeckhout, (see *supra* n.14) pp. 203-205
[94] Article II FAO Constitution was changed to admit the regional economic organization as a member as opposed to the previous situation when only states could become members
[95] Article II Constitution of FAO, paras 4, 8, 9 and 10
[96] Article II CFAO, paragraph 5
[97] Article LXI(2) of the rules of procedure of the FAO referred to in Sack, (see *supra* n. 4), p. 1245
[98] Article II, para. 6 Constitution of FAO
[99] Article II, para 10 CFAO
[100] Sack, (see *supra* n. 4), at p. 1246; Eeckhout, (see *supra* n. 14), at. P. 204

especially regarding the demarcation of competences (in light of a constant intergovernmental-supranational struggle within the EC, and legal questions deriving from principle of implicit powers bound by the principle of necessity) and excessive administrative work required.[101] These complications in practise somewhat undermine the role of the EC in the FAO.

Apart from the voting arrangements, there are other difficulties for the EC to play a prominent role as a member of the FAO, regarding the role in organisational structure or the budgetary affairs of FAO. According to paragraph 9 of Article II of the Constitution of FAO, in the bodies of restricted membership of FAO (which include the Constitutional, Legal, Financial and Planning Committees) only the Member States of the EC can participate, the EC is 'not eligible for election or designation to any such body, nor it shall be eligible for election or designation to any body established jointly with other organisations'[102]. As Sack argues, this, quite absurdly, leaves the EC out from influencing decisions that affect its own statutory, financial and legal position.[103] It may be argued that, with the arrangements like this, especially in areas of mostly shared competence between the EC and Member States (therefore not for commercial and fisheries policy) the Community is better off enhancing the observer status, instead of settling with membership status restricted in this manner.[104]As an observer, the EC could be present at the meetings and be able to steer the negotiations in their wanted direction for example.

3.4.2 EC Membership in WTO[105]:

WTO is a fully fledged international organisation with legal personality and capacity as an international organisation, with the general goal to 'facilitate the implementation, administration, and operation as well as to further objectives' of the WTO Agreements. The specific tasks of the WTO are outlined in the article III of WTO Agreement: To provide a forum for negotiations among Members both as to current matters and future agreements, to administer the system of dispute settlement, to administer the Trade Policy Review mechanism, and to cooperate as needed with the IMF and the World Bank, the two other Bretton Woods institutions.[106]

[101] Eeckhout, (see *supra* n. 14), p. 205
[102] Atricle II CFAO, para. 9, and Art. XVI(3) of the rules of procedure of the FAO
[103] Sack, (see *supra* n. 4), p. 1245
[104] Ibid, p.1247, for the recommendation on improvements of membership rights of EC in FAO see pp.1246-1247
[105] For the status of the EC and Member States in WTO see: Koutrakous (see *supra* n. 31), pp. 175-179, for the effects of GATT and WTO Rules in Community legal order: pp. 253-295
[106] WTO Agreement, Articles. I, III:1, VIII,

The EC was one of the founders and main players in Uruguay Round of negotiations that lead to the establishment of the WTO and it was already a de facto member of GATT.[107] This already makes its status in this organisation more prominent than in FAO. In contrast with membership in FAO, there were no major restrictions to Community's membership to WTO. There are no requirements of declaration of competences as in FAO and precise legal rules on the exercise of competences between the EC an MS in the treaty establishing the WTO[108]. In principle, the Community and its Member States have alternative voting rights[109], with the Community's vote weighting the number of its Member States that are members to WTO. However, as Eeckhout argues, these voting arrangements are theoretical, due to the fact that voting rarely takes place in the WTO.[110]

Looking at the membership rights that EC enjoys in the WTO, there are no major obstacles for the EC to exercise its external competences in the matters regarding WTO. Therefore, it is fair to say that these membership arrangements are more favourable than in the case of FAO. However, the two cases cannot really be fairly compared. As mentioned before, the participation of EC in international organisations is highly influenced by division of competence between the EC and Member States, as well as influences from the international arena, and it naturally differs on a case to case basis. In the case of WTO, there was no need to provide special clauses in the Constitution (as in the case of FAO), as the EC was among the founders of the organisation. Furthermore, the EC's extensive exclusive competence in matters of trade and tariffs as provided in article 133 on common commercial policy makes the EC exclusively competent for most parts of the field of work of WTO; therefore there was no need for constant clarifications and declaration of competences.

