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**“Study for the Assessment of the EU’s Role  
in International Maritime Organisations”**

*Final Report*

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## ABBREVIATIONS AND ACRONYMS

AFS	International Convention on the Control of Harmful Anti-fouling Systems on Ships
AIDCP	Agreement on the International Dolphin Conservation Program
ASEAN	Association of South East Asian Nations
BARCOM	Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean
CARICOM	Caribbean Community and Common Market
CBD	Convention on Biological Diversity
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CECLAD-Med	Anti-Drug Coordination Centre for the Mediterranean
CFCA	Community Fisheries Control Agency
CFP	Common Fisheries Policy
CFSP	Common Foreign and Security Policy
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CLC	International Convention on Civil Liability for Oil Pollution Damage
CMMCC	Conservation and Management Measures Compliance Committee
CMS	Convention on the Conservation of Migratory Species of Wild Animals
COFI	Committee on Fisheries
COLREG	Convention on the International Regulations for Preventing Collisions at Sea
COMAR	Council Working Group on the Law of the Sea
COREPER	Committee of Permanent Representatives
COSS	Committee on Safe Seas and the Prevention of Pollution from Ships
CSD	United Nations Commission on Sustainable Development
DG	Directorate-General of the European Commission
EAEC	European Atomic Energy Community
EC	European Community
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
EEA	European Economic Area
EEA	European Environment Agency
EEAS	European External Action Service
EEC	European Economic Community
EDA	European Defence Agency
EIA	Convention on Environmental Impact Assessment in a Transboundary Context
EMSA	European Maritime Safety Agency
ELARG	European Commission Directorate-General on Enlargement
ENV	European Commission Directorate-General on Environment
EP	European Parliament
ERTA	European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport

ESDP	European Security and Defence Policy
EU	European Union
FAL	Facilitation Committee
FAO	Food and Agriculture Organization of the United Nations
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders
FSI	Sub-Committee on Flag State Implementation
GFCM	General Fisheries Commission for the Mediterranean
GFOCI	Global Forum on Oceans, Coasts and Islands
HELCOM	Helsinki Commission for the Protection of the Marine Environment of the Baltic Sea Area
HR	High Representative of the Union for Foreign Affairs and Security Policy
IAEA	International Atomic Energy Agency
IATTC	Inter-American Tropical Tuna Commission
IBSFC	International Baltic Sea Fishery Commission
ICAO	International Civil Aviation Organization
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICRW	International Convention for the Regulation of Whaling
IGC	Inter-Governmental Conference
ILO	International Labour Organization
IMAO(s)	international maritime organisation(s)
IMCO	Inter-Governmental Maritime Consultative Organization
IMP	Integrated Maritime Policy
IMO	International Maritime Organization
IMSO	International Mobile Satellite Organization
INMARSAT	Convention on the International Maritime Satellite Organization, and Operating Agreement
Inmarsat	International Maritime Satellite Organization
IOPC	Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage
IOTC	Indian Ocean Tuna Commission
ISBA	International Seabed Authority
IUCN	International Union for Conservation of Nature
IUU	Illegal, Unreported and Unregulated Fishing
IWC	International Whaling Commission
LEC	Legal Committee of the International Maritime Organization
LLMC	Convention on Limitation of Liability for Maritime Claims
MAOC-N	Maritime Analysis and Operations Centre - Narcotics
MARE	European Commission Directorate-General for Maritime Affairs and Fisheries
MARPOL	International Convention for the Prevention of Marine Pollution from Ships
MARSEC	Maritime Security Committee
MEPC	Marine Environment Protection Committee
MOX	Mixed oxide
MS	European Union Member State
MSC	Maritime Safety Committee
NAFO	Northwest Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Conservation Organization

NAV	Sub-Committee on Safety of Navigation
NEAFC	North East Atlantic Fisheries Commission
NGO	non-governmental organisation
OECD	Organization for Economic Co-operation and Development
OPRC	International Convention on Oil Pollution Preparedness, Response and Co-operation
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PAL	Athens Convention relating to the Carriage of Passengers and their Luggage by Sea
PWG	Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures
RAMSAR	Convention on Wetlands of International Importance especially as Waterfowl Habitat
RELEX	European Commission Directorate-General on External Relations
REIO	Regional Economic Integration Organisation
REIOC	Regional Economic Integration Organizations Committee
RFMO(s)	Regional Fisheries Management Organisation(s)
RFO(s)	Regional Fisheries Organisations
SEAFO	South East Atlantic Fisheries Organisation
SCRS	Standing Committee on Research and Statistics
SJ	European Commission Legal Service
SOLAS	International Convention for the Safety of Life at Sea
STW	Sub-Committee on Standards of Training and Watchkeeping
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
SWP	Council Shipping Working Party
TAC	Total Allowable Catch
TBEIA	Convention on Transboundary Effects of Industrial Accidents
TCC	Technical Cooperation Committee
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TEU-L	Consolidated Treaty on European Union after Treaty of Lisbon
TFEU	Treaty on the Functioning of the European Union
TREN	European Commission Directorate-General on Transport & Energy
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCND	United Nations Commission on Narcotic Drugs
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNICPOLOS	United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
UNFSA	United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks
UNGA	United Nations General Assembly
UK	United Kingdom
US	United States of America
WCO	World Customs Organization

WCPFC

Western and Central Pacific Fisheries Commission

## EXECUTIVE SUMMARY

The European Commission outlined its vision for a maritime policy in its 2007 Communication *An Integrated Maritime Policy for the European Union*, which covers all aspects and sectors of the Union's relationship with the oceans and seas. Such an integrated policy requires extensive cooperation with international organisations and relevant multilateral fora, as well as third countries.

The present study aims to create a transparent overview of how the interests of the EU and its Member States are best represented in selected international maritime organisations (IMAOs) and, where possible, to suggest mechanisms to ensure that the EU has a single voice on the international stage. The study analyses the impact of identified shortcomings on the coherence of the EU's position in international arenas with regard to key contemporary maritime issues, and suggests possible ways of improving the situation.

The study provides an analysis and assessment of EC participation in selected IMAOs with a view to formulate suggestions for improved working methods that can potentially enhance the Union's ability to speak with a single voice in IMAOs. The selected cases are (1) the International Commission for the Conservation of Atlantic Tunas (ICCAT), (2) the Food and Agriculture Organization of the United Nations (FAO) and the United Nations General Assembly (UNGA), (3) the International Maritime Organization (IMO) and (4) the International Whaling Commission (IWC). The case study analysis focuses on the preparation of EU positions within the selected organisations, as well as the operational aspects entailed in the management of EU interventions in these organisations. In addition, the study addresses the implications of the Treaty of Lisbon for EU maritime policy.

The European Community is full member in a number of IMAOs, especially in the area of fisheries, and is a contracting party to many international agreements in the maritime field. The EC is also increasingly occupying the field in a wide range of maritime issues through the promulgation of a substantive body of Community legislation. However, Community participation and coordination in the context of IMAOs is often hampered, both from an institutional and a procedural point of view.

The study recommends that the Community should always strive for full accession to IMAOs where possible to accurately reflect its expanding powers in maritime matters, especially in case of exclusive EC competences. If full membership cannot be attained for the time being, transitional measures should increasingly be used to mitigate the effects of the long and complex procedure of EC accession. In addition, the Commission should make full use of the possibilities offered by Article 302 TEC to soften procedural obstacles to participating and speaking with a single voice in IMAOs. These efforts should have the aim of, *inter alia*, ensuring that Community and common positions can be expressed by the Commission during formal IMAO meetings, or in case of a coordinated position that the Presidency can make clear that it speaks on behalf of all EU Member States and the European Community.

The Commission should be mindful during accession negotiations that the conditions imposed upon the Community when becoming a full member should not in effect negate the benefits of accession. Such conditions should not affect the EC's ability to speak and vote coherently. Likewise, no undue restrictions should follow from internal arrangements between EU institutions on the adoption and expression of positions in IMAOs. To this end,

inter-institutional agreements and procedural frameworks should be formulated so as to ensure that both EU institutions and Member States have proper and mutually reinforcing incentives to arrive at unified positions.

The applicability of the general principles of EC coordination does not depend upon the Community's formal legal status to a given IMAO. Coordination shall still be pursued in the absence of full membership and can be enforced through the conclusion of inter-institutional arrangements between the Commission and the Council, which the European Court of Justice (ECJ) has declared binding. Furthermore, the ECJ has emphasised on numerous occasions that all EU Member States are bound by positive and negative obligations derived from Article 10 TEC. The duty of loyal cooperation does not hinge upon whether the Community competence concerned is exclusive and is furthermore not affected by the mere fact that the Community is not a member of a particular IMAO. All actions of EU Member States and EU institutions in the process of international maritime negotiations are to be carried out with due respect for Article 10 TEC and the principle of unity in the Community's external representation. Compliance with these principles can be enforced, as a last resort, through procedures before the ECJ.

Several generic factors were found that may affect the EU coordination process within IMAOs and thus may as a result inhibit the Union to speak with a single voice on the international maritime stage, *i.e.* (i) the heterogeneity of interests of Member States; (ii) the nature of measures adopted within IMAOs; (iii) the time available for preparatory coordination; (iv) the improper application of established coordination procedures; and (v) the lack of procedural guarantees during the on the spot coordination process.

Interests of Member States in maritime affairs are generally heterogeneous with sometimes strong diverging views being expressed on certain issues discussed within IMAOs. This heterogeneity impacts upon both the chances of the EC obtaining legal status to a given IMAO and the efficiency of the process of coordination. Furthermore, coordination will typically be a lengthier and more difficult process when the measures negotiated within an IMAO produce legally binding effects that ultimately will have to be transposed into Community law.

Chances of a unified position being reached and subsequently supported during IMAO meetings increase markedly when sufficient time is given to all actors involved in the context of the preparatory meetings organised by the Commission and the relevant Council Working Group. To this end, the Commission should make good use of the opportunities offered by Article 302 TEC and act within its power to ensure a timely reception of all documents from IMAOs needed for proper coordination, pursuant to its task of maintaining all appropriate relations with international organisations. Furthermore, all EU actors should cooperate in ensuring that difficulties arisen during internal coordination are resolved in a timely manner before the start of an IMAO session.

Where appropriate the Commission should propose either a negotiation mandate pursuant to Article 300(1) TEC or a Council decision under Article 300(2) second paragraph TEC whenever the adoption of legally binding measures is being considered in an IMAO on an issue falling within Community competence. The Council should cooperate to this end by adopting the proposed decision taking into account timely voiced concerns from Member States with regard to the Commission proposal. Moreover, coordination to reach unified positions is effective only when the EU can subsequently express these positions with a

single voice on the international stage. A procedural framework should be established, clearly setting out rules governing the expression of positions and detailing the respective voting rights. In this context, all EU actors should cooperate to enhance the visibility of the EU at the international scene by explaining its specific competences.

The study found that few procedural safeguards are in place that could help ensure consistency in the quality of on the spot coordination. Procedural guarantees should be established ensuring more consistency and coherence in coordination on the spot during IMAO sessions, emphasising thereby the crucial role of the Presidency and the Commission in this regard. If the current Presidency is held by a Member State with limited maritime interests or not involved in the specific regional forum, its coordination tasks could be fulfilled for instance by the preceding or succeeding Presidency.

The Treaty of Lisbon contains several new provisions that may have an impact on Union coherence and the ability of the EU to increase coordination and speak with a single voice on maritime issues after the entry into force of the Treaty. Further, specific amendments have been adopted to increase the powers of the European Parliament under the Common Fisheries Policy, which might have an impact on the participation of the EU in IMAOs. The Treaty of Lisbon also explicates the Union's competences on matters of fisheries, but these should be read as a codification rather than as a regress.

A truly integrated maritime policy can only take root if the concerns identified in this study are sufficiently addressed. This as a result will ensure and further enhance the coherence and consistency of the Union's external activities in the maritime field.

