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IMPROVING THE EU'S STATUS IN THE UN AND THE UN SYSTEM: AN OBJECTIVE WITHOUT A STRATEGY?

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ABSTRACT

The Lisbon Treaty emphasizes the EU's commitment to multilateralism, stating that it 'shall seek to develop relations and build partnerships with [...] international, regional or global organisations' and to 'promote multilateral solutions to common problems, in particular in the framework of the United Nations' (Article 21(1), second para., TEU). One of its key goals in external relations is 'to support and work for effective multilateralism, with the United Nations at its core'. However these global ambitions are often not matched by the level of participation and representation that the EU enjoys in the UN and the UN system. This contribution examines some of the legal and political issues that are at play as the EU attempts to enhance its cooperation with and representation in the UN and the UN system. It examines these issues with regard to UN bodies that have been identified as targets for closer co-operation and others where the EU could potentially pursue upgraded status. It analyses both the EU's participation in the respective fora and the legal and political potential for improving the Union's status. The EU not only remains faced with a series of internal and external obstacles as a participant within the UN and the UN system, barring it from taking up its leading role at the global level – it currently also lacks a convincing strategy to overcome them.

KEYWORDS

European Union, United Nations, United Nations General Assembly, Effective Multilateralism, Human Rights Council, Food and Agriculture Organization, International Maritime Organization, International Atomic Energy Agency, United Nations Educational, Scientific and Cultural Organization

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I. INTRODUCTION: THE UN AS A POLITICAL PRIORITY OF THE UNION

The Lisbon Treaty emphasizes the European Union's ('EU' or 'Union') commitment to multilateralism, stating that the EU 'shall seek to develop relations and build partnerships with [...] international, regional or global organisations' and to 'promote multilateral solutions to common problems, in particular in the framework of the United Nations' (Article 21(1), second para., TEU). Moreover, one of the objectives of the EU's external action is to 'promote an international system based on stronger multilateral cooperation and good global governance' (Article 21(2)(h) TEU). The EU being itself one of the most advanced forms of multilateral cooperation among states, it is quite understandable that it would be committed to 'a stronger international society, well-functioning international institutions and a rule-based international order'.¹ The Union not only seeks to participate in this multilateral system, it actually aims to have a leading role in shaping it:

'At a global level, Europe must lead a renewal of the multilateral order. The UN stands at the apex of the international system. Everything the EU has done in the field of security has been linked to UN objectives. We have a unique moment to renew multilateralism, working with the United States and with our partners around the world.'²

A key part of the EU's engagement in this multilateral order is its relationship with and participation in the United Nations ('UN') bodies, specialised agencies, programmes, funds and related international organizations. In order to play a role in shaping and renewing the multilateral system, the EU should also have strong and effective voice within the UN and the UN system.

It is also clear from the Treaties that the UN is of major importance to the Union.³ The UN tackles a number of issues that fall completely or predominantly within the competences of the Union. Furthermore, the UN is a cardinal example of an international organization whose work affects a wide range of EU policies. Many of the EU's key foreign policy goals require some kind of engagement with the UN and the UN system. These include issues such as climate change policy, eradication of global poverty, humanitarian assistance and security issues such as Iran's nuclear aspirations and combating arms proliferation. Thus, achieving an effective representation of the Union in the UN and the UN system is in the interest of the EU, and is a significant political priority.

Despite being a priority, the cooperation of the EU with the UN encounters several stumbling blocks that at times hamper the EU's efforts to have a unified and effective presence within the

¹ European Council, European Security Strategy: A Secure Europe in a Better World, 12 December 2003.

² Council of the European Union, Report on the Implementation of the European Security Strategy: Providing Security in a Changing World, S407/08, 11 December 2008, p. 2. For a survey of scholarly literature on the EU's commitment to multilateralism see R. KISSACK, *The European Union and multilateralism*, in « Routledge Handbook on the European Union and International Institutions: Performance, policy, power », K.E. JØRGENSEN and K.V. LAATIKAINEN (ed.) London, New York (Routledge), 2013, 405-415.

³ Apart from the reference in Art. 21(1) TEU, the UN/UN Charter is being referred to in 14 other instances in the EU Treaties: Art. 3(5), Art. 21(2)(c), Art. 34(2), Art. 42(1) and (7) TEU, 7th recital of the preamble of the TFEU, Art. 208(2), Art. 214(7), Art. 220(1) TFEU, 3th and 8th recital preamble, as well as Art. 1(b) Protocol No 10 on permanent structured cooperation, 3th paragraph Declaration No 13 concerning CFSP, Declaration No 14 concerning CFSP.

organization. One of the most contentious issues in this respect is the division of powers between the EU and its Member States, most notably with regard to the right to speak or the right to negotiate international agreements. These issues of external representation are aggravated by the variation of statuses that the EU has in the different UN fora. While there are several bodies in which only the EU Member States are represented, the EU has obtained observer status in most fora, was given enhanced participation rights in some, and was even granted the status of a member organization in very few exceptional cases.⁴ The type of status depends not only on the competences of the EU, but also on the institutional framework of the respective UN bodies, which is in turn contingent upon the political circumstances.⁵ Consequently, the EU's status in UN fora does not necessarily correspond to its competences and priorities, thereby hindering its effective representation.

In light of these shortcomings, European Commission President Barroso and Vice-President Ashton issued on 20 December 2012 a 'Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Treaty of Lisbon',⁶ ('Barroso-Ashton Strategy' or 'Strategy') which contains a number of recommendations concerning EU representation in international organizations, including the UN framework. Firstly, with regard to the EU's work in the UN General Assembly ('UNGA'), the Strategy recommends continued efforts to ensure the full implementation of UNGA Resolution 65/276 on the enhanced participation rights of the Union, as well as an evaluation of its possible extension to other UNGA subsidiary bodies. Secondly, with regard to other UN agencies and programmes, the Strategy makes a classification of the various situations, based on the potential for a status upgrade and on whether or not efforts are currently being undertaken. For each situation, recommendations and examples are provided, often indicating a number of priority organizations.

The present contribution examines some of the legal and political issues that are at play as the EU attempts to enhance its cooperation with and representation in the UN and the UN system. Section II deals with general issues of EU external representation, which have recently played a major role in EU-UN relations. Section III analyses difficulties with regard to the practical implementation of UNGA Resolution 65/276 as well as the possibility to extend its application to UNGA subsidiary bodies, using the example of the Human Rights Council ('HRC' or 'Council'). Section IV takes a closer look at UN bodies that were identified as targets for closer co-operation in the Barroso-Ashton-Strategy and where the EU could potentially pursue upgraded status, analysing both the EU's participation in the respective fora and the legal and political potential for improving the Union's status. Our analysis focuses on a series of UN bodies which illustrate the institutional diversity within the UN and the UN system – ranging from primary organs to subsidiary bodies, specialized agencies and independent organizations whose relationship with the UN is governed by special agreements – and the broad range of issue areas where the EU is involved internationally: human rights, food and agriculture, transport, security, science and culture. In addition to the UNGA and the HRC, the paper examines the cases of the Food and Agriculture Organization (FAO), which is the only example of a UN specialized agency in which the EU holds membership status; the International Maritime

⁴ F. HOFFMEISTER, *Outsider or Fronrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies*, CMLRev 2007, 41-68.

⁵ C. FLAESCH-MOUGIN, *Le statut de la Communauté Européenne au sein des organisations internationales*, in « Commentaire J. Mégret: Le Droit de la CE et de l'Union Européenne », Vol. 12: Relations extérieures, J.-V. LOUIS and M. DONY (ed.) Brussels (Editions de l'Université de Bruxelles), 2005, 369-397, 369 et seq.

⁶ Communication to the Commission from the President in Agreement with Vice-President Ashton – Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Treaty of Lisbon, C(2012) 9420 final, 20 December 2012.

Organization (IMO), a UN specialized agency in which the EU holds no status despite its prolific legislative and policy initiatives in maritime affairs; the International Atomic Energy Agency (IAEA), where the EU's external representation is complicated by the continuing existence of the European Atomic Energy Community (Euratom); and finally the United Nations Educational, Scientific and Cultural Organization (UNESCO), as an example of a UN specialized agency in a policy field of 'weak' EU powers but where the EU has nevertheless been granted an 'ad hoc' upgraded status for a specific purpose. Thus, this contribution does not intend to give an exhaustive account of the UN bodies and organizations where the EU might pursue closer co-operation or an upgraded status; rather, it aims to illustrate the legal and political challenges that the Union encounters when it seeks to improve its status in the UN framework.

We argue that even after the entry into force of the Lisbon Treaty which aimed to streamline the Union's external representation, the EU continues to struggle for more effective participation in the UN framework. The stumbling blocks are both internal – due to disagreements between the Union and its Member States – and external – in particular due to gaps between the EU's status in most UN bodies and its competences and priorities. Although aligning the Union's internal and external dimensions thus remains a focal point of the EU's engagement at the UN, this contribution aims to demonstrate that the Barroso-Ashton Strategy to achieve this goal lacks the required level of vision and precision, and is thus inadequate for guiding the EU's efforts towards assuming its desired leadership role at the UN level.

II. EU REPRESENTATION AT THE UN AFTER LISBON

The EU's representation in multilateral fora has long been a contentious issue. The Lisbon Treaty had intended to deal with some of the obstacles that plagued EU external relations. However, problems have persisted, and the EU's relationship with the UN has not been immune to this.⁷ Much of this can be traced to the fact that the EU can be only a full member in some of these organizations and instruments and cannot be a full member of the UN in general.⁸ It therefore must rely on and co-operate with the EU Member States, who are full members of the UN and of most UN specialized agencies.

In order to ensure unity in the international representation of the Union,⁹ the Member States and the Union have the duty to cooperate closely in their activities at the UN level.¹⁰ This entails

⁷ S. GSTÖHL, *EU Diplomacy After Lisbon: More Effective Multilateralism?*, *Brown Journal of World Affairs* 2011, 181-191; N. HADESHIAN, *European Union's External Relations: More Consistency?*, *Yearbook of Polish European Studies* 2010, 107-127; N. HELWIG, *EU Foreign Policy and the High Representative's Capability-Expectations Gap: A question of Political Will*, *European Foreign Affairs Review* 2013, 235-254.

⁸ Cf. Art. 4(1) UN Charter, which limits membership to states only. For literature examining the status and representation arrangements of the EU in different international organizations in accordance with the founding instrument of each organization, see M. EMERSON, R. BALFOUR, T. CORTHAUT, J. WOUTERS, P.M. KACZYNSKI and T. RENARD, *Upgrading the EU's Role as a Global Actor: Institutions, Law and the Restructuring of European Diplomacy*, Brussels (Centre for European Policy Studies), 2011; HOFFMEISTER, *supra*, n. 4.

⁹ On the 'requirement' or 'principle' of unity in the international representation of the EU see *inter alia* European Court of Justice ('ECJ'), Case 1/78, IAEA, [1978] ECR 2151, para. 34-36; ECJ, Opinion 2/91, ILO, [1993] ECR I-1061, para. 38; ECJ, Opinion 1/94, WTO, [1994] ECR I-5267, para. 108; ECJ, Case C-25/94, Commission v Council, [1996] ECR I-1469, para. 48; ECJ, Case C-246/07, Commission v. Sweden, [2010] ECR I-3317, paras 73, 104.