This is not to say that there was never a dispute over the competences on matters covered by the WTO Agreement or that the EC competence covers the entire WTO agenda. After all, the Agreement was signed as a mixed agreement because parts of it fell outside the scope of article 133 EC (old article 113 EEC). In the before mentioned ECJ Opinion 1/94[111], the question of competence of the Commission to conclude GATS (General agreement on Trade in Services) and TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) agreements annexed to Agreement establishing the WTO was raised.[112] The court ruled that that the Commission does not have the exclusive competence to conclude agreements for trade in services and trade related aspects of intellectual property. As much as this decision of the Court

[107] Eeckhout, (see *supra* n. 14), p. 205
[108] Sack, (see *supra* n.4), p. 1248
[109] WTO agreement article IX: in the footnote states that the number of EC and its Member States should not exceed the number of the Member States
[110] Eeckhout, (see *supra* n. 14), p. 205
[111] ECJ Opinion 1/94, (see *supra* n. 55)
[112] Ibid

led scholars to believe that the status of the EC within the WTO was going to be undermined[113], as Billet argues, in practice the EC, or more precisely the Commission, does play a prominent role in the WTO, especially in dispute settlement system part, and more strikingly it is the main actor concerning TRIPS and GATS dispute settlement, despite the opinion of the court of non exclusive competence in this matter and Member States reluctance to let go of their official role in WTO.[114]

Therefore, despite the principle of 'mixity' ruling the membership of the EC and its Member States (all the WTO disputes on intellectual property rights concerning the EC or the Member States have been initiated by the 'European Communities and their Member States'[115]), the EC is the one playing the leading role. The reasons for this, could be found in the both the EC and WTO side of the token. Billet argues that one the one hand, the strongly institutionalised setting of the WTO (highly legalised panel and appeal procedure, plus the strict timeframes for the different stages of the procedure) strengthens the position of the Commission, 'both internally- vis-a-vis the Member States – as well as internationally'.[116] On the other hand, the decision making process of the EC[117], and the Commission's expertise, also played a role in reinforcing the position of the EC in WTO.

Finally, this *de facto* competence of the EC in 'new trade' issues became *de jure* competence through Amsterdam and Nice amendments of the Treaty, although with some limitations. The Nice amendments to the article 133 EC included the new trade issues, the trade in services and intellectual property rights as exclusive competence of the Community, but with the condition that the Council acts by unanimity (if the voting rule to adopt internal rule is unanimity, or when the EC has not yet exercised the its powers internally)[118]

All this again supports before mentioned idea that the external relations field of the EC is a flexible subject, developing from one case to another, influenced by developments from the international scene. In this case the institutional setup of the WTO had important impact in strengthening the position of the Community in this international organisation, and finally it had impact on the EC law in respect to broadening the scope of the article 133.

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[113] J.H.J Bourgeois, 'The EC in the WTO and Advisory Opinion 1/94: An Ech-ternach Procession', Common Market Law Review, Vol. 32, 1996, pp.763-787, at p. 786

[114] S. Billet, 'From GATT to WTO: Internal Struggle for External competences in the EU', 2006, JCMS, Vol.4, n. 5, pp. 899-919, at p. 904

[115] Ibid, p. 904

[116] Ibid, p.901

[117] Ibid, p.905; The Commission has a monopoly on the initiative, and the strict timeframes play to the advantage of the initiator, plus member states have the incentive to defend their interest through EC "because of the better chances for the big country enforcing compliance"

[118] For more details see Art. 133 (5), 133(6), 133(7) TEU; For discussions about the Nice amendments of Art. 133 see M. Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy after Nice' (2001) Cambridge Yearbook of European Legal Studies, Vol. 4, pp. 61–91.

Finally, as these examples of Community participation show, there are problems arising from both observer and member status of the EC in International Organiastions. The limitations that the Community faces concerning voting rights, or participation in conventions and bodies set up by conventions (case of ILO) seriously undermine the possibility of the EC to exercise the powers attributed to it by the treaty. On the other hand, the membership can create problems as well, as we have seen in the case of FAO where the Community does not participate in bodies of the FAO (and therefore it is excluded from important decision-making part of the organisation), and where it is overloaded by excessive (often unnecessary) administrative load and costs, deriving from the requirement of constant declarations of competences in FAO. The status of the WTO is indeed different than usual, due to historical role in GATT negotiations, the Community can exercise its role in WTO without much trouble, however it needs to be pointed out that the case of WTO is a special one, the EC external competence in the issues covered by the WTO agenda are almost exclusive, and as we have seen, the WTO setup served quite well in pushing the Commission as a main actor in the dispute settlement of this organisation. The Member States, even though reluctant to officially give away their representation in this matter, gave the Commission *de facto* main role in this organisation.