## INTRODUCTION

Sustainable development is at the heart of European Union (EU) policy-making.<sup>1</sup> The underlying objective is to ensure mutual reinforcement of economic growth, social welfare and environmental protection. The EU now has the opportunity to apply sustainable development to the oceans. To do so, it can build on its knowledge of the oceans and its extensive experience in maritime policy making and environmental protection. Oceans and seas, however, cannot be managed without the cooperation of third countries and relevant multilateral fora.<sup>2</sup> Many international organisations and regimes deal with maritime matters, such as maritime transport, energy, coastal regions, fisheries, the marine environment, maritime security or other relevant areas.

Examples of such international maritime organisations (IMAOs) include the International Maritime Organization (IMO), the Food and Agriculture Organization of the United Nations (FAO), the International Commission for the Conservation of Atlantic Tunas (ICCAT), the International Whaling Commission (IWC), the Helsinki Commission for the Protection of the Marine Environment of the Baltic Sea Area (HELCOM), the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and many others. EU maritime policy must be developed within that international context.<sup>3</sup>

In order for the EU's maritime policy to be effective, full account needs to be taken of the great variety of IMAOs in which the European Community (EC) participates. The Commission Action Plan accompanying the 2007 Communication stipulates that the Commission will produce "*an assessment of the situation of the EU within all the international organisations with maritime objectives, from the IMO to the IWC*".<sup>4</sup> This issue is crucial, both in terms of competences and the need for effective and coherent international cooperation, as well as for the development, implementation, and enforcement of international action on maritime issues in conformity with the EU's policy objectives.

The objective of the present study is to create a transparent overview of how the interests of the EU and its Member States are best represented and promoted in selected IMAOs and, where possible, to suggest mechanisms to ensure that the EU has a single voice on the international stage. The envisaged outcome is to present a state of play and provide recommendations to help facilitate better coherence amongst Community actors in respect to international agreements and organisations in the field of maritime policy.

The study analyses the impact of identified shortcomings on the coherence of the EU positioning in the international arena with regard to key maritime issues today and suggests options for improving the current situation. Reasons for Member State resistance to supporting an EU position are indicated where possible. Finally, the study also provides a brief overview of the changes the Treaty of Lisbon will or is likely to bring forward to the process of EU participation and coordination in IMAOs.

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<sup>1</sup> See, e.g., Communication from the Commission to the Council and the European Parliament, *On the review of the Sustainable Development Strategy: A platform for action*, COM(2005) 658 final, 13 December 2005.

<sup>2</sup> Commission, *Green Paper Towards A Future Maritime Policy for the Union: A European Vision of the Oceans and Seas*, COM(2006) 275, 7 June 2006, p. 4.

<sup>3</sup> *Ibid.*

<sup>4</sup> Commission Staff Working Document accompanying the Communication *An Integrated Maritime Policy for the European Union*, SEC(2007) 1278, 10 October 2007, p. 28.

The study is structured as follows. *Chapter 1* addresses the external dimension of the EU's integrated maritime policy, focusing on the distribution of competences on maritime issues (both internally and externally), the status of the Community in various IMAOs, the need for coordination in order to ensure unity and coherence of the EU's external action and the principles that have been developed in this respect by the European Court of Justice (ECJ). *Chapter 2* introduces the research methodology as well as the selected cases. *Chapter 3* presents an overview of the current state of play of the EC's formal status in a selection of important IMAOs. *Chapter 4* comprises in-depth case studies of the coordination processes in preparation for and during meetings of the following IMAOs: ICCAT, FAO, the United Nations General Assembly (UNGA), IMO and IWC. Taking the case studies of chapter 4 as a point of departure, *chapter 5* analyses in further depth the identified shortcomings as regards EU participation and coordination in IMAOs, and develops recommendations to enhance the EU's ability of speaking with a single voice in IMAOs. *Chapter 6* highlights the changes which the Treaty of Lisbon will entail once adopted and entered into force. Finally, a brief conclusion summarising the main findings of the study is provided.

*Annex I* contains a table detailing the current state of play of the formal status held by the EC in international agreements and IMAOs. *Annex II* provides an overview of contacted stakeholders.

## CHAPTER 1

### AN INTEGRATED MARITIME POLICY FOR THE EUROPEAN UNION: THE EXTERNAL DIMENSION

#### *1.1. The EU's Integrated Maritime Policy – External Priorities*

The sea is inextricably linked with the well-being of Europe. This is illustrated by the presence of two oceans and four seas: the Atlantic and Arctic Ocean, the Baltic, the North Sea, the Mediterranean, and the Black Sea. Many different types of activities are taking place on Europe's seas and oceans, of which shipping, ports and fisheries remain key maritime activities. Offshore energy (including oil, gas and renewables) and coastal and marine tourism generate massive revenues. The Community's policies that focus on the above areas are as of yet characterised by a sectoral approach.<sup>5</sup> Policies on maritime transport, fisheries, energy, surveillance and policing of the seas, tourism, the marine environment and marine research have been developed separately. This sectoral approach might hamper coordination and at times may lead to inefficiencies, incoherencies and conflicts of use.

As a result a more integrated approach which embraces all relevant policy areas is needed. The European Commission laid down its vision for an EU Integrated Maritime Policy (IMP) that covers all aspects of Europe's relationship with the oceans and seas in its 2007 Communication *An Integrated Maritime Policy for the European Union*.<sup>6</sup> The Commission's holistic approach aims to provide a coherent policy framework that will allow for the optimal development of all sea-related activities in a sustainable manner.<sup>7</sup> The European Council of 14 December 2007 welcomed the Communication and stressed that

*“[t]he future integrated maritime policy should ensure synergies and coherence between sectorial policies, bring added value and fully respect the principle of subsidiarity. Furthermore it should be developed as a tool to address the challenges facing Europe's sustainable development and competitiveness. It should take particularly account of the different specificities of Member States and specific maritime regions which should call for increased cooperation, including islands, archipelagos and outermost regions as well as of the international dimension.”*<sup>8</sup>

Among the priority action areas identified by the Commission for an EU integrated maritime policy is the promotion of Europe's leadership in international maritime affairs:

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<sup>5</sup> In the Commission's Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Guidelines for an Integrated Approach to Maritime Policy: Towards best practice in integrated maritime governance and stakeholder consultation*, COM(2008) 395 final, 26 June 2008, p. 6, it is observed that “[s]uch compartmentalisation of maritime governance continues to predominate the different levels of power at international, European, national, regional and local levels.”

<sup>6</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Integrated Maritime Policy for the European Union*, COM(2007) 575 final, 10 October 2007.

<sup>7</sup> *Ibid.*, p. 4.

<sup>8</sup> Presidency Conclusions, Brussels European Council 14 December 2007, available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/97669.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/97669.pdf) (accessed on 23 February 2009), para. 58.

*“The EU will work towards more efficient international governance of maritime affairs and effective enforcement of international maritime law, urging Member States to ratify the relevant instruments. It will promote coordination of European interests in key international fora.”<sup>9</sup>*

The Commission identified the following *external priorities* for IMP:

*“Access to international markets for Europe’s maritime industries and services, sustainable scientific and commercial exploitation of the deep seas, protection of global marine biodiversity, improvement of maritime safety and security, working conditions, reduced ship pollution and the fight against illegal activities in international waters.”<sup>10</sup>*

These external priorities touch upon several different policy areas of the Community and the Union. Securing access to international markets for Europe’s maritime industries and services, for instance, is of relevance to the Community’s customs, trade and transport policies. Sustainable scientific and commercial exploitation of the deep seas falls amongst others under EC environmental policy. Yet, this priority area intersects heavily with maritime affairs and the Common Fisheries Policy (CFP). Europe’s fishing industry has a vital interest in ensuring the conservation of marine ecosystems as all fishing and aquaculture activities depend on a plentiful scope of quality marine resources. The improvement of maritime safety and security as well as marine pollution prevention, preparedness and response falls within the mandate of the European Maritime Safety Agency (EMSA)<sup>11</sup>; maritime surveillance involves even more European agencies.<sup>12</sup> Maritime working conditions form part of the employment, social affairs and equal opportunity policies of the Community. Reducing pollution from ships is both part of the tasks of EMSA as well as of the Community’s environmental policy. The fight against illegal activities in international waters touches upon diverse areas from the Community’s CFP to the EU’s Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP).<sup>13</sup>

### *1.2. Distribution of Competences on Maritime Issues, Internally and Externally*

As in all areas of EC competence, the scope and exercise of Community competence on maritime issues is, by its very nature, subject to continuous development. Any general overview in this respect can be no more than a temporary reflection of the state of play at a given time, based on a comprehensive analysis of Community legislation and aided by a set of accepted principles of EC law.

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<sup>9</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Integrated Maritime Policy for the European Union*, *supra* note 6, p. 13.

<sup>10</sup> *Ibid.*

<sup>11</sup> See Regulation (EC) Nr. 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ L 208, 5 August 2002, p. 1, as amended. For a consolidated version, see [http://www.emsa.europa.eu/Docs/legis/regulation\\_1406-2002\\_-\\_consolidated.pdf](http://www.emsa.europa.eu/Docs/legis/regulation_1406-2002_-_consolidated.pdf).

<sup>12</sup> See Draft Council Conclusions on the Integrated Maritime Policy, Council Doc. 16503/1/08 REV 1, 5 December 2008, para. 4: apart from EMSA the conclusions mention the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), the Community Fisheries Control Agency (CFCA), the European Environment Agency (EEA), the European Defence Agency (EDA) and the centres for the coordination of the fight against drug trafficking – the Maritime Analysis and Operations Centre - Narcotics (MAOC-N), the Anti-Drug Coordination Centre for the Mediterranean (CECLAD-Med) and the coordination centre against drug trafficking in the Eastern Mediterranean.

<sup>13</sup> See recently, e.g., Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ L 301, 12 November 2008, p. 33.

Most of the competences in the field of maritime issues are shared between the Community and EU Member States. Throughout the years, however, the Community has enacted extensive legislation with regard to these issues and has acquired exclusive competence on several matters. Fisheries is such an area.<sup>14</sup> The Community's exclusive competence in the area of conservation of marine biological resources was recognised as early as 1972<sup>15</sup> and has more recently been confirmed in the Treaty of Lisbon (see *infra*, 6).<sup>16</sup>

Declarations of competence made at the time of the Community's accession to certain international agreements or IMAOs can prove helpful in determining the nature of the Community's competences on maritime issues. Even though such declarations should be regarded in their context and are merely a temporary and *ad hoc* reflection of EC competences in a given field, the ECJ has confirmed that they constitute "*a useful reference base*".<sup>17</sup> For instance, the Declaration concerning the competence of the EC concerning matters governed by United Nations Convention on the Law of the Sea (UNCLOS) confirms the exclusive nature of Community competence with regard to the conservation and management of sea fishing resources as well as with regard to maritime issues related to international trade.<sup>18</sup> Matters for which the Community shares competence with EU Member States include certain issues in the area of fisheries, such as research and technological development and development cooperation. Moreover, with regard to maritime transport, safety of shipping and prevention of marine pollution, the Community has, according to the UNCLOS Declaration, exclusive competence to the extent that the relevant provisions of the Convention or legal instruments adopted in the implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, as is the case with Community rules establishing only minimum standards, the Member States have competence, without prejudice to the Community competence in this field. Otherwise, competence rests with the Member States.<sup>19</sup> Attached to the Declaration is an Appendix listing relevant Community acts which refer to matters governed by UNCLOS, thus in fields of shared competence effectively precluding legislative action by the Member States for those matters. The listed acts cover such fields as maritime safety, prevention of marine pollution, protection and preservation of the marine environment, marine environment research and scientific and technological cooperation.