¹⁰ The case-law of the ECJ has so far not established complete clarity on the legal foundations of the duty of cooperation in the Union's external relations. While the ECJ has frequently held that the 'obligation to cooperate flows from the requirement of unity in the international representation of the Community' (see e.g. ECJ, Opinion 1/94, *supra*, n. 9, para. 108; Case C-25/94, *supra*, n. 9, para. 48; C-246/07, *supra*, n. 9, para. 73), commentators interpret the recent judgments in the cases C-459/03, Commission v Ireland, [2006] ECR I-4635 and C-246/07, *supra*, n. 9, to support the view that the Court derives the duty from the principle of sincere cooperation, enshrined in Art. 4(3) TEU. See C. HILLION, *Mixity and Coherence in EU External Relations: The Significance of the 'Duty of Cooperation'*, in « Mixed Agreements Revisited: The EU and its Member States in the World », C. HILLION and P. KOUTRAKOS (ed.) Oxford (Hart), 2010, 87-115, 91-92; F. CASOLARI, *The principle of loyal co-operation: A 'master key' for EU external representation?*, in « Principles and practices of EU external representation », S. BLOCKMANS and R.A. WESSEL (ed.)

among others that Member States must collectively submit a Union position, whenever a matter in a UN body in which the EU does not have member status, falls in an area of exclusive EU competence.¹¹ Member States are not entitled to table unilateral proposals, even in areas of shared competences, when the Union has remained passive pursuant to a common strategy not to submit a proposal.¹²

An issue that has prominently manifested itself in the UN has been the question in whose names statements are to be made. In particular, disagreement centred on the seemingly trivial issue of whether statements before the UN should be preceded by a short clause indicating if the statement was delivered “on behalf of the EU”, “on behalf of the EU and its Member States”, or “on behalf of the Member States of the European Union”. In the second half of 2011, the United Kingdom blocked a significant number of EU statements in an ostensible attempt to safeguard its national competences in the field of shared competences,¹³ thereby considerably impacting on the EU’s external action.¹⁴ The adoption of ‘general arrangements’ on EU statements in multilateral organizations by the Council on 24 October 2011¹⁵ has ended the conflict for now, but these arrangements are far from offering a permanent solution. Their provision that ‘Member States agree on a case-by-case basis whether and how to co-ordinate and be represented externally’¹⁶ immediately triggered criticism by the Commission¹⁷ and risks creating confusion for third countries regarding the allocation of competences within the EU.¹⁸

Other disagreements with regard to the delivery of statements have focused on the use of nameplates. When the Commission proposed in 2013 that EU or common statements in the FAO should in the future only be delivered from behind the EU nameplate,¹⁹ the United Kingdom disagreed, favoring the current practice according to which ‘any Member State may intervene in support of an agreed EU statement from behind their national nameplate’.²⁰ It highlights the unease with which some Member States react whenever the EU advances into territory previously reserved to state actors, and illustrates their latent fear of competence creep.

CLEER Working Papers 2012/5, 11-36; M. CREMONA, *Case C-246/07, Commission v. Sweden (PFOS), Judgment of the Court of Justice (Grand Chamber) of 20 April 2010*, nyr., Common Market Law Review 2011, 1639-1666, 1650 et seq.

¹¹ ECJ, Case C-45/07, *Commission v. Greece*, [2009] ECR I-701, para. 14-38.

¹² ECJ, Case C-246/07, *Commission v. Sweden*, [2010] ECR I-3317, para. 69-105; G. DE BAERE, “O, Where is Faith? O, Where is Loyalty?” *Some Thoughts on the Duty of Loyal Co-operation and the Union’s External Environmental Competences in the light of the PFOS Case*, European Law Review 2011, 405-419.

¹³ T. VOGEL, *Split Emerges over Remit of the EU’s Diplomatic Service*, 2011, European Voice, <http://www.europeanvoice.com/article/imported/split-emerges-over-remit-of-the-eu-s-diplomatic-service/71168.aspx> (16 February 2014); J. BORGER, *EU Anger over British Stance on UN Statements*, 2011, The Guardian, <http://www.guardian.co.uk/world/2011/oct/20/uk-eu-un-statements-wording> (16 February 2014); S. BARKOWSKI and K. WIATR, *External Representation of the European Union and Shared Competences – an Unsolved Puzzle*, Yearbook of Polish European Studies 2012, 155-175, 166 et seq.

¹⁴ European External Action Service, Report by the High Representative to the European Parliament, the Council and the Commission, 22 December 2011, point 17.

¹⁵ Council of the European Union, EU Statements in Multilateral Organisations – General Arrangements, Doc. No. 15901/11, 24 October 2011 (‘General Arrangements’). For a commentary see C. FLAESCH-MOUGIN, *Représentation externe et compétences de l’Union européenne: quelques réflexions à propos des arrangements généraux du Conseil relatifs aux déclarations de l’UE dans les organisations multilatérales*, in « La Constitution, l’Europe et le droit – Mélanges en l’honneur de Jean-Claude Masclet », C. BOUTAYEB (ed.) Paris (Publications de l’Université Paris-Sorbonne), 2013, 571–592.

¹⁶ *Ibid.*

¹⁷ Statement by the Commission to be entered into the minutes of the Council session endorsing the General Arrangements, Council of the European Union, EU Statements in Multilateral Organisations – General Arrangements, *supra*, n. 15.

¹⁸ See further T. RAMPOULOS and J. ODERMATT, *EU Diplomacy: Measuring Success in Light of the Post-Lisbon Institutional Framework*, in « Global Power Europe », Vol. 1: Theoretical and Institutional Approaches to the EU’s External Relations, A. BOENING et al (ed.) Heidelberg, New York, Dordrecht, London (Springer), 2013, 19-35, 27 et seq.

¹⁹ Communication from the Commission to the Council, 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 fin, annex 2, p. 13 (‘FAO Communication’).

²⁰ United Kingdom, Department for International Development, Explanatory Memorandum on COM (2013) 333 final, Doc. No. 10368-13, 27 June 2013, para. 17.

The negotiation of international agreements is another case where similar problems arose with regard to representation in the post-Lisbon era, particularly in areas of shared competences.²¹ In negotiations on a legally binding instrument on mercury, for example, the Commission held the view that it should be the negotiator on all Union competences, including shared ones, having to cooperate closely with the Member States. The Council on the other hand opted for a negotiating team comprising of the Commission and the Presidency as a means to attain unity of representation. The current compromise foresees that the Commission will be the Union negotiator in areas where the Union has competence and has acted upon it, but that it will do so 'in consultation with a special committee of representatives of Member States, and in accordance with [specific] negotiating directives'.²²

The EU has managed to overcome many of these representation issues, mostly due to the desire of the Member States and the EU institutions to work together to find practical arrangements. Nevertheless, the representation problems that were exhibited in the post-Lisbon period were never fully settled, and could possibly arise again in the future.

III. THE EU AT THE UNGA AND THE HRC: UNGA RESOLUTION 65/276 AND ITS AFTERMATH

The issues regarding EU representation discussed above are further aggravated by the incoherent picture of EU status at the level of the UN and the UN system. Across the wide range of UN bodies, the Union holds a variety of different legal statuses, ranging from no representation to full membership. As indicated above, the level of status depends not only on the competences of the EU but also on external factors, such as the institutional framework of the respective UN bodies and the political context.²³ This leads to the situation whereby the EU's status at UN bodies is not necessarily in line with its competences and priorities. Thus the EU frequently has very limited participation rights in those UN fora which are of high relevance for the effective exercise of its powers. Consequently, the Union has continuously pursued the objective of improving its representation at UN bodies.

One of the most prominent examples of such efforts is the 2011 upgrade of the EU's observer status at the UNGA. The Union had already been actively engaged at the UNGA for decades, ever since the European Economic Community ('EEC') was invited to participate as an observer.²⁴ In light of the UNGA's high visibility and its rank as the premier forum to address the global community of states, it appeared to be the natural setting for the EU to seek an upgraded status.²⁵ Being one of the UN's primary organs, it was hoped that a status change in the UNGA would set a precedent for realigning the Union's participation rights in other UN bodies with its

²¹ See for example on the negotiations of a legally binding instrument on mercury T. CORTHAUT and D. VAN EECKHOUTTE, *Legal Aspects of EU Participation in Global Environmental Governance under the UN Umbrella*, in « The European Union and Multilateral Governance », J. WOUTERS et al (ed.) Basingstoke (Palgrave Macmillan), 2012, 145-170; G. DE BAERE, *International Negotiations Post-Lisbon: A Case Study of the Union's External Environmental Policy*, in « The European Union's External Relations a Year After Lisbon », K. KOUTRAKOS (ed.) CLEER Working Papers 2011/3, 97-112, http://www.asser.nl/upload/documents/772011_51358CLEER%20WP%202011-3%20-%20KOUTRAKOS.pdf.

Similar disagreements were observed with regard to the negotiation of the Arms Trade Treaty, see Foreign & Commonwealth Office, Review of the Balance of Competences between the United Kingdom and the European Union: Foreign Policy, 22 July 2013, 40, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227437/2901086_Foreign_Policy_acc.pdf, 38-39.

²² Council Decision on the participation of the Union in negotiations on a legally binding instrument on mercury further to Decision 25/5 of the Governing Council of the United Nations Environment Programme (UNEP), Doc. No. 16632/10, 6 December 2010.

²³ FLAESCH-MOUGIN, *supra*, n. 5.

²⁴ UNGA Res. 3208 (XXIX) 1974, *Status of the European Economic Community in the General Assembly*, 11 October 1974.

²⁵ Cf. G. DE BAERE and E. PAASIVIRTA, *Identity and Difference: The EU and the UN as Part of Each Other*, in « The Emergence of the European Union's International Identity – Views from the Global Arena », H. DE WAELE and J.J. KUIPERS (ed.), Leiden, Boston (Martinus Nijhoff), 2013, 21-42, 26.

new internal institutional realities after the entry into force of the Lisbon Treaty. The Union aimed for an 'enhanced' observer status which would allow the EU, as far as possible, to be represented in the UNGA in its own right instead of through the Member State holding the rotating Council Presidency. Diplomatic efforts suffered a serious setback in September 2010 when a first draft resolution was met with opposition by third states and failed to be adopted.²⁶ It was only after increased outreach and substantive amendments that the UNGA adopted Resolution 65/276 on 3 May 2011 and saved the EU from a diplomatic debacle.²⁷ Still, the EU achieved far less than it had initially intended, as the final Resolution secured participation rights that were far lower than what had been proposed at the outset.