Once again we see how different the participation is from case to case and how the international inputs help shape the Community/Member States representation in international organisations. This also shows that there is no general prescription for the Community/Member States participation, as sometimes we have seen that certain membership arrangements are not worth wile for the Community (as in FAO) and it would be better off enhancing the observer status in those cases. On the other hand the traditional observer status undermines the Community's role in cases where it has the exclusive external competence.

Conclusions:

As previously mentioned, the external representation is one of the main features of the sovereignty of one state. The state is traditionally a central actor in international legal system and the participation in international organisations is typically reserved for states. At the same time as part of the first chapter, we have seen that international regulatory system is increasingly changing due to the effects of globalisation. In light of the phenomenon of multilevel governance the regulatory forums and actors are increasingly diversified, the clear division between them is fading away, and the effect of the international law making on the sovereignty of the states is more and more recognised. All this is reflected well on the example of European Community participation in international organisations. The representation of the EC in international regulatory forums seems to be characterized by a constant struggle of intergovernmental and supranational forces, where Member States are trying to protect their sovereignty by keeping their role in international organisations, while the role of a supranational body they created by attribution of competences, in order to tackle the amongst other, the effects of globalisation, is increasing.

We have seen in chapter two that the EC has been attributed with the legal personality, capacity, and competences to act on the international scene, on behalf or jointly with the Member States. However, it has also been shown that the path to acquiring the competences has not been an easy one. The powers of the Community were gradually being extended by case-law of the European Court of Justice as the need for clarification of not so well defined powers given by the Treaty, arose.

Finally in chapter three, it has been shown in the brief survey of cases of EC participation in international organisations, that the Community is certainly present in wide variety of policy fields and types of organisations, despite the obstacles from international legal sphere and the struggles within the European Community. The participation varies from case to case, from an observer status, through full participant status, to membership status. As Hoffmeister argues, despite the fact that the membership right is confined to only a few cases, the Community plays a prominent role in the international organisations by means of other forms of participation, therefore by enhancing its observer status.[119] As shown on the cases of ILO and FAO, there is no generally prescribed best mode of participation for the Community, as gaining a restricted membership status is sometimes worse than gaining an enhanced observer status (ex. FAO). The status that the EC has, provided it has competences in the field of work of international

[119] Hoffmeister, Introduction

organisation, depends on the rules and regulations coming from a target organisation as we have seen on the example of ILO.

Therefore, in relation to the first part of the research question – to what extent does the EC participate in international organisations, it can be concluded that the EC participates in wide variety of international organisations, mostly through an observer status which is being enhanced in several cases, however the participation is limited by the nature of the international legal scene on the one hand, and by the lack of clarity of rules prescribing the participation and the complex questions of delimitation of powers between the Community and Member States in the European legal sphere. The Community's participation is still quite limited when it comes to membership rights, which are bound to a very few cases, when it comes to organisation of a universal character. As seen above there is no Treaty provision which would regulate the participation of the Community in international organisations also in relation to its Member States, given it is not really possible to look at participation of the EC isolated from the Member States, therefore this area of EC legislation is quite flexible and it is developing from one case to another.

As seen in previous chapters, this representation is defined by mixity, or joint participation, due to complex division of competences between the Community and its Member States and the Member States reluctance to undermine their most obvious sovereign right, that of external representation. Coming to the second part of the main research question, how is the participation of the EC affecting the participation of the Member States, it must be said that it is difficult to draw precise conclusions from this limited research. In the cases where the Community is a member of an organisation we have seen that Member States are still present in the organisations as full members of the same organisations and they are reluctant to give away their sovereign right of representation. Increasing Community's participation in relation to decreasing participation of Member States can be seen to a certain extent on the example of the WTO, where the Community plays a prominent role also in relation to TRIPS and GATS (despite the dispute over its competences in these matters). Furthermore, Member States are affected by the duty of co-operation principle, being obliged by the Court and the Treaty principle of loyalty to act in accordance with Community principles, which, as shown above, is especially important in the cases where the Community cannot become a member of an organisation (ILO). These answers are all but straight forward, however. It has been shown in the case of ILO as well as on the example of FAO that the Member States are managing to safeguard their place next to Community's place which often results in quite complicated situation as seen in case of FAO with the issue of declaration of competences, and in case of ILO regarding ratification of ILO Conventions.

Finally, having said all this, it is important to point out to a recommendation as to what could improve the complicated area of EC participation in international organisations. That is not an easy task, given the complicated circumstances in international legal system, and the variety and difference between the cases. Maybe the most obvious, is the need for a clear Treaty provision[120] that would regulate that the management of participation, especially in relation to 'mixity'. Indeed, the Court did point out to the duty of co-operation principle, however, as mentioned before, the principle is not precisely defined, and quite often it fails to solve the arising conflicts (as on the example of ratification of ILO Convention). The treaty provision would not prescribe whether or not the Community should pursue a membership status in all the cases, as the best mode of participation, the cases are too different. However, the provision could solve some of the problems of inter-institutional struggle inside the Community, by providing clear rules of the role and obligation of the Commission, Council and the Parliament. Furthermore such a provision could help in clearing some of the questions and concerns of the third parties when it comes to the participation of the EC/Member States in international organisations.