Specific areas of maritime concern that are on the agenda of various IMAOs and in which EC legislation has been adopted include, but are not limited to, safe management of ships<sup>20</sup>, port

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<sup>14</sup> ECJ, Joined cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279. See, for example, Communication from the Commission to the Council and the European Parliament, *Community Participation in Regional Fisheries Organisations (RFOs)*, COM(1999) 613 final, 8 December 1999, p. 15.

<sup>15</sup> Act concerning the Conditions of Accession and the Adjustments to the Treaties, annexed to the Treaty concerning the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community, OJ L 73, English Special Edition, 27 March 1972, p. 14.

<sup>16</sup> Art. 3(d) of the Treaty on the Functioning of the European Union (TFEU).

<sup>17</sup> ECJ, Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, para. 109.

<sup>18</sup> Declaration concerning the Competence of the European Community with regard to Matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the Implementation of Part XI of the Convention, 1 April 1998, OJ L 179, 23 June 1998, p. 130, point 1.

<sup>19</sup> *Ibid.*, point 2.

<sup>20</sup> Regulation (EC) Nr. 336/2006 of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation 3051/95, OJ L 64, 4 March 2006, p. 1.

State control<sup>21</sup>, ship-source pollution<sup>22</sup>, safety of navigation<sup>23</sup>, registration of passengers<sup>24</sup>, formalities connected with the arrival, stay and departure of ships<sup>25</sup> and international trade in endangered marine species.<sup>26</sup>

Once it has been established that the EC has competence on certain maritime issues, the Community can choose to exercise this competence not only internally by adopting legislation, but also externally by entering into binding agreements with third countries and international organisations. This holds true even if the relevant competence is shared, for what matters is the attribution, and thus the very existence of the competence, not its nature.<sup>27</sup>

Three different types of situations can be discerned. First, the EC Treaty in some of its provisions expressly authorises the Community to conclude international agreements. For example, the ECJ has interpreted Article 175(1) of the Treaty establishing the European Community (TEC) as the appropriate legal basis for conclusion, on behalf of the Community, of international agreements on protection of the environment, including the marine environment.<sup>28</sup> The nature of the competence concerned can also be indicated explicitly in this situation.

Second, it follows from the case-law of the ECJ that the Community not only has exclusive competence for the conclusion of an international agreement when its conclusion is expressly provided for in the EC Treaty, but also when and in so far as its conclusion by Member States may affect or alter the scope of rules adopted by the Community.<sup>29</sup> The nature of the competence of the EC to act externally in this case is exclusive to this extent. This has been confirmed by the 2006 *Lugano* Opinion of the ECJ, in which the Court stressed that the Community has exclusive competence to conclude international agreements where the conclusion of these agreements by Member States would be incompatible with the uniform application of EC law or where, given the nature of existing Community provisions, any agreement in the area concerned would necessarily affect the relevant Community rules.<sup>30</sup>

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<sup>21</sup> Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control), OJ L 157, 7 July 1995, p. 1, as amended.

<sup>22</sup> Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, OJ L 255, 30 September 2005, p. 11.

<sup>23</sup> Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208, 5 August 2002, p. 10.

<sup>24</sup> Council Directive 98/41/EC of 18 June 1998 on the registration of persons sailing on board passenger ships operating to or from ports of the Member States of the Community, OJ L 188, 2 July 1998, p. 35, as amended.

<sup>25</sup> Directive 2002/6/EC of the European Parliament and of the Council of 18 February 2002 on reporting formalities for ships arriving in and/or departing from ports of the Member States of the Community, OJ L 67, 2 March 2002, p. 31.

<sup>26</sup> Council Regulation 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ L 61, 3 March 1997, p. 1, as amended.

<sup>27</sup> *Commission v Ireland*, *supra* note 17, para. 93.

<sup>28</sup> ECJ, Opinion 2/00 [2001] ECR I-9713, para. 44 and *Commission v Ireland*, *supra* note 17, para. 90. See further, for example, Art. 133 TEC.

<sup>29</sup> ECJ, Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263 and *Kramer*, *supra* note 14. See further ECJ, Case C-405/92 *Mondiet* [1993] ECR I-6133. See also Art. 3(2) TFEU and *infra*, 6.

<sup>30</sup> ECJ, Opinion 1/03 [2006] ECR I-1145, para. 122, referring to *ERTA*, *supra* note 29, para. 31; ECJ, Opinion 1/94 [1994] ECR I-5267, paras. 95-96; ECJ, Case C-467/98 *Commission v Denmark* [2002] ECR I-9519, paras. 83-84. See further paras. 114-121 of the *Lugano* Opinion. The Court in this regard also pointed out that, in all the areas corresponding to the objectives of the EC Treaty, Article 10 TEC requires Member States to facilitate

Whether the EC competence to conclude an international agreement on this basis is exclusive, should be determined on the basis of a comprehensive and detailed analysis, not only of the area covered by Community rules and the provisions of the agreement envisaged, but also of the nature and content of these rules and provisions.<sup>31</sup> Further, it is also necessary to take into account “*not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis*”.<sup>32</sup> Finally, the ECJ has clarified that it is not necessary that the full domain at stake already be regulated internally. The test is whether the area “*is already covered to a large extent by Community rules*”.<sup>33</sup>

The progressive expansion of exclusive powers of the Community on maritime issues is thus reflected in the external field of EC competences as well. This has recently been confirmed by the ECJ with regard to Regulation (EC) Nr. 725/2004 on ship and port facility security, promulgated for the attainment of the Community objective of setting a common policy in the sphere of transport under Article 3(1)(f) TEC.<sup>34</sup> The Court established that the Community had acquired exclusive competence to assume international obligations in the area covered by that regulation.<sup>35</sup>

Third, the EC may also obtain the power to act externally if the Community’s competence to negotiate and conclude international agreements in a given domain is provided for in a legally binding internal Community act.<sup>36</sup> In this situation, the Community acquires exclusive competence to act on the international level. It has even been held by the ECJ that implied external Community competence can exist even though the internal competence of the EC has not yet been exercised, provided the external action is necessary to achieve one of the objectives referred to in the Treaties.<sup>37</sup>

The Community has exercised its external competence with regard to maritime issues by concluding a number of international agreements and by acceding to various international organisations, particularly in the field of fisheries. As such, the Community is a party to, *inter alia*, the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR)<sup>38</sup>, the Protocol concerning Mediterranean Specially Protected Areas and Biological Diversity in the Mediterranean<sup>39</sup>, UNCLOS<sup>40</sup> and ICCAT.<sup>41</sup> Further, the Community has

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the achievement of the Community’s tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. See Opinion 1/03, para. 119 and *Commission v Ireland*, *supra* note 17, para. 174. See further *infra*.

<sup>31</sup> Opinion 1/03, *supra* note 30, para. 133.

<sup>32</sup> *Ibid.*, para. 126, referring to ECJ, Opinion 2/91 [1993] ECR I-1959, para. 25.

<sup>33</sup> See Opinion 2/91, *supra* note 32, paras. 25-26.

<sup>34</sup> Regulation (EC) Nr. 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security, OJ L 129, 29 April 2004, p. 6.

<sup>35</sup> ECJ, Judgment of 12 February 2009 in Case C-45/07, *Commission v Greece* [2009] ECR I-0000.

<sup>36</sup> Opinion 1/94, *supra* note 30, para. 95.

<sup>37</sup> ECJ, Opinion 1/76 [1977] ECR 741, para. 4.

<sup>38</sup> Council Decision 98/249/EC of 7 October 1997 on the conclusion of the Convention for the protection of the marine environment of the north-east Atlantic, OJ L 104, 3 April 1998, p. 1.

<sup>39</sup> Council Decision 1999/800/EC of 22 October 1999 on concluding the Protocol concerning specially protected areas and biological diversity in the Mediterranean, and on accepting the annexes to that Protocol (Barcelona Convention), OJ L 322, 14 December 1999, p. 1.

<sup>40</sup> Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, OJ L 179, 23 June 1998, p. 1.

<sup>41</sup> Council Decision 86/238/EEC of 9 June 1986 on the accession of the Community to the International Convention for the Conservation of Atlantic Tunas, as amended by the Protocol annexed to the Final Act of the

also joined IMAOs such as the Northwest Atlantic Fisheries Organization (NAFO) and the General Fisheries Commission for the Mediterranean (GFCM).

### *1.3. Status of the Community in IMAOs*

The legal status of the Community in international organisations, including IMAOs, is regulated on an *ad hoc* basis. The status of the Community depends on the agreement reached with the relevant organisation and correspondingly varies between full member, full participant and observer. The Community's status should ideally reflect the distribution of competences with Member States and should thus be stronger in areas of exclusive Community competence such as trade and fisheries and in areas of shared competence where EC competence is predominant having regard for instance to the extent of applicable EC legislation.<sup>42</sup> Where EU Member States would solely remain members of IMAOs dealing with issues within the exclusive or predominant competence of the Community, this competence is disregarded, both internally and externally.<sup>43</sup> Moreover, an inaccurate reflection of Community competences through EC status in IMAOs may also prove confusing for third countries, who could interpret the (sole) membership of EU Member States in a given IMAO as an expression of their national competences, whereas the actual competences may have been transferred to the Community.

Most of the treaties constituting international organisations merely provide for States to become members, thus limiting the legal status of the EC to that of observer or full participant. The exact content of the statuses of observer and full participant depends on the decision adopted by the relevant body of the international organisation. Generally speaking, an *observer* faces more severe restrictions than a full participant, which is therefore also sometimes referred to as an 'enhanced observer'. Observers may only be invited to formal meetings and may typically intervene only after full members and full participants have made their interventions. Further, observers may not propose amendments, preside over meetings or serve as rapporteur. These rights may, however, be granted to *full participants*. Moreover, full participants may also partake in informal meetings, having the ability to speak as other participants, without facing restrictions as to the length of interventions. The EC enjoys such 'enhanced observer' status in *inter alia*, the United Nations Commission on Sustainable Development (CSD), the Council of Europe, the International Civil Aviation Organization (ICAO) and the Organization for Economic Co-operation and Development (OECD).<sup>44</sup> Obtaining full participant status can be valuable in cases where mixity remains important but, as a rule of thumb, full membership should always be strived for in areas of exclusive EC competence.

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Conference of Plenipotentiaries of the States Parties to the Convention signed in Paris on 10 July 1984, OJ L 162, 18 June 1986, p. 33.

<sup>42</sup> See in this respect Opinion 1/76, *supra* note 37, paras. 11-12. See also I. Govaere, J. Capiu and A. Vermeersch, "In-Between Seats: The Participation of the European Union in International Organizations", *European Foreign Affairs Review* (2004), 155, at 172-173, noting that "it seems to be logical that the EC should become a member of an international organization whenever it is competent. [...] Accession by the EC should definitely be the case in the presence of exclusive EC competence."

<sup>43</sup> See ECJ, Opinion 1/75 [1975] ECR 1355. See further I. Govaere, J. Capiu and A. Vermeersch, *supra* note 42, 172-173.

<sup>44</sup> See F. Hoffmeister, "Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies", *Common Market Law Review* (2007), 41, at 54-56.

With the political backing of the Council, the Commission may formulate a request to become an observer or full participant to an IMAO under Article 302 TEC, which provides that the Commission shall maintain all appropriate relations with all international organisations.<sup>45</sup> The procedure for the EC to become a full member of an IMAO, however, typically requires either that it is agreed during the drafting process of the instrument or an amendment to the constituent treaty of the latter since, as indicated above, membership has often been reserved for States. In this regard, the Commission must, pursuant to Article 300(1) TEC, first be authorised by the Council to conduct negotiations with the IMAO in question. These negotiations shall be conducted in consultation with special committees appointed by the Council and within the framework of such negotiation directives as the Council may see fit. The Commission to this end makes recommendations to the Council. The negotiations conducted by the Commission on behalf of the Community should result in an amendment to the constituent treaty of the IMAO, which usually takes the form of the insertion of a Regional Economic Integration Organisation (REIO) clause, allowing for such organisations to become a full member. An alternative proposal could be the insertion of a clause allowing specifically the EC to join the international organisation. Additionally, rights and obligations akin to membership *ad interim* may be granted to the EC in the process of negotiations, awaiting full membership through amendment of the constituent treaty.<sup>46</sup> The actual agreement with the international organisation shall be concluded by the Council upon proposal from the Commission, according to Article 300(2) TEC.