A. PRACTICAL IMPLEMENTATION

Even though UNGA Resolution 65/276 was eventually adopted with a large majority voting in favour, its implementation in practice presented new challenges. Based on lingering concerns of endangering the principle of sovereign equality of the UN's Member States and the intergovernmental character of the organization, a number of States, most vocally the CARICOM group, advocated a narrow interpretation of the Resolution. The disagreement centred in particular on the Union Delegation's right 'to be inscribed on the list of speakers among representatives of major groups, in order to make interventions'.²⁸ This had been interpreted by the UN Secretary-General ('UNSG') to mean that the EU shall be inscribed 'in the order in which the European Union signified its desire to speak'.²⁹ In an interpretive declaration of UNGA Resolution 65/276 CARICOM stated that it did not share the UNSG's interpretation, expressing the view that the Union should not take 'priority over other major groups that are represented by a State member of the United Nations'.³⁰ In order to maintain the clear hierarchy between states and observers, CARICOM concluded that 'in a speakers' list including multiple major groups, the European Union will not be able to speak prior to any major group represented by a full State Member of the United Nations'.³¹

The controversy had practical consequences when UNGA Resolution 65/276 was applied in the UNGA's 66th session. Speaking in the Third Committee, the representative of CARICOM reiterated its view, arguing that the UNSG's interpretation 'would appear to confer even more enhanced privileges to the European Union's observer'.³² His view was shared by the representatives of Venezuela and Nicaragua. Poland on the other hand rejected any unilateral interpretation of the 'crystal clear' text of the Resolution, while the United States stated that the EU Member States should be able to decide who would speak on their behalf.³³ In an attempt to resolve the disagreement, the Chair of the Third Committee launched open-ended consultations and, as an interim measure, decided to rotate the speaking order of the representatives of major

²⁶ See M. EMERSON and J. WOUTERS, *The EU's Diplomatic Debacle at the UN: What else and what next?*, Commentary, Centre for European Policy Studies, 1 October 2010.

²⁷ On the diplomatic saga involving the EU's upgraded status at the UNGA see E. BREWER, *The Participation of the European Union in the Work of the United Nations: Evolving to Reflect the New Realities of Regional Organizations*, International Organizations Law Review 2012, 181-225; DE BAERE and PAASIVIRTA, *supra*, n. 25; J. WOUTERS, J. ODERMATT and T. RAMOPOULOS, *The Status of the European Union at the United Nations General Assembly*, in « The European Union in the World: Liber Amicorum Professor Marc Maresceau », I. GOVAERE, E. LANNON, P. VAN ELSUWEGE, S. ADAM (ed.), Leiden (Brill Publishers), 2014, 211-223.

²⁸ UNGA Res. 65/276, *Participation of the European Union in the work of the United Nations*, 3 May 2011, annex Art. 1(a).

²⁹ Note by the Secretary-General, *Participation of the European Union in the work of the United Nations*, A/65/856, para. 5.

³⁰ Letter dated 9 May 2011 from the Permanent Representative of the Bahamas to the United Nations addressed to the Secretary-General, A/65/834.

³¹ *Ibid.*

³² UNGA Third Committee, *As World Struggles with Economic Crisis, 'Time Bomb' of Rising Social Inequality Could Tear Apart Moral Fabric of Societies, Third Committee Told (3 October 2011)*, GA/SHC/4004.

³³ *Ibid.*

groups in order to avoid setting a precedent.³⁴ Nevertheless, the dispute could not be settled, and escalated in a later meeting which had to be postponed when consensus on the list of speakers could not be obtained.³⁵ Subsequent consultations led to an additional hardening of the respective positions and the Chair's proposal that representatives of major groups could informally swap their places if they wanted to speak earlier, was met with hesitation.³⁶ A similar conflict erupted in the Fifth Committee, when the EU intended to take the floor after Argentina for the G77 and China, which initially resulted in having the EU speak after all regional groups.³⁷ Other Committees, however, established pragmatic solutions apparently without opposition, such as the Second Committee, where inscription of the major groups on the list of speakers was made on a 'first-come, first-served basis'.³⁸ For the time being, the issue appears to have been settled and the Union Delegation regularly speaks before other major groups represented by states. Yet, without a common understanding about the scope of UNGA Resolution 65/276, the disagreement about its accurate interpretation results in unequal application across the UNGA's Main Committees and may cause further discussions in the future.

Another conflict focused on the right to submit an explanation of vote. It was argued by some Member States that this right could only be exercised by those entities that had a right to vote, given that the two rights were inextricably linked.³⁹ It would thus fall again to the EU Member States to submit explanatory statements on behalf of the EU. In some cases the EU was granted the right to make a 'general statement' after the State Parties had delivered their explanations of vote; however, this practice has equally triggered criticism. When the UNGA President in a meeting on Resolution 65/281 gave the floor to the EU representative to make a general statement, the representative of Saint Vincent and the Grenadines, supported by Venezuela, raised a point of order, arguing that the Union should not be granted the exclusive privilege to make a general statement, when the same right was denied to Member States, and reiterating the view that the EU 'would not be able to speak after the vote since it had no vote'.⁴⁰

Other difficulties in the practical implementation of Resolution 65/276 stemmed from the EU's allocation of competences and its external relations architecture. This includes the abovementioned disagreement between the United Kingdom and the Union on the question in whose name statements ought to be delivered, and the oftentimes inconsistent external representation, alternatively by the EU Delegation or by the Member State holding the rotating Council Presidency on its behalf.⁴¹

These hurdles prompted President Barroso and Vice-President Ashton to call for continued efforts to ensure the full implementation of the Resolution in their Strategy.⁴² Nevertheless, despite certain setbacks, the overall application can be judged a success.⁴³ The Union

³⁴ UNGA Third Committee, *With Crises Disproportionately Affecting Most Vulnerable, World Community Must Ensure Economic, Social Rights Not Relegated to Second Tier, Committee Told* (26 October 2011), GA/SHC/4020.

³⁵ UNGA Third Committee, *Landmark Election in Tunisia Superb Demonstration of UN Providing Advice, Support, while Fully Respecting National Leadership, Ownership Third Committee Told* (25 October 2011), GA/SHC/4019.

³⁶ UNGA Third Committee, GA/SHC/4020, *supra*, n. 34.

³⁷ WOUTERS, ODERMATT and RAMOPOULOS, *supra*, n. 27, p. 214; but see BREWER, *supra*, n. 27, p. 208 et seq. who identified that the EU spoke before many major groups represented by states.

³⁸ Ad Hoc Working Group on General Assembly revitalization, Meeting devoted to the working methods of the Main Committees – briefing by the Chairs of the Main Committees, pursuant to operative paragraph 19 of GA resolution 66/296: Statement by H.E. Ambassador George Talbot (Guyana), Chair of the Second Committee.

³⁹ UNGA, *Five Years after Creation, General Assembly Maintains Human Rights Council as Subsidiary Body, Concluding Review of Work, Functioning* (17 June 2011), GA/11101.

⁴⁰ *Ibid.*

⁴¹ BREWER, *supra*, n. 27, p. 209 et seq.

⁴² Barroso-Ashton-Strategy, *supra*, n. 6, p. 4.

⁴³ P.A. SERRANO DE HARO, *Participation of the EU in the work of the UN: General Assembly Resolution 65/276*, CLEER Working Papers 2012/4, p. 32.

Delegation has smoothly assumed its new responsibilities, EU representatives regularly address the plenary and the Committees, and Union communications are directly circulated as official documents. It is in this light that the President of the Commission and the HR/VP concluded in 2013: 'By now, the EU's enhanced participatory status in the work of UNGA, its committees and conferences, is broadly accepted at the UN; internal debates have largely subsided, although practical implementation requires permanent attention and vigilance by the EU Delegation in New York'.⁴⁴

The EU's experience surrounding the 2011 upgrade at the UNGA not only demonstrates the challenges in seeking enhanced participation rights in the UN, it has been highly influential in shaping EU policy towards international organizations ever since. It is now clear that for the Union securing upgraded status in international organizations is neither simple nor automatic, but requires a serious and careful diplomatic effort that takes into account the political sensitivities of third states, and even of the EU's own Member States. Moreover, this experience also makes clear that even once a higher status is reached, the EU may still have to fight for its place at the table to make sure the upgrade is given full effect. Consequently the Union has adopted a more cautious and deliberate approach to similar efforts in other international organizations, especially those in the UN system. Although UNGA Resolution 65/276 is touted as a diplomatic success, since 2011 there has been no comparable effort to replicate the EU's upgraded status in other international organizations or UN bodies.

B. EXTENSION TO THE HUMAN RIGHTS COUNCIL

This does not mean, however, that the EU's ambitions to improve its status in the UN framework have been entirely crushed. As illustrated by the Strategy, Commission services and the EEAS are still evaluating and promoting options to remedy the perceived impediments for effective Union representation in UN bodies. Nevertheless, the Barroso-Ashton-Strategy follows a significantly more cautious approach compared to similar EU communications dating from before the UNGA status upgrade. Written with a view to eventual EC membership in UN bodies, the Commission's 2003 Communication 'The European Union and the United Nations: The Choice of Multilateralism' boldly demanded that the EC 'should be given the possibility to participate fully in the work of UN bodies where matters of Community competence are concerned, and Member States should contribute effectively towards this',⁴⁵ and stated – referring to EC membership in the FAO⁴⁶ and the Codex Alimentarius – that '[t]his option should also be pursued for other relevant organisations that belong to the UN system'.⁴⁷ Almost 10 years later, the Barroso-Ashton-Strategy is far less ambitious. It avoids a clear commitment to any fixed negotiation goal and merely refers to the 'improvement of the EU status and its alignment with the objectives of the EU Treaties'.⁴⁸ For the time being, full participation of the EU in the UN framework as a member organization seems to have been abandoned as the final aim, giving way to a strategy of piecemeal steps towards modest upgrades wherever these appear to be legally and politically feasible.

⁴⁴ Note to the College of Commissioners from President Barroso and Vice-President Ashton on the implementation of the 'Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Treaty of Lisbon, C(2012) 9420 final', INFO(2013) 115, p. 3 ('Information Note').

⁴⁵ Communication from the Commission to the Council and the European Parliament – The European Union and the United Nations: The choice of multilateralism, COM(2003) 526 final, p. 23.

⁴⁶ See for more detail below, ch. IV.A.

⁴⁷ Communication from the Commission to the Council and the European Parliament, *supra*, n. 45, p. 17.

⁴⁸ Barroso-Ashton-Strategy, *supra*, n. 6, p. 1.

One of the ways forward recommended by the Barroso-Ashton-Strategy is the application of Resolution 65/276 in UNGA subsidiary organs.⁴⁹ In particular, the Strategy recommends to focus, among others, on the HRC and to avoid 'reopening the resolution, under which [subsidiary bodies] are not explicitly covered'.⁵⁰

The HRC, which in 2006 replaced the UN Commission on Human Rights,⁵¹ is a body of 47 elected UN Member States, tasked with the promotion of human rights and fundamental freedoms. It addresses cases of human rights violations, provides recommendations, and monitors the fulfilment of each state's human rights obligations through the universal periodic review ('UPR'). As one of the foremost global human rights fora it is of significant importance for the Union's external action.⁵²

While fundamental rights have been enshrined in EU primary law since the Maastricht Treaty, and the Union adopted a non-binding Charter of Fundamental Rights in 2000, it is only with the entry into force of the Lisbon Treaty that the EU has reached the 'high point of its engagement with human rights'.⁵³ Not only does Article 6 TEU pave the way for the EU's accession to the European Convention on Human Rights and confer binding treaty force to the Charter of Fundamental Rights, Article 21 TEU defines human rights and fundamental freedoms as guiding principles and objectives of the EU's external action. Human rights are nowadays regarded as the 'silver thread running through all EU action both at home and abroad'.⁵⁴ In mid-2012 the EU appointed its first Special Representative for Human Rights,⁵⁵ and adopted a 'Strategic Framework and Action Plan on Human Rights and Democracy'⁵⁶ in which it 'underlines the leading role of the UN Human Rights Council in addressing urgent cases of human rights violations' and pledges to 'contribute vigorously to the effective functioning of the Council'.⁵⁷ More specifically, items 9(a) and 23(b) of the Action Plan single out the HRC as a forum for the EU to promote economic, social and cultural rights and the freedom of religion or belief. Furthermore, the promotion of human rights, democracy and the rule of law ranked consistently as one of the EU's priorities during UNGA sessions.⁵⁸

The EU was a strong supporter for the establishment of the HRC since the idea first emerged in the 2004 sessions of the Commission on Human Rights, quickly endorsing the initiative for its establishment.⁵⁹ 'Welcom[ing] the presentation of a proposal reflecting the primacy of human

⁴⁹ *Ibid.*, p. 4.