[120] Sack, 1250

Appendix – Tables of EC Participation in International Organisations within and outside the UN System

EC Participation in UN System[121]:

Organisation	**EC Status**
UN Principal Organs	
General Assembly	Observer
Main Committees of General Assembly	Observer
Economic and Social Council	Observer
Secretariat	Observer
UN Subsidiary Organs	
Regional Economic Commissions:	
Economic Commission for Europe	Observer
Economic and Social Commission for Asia and the Pacific	Observer
Economic Commission for Latin America and the Caribbean	Observer
Economic Commission for Africa	Observer
Economic and Social Commission for Western Asia	Observer
Subsidiary Organs of the General Assembly and ECOSOC	
UNHCR	Observer
UNCTAD	Observer
Codex Alimentarius Commission (FAO/WHO)	Member
UNEP	Observer
UNDP	Observer
UNCITRAL	Observer
CND (Commission on Narcotic Drugs)	Observer
UNIDCP	*De Facto* member (as a major donor)
CSD	Full participant
UNCLOS (UN Convention on the Law of the Sea)	Member
UN Specialized Agencies	
ILO	Observer
FAO	Member
IMF	Observer

[121] R. Frid, *The relations between the EC and International Organisations: Legal Theory and Practice,* The Hague, Kluwer Law International, Annex I; also F. Hoffmeister, 'Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies', Common Market Law Review, vol. 44, 2007, pp. 41-68; Following Hoffmeister's approach the enhanced observer status is categorised as full participant status, at p. 54

IBRD	Observer
UNESCO	Full Participant
ICAO	Full Participant
ITU	Observer
WHO	Observer at the European Regional Office
WMO	Observer
IMO	Observer
UNIDO	Observer
WIPO	Observer
WTO	Member

EU Participation in Organisations outside the UN System[122]:

Organisation	**EC Status**
Universal Character	
WCO	*De facto* Member
ISO (International Organisation for Standardisation)	Observer
ICES (International Council for Exploration of the Sea)	Observer
World Organisation for Animal Health /Office International des Epizooties (OIE)	Observer
OIML (International Organisation of Legal Metrology)	Observer
IOM (International Organisation for Migration)	Observer
UNWTO (OMT) World Tourism Organisation	Observer
Organisations of Regional Character	
Council of Europe	Full participant
OECD	Full participant
CEMTE (European Conference of Ministers of Transport)	Observer
EUROCONTROL (European Organisation for the Safety of Air Navigations)	Observer
ECAC (European Civil Aviation Conference)	Observer
OAS (Organisation of American States)	Observer
ESA (European Space Agency)	Observer

[122] Dormoy, D 'Le statut de l'Union europenne dans les organizations internationales' in Dormoy, D (Ed.) *L'Union européenne et les organisations internationals*. Bruxelles: Bruylant: Université de Bruxelles, 1997, pp. 47-55; also H.G Schermers, and N.M. Blokker, N.M *International Institutional Law: Unity within Diversity,* The Hague: Martinus Nijhoff Publishers, 2004, at p. 56; also Hoffmeister, (see above n. 1), pp. 42-68, at pp. 54-56; also J. Sack, 'The European Community's Participation in International Organizations', Common Market Law Review, Vol.32, pp. 1227-1256

Organisation	EC Status
Organisation of a Specialised Character	
NAFO (Northwest Atlantic Fisheries Organisation)	Member
NEAFC (North-East Atlantic Fisheries Commission)	Member
NASCO (North Atlantic Salmon Conservation Organisation)	Member
Commission for the Conservation of Antarctic Marine Living Resources	Member
International Baltic Sea Fishery Organisation	Member
International Commission for the Conservation of Atlantic Tunas	Member
International Agreement on Olive Oil	Member
Intergovernmental Forum on Forests (IFF)	Full Participant
International Tropical Timber Organisation	Member
International Olive Oil Organisation	Member
International Cocoa Organisation	Member
International Natural Rubber Organisation	Member
International Sugar Organisation	Member
International Jute Organisation	Member
International Coffee Organisation	Member
International Wheat Council	Member
Common Fund for Commodities	Member
International Tin Study Group	Member
International Copper Study Group	Member
International Nickel Study Group	Member

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