#### *1.4. Coordination in order to ensure Unity and Coherence*

The Treaty on European Union stresses the need for the Council and the Commission to cooperate in order to ensure the coherence and consistency of the Union's external activities as a whole in the context of its external relations.<sup>47</sup> The notion of coherence in the context of EU external activities is multifaceted. It entails, first, the absence of contradiction between the international actions of the EU and its Member States and, second, a positive duty of all EU institutions and Member States to cooperate on the international scene.<sup>48</sup> The processes of EU coordination in the framework of IMAOs can be described as follows. For matters falling within exclusive competence, a '*Community position*' will be established.<sup>49</sup> For matters of shared competence, the Member States and the Community must cooperate in order to adopt a '*common position*' to ensure the unity of external representation of the Community and EU Member States.<sup>50</sup> When the international organisation adopts decisions having legal effects, the procedure of Article 300(2) second paragraph TEC needs to be followed. Thus, in bodies established under an IMAO or by international agreements concluded under the auspices of an IMAO, it is for the Council to adopt the Community position upon proposal from the

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<sup>45</sup> *Ibid.*, 58-59.

<sup>46</sup> See, for example, the decision of the Council of the World Customs Organization (WCO) of 30 June 2007 to accept the request by the European Community to join the WCO as of 1 July 2007: EC Membership in the World Customs Organization – Ensuring Community Coordination, Council Doc. 8594/08, 22 April 2008.

<sup>47</sup> Art. 3(2) of the Treaty on European Union (TEU).

<sup>48</sup> See on the notion of coherence in the Union's external relations, *inter alia*, C. Hillion, "Tous pour un, un pour tous! Coherence in the external relations of the European Union", in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford, OUP, 2008), 10; P. Gauffier, "Horizontal Coherence and the External Competences of the European Union", *European Law Journal* (2004), 23.

<sup>49</sup> See also, e.g., Council Decision 2007/668/EC of 25 June 2007 on the exercise of rights and obligations akin to membership *ad interim* by the European Community in the World Customs Organisation, OJ L 274, 18 October 2007, p. 11, eighth recital.

<sup>50</sup> See for instance for WCO, Council Doc. 8594/08, *supra* note 46, Annex "WCO Membership: Ensuring Community Coordination. Guidelines", point 8; compare the formulation in Council Decision 2007/668/EC, *supra* note 49, eighth recital.

Commission. If the relevant decision lacks legal effects, the Community position is typically adopted by the Commission after consultation with the Council.<sup>51</sup>

On issues of exclusive Member State competence dealt with in the framework of an IMAO, Member States must endeavour to adopt a ‘*coordinated position*’ among each other.<sup>52</sup>

Community positions are to be expressed in principle by the Commission, but this is, at least in the case of the IMO, complicated by the status matter, as the Community as such is not recognized in the IMO and the Commission itself only has observer status.<sup>53</sup> In practice, Member States have the possibility to speak in order to support or further develop the Community position.<sup>54</sup> In areas of shared competence, depending on the thrust of the matter, the common position is expressed by either the Presidency of the Council (or another Member State, if the Presidency is not a member of the IMAO in question) or the Commission. The Commission not only intervenes wherever there is exclusive Community competence, but also where there is predominant Community competence as well as where there is a direct relation with the *acquis communautaire*. Member States may again speak in order to support/develop the common position.<sup>55</sup> Finally, in areas of exclusive national competence, the Presidency (or another Member State in the situation mentioned above) expresses the coordinated position.

The comport of Member States with regard to the adoption and expression of Community, common and coordinated positions is dictated by their duty of loyal cooperation, as enshrined in Article 10 TEC<sup>56</sup>, and by what the ECJ has termed “*the requirement of unity in the international representation of the Community*”.<sup>57</sup> Especially for international negotiations touching on shared competences, the ECJ has repeatedly stressed that it is essential to ensure close cooperation between the Member States and EC institutions, “*both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into. [...] The Community institutions and the Member States must take all necessary steps to ensure the best possible cooperation in that regard*”.<sup>58</sup>

The ECJ also stressed the importance of loyal cooperation in the *MOX (mixed oxide) Plant* case in fulfilling the commitments undertaken by EU Member States and the Community under shared competence when concluding a mixed agreement, *in casu* the UN Convention on the Law of the Sea.<sup>59</sup> In this regard, reference can be made to the *FAO compliance* case, in

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<sup>51</sup> See, for example, for the Art. 133 Committee, ECJ, Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para. 14.

<sup>52</sup> See, for instance, Procedural framework for the adoption of Community or common positions for IMO related issues and rules governing their expression in IMO: Presidency suggestion, Council Doc. 9676/05, 3 June 2005, Annex, point 5.1. See further Annex to Council Doc. 8594/08, *supra* note 46, point 9.

<sup>53</sup> See for the practice at IMO, *infra* 4.3.3.

<sup>54</sup> Annex to Council Doc. 8594/08, *supra* note 46, point 10.

<sup>55</sup> *Ibid.*, point 11.

<sup>56</sup> Art. 10 TEC provides that “*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.*”

<sup>57</sup> ECJ, Ruling 1/78 [1978] ECR 2151, paras. 34-36; Opinion 2/91, *supra* note 32, para. 36; Opinion 1/94, *supra* note 30, para. 108; ECJ, Case C-25/94 *Commission v Council* [1996] ECR I-1469, para. 48.

<sup>58</sup> *Commission v Council*, *supra* note 57, para. 48. See further *ERTA*, *supra* note 29, paras. 20-31; Ruling 1/78, *supra* note 57, paras. 34-36; Opinion 2/91, *supra* note 32, para. 36; Opinion 1/94, *supra* note 30, para. 108.

<sup>59</sup> *Commission v Ireland*, *supra* note 17, paras. 174-175. The Court in this case noted that the fact that the competence at stake relating to the protection of the environment was in principle shared with the Member

which the ECJ annulled a decision of the Council granting Member States the right to conclude a mixed agreement, as the essential object of the agreement was compliance with international conservation and management measures by fishing vessels on the high seas, a matter falling within Community competence.<sup>60</sup>

It is well-established case-law of the ECJ that the duty of loyal cooperation is of general application and does not depend on whether the Community competence concerned is exclusive or not, or on any right of the Member States to enter into obligations towards non-member countries.<sup>61</sup> The ECJ has further consistently held that Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action.<sup>62</sup> The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of concerted Community action at the international level. Accordingly, this requires if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the EU institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation.<sup>63</sup>

As very recently confirmed by the ECJ in a dispute revolving around maritime affairs, the obligation under Article 10 TEC entails both a positive duty to take all appropriate measures to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the EU institutions, and a negative obligation to abstain from any measure which might jeopardise the attainment of the objectives of the Treaty.<sup>64</sup> In the context of IMAOs this implies, *inter alia*, that a Member State can therefore not submit national positions on matters falling within the exclusive or the predominant competence of the Community unless expressly authorised to do so by the latter.<sup>65</sup>

Further, the legal status of the Community in an IMAO in itself does not affect the issues of competence or the need for coordination. Indeed, as the ECJ has very recently expressly held with respect to IMO, “[t]he mere fact that the Community is not a member of an international organisation in no way authorises a Member State, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty. [...] Moreover, the fact that the Community is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the

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States (Art. 176 TEC) could not preclude the Community from exercising this competence externally by entering into binding international agreements on the subject on the basis of Art. 175(1) TEC. This is what the Community had done by acceding to UNCLOS. See para. 90 *et seq.* of the judgment. See further S. Boelaert-Suominen, “The European Community, the European Court of Justice and the Law of the Sea”, *The International Journal of Marine and Coastal Law* (2008), 676-677.

<sup>60</sup> *Commission v Council*, *supra* note 57. On this case, see further *infra*, 4.2.2.

<sup>61</sup> ECJ, Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, para. 58; ECJ, Case C-433/03 *Commission v Germany* [2005] ECR I-6985, para. 64.

<sup>62</sup> ECJ, Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, para. 28; *Commission v Luxembourg*, *supra* note 61, para. 59; *Commission v Germany*, *supra* note 61, para. 65.

<sup>63</sup> *Commission v Luxembourg*, *supra* note 61, para. 60; *Commission v Germany*, *supra* note 61, para. 66.

<sup>64</sup> See *Commission v Greece*, *supra* note 35, para. 16.

<sup>65</sup> See, for example, Council Doc. 9676/05, *supra* note 52, Annex, point 3.2. See further *Commission v Greece*, *supra* note 35, para. 14.

*Member States acting jointly in the Community's interest.*'<sup>66</sup> In external relations, including in IMAOs, the principles of loyal cooperation and unity in the international representation of the Community are therefore powerful tools to ensure that EU Member States behave consistently with their Community law commitments. These principles thereby also serve to bridge gaps between the Community's competence and its actual legal status (or absence thereof) in IMAOs.<sup>67</sup>

It is also well-established case-law, recalled by the ECJ in the aforementioned recent judgment, that Article 10 TEC also puts an obligation to cooperate upon EU institutions both towards Member States and towards each other. There are two implications in this regard. First, EU institutions cannot, for example, prevent a discussion within an IMAO on the sole ground that a proposal is of a national nature, and they should cooperate to ensure proper debate on the matter concerned.<sup>68</sup> Second, it could be argued that, when the Council fails to act upon a recommendation from the Commission under Article 300(1) TEC to open negotiations with an IMAO in order to amend the latter's constituent treaty allowing for the insertion of a REIO clause<sup>69</sup>, this could be seen as a breach of the Council's obligation to cooperate if the IMAO deals with matters falling under shared competences and *a fortiori* if it deals with matters covered by exclusive Community competences.<sup>70</sup> Indeed, the ECJ has held that the Community and its Member States are "*under a duty to use all the political and legal means at their disposal*" to ensure the participation of the EC in an international organisation that decides on issues of EU competence.<sup>71</sup> This could include an action by the Commission under Article 232 EC to institute proceedings against the Council before the ECJ for failure to act, in infringement of the EC Treaty.

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<sup>66</sup> *Commission v Greece*, *supra* note 35, paras. 30-31. Compare Opinion 2/91, *supra* note 32, para. 5, holding that, even though the Community could not conclude a given ILO Convention, "*its external competence may, if necessary, be exercised through the medium of the Member States acting jointly in the Community's interest*".

<sup>67</sup> See also P. Eeckhout, *External relations of the European Union: Legal and constitutional foundations* (Oxford, OUP, 2004), 201 and 203, noting that "[w]here an international organization takes decisions on matters coming within the Community's exclusive competences, the Member States are in any event required to adopt a common position and will form a block. Whether the expression of such a common position takes place by way of Member State voting, or by way of a Community vote, should not in any way alter the outcome of the process."

<sup>68</sup> *Commission v Greece*, *supra* note 35, para. 25.

<sup>69</sup> This is the case with IMO and IWC. See *infra*.

<sup>70</sup> F. Hoffmeister, *supra* note 44, 59-60 and P. Eeckhout, *supra* note 67, 214.

<sup>71</sup> *Kramer*, *supra* note 14, paras. 44-45.

## CHAPTER 2

### RESEARCH DESIGN

This chapter provides an overview of how the research for the present study was conducted and highlights the methodology that was employed in the course of the study. To this end the chapter discusses the focus of the study (2.1), the process of mapping the state of play during the first phase of the project (2.2), the case selection process and a brief introduction to the selected cases (2.3) and an overview of the sources and materials used in the study, including how it was obtained and processed (2.4). Finally, the chapter concludes by outlining the analytical framework that was created and applied with the view of formulating recommendations to enhance the ability of the EU to speak with a single voice (2.5).