⁵⁰ *Ibid.*

⁵¹ UNGA Res. 60/251, *Human Rights Council*, 15 March 2006.

⁵² Cf. e.g. Council of the European Union, Council conclusions on EU priorities at the UN Human Rights Fora, Foreign Affairs Council meeting, 10 February 2014.

⁵³ G. DE BURCA, *The Road Not Taken: The European Union as a Global Human Rights Actor*, *American Journal of International Law* 2011, 649-693, 649.

⁵⁴ European Commission/High Representative of the European Union for Foreign Affairs and Security Policy – Joint Communication to the European Parliament and the Council: Human rights and democracy at the heart of EU external action – Towards a more effective approach, COM(2011) 886 final.

⁵⁵ Council Decision appointing the European Union Special Representative for Human Rights, 2012/440/CFSP, 25 July 2012 (O.J. 2012, L200/21).

⁵⁶ Council of the European Union, Human Rights and Democracy: EU Strategic Framework and EU Action Plan, Doc. No. 11855/12, 25 June 2012.

⁵⁷ *Ibid.*, p. 8.

⁵⁸ See e.g. EU priorities since the 55th UNGA session, http://www.eu-un.europa.eu/articles/articleslist_s27_en.htm (18 February 2014).

⁵⁹ J. WOUTERS, S. BASU, N. BERNAZ, *The Role of the European Union in the Human Rights Council*, European Parliament, Directorate-General for External Policies, EXPO/B/DROI/2007/41, November 2008, p. 6 et seq.; for a more recent analysis, see J. WOUTERS and K. MEUWISSEN, *The European Union at the UN Human Rights Council. Multilateral Human Rights Protection Coming of Age?*, forthcoming in *European Journal of Human Rights – Journal européen des droits de l'homme* 2-2014.

rights by the creation of a Human Rights Council',⁶⁰ the EU actively lobbied for the realization of its vision of the Council, which foresaw not only the creation of a standing body, possibly with the rank of a main organ of the UN, but whose membership should also be elected by a two thirds majority of the UNGA and be smaller in numbers, admitting only those states which demonstrated genuine interest in the promotion of human rights.⁶¹ Although the EU eventually had to compromise on many of its positions, it commented favourably on the final outcome and welcomed the HRC as an improvement over the Commission on Human Rights.⁶² The Union has remained an active supporter of the HRC ever since, participating extensively in the 2009-2011 review process,⁶³ supporting special procedures and the Office of the High Commissioner for Human Rights, and proposing or supporting resolutions, in particular focusing on the freedom of religion or belief, the rights of the child, freedom of expression and country situations. Despite several recent successes,⁶⁴ the Union's impact at the HRC has often been described as marginal due to its inability, at least until recently, to forge cross-regional coalitions. This was caused by a lack of credibility in light of the Union's persistent 'double-standards problem', but also by its inflexible negotiation practice, defensive stance and insufficient outreach.⁶⁵

Effective EU participation is among others hindered by its legal status in the HRC. Full membership is only open to UN Member States. The Union has observer status, meaning that it cannot vote or sponsor resolutions, and while it has the right to make interventions, it may not do so in the speaking slots for states.⁶⁶ The EU thus remains dependent on the representation by a Member State, in particular by the rotating Council Presidency. Even after the entry into force of the Lisbon Treaty, the Union's participation in the HRC is clogged by cumbersome internal coordination processes, which often focus on burden sharing rather than on substantive issues.⁶⁷ This heavy focus on the internal process often leaves insufficient time and resources to gather support for EU positions and to build successful coalitions. The necessary internal coordination also reduces the Union's flexibility during negotiations and with regard to new and unforeseen developments. Nevertheless, caution should be exercised to regard a status upgrade as a panacea that will solve all of the abovementioned issues. On the contrary, the Union must avoid contributing to the persistent bloc dynamics in the Council. In parallel with efforts to improve its status in the Council, it should fully seize the possibilities offered by EU Member States participating in the Council, which can support the Union's message and bring invaluable expertise and third country networks.⁶⁸

While there appear to be no plans to eventually aim for full EU membership in the HRC, the Barroso-Ashton-Strategy considers to promote the extension of Resolution 65/276 and thereby to grant the EU enhanced participation rights. This would permit the Union to participate in the

⁶⁰ EU Presidency, Statement by the Representative of Luxembourg to the United Nations, Formal Plenary Session of the UN General Assembly, PRES05-032EN, 6 April 2005.

⁶¹ WOUTERS, BASU, BERNAZ, *supra*, n.60, p. 10.

⁶² UNGA, EU Explanation of vote on the draft resolution on the Human Rights Council (L.48), Statement by Ambassador Gerhard Pfanzelter, Permanent Representative of Austria to the United Nations, on behalf of the European Union, 15 March 2006.

⁶³ UNGA Res. 60/251, *supra*, n. 51, para. 1, 16.

⁶⁴ See for example the initiative for the establishment of a new country mandate for Belarus, A/HRC/RES/20/13 of 16 July 2012.

⁶⁵ WOUTERS and MEUWISSEN, *supra*, n. 59; K.E. SMITH, *The European Union at the Human Rights Council: speaking with one voice but having little influence*, Journal of European Public Policy 2010, 224-241. A salient and frequently cited example of EU a 'failure' at the HRC includes the resolution terminating the expert mandate for the DR Congo where the EU joined the consensus although it had previously invested considerable diplomatic efforts for a renewal (HRC Resolution 7/20, *Technical cooperation and advisory services in the Democratic Republic of the Congo*, 27 March 2008), S. BASU, *The European Union in the Human Rights Council*, in « The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora », J. WOUTERS, H. BRUYNINCKX, S. BASU and S. SCHUNZ (ed.), Basingstoke (Palgrave Macmillan), 2012, 86-102, 91 et seq.

⁶⁶ S. BASU, *supra*, n. 65, p. 90; WOUTERS and MEUWISSEN, *supra*, n. 59.

⁶⁷ WOUTERS and MEUWISSEN, *supra*, n. 59.

⁶⁸ *Ibid*, p. 19; GSTÖHL, *supra*, n. 7, p. 190.

work of the HRC 'in its own right', thus aligning its external representation with the requirements of Article 221 TFEU. However, the question remains whether it is legally and politically feasible to extend the application of Resolution 65/276 to the HRC. Adoption of the Resolution in the UNGA alone was not sufficient to modify the procedures of the HRC, given that the competence to decide on the granting of observer status and the modalities of participation rests with the Council.⁶⁹ Participation of and consultation with observers in the HRC is governed by Rule 7(a) of its Rules of Procedure which provides:

The Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996, and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities.

Enhanced participation rights for the Union would be within reach, if, firstly, Resolution 65/276 was part of the rules of procedure established for the UNGA committees and if, secondly, the UNGA and the HRC did not decide against its application. As to the first point, in a narrow reading the term 'rules of procedure' in Rule 7(a) of the HRC's Rules of Procedure might refer only to the UNGA's rules of procedure *sensu stricto*, which in Section XIII contain provisions for the proceedings in the committees.⁷⁰ A broader understanding of the term, however, would not depend on the formal status of a provision, but on its substance, thereby widening the scope to include resolutions which govern the procedure of the Assembly and its committees. This would also include the various resolutions granting participation rights to non-member states and observers – matters on which the UNGA's rules of procedure *sensu stricto* are silent. Given that Resolution 65/276 contains 'modalities [...] for the participation of the representatives of the European Union, in its capacity as observer, in the sessions and work of the General Assembly and its committees',⁷¹ it can be regarded as forming part of the rules of procedure referred to in Rule 7(a) of the HRC's rules of procedure and would therefore find application in the HRC.

Secondly, however, the question remains as to whether the UNGA or the HRC 'subsequently [decided] otherwise'. Neither body adopted an explicit decision against the application of Resolution 65/276 in the HRC. They may have done so implicitly, though. At first glance, the sweeping title of the Resolution ('Participation of the European Union in the work of the United Nations') suggests a broad scope of application across the entire spectrum of UN bodies.⁷² But it was clearly not the intention of the drafters to modify the EU's status in the UN framework in general, firstly because this would entail a restriction in those fora where the EU obtained full participant or membership status and thus even broader participation rights, secondly because the UNGA lacks the competence to set the rules of procedure for the various UN bodies and fora.⁷³ Instead, Resolution 65/276 limits its application to the 'sessions and work of the General Assembly and its committees and working groups, in international meetings and conferences

⁶⁹ The HRC has made use of its competence to adopt its own rules of procedure, cf. UNGA Res. 60/251, *supra*, n. 51, para. 11; HRC Resolution 5/1, *Institution-building of the United Nations Human Rights Council*, 18 June 2007; J. WOUTERS, J. ODERMATT and T. RAMOPOULOS, *The Lisbon Treaty and the Status of the European Union in the International Arena: The May 2011 Upgrade at the UN General Assembly*, IEMed. Mediterranean Yearbook 2011, 166-170.

⁷⁰ UNGA, Rules of Procedure of the General Assembly, A/520/Rev.17, 2008.

⁷¹ UNGA Res. 65/276, *supra*, n. 28, para. 2.

⁷² WOUTERS, ODERMATT and RAMOPOULOS, *supra*, n. 69, p. 5.

⁷³ Cf. Art. 30 UN Charter (UNSC), Art. 72 UN Charter (ECOSOC), Art. 30(1) ICJ Statute (ICJ).

convened under the auspices of the Assembly and in United Nations conferences'.⁷⁴ While this list is not explicitly declared to be exhaustive, it reveals a conscious inclusion of several subsidiary organs, namely committees and working groups, while other subsidiary bodies, such as boards, commissions, councils and panels, were omitted. It could therefore be argued that Resolution 65/276 implies a decision by the UNGA against its application in the HRC, in the terms of Rules 7(a) of the HRC's rules of procedure.