#### *2.1. Focus*

In line with its objectives (see *supra*, Introduction) the study takes a closer look at the formal position the EC currently holds in various IMAOs and presents an overview thereof in a schematic representation of the state of play in this respect. A typology of cases is established on the basis of concrete examples and cases are identified where EC status is not consistent with existing Community competence.

The internal process of preparing for EU interventions in IMAOs is analysed in detail, explicating the role played by EU actors (Presidency, European Commission, Member States) as well as by other relevant stakeholders and civil society, thereby taking into account the existing practices of stakeholders' involvement in international negotiations. The study also examines whether the mechanisms in place ensure a timely and smooth communication and coordination between all the actors involved in defining the EU position, and whether the outcome of this coordination corresponds to EU policy objectives.

In addition, the study provides an in-depth analysis of EU practices with regard to the management of interventions such as EU coordination practices in different settings of IMAOs including open debates, negotiations or elections. This includes an analysis of the composition of the Community delegation and the role of each participant based on the distribution of competences. A distinction is made between policy coordination decided in the Council Working Groups and coordination on the spot. Further, an assessment is made of how EU interventions take place in practice, whether this has proven successful, and to what extent the Member States act in a unified manner.

#### *2.2. Mapping the State of Play*

On 25 September 2008 a kick-off meeting was held in Brussels, organised by the Commission's Directorate-General for Maritime Affairs and Fisheries (DG MARE) and attended by officials from the Directorates-General MARE, External Relations (DG RELEX), Transport & Energy (DG TREN), Enlargement (DG ELARG), Environment (DG ENV) and the Commission Legal Service (SJ). At this meeting the study plan was presented and a first exchange of ideas regarding the case studies was held.

The kick-off meeting was followed by a series of explorative interviews with Commission officials from DG MARE and DG ENV with the view of gathering general information on relevant case studies.

In the first phase of the project a state of play was drawn up in order to shed light on the different legal statuses the EC holds in the various IMAOs. The mapping of EC participation in IMAOs was based on information regarding the ratification of major international agreements relevant for maritime policy. This was made available by the Commission (DG MARE). The legal status is in itself an important determinant for EC participation within IMAOs and was used as one of the selection criteria for the case study research.

### *2.3. Case Selection*

The state of play made clear that the efficiency and effectiveness of EU coordination practices in IMAOs is very much dependent on a wide range of institutional factors such as the Community's legal status and the nature of measures adopted within IMAOs. Further, procedural aspects including the legal basis for coordination procedures and provisions governing the expression of positions within IMAOs seemingly also impact the Union's ability to coordinate effectively. This was confirmed by information gathered from the various explorative interviews.

The case selection process entailed a rigorous qualitative analytical exercise to yield insights into where the identified factors discussed above, impacting upon the ability of the EU to speak with a single voice, are prevalent. Correspondingly, the following cases have been selected.

#### *(i) International Commission for the Conservation of Atlantic Tunas*

The International Commission for the Conservation of Atlantic Tunas deals with one of the most valuable marine resources and as such is of great importance to the EU. ICCAT was established by the 1966 International Convention for the Conservation of Atlantic Tunas (ICCAT Convention), to which currently 47 parties have acceded. The EC became a member of ICCAT on 14 November 1997, prompting the withdrawal of EU Member States France, Portugal, Spain, Italy and the United Kingdom.<sup>72</sup> Cyprus and Malta also withdrew upon their accession to the Union in 2004. The full and exclusive nature of the Community's legal status in ICCAT makes for an interesting case to study in detail.

#### *(ii) Food and Agriculture Organization and United Nations General Assembly*

Important fora in the areas of fisheries and law of the sea are the Food and Agriculture Organization and the United Nations General Assembly. The EC has full membership status in the FAO, which it obtained subject to certain inhibiting conditions. The status of the Community in UNGA is limited to that of observer. UNGA adopts two annual resolutions on maritime issues (fisheries and law of the sea). Furthermore, a growing number of other fora in the context of the United Nations discuss various maritime issues that are of interest to the EC. The FAO was selected because of the concurrent membership of the EC and EU Member States and because of the impact of institutional limitations on Community participation. This

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<sup>72</sup> France and the UK are still contracting parties to ICCAT, however, with respect to their overseas territories not governed by the EC Treaty. See *infra*.

is contrasted with the more informal process of EU participation and coordination within UNGA and various other fora on maritime affairs.

*(iii) International Maritime Organization*

The International Maritime Organization discusses many issues of great interest to the EU, prompting a substantive body of EU law adopted on matters falling within the scope of this IMAO. Nevertheless, the EC is yet to be granted an official legal status in IMO and the role of the Commission is limited to that of permanent observer. Given the discrepancy between the importance of issues discussed within IMO to the EU and the limited possibilities of formal Community participation therein, an accurate understanding of the process of coordination in this IMAO is vital to gaining insights into how the shortcomings in EU coherence can be addressed.

*(iv) International Whaling Commission*

The EC has observer status in the International Whaling Commission. Given the exclusive nature of Community competence in the area of conservation of marine biological resources and the importance attached by the EU to the protection of global marine biodiversity, it was thought relevant to analyse the process of Community participation and coordination within IWC, taking into account the limits imposed by its observer status.

*2.4. Case Analysis*

The selected case studies were performed on the basis of information gathered from extensive literature review and in-depth interviews with officials from the various Commission services involved including DG ENV, MARE, TREN and the Commission Legal Service.

Relevant literature was taken from a host of scientific databases, catalogues and websites including Libis, Librisource, Web of Science, College of Europe Library Bruges Online, Springer Link, J-Stor. The websites of the European Commission, the Council and the European Parliament, Wiley Interscience, Econlit, Sciencedirect, EBSCOhost and MetaPress were also used as reference points. Legal information was primarily drawn from case-law of the ECJ, EUR-Lex, PreLex, ECLAS, Westlaw, Hein Online and the Peace Palace Library.

The information obtained from these sources was subsequently complemented by interviews with other relevant stakeholders on the international maritime stage by means of semi-structured questionnaires.<sup>73</sup> Interviews were held with Member State representatives from national delegations at the selected IMAOs and Member State officials who took part in the preparatory coordination process within the EU. Officials from the EU Council General Secretariat were consulted for their role in coordinating the views and actions from the various EU actors involved, both before and during sessions of the selected IMAOs. Further information on these sessions was drawn from interviews with the relevant IMAO secretariats. Additional interviews were held with Commission permanent representatives to IMO and FAO in the light of their liaison roles. With respect to the changes that will be brought forward by the Treaty of Lisbon, further interviews were conducted with an EU

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<sup>73</sup> The questionnaires aimed to gain insight into the role of each participant during preparations for and deliberations during meetings of the IMAO in question. Specific questions centred on devising possible suggestions for improvement of the EU coordination process and the development of mechanisms to ensure that the EU speaks with a single voice.

Council Legal Service Director and the Head of Unit for the Secretariat of the Committee on Fisheries of the European Parliament. The information obtained from these interviews was processed in short functional reports and incorporated into the analysis of the selected case studies.

Each case study consists of four parts. The first part gives a brief overview of the specific characteristics of the selected IMAO, including the organisation's relevance to the maritime field and the nature of the measures adopted. The second part of each case study describes the official status of the EC in the IMAO and the nature of the Community competences on the issues falling within the activities of the organisation. The third part provides an analysis of the law and practice of EC participation and coordination within the specific IMAO. The main findings relevant to the IMAO concerned and to the objectives of the present study are briefly summarised in the fourth part of each case study.

### *2.5. Shortcomings and Recommendations for Improved EU Coherence*

The findings from the selected cases were subsequently analysed with a specific focus on factors that may inhibit the process of EU coordination and on elements that can serve to explain Member State resistance to supporting an EU position. Specific and additional research was conducted for this purpose pursuant to the process described in the previous section. Several inhibiting factors were identified, described and analysed for their impact upon EU coherence in the international arena with regard to key contemporary maritime issues. The findings from this analysis were then taken as the basis for formulating a series of policy recommendations. These recommendations should help facilitate the EU to overcome the identified shortcomings and ensure that the EU has a single voice on the international stage.

## CHAPTER 3

### MAPPING THE OFFICIAL STATUS OF THE EC

The table in Annex I presents an overview of the participation of the EC within selected international agreements and IMAOs. The overview covers the following key policy areas: (i) law of the sea, (ii) marine resources and environment, (iii) maritime safety and security and (iv) seafarers' rights. A number of these policy areas are subdivided into more specific themes. For marine resources and environment these are: conservation and environment, living resources, and prevention and control of maritime pollution. The area of maritime safety and security is further subdivided in vessel safety, safety of navigation-shipping-traffic, liability and compensation, maritime security-illegal activities and nuclear protection.

The table shows that the EC participates within the IMAOs according to differing forms of legal status. As indicated previously (*supra*, 1.3), the legal status of the EC in IMAOs can vary between (i) exclusive membership, (ii) full membership along with (all or some) EU Member States, (iii) full participant status or (iv) observer status (permanent or *ad hoc*). Further, instances occur where the EC has no official legal status in an IMAO, even in areas largely falling within Community competence. The table further indicates the international agreements covering maritime issues to which the EC is a contracting party to and identifies those EU Member States that have also acceded to it.

The table in Annex I should be read as follows: from left to right information is presented on the acronym of the IMAO or agreement, its zone of impact (i.e. regional/global range) the year the agreement or constituent treaty was adopted, the year it came into force, the full title of the agreement or IMAO, the contracting parties and the status of the EC with respect to the agreement or IMAO in question.

A few examples may serve to clarify the functioning of the table. UNCLOS is a first example (see Annex I, 0).<sup>74</sup> Starting from the top left of the table, it can be seen that UNCLOS has a global range, was adopted in 1982 and came into force twelve years later. The treaty has been ratified by the EC, all EU Member States and a large majority of other UN Member States. The EC is a contracting party to UNCLOS and has observer status in UNGA. The EC thus acts in its capacity of contracting party for matters governed by UNCLOS, but is limited by its observer status in UNGA for matters falling outside the scope of UNCLOS.<sup>75</sup>

Examples where either the EC or the Commission has a status in the depositary organisation but where the Community is not a contracting party to the constituent treaty, include the International Maritime Organization (2.1). As the table shows, the IMO has a global range, its constituent treaty was adopted in 1948 and came into force in 1958.<sup>76</sup> All EU Member States have become member of IMO, as have many other States. Due to the absence of a clause providing for the accession of Regional Economic Integration Organisations (REIOs) the EC

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<sup>74</sup> Unless indicated otherwise, all references in the present chapter refer to the place of the relevant IMAO or international maritime agreement in the table in Annex I.

<sup>75</sup> See *infra*, 4.2.4.

<sup>76</sup> The 1948 Convention of the Inter-Governmental Maritime Consultative Organization established the Organization by the same name, which was changed to International Maritime Organization in 1982. The name of the 1948 Convention was simultaneously amended to 'Convention on the International Maritime Organization'.

has been unable to join IMO and has no formal status in IMO as such. Permanent observer status in IMO was however granted to the European Commission. After its formation, IMO has become the depositary for many international agreements. Examples include the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPC) of 1971 (2.3), the Convention on the International Regulations for Preventing Collisions at Sea (COLREG) of 1972 (2.2), the International Convention for the Prevention of Marine Pollution from Ships (MARPOL) of 1973 (1.3.1), the International Convention for the Safety of Life at Sea (SOLAS) of 1974 (2.1), the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL) of 1974 (2.3), the Convention on Limitation of Liability for Maritime Claims (LLMC) of 1976 (2.3), the Convention on the International Maritime Satellite Organization and Operating Agreement (INMARSAT) of 1976 (2.2), the Civil Liability Convention (CLC) of 1992 (2.3) and the International Convention on the Control of Harmful Anti-fouling Systems on Ships of 2001 (1.3.1). None of these agreements include the EC as a contracting party.<sup>77</sup>

The official status of the EC depends on a number of factors. First, legal obstacles can prevent the EC from acceding to an international agreement as a full contracting party or as a full member of an IMAO. The necessary precondition for joining an international agreement or IMAO is, as it may be recalled, the existence of a clause in the agreement or constituent treaty that allows for regional economic integration organisations to become a party.<sup>78</sup> In the absence of such a REIO clause it is not possible for the EC to become a contracting party to the agreement or a full member of the organisation, as is demonstrated by the cases of IMO and IWC (1.2.2). In view of the absence of a REIO clause the status of the EC in these organisations is limited. International agreements that do not allow REIOs to accede as a contracting party include the Antarctic Treaty (1.1.2) of 1959 and the Convention on Wetlands of International Importance especially as Waterfowl Habitats (RAMSAR) of 1971 (1.1.1). In principle, a lack of legal status of the EC in an IMAO does not as such preclude the Community from becoming a contracting party to international agreements concluded under the auspices of the latter organisation. However, examples where this has occurred are very rare as most agreements do not include a REIO clause. Conventions to which the EC has acceded but where the Community has observer status at the depositary organisation include the Convention on Biological Diversity (CBD) of 1992 (1.2.2) and the Convention for the Protection of the Ozone Layer (Vienna Convention) of 1985 (1.3.1).

A second factor to take into account is the distribution of competences within the area covered by the relevant international agreement or IMAO. The Community is full and sole member (i.e. without concurrent membership of EU Member States) in most Regional Fisheries Management Organisations (RFMOs) (1.2.1), due to its exclusive competence in the field of fisheries.<sup>79</sup> Agreements in areas such as other living resources (non-fisheries)

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<sup>77</sup> The INMARSAT Convention deserves some additional clarification. Originally, this Convention was administered by the IMO. At its Twelfth Session in April 1998, restructuring amendments to the INMARSAT Convention were adopted, which entered into force on 31 July 2001. Pursuant to these amendments, the name of the International Maritime Satellite Organization (Inmarsat) became the International Mobile Satellite Organization (IMSO). The Commission has observer status subject to invitation in IMSO, which in turn acts as an observer at IMO meetings, as does the Commission.

<sup>78</sup> In certain cases Community membership was not made possible by a REIO clause but by a clause allowing customs or economic unions to acquire membership. This is the case for the WCO: see *supra* note 44.

<sup>79</sup> The EC is the sole member of the following RFMOs: ICCAT (France and the UK are still members of ICCAT, albeit only with respect to their territories not governed by the EC Treaty), the Northwest Atlantic Fisheries Organization (NAFO) (Denmark and France are member with respect to overseas territories), the North East Atlantic Fisheries Commission (NEAFC) and the North Atlantic Salmon Conservation Organization

(1.2.2) prevention and control of maritime pollution (1.3) and maritime security-illegal activities (2.4) are typically concluded by the EC alongside (all or some) EU Member States. Membership rights are then distributed and exercised accordingly.

Whether the scope of EC competence is accurately reflected in the Community's legal status in an IMAO will mainly depend on considerations of a political nature. In areas of strong national interest for EU Member States, the Community will generally find it harder to obtain full membership status, even in the case of substantive competences in the field concerned.<sup>80</sup> Strong national considerations will typically complicate both the internal EU procedure between the Commission and the Council/EU Member States to agree on the negotiating mandate and the external procedure of negotiations within the IMAO concerned and with the other contracting parties/third countries. In case the EC succeeds in obtaining membership status, membership rights will typically be exercised on an alternative basis with EU Member States, as is shown by the example of the FAO.<sup>81</sup>

*Table 3.1: Overview of EC Participation in IMAOs according to Legal Status*

<b>Legal Status</b>	<b>Name of Agreement / Organisation</b>
Contracting party / full member (EC)	ICCAT, NAFO, NEAFC, NASCO, IOTC, WCPFC, SEAFO
Contracting party / full member (EC + MS)	UNCLOS, Part XI UNCLOS, EIA, OSPAR, HELCOM, BARCOM, FAO, UNFSA, GFCM/FAO, IBSFC, CCAMLR, CMS, CBD, AIDCP, Vienna Conv., Basel Conv., UNFCCC, Rotterdam Conv., Bonn Agr., Lisbon Agr., TBEIA, UN Conv. Illicit Traffic Narcotic Drugs, UN Conv. Transnational Organised Crime, Nuclear Safety, Safety on spent Fuel
Full participant	CSD
Observer (* Observer status European Commission)	UNGA, RAMSAR, Cartagena Conv., UNEP, Bucharest Commission, CCSBT <sup>82</sup> , IWC, CITES, IATTC <sup>83</sup> , IMO*, UNCND, IAEA, ILO
No recognised status	Antarctic Treaty

(NASCO) (Denmark is member with respect to overseas territories), the Indian Ocean Tuna Commission (IOTC) (France and the UK are members of IOTC with respect to their territories not governed by the EC Treaty), the Western and Central Pacific Fisheries Commission (WCPFC) (France is member with respect to overseas territories) and the South East Atlantic Fisheries Organisation (SEAFO). See further Communication from the Commission to the Council and the European Parliament, *Community Participation in Regional Fisheries Organisations (RFOs)*, *supra* note 14.

<sup>80</sup> An example in this respect is IWC. *See infra*, 4.4.

<sup>81</sup> *See infra*, 4.2.3.

<sup>82</sup> The EC is a Cooperating Non-Member of the Commission for the Conservation of Southern Bluefin Tuna (CCSBT).

<sup>83</sup> The EC is a Cooperating Non-Party to the Inter-American Tropical Tuna Commission (IATTC). Also, Spain has been authorised by the Council to accede to the Convention establishing the Inter-American Tropical Tuna Commission on a temporary basis pursuant to Council Decision 1999/405/EC of 10 June 1999 (OJ L 155, 22 June 1999, p. 37) pending the entry into force of the Antigua Convention that enables regional economic integration organizations whose vessels fish for fish stocks covered by the Convention to accede.

In the area of conservation the EC is often limited to that of observer status and is correspondingly limited with regard to its participatory rights (1.1). However, the EC is a contracting party to a number of regional sea conventions such as the Convention for the Protection of the Marine Environment of the North-East Atlantic and the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea of 1992 (1.1.2). EC participation is strongest in the field of fisheries (1.2.1), which is a reflection of its exclusive competence in the area. With regard to other living resources (non-fisheries) (1.2.2) the EC is often a contracting party to the relevant international agreement with observer status in the depositary organisation.<sup>84</sup> The same is true for EC participation in the area of prevention and control of maritime pollution (1.3). Further, in spite of significant Community legislation in the field of maritime safety (an area falling within the scope of IMO)<sup>85</sup>, the EC is conspicuously absent as a contracting party to IMO conventions (2.1-2.3). Conventions in the areas of illegal activities (2.4) and nuclear protection (2.5) are administered by various organs and organisations under the umbrella of the United Nations such as UNGA and the UN Commission on Narcotic Drugs (UNCND), in which the EC has observer status, or by the International Atomic Energy Agency (IAEA), in which the European Atomic Energy Community (EAEC) has observer status. Finally, the EC acts as an observer to the International Labour Organization (ILO) with regard to seafarer's rights (3).

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<sup>84</sup> IWC is an important exception in this respect given the lack of a REIO clause in the organisation's constituent instrument. See *infra*, 4.4.2.

<sup>85</sup> See further *infra*, 4.3.

## CHAPTER 4

### CASE STUDIES

This chapter provides an in-depth analysis of EU coordination processes in preparation for and during meetings of the following international organisations dealing with maritime matters: the International Commission for the Conservation of Atlantic Tunas (4.1), the Food and Agriculture Organization and the United Nations General Assembly (4.2), the International Maritime Organization (4.3) and the International Whaling Commission (4.4). The case studies have been selected on the basis of the principles and methodology discussed in the previous chapters. They constitute a representational selection of IMAOs varying in a wide range of factors capable of affecting the ability of the EU to speak with a single voice in international maritime fora. The main factors are presented schematically in a table at the end of the chapter (4.5).

#### *4.1. International Commission for the Conservation of Atlantic Tunas*

##### 4.1.1. Introduction

The International Commission for the Conservation of Atlantic Tunas was established by the 1966 International Convention for the Conservation of Atlantic Tunas, which entered into force in 1969 (ICCAT Convention).<sup>86</sup> ICCAT is responsible for the conservation of tunas and tuna-like species in the Atlantic Ocean and adjacent seas. ICCAT may, on the basis of scientific data, make binding recommendations designed to maintain the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch for food and other purposes.<sup>87</sup>

ICCAT currently has 47 contracting parties that are represented by delegations consisting of no more than three delegates, which may be assisted by experts and advisors.<sup>88</sup> The International Commission carries out its work through various committees, panels and working groups, such as the Standing Committee on Research and Statistics (SCRS), the Panel representing Northern temperate tunas (Panel 2) and the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures (PWG). Further, the Conservation and Management Measures Compliance Committee (CMMCC) reviews all aspects of compliance with ICCAT conservation and management measures in the ICCAT Convention Area, with particular reference to compliance with measures by the contracting parties. ICCAT conservation and management measures are legally binding and become mandatory for contracting parties which have not exercised their right to object within the established time limit.<sup>89</sup> Pursuant to the ICCAT Convention,<sup>90</sup> an agreement was concluded

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<sup>86</sup> Art. III(1) ICCAT Convention.

<sup>87</sup> See <http://www.iccat.int/en/introduction.htm> (accessed on 13 February 2009). See further P.A. Nickler, "A Tragedy of the commons in coastal fisheries: Contending prescriptions for conservation, and the case of the Atlantic bluefin tuna", *Environmental Affairs* (1999), 557 and T.C. Bestor, "Supply-side sushi: Commodity, market and the global city", *American Anthropologist* (2001), 76, at 85-86.

<sup>88</sup> Art. III(2) ICCAT Convention.

<sup>89</sup> Art. VIII(2) and (3) ICCAT Convention. See also Communication from the Commission to the Council and the European Parliament, *Community participation in Regional Fisheries Organisations (RFOs)*, *supra* note 14, 8.

<sup>90</sup> Art. XI(1) ICCAT Convention.

in 1973 between ICCAT and the Food and Agriculture Organization (see *infra*, 4.2) providing for reciprocal representation through observers, exchange of information, cooperation and consultation and joint actions.<sup>91</sup>

#### 4.1.2. Community competence and status within ICCAT

The ICCAT Convention was originally only open for signature by UN Member States or any of its specialised agencies.<sup>92</sup> After modification by the 1984 Protocol of Paris<sup>93</sup>, a provision was inserted allowing for any intergovernmental economic integration organisation to also become a member, provided the organisation is constituted by States that have transferred competence to it over the matters governed by the ICCAT Convention, including the competence to enter into treaties in respect of those matters.<sup>94</sup> The Community could thus become party to the ICCAT Convention and its accession was officially approved by the Council in 1986.<sup>95</sup> The Community finally acceded in 1997 when the Paris Protocol entered into force.

ICCAT member organisations have the same rights and obligations as all other contracting parties.<sup>96</sup> Further, when a REIO becomes party to the ICCAT Convention, its current Member States and those which adhere to it in the future cease to be parties to the Convention.<sup>97</sup> EC membership of ICCAT is thus full and exclusive, thereby accurately reflecting the Community's exclusive competence in fisheries. Accordingly, France, Portugal, Spain and Italy retreated from ICCAT in 1997 in their capacity of EU Member States. Cyprus and Malta also withdrew upon their accession to the EU in 2004. France and the UK are still contracting parties to ICCAT, however, with respect to their overseas territories not governed by the EC Treaty.