Independent of the legal aspects, the political feasibility of a status upgrade remains doubtful. Significant resistance, both externally and internally, against an enhanced EU status at the HRC has caused the current cautious approach of the Union. States, including the EU Member States, continue to regard human rights as a state prerogative and hesitate to accept 'that actors at the level of the EU [...] take over the role of state actors'.⁷⁵ The extension of Resolution 65/276 to the HRC therefore remains a rather distant possibility, which seems also reflected in the fact that it has completely disappeared in the 2013 information note on the implementation of the Barroso-Ashton-Strategy.⁷⁶

IV. THE STATUS OF THE EU IN THE WIDER UN SYSTEM

The EU has also pursued the objective of improving its representation at other UN agencies. In this regard the EU is faced with an important question: which bodies should it prioritize? The Barroso-Ashton-Strategy proposes a set of criteria based on interest and prospect: status enhancement should be sought in those organizations that have, both, a 'strategic or economic interest' for the EU and/or 'impact on policy areas where the EU has important competences', and in which 'an upgrade appears realistic in the short to medium term'.⁷⁷ Regrettably, neither of those factors is explained in more detail. It thus remains unclear which criteria the Strategy applies to determine the feasibility of a status upgrade. Also, the interest criterion is by far too broad to allow for a workable prioritization of Union efforts. There remain very few issues dealt with by the UN that are not of strategic or economic relevance to the EU or which do not impact areas of important Union competences. This criterion, too, would have benefited from a more thorough definition in order to make the selection of priority organizations more transparent. The Barroso-Ashton-Strategy's recommendation for resumed efforts with regard to the EU's participation in the FAO and for a status upgrade, among others, in the IMO and IAEA, therefore appears rather random. Furthermore, UNESCO, where the EU had been granted enhanced observer status for the negotiation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, is not mentioned in the Barroso-Ashton-Strategy. This raises questions, as it will be demonstrated below that this could serve as a precedent for a new approach of *ad hoc* upgraded EU participation for temporally restricted and closely defined purposes.

A. FOOD AND AGRICULTURE ORGANIZATION (FAO)

The Food and Agriculture Organization (FAO) is among those organizations for which the Strategy instructs Commission services and the EEAS 'to sustain their efforts with a view to a positive outcome', given that 'efforts to upgrade the EU status or improve the position of the EU within the existing arrangements are underway and progress is being made'.⁷⁸ It thereby refers

⁷⁴ *Supra*, n. 71.

⁷⁵ WOUTERS and MEUWISSEN, *supra*, n. 59, p. 19.

⁷⁶ Information Note, *supra*, n. 44.

⁷⁷ Barroso-Ashton-Strategy, *supra*, n. 6, p. 3.

⁷⁸ *Ibid*, p. 2.

to the ongoing revision of the internal arrangements between the Commission and the Council. The 2013 Commission Communication on ‘The role of the European Union in the Food and Agriculture Organisation (FAO) after the Treaty of Lisbon’ (‘FAO Communication’)⁷⁹ foresees not only upgrades of the EU’s status at the FAO, it also provides for more flexible internal coordination procedures and more robust external representation of the Union – thereby immediately prompting resistance on the side of EU Member States.

The FAO is the second oldest UN specialized agency, founded against the background of the Second World War, which had given rise to the idea that ‘international cooperation between nation states and the international regulation and supervision of economic sectors with strategic significance [...] could act as safeguards against future conflicts’.⁸⁰ Tasked with eradicating hunger, combatting poverty and promoting the sustainable use of natural resources, the FAO provides a network and forum of discussion for the dissemination of knowledge, expertise and up-to-date information.⁸¹

Agriculture is one of the core competences of the EU, and has been so since its earliest days, when the Treaty establishing the European Economic Community tasked the EEC with the creation of a common agricultural policy (‘CAP’).⁸² It encompasses a range of policy areas which overlap with the work of the FAO, in particular food safety, rural development and the environment. The importance of the CAP for the EU is clearly illustrated by its financial weight, which will – with a budget of 408.3 billion EUR (in current prices) – amount to a 38% share of the EU’s overall budget in the years 2014-2020.⁸³ The work of the FAO additionally encompasses fisheries policies, for which the EU also shares competence with the Member States (Article 4(2)(d) TFEU).

The first contacts between FAO and the Union coincided with the establishment of the EEC and the transfer of agriculture competences from domestic to Community level. While a first agreement between EEC and FAO had already been drafted in 1959, it was an exchange of letters between the President of the European Commission and the Director General of the FAO which in 1962 established principles of interaction between the two organizations.⁸⁴ The Commission participated as an observer in meetings of the FAO and obtained enhanced observer status in 1970. Still, its participation rights were deemed insufficient to effectively exercise its extensive competences.⁸⁵ The Commission deplored in particular its inability to table proposals and to fully participate in the policy making of the FAO and the work of its

⁷⁹ FAO Communication, *supra*, n. 19.

⁸⁰ F. SCHILD, *The Influence of the Food and Agriculture Organization (FAO) on the EU Legal Order*, in « Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations », R.A. WESSEL and S. BLOCKMANS (ed.), The Hague (Asser), 2013, 217-241, 224.

⁸¹ J. MAERSK PEDERSEN, *FAO-EU Cooperation: An Ever Stronger Partnership*, in « The United Nations and the European Union: An Ever Stronger Partnership », J. WOUTERS, F. HOFFMEISTER and T. RUYS (ed.), The Hague (Asser), 2006, 63-91, 63 et seq. On the crisis of the FAO and the role of the EU in the reform process see R. KISSACK, *Pursuing Effective Multilateralism: The European Union, International Organisations and the Politics of Decision Making*, Basingstoke (Palgrave Macmillan), 2010, 87-94.

⁸² Art. 3(d), 38-47 EEC Treaty.

⁸³ DG Agriculture and Rural Development, Unit for Agricultural Policy Analysis and Perspectives, *Overview of CAP Reform 2014-2020*, Agricultural Policy Perspectives Brief No. 5, December 2013, p. 3; M. HALL, *EU ministers give farm policy final political seal*, Euractiv, 2013, <http://www.euractiv.com/cap/eu-ministers-give-farm-policy-fi-news-532383> (18 February 2014); note that the share of the CAP expenditure of the overall EU budget has significantly decreased since the 1980s, and still amounted to more than 60% of the Union’s budget when the EC joined the FAO in 1991, see European Commission, CAP post-2013: Key graphs & figures, Graph 1: CAP expenditure in the total EU expenditure, 2014, http://ec.europa.eu/agriculture/cap-post-2013/graphs/graph1_en.pdf (28 February 2014).

⁸⁴ For a historical overview see SCHILD, *supra*, n. 80, p. 225 et seq.

⁸⁵ J. WOUTERS, S. DE JONG, A. MARX, P. DE MAN, *Study for the Assessment of the EU’s Role in International Maritime Organisations*, Final Report, April 2009, p. 36.

technical bodies.⁸⁶ Already in 1978 the Commission thus introduced its aim of EC accession to the FAO,⁸⁷ but it was only on 22 October 1990 that the Council requested the opening of accession negotiations, which were launched on 7 February 1991.⁸⁸ Accession of the European Community ('EC') as a full member was without precedent in the UN framework and required an amendment of the FAO constitution, to include a so-called 'regional economic integration organization' ('REIO') clause. The negotiation process had to overcome concerns, both on the side of the EU Member States, which were reluctant to give up rights, and on the side of other FAO State Parties, which feared to endanger the intergovernmental character of the UN by setting a precedent.⁸⁹ On 25 November 1991, however, the Council finally requested admission, which was accepted the next day by the FAO Conference.

Since then the EU has developed into the largest contributor of voluntary funding to the FAO.⁹⁰ Additional agreements have been concluded to align and strengthen the cooperation between both organizations. In 2004 FAO and EC adopted a strategic partnership agreement, to achieve more strategic cooperation in selected policy areas.⁹¹ In June 2011 the EU concluded a 'Strategic Programmatic Framework on Food Security and Nutrition' with the three Rome-based agencies, FAO, World Food Programme ('WFP') and International Fund for Agricultural Development ('IFAD'), 'to harmonize and coordinate the implementation of [...] food security and humanitarian food assistance goals'.⁹² Still, the role of the EU in the work of the FAO is evaluated controversially: while some detect a 'true partnership' between both organizations,⁹³ others posit that the FAO values the EU for its wallet, rather than for its policy cooperation.⁹⁴

Although the EU has obtained the status of a Member Organization⁹⁵ at the FAO, its effective representation continues to face serious challenges. These result firstly from the fact that, as a Member Organization, the EU does not enjoy the same rights as Members: it may not hold office in the Conference, the Council and their subsidiary bodies,⁹⁶ it has no voting rights for elective places⁹⁷ or budget matters,⁹⁸ and no participation rights in the restricted committees⁹⁹ and the bodies dealing with the internal working of the conference.¹⁰⁰ In its FAO Communication the Commission thus declared a need to address the limitations of the FAO Constitution in order to achieve coherence with the Lisbon Treaty and to achieve full and equal EU participation.¹⁰¹

⁸⁶ R. FRID, *The European Economic Community: A Member of a Specialized Agency of the United Nations*, *European Journal of International Law* 1993, 239-255, 241.

⁸⁷ D. DORMOY, *Le statut de l'Union Européenne dans les organisations internationales*, in « L'Union Européenne et les organisations internationales » D. DORMOY (ed.), Brussels (Bruylant), 1997, 36-55, 39 et seq.

⁸⁸ FRID, *supra*, n. 86, p. 246.

⁸⁹ *Ibid*, p. 241 et seq.

⁹⁰ European Commission/FAO, *FAO and EU join forces to fight hunger. Joint press release after the meeting of Commission President Barroso and FAO Director-General Graziano da Silva*, IP/12/1090, 11 October 2012.

⁹¹ European Commission/FAO, *Memorandum of Understanding concerning the establishment of a Strategic Partnership between the Food and Agriculture Organization of the United Nations and the Commission of the European Communities in the field of development and humanitarian affairs*, 13 September 2004.

⁹² European Commission/Rome based United Nations Agencies, *Statement of Intent: Programmatic Cooperation on Food Security and Nutrition*, 27 June 2011.

⁹³ MAERSK PEDERSEN, *supra*, n. 81, p. 65.

⁹⁴ SCHILD, *supra*, n. 80, p. 223.

⁹⁵ Art. II(3) FAO Constitution.

⁹⁶ Art. II(9) FAO Constitution; Rules XLIII (3), XLIV FAO General Rules.

⁹⁷ Rule XLV (2) FAO General Rules.

⁹⁸ Art. XVIII (6) FAO Constitution.

⁹⁹ Programme Committee, Finance Committee, Committee on Constitutional and Legal Matters, Art. II(9) FAO Constitution, Rule XLVI FAO General Rules.

¹⁰⁰ In particular: Credentials Committee, General Committee, Rule XLIII (2) FAO General Rules.

¹⁰¹ FAO Communication, *supra*, n. 19, p. 6; cf. H. de Waele, 'Name me your friends, and I will tell you who you are' – The Union and the Member States in the global arena', in « The European Union's Emerging International Identity: Views from the Global Arena », H. DE WAELE, J. KUIPERS (ed.), Leiden (Martinus Nijhoff), 2013, 239-256, p. 242.

Given that any changes to the current modalities require a two third majority in the biannual FAO Conference, the prospects of this initiative appear dim.

An additional complicating factor lies in the phenomenon of mixity. Since the EU acceded to the FAO as a Member Organization alongside its Member States, speaking and voting rights have to be exercised on an alternative basis.¹⁰² This causes a twofold problem of external transparency and internal coordination.