#### 4.1.3. Community participation within ICCAT

Community participation in ICCAT meetings where binding conservation and management measures are established in accordance with the terms of the ICCAT Convention should proceed according to Article 300(2) second paragraph TEC. However, until recently, untimely submission of scientific information by the various ICCAT Committees was considered to effectively preclude full compliance with the formalities of this procedure. In practice, the Commission would produce a statement during meetings of the Working Group on External Fisheries Policy in which the positions to be taken within ICCAT were broadly outlined. Coordination meetings would then take place on the spot to further discuss the relevant issues. In 2007, however, one Member State objected to the absence of a clear coordination procedure with respect to ICCAT. It was alleged that the Commission has at times adopted positions that did not reflect the views of EU Member States. The Commission argued that an attempt to follow the formalities of Article 300(2) second paragraph TEC could only result in the complete absence of a negotiated position due to the aforementioned

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<sup>91</sup> Agreement between the Food and Agriculture Organization of the United Nations and the International Commission for the Conservation of Atlantic Tunas, Annex I to the Report of the 60<sup>th</sup> session of the FAO Council, 11-22 June 1973.

<sup>92</sup> Art. XIV(1) ICCAT Convention.

<sup>93</sup> Protocol of Paris to amend Articles XIV, XV and XVI of the International Convention for the Conservation of Atlantic Tunas, 10 July 1984.

<sup>94</sup> Art. XIV(4) ICCAT Convention.

<sup>95</sup> Council Decision 86/238/EEC, *supra* note 41, p. 33.

<sup>96</sup> Art. XIV(5) ICCAT Convention.

<sup>97</sup> Art. XIV(6) ICCAT Convention.

time constraints, thereby being completely unable to defend the interests of EU Member States.

Nevertheless, since 2008, Community participation in ICCAT meetings proceeds in accordance with Article 300(1) TEC, as the Commission now has a formal mandate from the Council to conduct negotiations within ICCAT and represents the Community in both plenary ICCAT meetings and subsidiary ICCAT bodies and working groups. Pursuant to Article 300(2) second paragraph TEC, positions for ICCAT decisions having legal effects are established by qualified majority voting by Council decision, on a proposal from the Commission, keeping in mind the objective to assure the availability of supplies under the CFP.<sup>98</sup> The Council decision broadly describes the objectives to be pursued by the Commission in ICCAT meetings.

The Commission speaks and votes on behalf of the EC in accordance with the Community positions drawn up in meetings in the Working Group on External Fisheries Policy organised by the Council on the basis of Commission proposals. These meetings are followed by one or more technical meetings called by the Commission prior to the relevant ICCAT session. During these technical meetings, the scientific information provided by ICCAT committees is discussed on the basis of, *inter alia*, catch data which each contracting party is required to submit to ICCAT.<sup>99</sup> In practice, EU Member States collect this information and send it to the Commission for forwarding to ICCAT. The Commission as such acts as an intermediary between ICCAT and the Member States on the ground that it represents the Community, and is the sole party responsible for performing its obligations.<sup>100</sup> However, Member States appear not always to provide this information on time, thus compounding the preparatory process by the Commission.

Coordination meetings on the spot are called by the Presidency in order to further develop the positions adopted prior to the start of ICCAT meetings. Additional coordination meetings are organised whenever the need occurs due to ongoing negotiations. In practice this occurs every morning before the relevant ICCAT meeting, usually followed by an additional coordination meeting in the evening. In terms of coordination *vis-à-vis* third States, the Commission prepares and holds meetings with Japan, the US and Canada before and during an ICCAT meeting. Other prominent third States include Norway, Brazil and the non-EU Mediterranean States.

EC delegations to ICCAT consist of Commission representatives, EU Member States experts and advisers<sup>101</sup>, as well as a host of industry representatives, making for quite sizeable delegations.<sup>102</sup> The Member States assist the Commission with technical advice and through their informal contacts with other non-EU ICCAT members. In response to complaints from ICCAT, the Commission has recently attempted to reduce the size of EC delegations, but this initiative met with strong resistance from some EU Member States.

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<sup>98</sup> Art. 33 TEC. See further Council Regulation (EC) Nr. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358, 31 December 2002, p. 59.

<sup>99</sup> Art. IX(2) ICCAT Convention.

<sup>100</sup> Communication from the Commission to the Council and the European Parliament, *Community participation in Regional Fisheries Organisations (RFOs)*, *supra* note 14, 13.

<sup>101</sup> Rule 1, third paragraph ICCAT Rules of Procedure states that “[a]t any meeting of the Commission the Delegates of each member country shall be entitled to be accompanied by their experts and advisers”.

<sup>102</sup> One interviewee mentioned Community delegations consisting of up to 150 people.

Member States that were displeased with the proceedings before 2008 noted some progress with respect to the current working method under Article 300(2) second paragraph TEC. The process of coordination is seen as largely effective and the Community acts as a strong bloc in ICCAT. However, some Member States still perceive the Commission as sometimes not fully representing their views. They therefore stress the role of the Presidency in bringing together opposing views through calling additional coordination meetings on the spot, noting that this role was not always enacted in good order, leading occasionally to issues of coordination. A continuous dialogue between the Commission and Member States during ICCAT meetings was perceived to be lacking. Further, it was deemed advisable by some Member States to increase the number of coordination meetings and to establish a clear time schedule in order to improve coordination by, *inter alia*, calling for Member State contributions in a more timely way. In addition, the drafting of a summary by the Commission holding the main findings and recommendations of the scientific advice from the SCRS was suggested. More thorough preparatory work could reduce the need for additional coordination during ICCAT deliberations.

Additionally, negotiations by the Commission can also be conducted on the basis of a more unofficial document (non-paper) attached to the minutes of the Council Working Group, in order to fine-tune the Community position for ICCAT meetings. Practically this was the only feasible solution, as otherwise the Community participation would be blocked by procedural discussions. Stricter and more prescriptive mandates would enhance legal security, but at the same time impede the Commission's flexibility to deal with issues as they unfold.

#### 4.1.4. Interim conclusions

The legal status of the Community within ICCAT is a correct reflection of its exclusive competence under the CFP and duly takes into account the importance of fisheries conservation. The Commission, as assisted by experts from Member States, proves to be effective in reaching and defending Community positions during ICCAT sessions, and the Community's full membership status is generally put to good use.

The ICCAT coordination procedure before 2008 was a pragmatic way of dealing with the time restraints encountered in the preparatory process, in order to avoid the risk of getting bogged down in a procedural discussion. The new formalised procedure under Article 300(2) second paragraph TEC, however, has increased legal clarity for EU Member States and third countries, while at the same time providing the Commission with enough flexibility to negotiate efficiently. However, coordination could still be further improved by organising more preparatory meetings before a given ICCAT meeting and by calling for Member States contributions in a more timely way.

## 4.2. Food and Agriculture Organization and United Nations General Assembly

### 4.2.1. Introduction

The Food and Agriculture Organization is a specialised agency of the United Nations. It mainly assists developing countries and countries in transition to ensure good nutrition and to modernise and improve their agriculture, forestry and fisheries practices. The most important FAO organ involved in maritime affairs is the Committee on Fisheries (COFI) of the Fisheries and Aquaculture Department.

COFI is a subsidiary body of the FAO Council that constitutes a global inter-governmental forum where major international fisheries and aquaculture issues are examined and recommendations are formulated. The Committee reviews FAO programmes of work in the fields of fisheries and their implementation<sup>103</sup>. COFI generally takes non-binding measures but can adopt binding decisions as well.<sup>104</sup> The development of an international legally binding instrument on port State measures to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing was initiated during the 27<sup>th</sup> COFI session in March 2007.<sup>105</sup>

### 4.2.2. Community competence and status within FAO

Initially, relations between the European Economic Community (EEC) and the EAEC on the one hand, and FAO on the other hand, were governed by an exchange of letters signed in 1962 between the President of the Commission and the FAO Director-General, with the aim of facilitating the coordination of the activities of the two institutions, *inter alia* in fisheries.<sup>106</sup> This led to the Community being granted the status of non-permanent observer in FAO. Commission representatives participated as observers in FAO governing bodies meetings as well as in important technical meetings, but only upon invitation by the FAO Secretariat with the express or tacit approval of its deliberative body.<sup>107</sup> This arrangement was soon deemed insufficient, however, and the Commission initiated exploratory talks with the FAO Secretariat with a view of improving the EEC's status. Detailed amendments to the FAO Constitution and General Rules were discussed and official accession negotiations started in February 1991. The apprehension of some FAO members concerning accession of a non-State entity led to a further round of negotiations being carried out by a special Regional Economic Integration Organizations Committee (REIOC), an *ad hoc* working group set up for this purpose. The final amendments to the Constitution and General Rules of FAO, including the insertion of a REIO clause, were eventually adopted at the occasion of the 26<sup>th</sup>

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<sup>103</sup> See Rule XXX(6) of the FAO General Rules.

<sup>104</sup> See the Rules of Procedure of the Committee on Fisheries, available at <http://www.fao.org/docrep/x0152e/x0152E06.htm> (accessed on 11 February 2009).

<sup>105</sup> Report of the twenty-seventh session of the Committee on Fisheries, 5-9 March 2007, Doc. FIEL/R380, para. 68.

<sup>106</sup> Exchange of letters between the EEC Commission and the FAO of 25 October 1962 and Exchange of letters between the President of the EAEC Commission and the Director-General of the FAO, signed on 9 and 14 December 1961, OJ 43, 7 June 1962, p. 1356. See point 1(a) of the first letter.

<sup>107</sup> J.M. Pedersen, "FAO-EU cooperation: An ever stronger partnership", in J. Wouters, F. Hoffmeister and T. Ruys (eds.), *The United Nations and the European Union: An ever stronger partnership* (The Hague, TMC Asser, 2006), 63.

session of the FAO Conference in November 1991.<sup>108</sup> The EEC became a full member of FAO on 26 November 1991.<sup>109</sup>

Full FAO membership of the Community was not unconditional, however. Article II of the FAO Constitution provides that, to be eligible to apply for membership, a REIO should be constituted by sovereign States, a majority of which are Member Nations of FAO, and to which its Member States have transferred competence over a range of matters within the purview of FAO, including the authority to make decisions binding on its Member States in respect of those matters.<sup>110</sup> The EC's membership of FAO thus depends upon the concurrent membership of its Member States, even if in the course of time the Community would acquire exclusive competence over all the issues discussed within FAO. In the latter case, however, concurrent membership would appear to be inconsistent with Community law.<sup>111</sup> Indeed, the legal justification for Member States to remain active members of an IMAO exists only insofar as the Community does not have exclusive competence over the major field of the activity of the IMAO.<sup>112</sup>

Pursuant to the FAO Constitution, the Community, at the time of accession, also had to submit a declaration of competence specifying the matters in respect of which competence has been transferred to it by its Member States.<sup>113</sup> The latter shall be presumed to retain competence over all matters not specified in this declaration.<sup>114</sup> Further, the EC or its Member States have to indicate before each FAO meeting who has competence and who shall exercise the right to vote with respect to each particular agenda item.<sup>115</sup> Moreover, any Member Nation of FAO may request the EC or its Member States to provide information as to who has competence over a specific question, which the latter are then obliged to provide.<sup>116</sup>

The declaration of competence submitted by the Community at the time of accession to FAO<sup>117</sup> clarifies that, with respect to matters falling within the purview of the latter organisation, the Community has exclusive competence in all matters relating to commercial policy, as well as fisheries issues which are aimed at protecting the fishing grounds and conserving the biological resources of the sea.<sup>118</sup> Further, the Community shares competence

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<sup>108</sup> Report of the twenty-sixth session of the Conference of FAO, 9-27 November 1991, Doc. C91/REP, points 302 (the adoption of Resolution 7/91) and 376-379 (the admission of the EEC as member).

<sup>109</sup> See Council Resolution of 25 November 1991, OJ C 326, 16 December 1991, p. 238.