The former entails that the EU carries an additional burden of ensuring transparency vis-à-vis the FAO concerning its division of competences with the Member States. Under the FAO Constitution the EU was thus required to submit a declaration of competence in order to disclose its internal division of competences to the State Parties of the FAO,¹⁰³ and to notify the Director-General of any subsequent changes.¹⁰⁴ The EU's current declaration, however, still dates back to 1994, despite the significant reforms that have since been undertaken.¹⁰⁵ It was only with the 2013 FAO Communication that the Commission submitted an updated draft declaration to the Council, aiming to bring the present version in line with the provisions of the Lisbon Treaty.¹⁰⁶ The draft is currently under review.¹⁰⁷ It has already attracted criticism from the side of EU Member States, among others for not including 'any recognition of the extent to which the EU has not exercised its competence under shared competence areas'.¹⁰⁸ Furthermore, the FAO Constitution obliges the EU or its Member States to indicate before each meeting the division of competences for each agenda item and to declare which entity shall vote.¹⁰⁹ Given that this constitutes a significant additional burden, the Commission stated in its Communication that it considered 'the systematic submission of such an information note [to be] not required for meetings or specific agenda points thereof where either a vote is not envisaged or the division of competence between the EU and its Member States results directly from the present declaration of competence'.¹¹⁰ This view appears questionable and has triggered criticism from Member State side.¹¹¹ The General Rules of the FAO explicitly require an indication of competence 'before any meeting of the Organization'.¹¹² Also, the new Declaration of Competences, which adds little if any information to the provisions of the EU Treaties, is too vague to allow third states to determine by which competence a specific agenda item is covered.¹¹³ This holds especially true for the area of shared competences, where up-to-date and

¹⁰² Art. II(8), (10) FAO Constitution; on the exercise of voting rights see J. HELISKOSKI, *Internal Struggle for International Presence: The Exercise of Voting Rights Within the FAO*, in « The General Law of E.C. External Relations », A. DASHWOOD and C. HILLION (ed.), London (Sweet & Maxwell), 2000, 79-99.

¹⁰³ Art. II(5) FAO Constitution.

¹⁰⁴ Art. II(7) FAO Constitution.

¹⁰⁵ Council Decision of 25 November 1991, Declaration of Competence by the European Union in respect of matters covered by the constitution of the Food and Agriculture Organization of the United Nations (Pursuant to the General Rules of the Organization) (O.J. 1991 C 238); updated by a letter sent on 4 October 1994 from the President of the Council to the Director-General of the FAO, cf. Communication from the Commission to the Council on the notification of a change in the distribution of competence between the EC and its Member States pursuant to Article II(7) of the FAO Constitution, SEC 94 (437) final; cf. SCHILD, *supra*, n. 80, p. 226, fn. 35. On the legal effects, the practice and effectiveness of declarations of competence see A.D. CASTELEIRO, *EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?*, European Foreign Affairs Review 2012, 491-510.

¹⁰⁶ Draft Declaration of competences by the European Union in respect of matters covered by the Constitution of the Food and Agriculture Organisation of the United Nations (FAO), FAO Communication, *supra*, n. 19, Annex 1.

¹⁰⁷ Information Note, *supra*, n. 44, p. 3.

¹⁰⁸ United Kingdom, Department for International Development, Explanatory Memorandum on COM (2013) 333 final, Doc. No. 10368-13, 27 June 2013, para. 3.

¹⁰⁹ Rule XLII(2) of the General Rules of the FAO.

¹¹⁰ FAO Communication, *supra*, n. 19, annex 1, fn. 4.

¹¹¹ United Kingdom, Explanatory Memorandum, *supra*, n. 108, para. 4.

¹¹² Rule XLII(2) of the General Rules of the FAO.

¹¹³ Cf. J. HELISKOSKI, *EU Declarations of Competence and International Responsibility*, in « The International Responsibility of the European Union: European and International Perspectives », M. EVANS and P. KOUTRAKOS (ed.) Oxford (Hart), 2013, 189-212.

tailored information notes can present the extent to which the Union has exercised its competences.

The biggest hurdle for effective EU participation at the FAO remains, however, the cumbersome internal coordination process between Member States and EU institutions. In order to facilitate the procedure, the Commission and Council agreed in the internal 'Arrangement Between the Council and the Commission Regarding Preparation for FAO Meetings and Statements and Voting' that the EU exercises speaking and voting rights if the issue falls in the area of its exclusive competence and that the EU Member State holding the rotating Council Presidency is competent in case of Member State competence.¹¹⁴ If an issue falls, both, under EU and Member State competence, a common position should be sought, based on whether the 'thrust' of the issue falls in exclusive EU or Member States competence.¹¹⁵ In case of disagreement the matter will be referred to the COREPER.¹¹⁶ This Arrangement has not only failed to avoid legal disputes in the past,¹¹⁷ it also has not sufficiently streamlined the cumbersome process in which statements by the EU or the EU and its Member States are negotiated and agreed upon. Time-consuming discussions of procedural issues leave insufficient opportunity to focus on the substance, and weaken the EU's effective participation in the FAO. In an attempt to solve this problem, the Commission proposed a set of revised 'Arrangements between the Council and the Commission regarding the Exercise of Membership Rights of the European Union and its Member States in the Food and Agriculture Organisation (FAO)',¹¹⁸ in Annex 2 of its 2013 FAO Communication. According to the draft arrangements, full statements shall in the future only be prepared in exceptional cases, while the new default modus for EU positions in the FAO shall be the one of 'lines to take'.¹¹⁹ Although this would ensure greater flexibility for the external representative of the Union, fears of 'unscripted interventions with which Member States do not fully agree' have already been voiced¹²⁰ and indeed the additional effort, which Member States might invest to 'ensure lines to take [are] sufficiently tightly drafted to reduce these risks',¹²¹ might negate any hopes of a more efficient coordination process. This is strongly suggested by a recent incident at the FAO, when the Commission representative deviated from the exact wording of a statement, which had been previously agreed during the Coordination Working Party, omitting or exchanging words that had been particularly contentious.¹²² Nineteen EU Member States subsequently issued a joint statement in which they expressed their deep regret about the incident and underlined that agreed statements should be fully respected.¹²³ A working method which accords a higher degree of flexibility to the Union representative might therefore fail to win the necessary support in the Council.

The example of the FAO shows that even though the Union obtained full membership status, its participation in the work of the organization is still lagging behind.¹²⁴ This is not only due to the

¹¹⁴ Arrangement concerning preparation for the meetings of the FAO as well as interventions and voting ('Arrangement'), 18 December 1991, unpublished, reproduced in R. FRID, *The Relations between the EC and international organizations – Legal Theory and Practice*, The Hague (Kluwer), 1995, Annex VI, Art. 2.1-2.2. The 1991 Arrangement was subsequently updated in 1992 and 1995.

¹¹⁵ Arrangement, *supra*, n. 114, Art. 2.3; SCHILD, *supra*, n. 80, p. 228.

¹¹⁶ Arrangement, *supra*, n. 114, Art. 1.12.

¹¹⁷ ECJ, Case C-25/94, *Commission v. Council* [1996] ECR I-01469.

¹¹⁸ FAO Communication, *supra*, n. 19, Annex 2.

¹¹⁹ FAO Communication, *supra*, n. 19, Annex 2, ch. 2.3.

¹²⁰ United Kingdom, Explanatory Memorandum, *supra*, n. 108, para. 18.

¹²¹ *Ibid.*

¹²² Item 20.1 on the 148th session of the FAO Council, 4 December 2013.

¹²³ Council of the European Union, Joint statement concerning the representation of the EU and its Member States during the 148th session of the FAO Council, Doc. No. 17679/1/13, 13 December 2013.

¹²⁴ Cf. I. GOVAERE, J. CAPIAU and A. VERMEERSCH, *In-Between Seats: The Participation of the European Union in International Organizations*, *European Foreign Affairs Review* 2004, 155-187, 165.

limitations which the FAO Constitution and the General Rules of Procedure impose on member organizations, but primarily results from EU internal procedures and quarrels. The Barroso-Ashton-Strategy lists the FAO in the category of those international organizations where the prospects to improve the position of the Union are good, referring to the ongoing revision of the 1991 Arrangements between Council and Commission. In light of the above analysis, this evaluation of the Commission's FAO Communication might prove too optimistic. A two thirds majority of the FAO Conference for the expansion of EU competences appears difficult to achieve, and EU Member States' fears of competence creep and loss of status might prevent the adoption of more flexible internal agreements.

B. INTERNATIONAL MARITIME ORGANIZATION (IMO)

The IMO, a specialized agency of the UN, is an organization where the EU may seek to upgrade its status in the near future.¹²⁵ It is one of the organizations that have been prioritised for a status upgrade in the Barroso-Ashton-Strategy, based on the abovementioned criteria of interest and prospect.¹²⁶ The Union increasingly puts focus on the work of the organization, especially with regard to working on international environmental issues (e.g. reduction in CO₂ emissions) and issues of ship safety.¹²⁷ While the EU currently has an emissions trading system that covers other fields of transport, including airlines operating in EU Member States,¹²⁸ it has not yet implemented a system that regulates emissions from maritime transportation. On 28 June 2013 the Commission set out its plan to integrate maritime emissions into the EU's policy for reducing its domestic greenhouse gas emissions.¹²⁹ Despite the slow pace of discussions within the IMO on this issue, the Union still views the IMO as the best international forum to regulate emissions from shipping, which currently constitute around 3% of global greenhouse gas emissions.¹³⁰ The EU also plays an active role in other areas relevant to the IMO, such as maritime pollution and maritime safety. Apart from EU legislation in these fields, in 2003 the European Maritime Safety Agency ('EMSA') was established to provide specialised technical assistance. Lastly, the EU and the IMO are both becoming active in the field of maritime security and piracy¹³¹, a topic that is increasingly important to the Union from a security standpoint. Besides, work undertaken by the IMO has led to amendments of the International Convention for the Safety of Life at Sea, 1974 ('SOLAS Convention') and the International Ship and Port Facility Security Code ('ISPS Code'). Thus, interests as well as the significant EU legislation in fields covered by the work of the IMO support an enhanced status of the Union in the work of this organization.

The European Commission (not the Community or the Union) has been an observer at the IMO since 1974. Although the Commission recommended to the Council to pursue full membership

¹²⁵ WOUTERS, DE JONG, MARX, and DE MAN, *supra*, n. 85.

¹²⁶ Barroso-Ashton-Strategy, *supra*, n. 6, p. 3.

¹²⁷ European Commission, Press Release, *Transport: Vice President Kallas in talks with IMO Secretary General – focus on ship safety and reducing emissions*, IP/13/409, 7 May 2013.

¹²⁸ European Parliament and Council Directive 2008/101/EC of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (O.J. 2009, L8/3).

¹²⁹ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions – Integrating maritime transport emissions in the EU's greenhouse gas reduction policies, COM(2013) 479.

¹³⁰ *Ibid*, p. 4.

¹³¹ See IMO, Piracy and Armed Robber Against Ships, 'Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships', MSC.1/Circ.1334, 23 June 2009; European Commission, Recommendation of 11 March 2010 on measures for self-protection and the prevention of piracy and armed robbery against ships, 2010/159/EU.

of the then EC in both the IMO and the ICAO back in 2002,¹³² this was not supported by the EU Member States.¹³³ In the face of opposition from EU Member States which are IMO members, the Commission is now seeking instead to change the Commission's representation to that of the 'European Union' in accordance with the Lisbon Treaty. There are also significant external constraints that prevent the EU from becoming a full IMO Member.¹³⁴ The IMO Convention is only open to states,¹³⁵ and EU membership would require the inclusion of a REIO clause, as was the case with the FAO. There is little incentive, however, to go through the process of treaty modification that would be necessary to amend the Convention, which would require the ratification of two-thirds of the IMO membership.¹³⁶

The IMO therefore represents yet another organization where, even though the Union has significant competences, legislation and interests in the fields dealt with by this IO, its lack of membership means that it must continue to rely on its Member States. This can cause problems within the EU's legal order. When the EU is not a formal member of an IO where significant Union competences are concerned, this can create a gap in legal obligations between the EU and its Member States, since only the Member States are formally bound under international law. For instance, in the ATAA case the EU's non-membership of ICAO, another UN specialized agency, meant that the EU was not formally bound by a significant body of international law regulating air transport.¹³⁷ EU membership in international organizations such as ICAO and IMO would go a long way to filling this gap. Moreover the Union's membership in global regulatory bodies such as IMO is important for it to safeguard its own significant regulatory framework. However, the prospects for status upgrade look rather dim, as illustrated by the 2013 information note on the implementation of the Barroso-Ashton-Strategy, which states that 'little or no progress could be achieved due to a changed political context' and recommends that '[s]ervices will sustain their efforts in order to unlock the situation'.¹³⁸

C. INTERNATIONAL ATOMIC ENERGY AGENCY (IAEA)

The IAEA, although a separate international organization, is associated to the UN family, and is also a body where the EU has identified a priority in upgrading its status.¹³⁹ The Union is strongly committed to the prevention of proliferation of weapons of mass destruction,¹⁴⁰ and has worked actively in multilateral fora to prevent states such as Iran from acquiring nuclear weapons capabilities¹⁴¹ and to deal with the nuclear weapons programme of North Korea. Talks with Iran over its nuclear issues have been one of the key priorities of HR/VP Catherine Ashton

¹³² European Commission, Recommendation from the Commission to the Council in order to authorise the Commission to open and conduct negotiations with the International Civil Aviation Organization (ICAO) on the conditions and arrangements for accession by the European Community, SEC/2002/0381 final.

¹³³ Cf. de Baere who observed that 'external sovereignty seems to be regarded as rather more sacred than internal sovereignty: the Member States are quite happy to accept Community-imposed restrictions on their regulatory competences with regard to internal policy areas, while refusing to accept parallel restrictions for the external aspects of the same areas', G. DE BAERE, *Constitutional Principles of EU External Relations*, Oxford (OUP), 2008, 249-250, see also GOVAERE, CAPIAU and VERMEERSCH, *supra*, n. 124, p. 164.

¹³⁴ For further discussion on these constraints, see L. NENGYE and F. MAES, *Legal Constraints to the European Union's Accession to the International Maritime Organization*, *Journal of Maritime Law & Commerce* 2012, 279-291.

¹³⁵ Art. 4 IMO Convention.

¹³⁶ Art. 66 IMO Convention.

¹³⁷ ECJ, Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, [2011], nyr.

¹³⁸ Information Note, *supra*, n. 44, p. 3.

¹³⁹ Barroso-Ashton-Strategy, *supra*, n. 6, p. 3.

¹⁴⁰ Council of the European Union, EU Strategy Against Proliferation of Weapons of Mass Destruction, Doc. No. 15708/03.

¹⁴¹ R. GOWAN, *The UN and European Strategy*, in « The Routledge Handbook of European Security », S. BISCOP and R.G. WHITMAN (ed.), London, New York (Routledge), 2013, 270-280, 279.

as part of the E3+3. The Joint Plan of Action¹⁴² on Iran's nuclear activities, concluded in Geneva on 24 November 2013, establishes the IAEA as being responsible for the verification of nuclear-related measures. The EU is also actively involved in issues of nuclear safety, which were brought back to the world's attention after the Fukushima disaster in Japan. While the Union has worked on these issues in other fora, most notably within the UN Security Council, the IAEA also plays a crucial role in these fields.

On 25 January 2013 a meeting was held in Brussels bringing together officials from the EEAS, the European Commission and the IAEA for the first time, to focus on areas of co-operation in the areas of nuclear safety, nuclear security, nuclear applications, technical cooperation, nuclear energy and nuclear safeguards.¹⁴³ It is evident that closer co-operation between the EU and IAEA would benefit both organizations. The EU is a major contributor to the IAEA, both in terms of financial aid and technical assistance. The gross overall contribution to the IAEA for the period of 2007-2013 was € 111.5 million.¹⁴⁴ On 21 June 2013 the EU and IAEA signed a contribution agreement under the 2012 Annual Action Programme of the Instrument for Nuclear Safety Cooperation (INSC) whereby the EU would contribute € 9,260,000 for technical cooperation and nuclear safety. Moreover, many of the issues dealt with by the IAEA are of key importance to EU domestic and foreign policy, most notably the Union's engagement with issues such as nuclear non-proliferation.

The EU itself has no formal observer status at the IAEA although Euratom is an observer. The relationship is based upon an agreement between Euratom and the IAEA, which has been in force since 1 January 1976 (Cooperation Agreement 1975) and whereby Euratom is invited to the annual sessions of the General Conference of the Agency but does not have the right to vote. There are several options available to the EU for improving its status at the IAEA. The first would require the EU to attain observer status alongside Euratom. This would probably require an agreement between the EU and Euratom concerning competences and clarifying the relationship between the existing IAEA-Euratom Agreement. Another option would be to update the IAEA-Euratom agreement to allow for dual EU-Euratom representation in their respective fields of competence. The 2013 information note on the implementation of the Barroso-Ashton-Strategy favourably reported progress made in the internal debates, and stated that 'Commission services and the EEAS are in the process of assessing the most promising approach to obtain an appropriate status for the EU'.¹⁴⁵ Either way, there is still an important requirement for the EU and Euratom "to ensure consistency between [their] external relations."¹⁴⁶

D. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO)

The United Nations Educational, Scientific and Cultural Organization ('UNESCO') is an example for a body that is not mentioned in the Barroso-Ashton-Strategy although it might arguably fulfil the interest and prospect criteria. It additionally serves as an interesting example of an *ad hoc*

¹⁴² Joint Plan of Action agreed by Iran and the E3/EU+3, adopted in Geneva, Switzerland, 24 November 2013, available at http://eeas.europa.eu/statements/docs/2013/131124_03_en.pdf (20 February 2014).

¹⁴³ Joint Press Statement (2013) of First EU-IAEA Senior Officials Meeting on 25 January 2013, available at http://eeas.europa.eu/250113_press_statement_for_the_first_eu_iaea_som_as_of_25_january.pdf and <http://www.iaea.org/newscenter/mediaadvisory/2013/ma201302.html> (18 February 2014).

¹⁴⁴ IAEA, Overview of EU support to the International Atomic Energy Agency (IAEA) in the field of nuclear safety, safeguards, security and technical cooperation financed during the current Multiannual Financial Framework 2007-2013, available at <http://www.iaea.org/newscenter/pressreleases/2013/eucontribution.pdf> (18 February 2014).

¹⁴⁵ Information Note, *supra*, n. 44, p. 3.

¹⁴⁶ Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the EEAS (O.J. 2010, L201/3), recital 18.

status upgrade strategy, which has the potential for wider application throughout the UN framework.

UNESCO, a UN specialized agency, was founded in 1945 to foster peace 'on the basis of humanity's moral and intellectual solidarity'.¹⁴⁷ Aiming to avoid conflicts by strengthening international cooperation in the fields of culture, education, science and communication, its work focuses on the dissemination of knowledge and ideas, the protection of the world's heritage and cultural diversity, and the promotion of scientific cooperation and quality of education.¹⁴⁸

Cultural policy was not an obvious competence for a regional integration organization which was initially primarily economic in nature and consequently it was not part of the EU's portfolio before 1993. The EEC impacted the Member States' authority in the cultural domain only incidentally, in the context of the freedom of movement of cultural goods, services and people.¹⁴⁹ The Maastricht Treaty introduced a cultural competence into the Union's primary law. Article 3(p) of the EC Treaty tasked the Community with 'a contribution [...] to the flowering of the cultures of the Member States' but its responsibility remained deferential towards the Member States, and did not exceed the competence to encourage cooperation between them and to support and supplement their action. This wording was retained in the current Article 167 TFEU. Article 6(c) TFEU provides that in the area of culture, the Union shall merely 'support, coordinate or supplement the actions of the Member States', and Article 2(5) TFEU stipulates that Union action in the cultural field will neither supersede Member States' competences nor that the adoption of legally binding acts will entail harmonisation of the domestic law. The explicit competence for EU engagement in UNESCO is enshrined in Article 167(3) TFEU,¹⁵⁰ which states that the 'Union [...] shall foster cooperation with [...] the competent international organisations in the sphere of culture'. A similar development can be traced for EU policy in the field of education, which found its first basis in a 1976 Action Programme,¹⁵¹ before being formally introduced in EU primary law with the Maastricht Treaty. EU competences in research, on the other hand, were already included in the ECSC and Euratom treaties, and while the EEC treaty contained only narrow research competences in the field of agriculture, its sweeping Article 235 was used to launch a series of research programmes. The Union's education competence has remained confined to actions that 'support, coordinate or supplement' Member States' initiatives (Article 6(e), 165 TFEU), whereas the Union enjoys a 'parallel' competence in the field of research (Article 4(3), 179 et seq.).

Remarkably, formal relations between the EEC and UNESCO were established at a time when the Community enjoyed only limited competences in the research area, and when culture and education still rested exclusively with the Member States. A first exchange of letters between the President of the Commission and the UNESCO Director-General in 1964 established methods for closer cooperation to achieve common goals, including most importantly the reciprocal invitation of observers to participate in the work of the respective bodies.¹⁵² A second exchange of letters in 1972/1973 determined those areas where UNESCO and EEC

¹⁴⁷ UNESCO, *Introducing UNESCO*, <http://en.unesco.org/about-us/introducing-unesco> (18 February 2014).

¹⁴⁸ Art. 1(2) UNESCO Constitution.

¹⁴⁹ E. PSYCHOGIOPOULOU, *The Convention on the Diversity of Cultural Expressions and the European Union: The Quest for Competence and Implementation*, in « The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation », T. KONO, S. VAN UYTSEL (ed.), Antwerp (Intersentia), 2012, 365-394, 369.

¹⁵⁰ Art. 128(3) TEC.

¹⁵¹ Resolution of the Council and of the Ministers of Education, meeting within the Council, of 9 February 1976 comprising an action programme in the field of education (O.J. 1976 C38/1).

¹⁵² CAVICCHIOLI, *The European Community at UNESCO: An exceptionally active observer?*, in « The United Nations and the European Union: An Ever Stronger Partnership », J. WOUTERS, F. HOFFMEISTER and T. RUYSS (ed.), The Hague (Asser), 2006, 135-154, 137.

involvement overlapped, and designated a number of priority areas. In February 1996, the European Commission and UNESCO signed an agreement detailing the methods of their cooperation, particularly focusing on technical assistance and joint projects,¹⁵³ followed by an extension of the Financial and Administrative Framework Agreement between the EC and the UN to UNESCO in 2004.¹⁵⁴ In 2012 the EU and UNESCO concluded a Memorandum of Understanding in which they laid down principles and objectives for their partnership, identified priorities and made arrangements for cooperation, including provisions on reciprocal invitations to meetings and working groups and on mutual information and consultation.¹⁵⁵

Despite its longstanding involvement in the work of UNESCO, its financial impact and the increasingly close partnership between both organizations, the EU's status generally remains one of a simple observer, restricting it to a predominantly passive role in the debates held in the framework of UNESCO. While Union representatives may participate in the meetings of the organization's bodies and make oral interventions, they do not have the right to vote, to submit proposals or amendments thereto.¹⁵⁶ These limited possibilities for participation were considered to be insufficient by the Commission with regard to the negotiation of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.¹⁵⁷ The Commission had supported the initiative since its earliest days, fully endorsing the 2001 UNESCO Universal Declaration on Cultural Diversity and Action Plan and ranking the '[p]reservation and promotion of cultural diversity [...] among the founding principles of the European model'.¹⁵⁸ In light of its status limitations, the Commission requested a negotiating mandate from the Council,¹⁵⁹ which was supported by the European Parliament and adopted by the Council in November 2004.¹⁶⁰ Thereby the Commission was given the mandate to take part in the negotiations of the Convention on behalf of the Community, as far as EC competences were concerned, and to negotiate alongside the Member States whenever a matter fell in an area of shared competence. A subsequently adopted Code of Conduct detailed the division of work between the Member States and the Commission, according to which the Presidency would represent the common positions of the Member States and the Commission would represent Community positions.¹⁶¹

While the internal dimension of EC participation in the negotiations was thus quickly and smoothly established, the external dimension caused more difficulties. A first proposal by the

¹⁵³ UNESCO, Executive Board, Co-operation between the European Commission and UNESCO, Doc. No. 147 EX/44, 16 August 1995.

¹⁵⁴ Agreement between UNESCO and European Commission of 23 February 2004, http://ec.europa.eu/europeaid/work/procedures/financing/international_organisations/other_documents_related_united_nations/document/un_specialised_agencies_covered_by_the_fafa_en.xls (7 March 2014); CAVICCHIOLI, *supra*, n. 152, p. 138.

¹⁵⁵ UNESCO/European Union, Memorandum of Understanding concerning the establishment of a partnership between the United Nations Educational, Scientific and Cultural Organisation Secretariat and its subsidiary bodies (hereinafter referred to as 'UNESCO') and the European Union, jointly referred to hereinafter as 'the two Sides', 8 October 2012.

¹⁵⁶ CAVICCHIOLI, *supra*, n. 152, p. 139 et seq.

¹⁵⁷ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, entry into force 18 March 2007, 2440 UNTS.

¹⁵⁸ Communication from the Commission to the Council and the European Parliament – Towards an international instrument on cultural diversity, COM(2003) 520 final.

¹⁵⁹ Recommendation from the Commission to the Council to authorise the Commission to participate, on behalf of the Community, in the negotiations within UNESCO on the convention on the protection of the diversity of cultural contents and artistic expressions, SEC (2004), 1062 final.

¹⁶⁰ Council of the European Union, Press Release, 2616th Council Meeting, Education, Youth and Culture, 15-16 November 2004, Doc. No. 14380/04; cf. Council of the European Union, Draft Council Decision authorising the Commission to participate, on behalf of the Community, in the negotiations within UNESCO on the convention on the protection of the diversity of cultural contents and artistic expressions, Doc. No. 13840/04, 29 October 2004.

¹⁶¹ Council of the European Union, Code of conduct between the Council, the Member States and the Commission on the UNESCO negotiations on the draft Convention on the protection of the diversity of cultural contents and artistic expressions, Doc. No. 5768/05, 31 January 2005.

Council Presidency in September 2004 to grant the Commission extended rights for the purpose of negotiating the Convention was included in the provisional agenda of the 170th session of UNESCO's Executive Board,¹⁶² where it failed to gain sufficient support. The State Parties were particularly concerned about setting a precedent and endangering the intergovernmental character of the organization. Additionally, the debate was characterized by a widespread lack of knowledge about the involvement of regional multilateral organizations in the UN framework, in particular through REIO clauses, and the practice of other UN bodies with regard to the EC.¹⁶³ The Commission thus remained restricted to its usual observer role for the initial negotiations. In March 2005 the Council Presidency again introduced the matter to the Executive Board's agenda, highlighting the insufficiency of the EC's status to fully participate in the negotiations and to safeguard its interests.¹⁶⁴ A group of eight EU Member States¹⁶⁵ submitted a draft decision, which would grant regional economic integration organizations active participation rights 'in the same manner as full participants', comprising in particular 'the right to speak, to reply, to put forward proposals and amendments at the formal meetings, and to take part in the committees, working groups, formal or informal meetings set up in the course of the work relating to this Convention, the European Community having its own nameplate' but 'excluding the right to vote'.¹⁶⁶ The draft decision proved to be particularly contentious and neither the Special Committee of the Executive Board nor its informal working group could come to an agreement.¹⁶⁷ Finally the Special Committee submitted a revised draft, which had been proposed by the Chairperson of the informal working group, to the Executive Board. The draft contained significantly amended language. In order to appease fears of setting a precedent, the amended draft highlighted that the extended rights were only granted 'on an exceptional basis [...] while maintaining [the] observer status' of the Community.¹⁶⁸ The draft also omitted the specific list of rights included in the EU Member States' proposal and restricted the scope of the application to the EC alone, not extending it to regional economic integration organizations in general. The decision which was finally adopted by the Executive Board was even narrower. Every comparison to the participation rights of full participants was avoided; instead the EC was granted the right to 'participate actively and as fully as appropriate'.¹⁶⁹ Furthermore, a time limit was introduced, restricting the enhanced rights to no more than the intergovernmental meeting of experts which was held between 25 May and 4 June 2005. The Council Presidency ensured afterwards to immediately indicate the list of rights that it deemed to be covered by its 'enhanced observer status' of which the Executive Board took note without objection.¹⁷⁰

Although the EC draft was thus considerably watered down in the final decision, the 'selective upgrade' of its observer status nevertheless was a significant achievement for the Community. It allowed the Commission to actively participate as a negotiating party in a policy field that held particular internal significance, and to shape the content of the Convention, among others by successfully advocating for the inclusion of a REIO clause.¹⁷¹ Even though the final decision of the Executive Board and the previous debates expressly stated that the Community's enhanced observer status could not be regarded as setting a precedent, it importantly confirmed a practice that had been launched two years earlier, when the WHO granted REIOs active participation rights in the negotiations of the 2003 Framework Convention on Tobacco Control. It also raised

¹⁶² UNESCO, Executive Board, 170 EX/37, 29 September 2004.

¹⁶³ UNESCO, Executive Board, Summary Records, 170 EX/SR.1-10, 14 January 2005.

¹⁶⁴ UNESCO, Executive Board, 171 EX/47, 17 March 2005.

¹⁶⁵ Czech Republic, France, Germany, Hungary, Italy, Slovakia, Slovenia, and the United Kingdom.

¹⁶⁶ UNESCO, Executive Board, 171 EX/47 Add., 31 March 2005.

¹⁶⁷ UNESCO, Executive Board, 171 EX/62, 27 April 2005.

¹⁶⁸ *Ibid.*, p. 5.

¹⁶⁹ UNESCO, Executive Board, 171 EX/Decisions, 25 May 2005, p. 72.

¹⁷⁰ CAVICCHIOLI, *supra*, n. 152, p. 146 et seq.

¹⁷¹ Art. 27 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

awareness among the State Parties of UNESCO for both the particularities of the division of competences between the Community and its Member States, and the participation of REIOs in the UN framework in general. The EC quickly acceded to the Convention, although its implementation record shows symptoms of a 'double standard', with strong results in external affairs and a comparatively weaker approach in the internal dimension.¹⁷² So far, the 'selective enhanced observer status' has not been pursued in other UN bodies and there was no opportunity to repeat the initiative with regard to subsequent UNESCO conventions. Tellingly the Barroso-Ashton-Strategy does not even consider this option for upgrading EU status in the UN framework, aiming for general status enhancements instead. It thereby overlooks a very promising and practical option to boost the EU's status *ad hoc* in those cases which are particularly relevant for the Union and where the Union could make a real difference in the shaping and the subsequent implementation of an international instrument. The process leading towards a temporarily or thematically enhanced observer status requires less time and diplomatic effort and might thus yield a more favourable effort/outcome ratio. At the same time, through setting positive examples of active EU participation in the UN framework, the Union could also pave the way for more permanent status upgrades. The lack of ambition and imagination of the Barroso-Ashton-Strategy is therefore also perceptible in its exclusive focus on the traditional goal of general status enhancement, ignoring prominent alternative paths that the recent practice in UNESCO and WHO has demonstrated.

V. CONCLUDING REMARKS

Although cooperation with the UN is a significant political priority for the EU, efforts to enhance the Union's representation in the various UN bodies have encountered stumbling blocks. The EU continues to deal with problems regarding representation in those fora where the EU Member States remain highly active, due to disagreements concerning the distribution of tasks, in particular with regard to speaking rights and negotiating mandates. Moreover, the EU's efforts to upgrade its status at the UN, as illustrated by the diplomatic saga around the adoption of UNGA Resolution 65/276, did not go as smoothly as planned, and the gaps between the EU's status in most UN bodies and its competences and priorities significantly hinder the effective representation of the Union.

Status enhancements, aligning the Union's internal and external dimensions, thus remain a focal point of the EU's diplomatic activity at the UN. The 2012 Barroso-Ashton-Strategy nevertheless reveals a significant decline in ambition, in that it opts for an approach of piecemeal, modest status upgrades, where its predecessor contained a clear commitment to aim for full participation of the Union at the UN level. The Strategy also lacks the precision that would be necessary to effectively guide the Union's diplomatic efforts towards better EU representation in the UN. This concerns in particular the overly broad set of criteria established to identify priority organizations, which provides little explanation, both on the inclusion of the selected bodies and on the omission of other fora. In this regard the Strategy's silence on UNESCO is particularly striking, given that it is an organization which not only appears to fit the broad selection criteria but also provides a promising example of a 'selective' status upgrade that might inform the strategy for other UN bodies. Moreover, a closer look at the selected priority organizations raises doubts about the plausibility of the Commission's assessment of whether 'an upgrade appears realistic in the short to medium term'.¹⁷³ This concerns not only the HRC, where an extension of UNGA Resolution 65/276 to the HRC appears to be neither legally nor politically feasible, but also the FAO and the IMO. The Commission's FAO

¹⁷² PSYCHOGIOPOULOU, *supra*, n. 149, p. 393.

¹⁷³ Barroso-Ashton-Strategy, *supra*, n. 6, p. 3.

Communication has already triggered significant internal resistance by the Member States and moreover recommends enhancements of the Union's status at the FAO, for which political support does not appear to be within reach. With regard to the IMO, the Commission itself reverted its positive assessment only a year later in its 2013 information note, reporting 'little or no progress [...] due to a changed political context'.¹⁷⁴ Of the analysed bodies it is only with regard to the IAEA that a positive assessment of the prospect for status enhancement can cautiously be confirmed.

If the EU is serious about its goal 'to support and work for effective multilateralism, with the United Nations at its core',¹⁷⁵ then this involves the EU's presence and involvement in the UN and the UN system. However, the EU not only remains faced with a series of internal and external obstacles as a participant within the UN and the UN system, barring it from taking up its leading role at the global level: it currently also lacks a convincing strategy to overcome them.

¹⁷⁴ Information Note, *supra*, n. 44, p. 3.

¹⁷⁵ See European Commission, *Ashton tells UN Security Council: EU is committed partner for UN in search for international peace*, http://ec.europa.eu/commission_2010-2014/ashton/topics/20140219_en.htm (25 February 2014).



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