<sup>110</sup> Art. II(3) and (4) FAO Constitution.

<sup>111</sup> See R. Frid, "The European Economic Community: A Member of a Specialized Agency of the United Nations", *European Journal of International Law* (1993), 239, at 250, referring to Opinion 1/75, *supra* note 43 and Opinion 1/76, *supra* note 37.

<sup>112</sup> R. Frid, *ibid.*, 240.

<sup>113</sup> Art. II(5) FAO Constitution.

<sup>114</sup> Art. II(6) FAO Constitution.

<sup>115</sup> See Rule XLI(2) FAO General Rules: "Before any meeting of the Organization the Member Organization or its Member States shall indicate which, as between the Member Organization and its Member States, has competence in respect of any specific question to be considered in the meeting and which, as between the Member Organization and its Member States, shall exercise the right to vote in respect of each particular agenda item." See, for example, Statement of competence and voting rights by the European Community and its Member States at the 27<sup>th</sup> COFI session, 5-9 March 2007, Doc. COFI/2007/Inf.14.

<sup>116</sup> Rule XLI(1) and (2) FAO General Rules. Further restrictions placed upon the EC as FAO member are laid down in Rules XLII-XLV and Art. II(9) FAO Constitution.

<sup>117</sup> Declaration of competence by the European Community in respect of matters covered by the constitution of the Food and Agriculture Organization of the United Nations, Annex II to the Council Decision on accession to FAO, *supra* note 109.

<sup>118</sup> *Ibid.*, point I.

with the Member States in FAO matters of, *inter alia*, environmental policy and policy on research and technological development.<sup>119</sup> Even though the original declaration of competence stresses that the scope of the competence which the Member States have transferred upon the Community is, by its nature, subject to continuous change, the document is not updated regularly. It would seem appropriate to update the original statement to correspond with evolving Community law. The *ad hoc* statements of competence before each FAO meeting can be helpful in this regard.

The formal requirements pertaining to the declarations of competence elaborated above appear to place a burden upon the Community. Admittedly, this burden is, according to the General Rules of FAO, in principle shared with the Member States. However, as Member States are thought to retain competence over all matters not specifically decided upon in the declaration of competence, inability to reach an agreement on a certain issue will be most of all detrimental to the Community. This makes it understandable why the Commission experiences the process of drafting a declaration of competence as burdensome. The Council Secretariat confirmed that the preparation of declarations of competence is not particularly time-consuming, especially in the context of fisheries. It noted that disagreements between the Community and Member States on the distribution of competences did not often arise, although in recent years some Member States were growing more apprehensive. However, discussions on where the thrust of an issue falling under shared competence lies do occur often, causing declarations to be issued with footnotes attached.

In any case, the division of competences as set out in the original FAO declaration of competence has been confirmed in Community case-law. In 1996, the ECJ was asked to settle a dispute between the Commission and the Council regarding competences involving the 1993 FAO Compliance Agreement.<sup>120</sup> The Court held that, as the thrust of the agreement concerned compliance with international conservation and management measures by fishing vessels on the high seas<sup>121</sup>, the agreement should be concluded by the Community.<sup>122</sup> The ECJ thus confirmed the original Community declaration of competence upon acquiring FAO membership with respect to the exclusive nature of EC competence in all matters of conservation of biological resources of the sea.<sup>123</sup>

#### 4.2.3. Community participation within FAO

Following the abovementioned exchange of letters in 1962, the Community enjoyed a privileged observer status in FAO as far as the right to speak was concerned. In cases of exclusive Community competence, the Commission was allowed to intervene upon decision from the chairperson, or after all FAO Member Nations had spoken. In most cases the Commission was granted the right to speak whenever it asked. In cases of shared

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<sup>119</sup> *Ibid.*, point II.

<sup>120</sup> *Commission v Council*, *supra* note 57. The case concerned EC accession to the Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas, adopted by the FAO Conference on 24 November 1993.

<sup>121</sup> *Commission v Council*, *supra* note 57, para. 45.

<sup>122</sup> The FAO Compliance Agreement was indeed accepted by the Community alone. See Council Decision 96/428/EC of 25 June 1996 on acceptance by the Community of the Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas, OJ L 177, 16 July 1996, p. 24.

<sup>123</sup> *Commission v Council*, *supra* note 57, para. 43.

competence, the speaker was often the representative of the Member State holding the Presidency.<sup>124</sup>

After the Community's accession to FAO as a full member in 1991, EC participation and coordination procedures were regulated more formally in an inter-institutional arrangement between the Council and the Commission regarding preparation for FAO meetings, statements and voting.<sup>125</sup> The agreement was declared legally binding by the ECJ in the *FAO compliance* case.<sup>126</sup> The Court argued that the agreement in question represented fulfilment of the duty of cooperation between the Council and the Commission, which was violated by the Council granting the right to vote to the Member States on an issue falling mainly under Community competence.<sup>127</sup> The inter-institutional arrangement between the Commission and the Council incorporates elements of FAO practice and was drawn up in accordance with the requirements imposed by the FAO Constitution. Specifically, the FAO Constitution provides that the Community and EU Member States shall exercise membership rights on an alternative basis<sup>128</sup>, implying that whenever the EC exercises its right to vote, the Member States shall not exercise theirs, and *vice versa*. The EC may exercise on matters falling within its competence a total number of votes equal to the number of its Member States which are entitled to vote in a given meeting.<sup>129</sup> Community delegations at FAO are comprised of Commission representatives.

Coordination meetings are held both in Brussels before the start of FAO meetings and in Rome, particularly at the beginning and, if necessary, at the end of FAO meetings, with further coordination meetings being called whenever the need arises.<sup>130</sup> The Commission on receipt will send the agenda of the FAO meeting to the Council Secretariat for circulation to Member States, indicating therein the agenda items on which a statement should be made and whether this will be done on behalf of the Community or the Community and EU Member States. The Commission will further give an opinion with regard to agenda items necessitating a vote on whether the Community or EU Member States should exercise this right.<sup>131</sup> A draft statement will then be sent to the Council by the Commission, on the basis of which discussions shall be held in coordination meetings within the competent Council Working Group in Brussels. These meetings will decide on the exercise of responsibilities, on

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<sup>124</sup> R. Frid, *The Relations between the EC and International Organizations* (The Hague, Kluwer, 1995), 230-231.

<sup>125</sup> Arrangement between the Council and the Commission regarding preparation for FAO meetings, statements and voting, Council Doc. 10478/91, 18 December 1991 (FAO Arrangement). The arrangement was supplemented on 7 October 1992 following some practical problems that arose from the application of the first arrangement. They mainly concerned the preparation of FAO meetings and the question of voting rights in the specific case of the approval of reports drawn up following FAO meetings. On the FAO Arrangement and how it is applied in practice, see R. Frid, *supra* note 124; J. Sack, "The European Community's Membership of International Organizations", *Common Market Law Review* (1995), 1246; J. Heliskoski, "Internal struggle for international presence: The exercise of voting rights within the FAO", in A. Dashwood and C. Hillion (eds.), *The general law of E.C. external relations* (London, Sweet & Maxwell, 2000), 79; I. Govaere, J. Capiu and A. Vermeersch, *supra* note 42, 165-167; J.M. Pedersen, *supra* note 107. See further the Statements of competence and voting rights by the European Community and its Member States at the various COFI sessions. See also *infra* note 135.

<sup>126</sup> *Commission v Council*, *supra* note 57, para. 49. The reasoning of the Court in reaching this conclusion is subject to some discussion, however. See J. Heliskoski, *supra* note 125, 92-96; P. Eeckhout, *supra* note 67, 213-214.

<sup>127</sup> *Commission v Council*, *supra* note 57, paras. 48-50.

<sup>128</sup> Art. II(8) and (10) FAO Constitution.

<sup>129</sup> Art. II(10) FAO Constitution.

<sup>130</sup> FAO Arrangement, para. 1.1.

<sup>131</sup> *Ibid.*, para. 1.2.

statements and on voting in relation to each item on the FAO meeting agenda on which a statement may be made or a vote is expected.<sup>132</sup> In the absence of an agreement between the Commission and the Member States the matter will be referred to the Committee of Permanent Representatives (COREPER). The draft statements can be further modified during coordination meetings in Rome.

In cases of exclusive EC competence, the Council Working Group in Brussels prepares a draft statement for a Community position to be expressed and voted upon by the Commission in the relevant FAO meeting. The Community position is established by consensus or, failing this, in accordance with the rules of the EC Treaty, and is expressed by the Commission. On matters of national competence, Member States adopt a position on which coordination took place beforehand “*in order to ensure the highest possible degree of cohesion in [their] statements*”.<sup>133</sup> Such coordinated positions are typically discussed at an informal coordination meeting. Member States speak and vote on issues covered by coordinated positions.

If an agenda item contains elements of both national and Community competence, a common position shall be aimed at by consensus. A common position, if agreed upon, shall be expressed by the Presidency when the thrust of the issue lies in an area outside of exclusive Community competence. Member States and the Commission are allowed to speak in support and/or development of the Presidency statement. Member States will then vote in accordance with the common position. Conversely, if the thrust of the agreement lies within the sphere of exclusive Community competence, the Commission shall express the common position, with Member States having the occasion to support and/or add to the Commission’s statement. The Commission votes in accordance with the common position.<sup>134</sup> The Council Working Group determines in a coordination meeting in Brussels where the ‘thrust of the issue’ lies in matters of shared competence. Practice shows that the thrust mostly lies within EC competence and hence, it is mostly the Commission who presents the common position.<sup>135</sup> If it proves impossible to reach a common position, Member States shall exercise the respective voting and speaking rights. The Commission in such cases will be able to participate in the discussion according to FAO rules and procedures.<sup>136</sup> These stipulate that, in cases of shared competence, even though both the EC and EU Member States are allowed to partake in the discussions, only the position of the body entitled to vote is officially taken into account.<sup>137</sup> Finally, if an EU Member State has particular concerns regarding a dependent territory that are not reflected in the Community or common position, it may speak and vote on its own behalf.<sup>138</sup>

Furthermore, even if the division of competences has been clearly settled beforehand, disagreements can arise, especially when the measure to be adopted produces legally binding effects. Finally, it was noted during interviews that the documents needed for EC preparation

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<sup>132</sup> *Ibid.*, paras. 1.3 and 1.9.

<sup>133</sup> *Ibid.*, para. 1.10.

<sup>134</sup> *Ibid.*, para. 2.3.

<sup>135</sup> See, for example, the Statement of competence and voting rights by the European Community and its Member States at the 27<sup>th</sup> COFI session, 5-9 March 2007, Doc. COFI/2007/Inf.14; Statement of competence and voting rights by the European Community and its Member States at the 4<sup>th</sup> session of the COFI Sub-Committee on Aquaculture, 6-10 October 2008, Doc. COFI/AQ/IV/2008/Inf.4; Statement of competence and voting rights by the European Community and its Member States at the 28<sup>th</sup> COFI session, 2-6 March 2009, Doc. COFI/2009/Inf.14.

<sup>136</sup> FAO Arrangement, para. 2.4.

<sup>137</sup> Art. XLI(3) FAO General Rules.

<sup>138</sup> FAO Arrangement, paras. 2.1-2.5.

of FAO meetings arrive too late. This creates a bottleneck situation which hampers coordination.

#### 4.2.4. United Nations General Assembly

The status of the Community in the UN General Assembly is that of permanent observer.<sup>139</sup> The Commission is therefore generally limited to speaking after all UN Member States in UNGA, doing so from its EC observer seat. However, the EC is sometimes given preferential treatment over other observers. For example, in recent sessions of the UN *ad hoc* Working Group on Biodiversity in Areas beyond National Jurisdiction and the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) (see *infra*, 4.2.5) the seating order was adjusted, placing the EC before other observers but after all States.<sup>140</sup> Generally speaking, EU coordination at the UN works rather well, despite certain complications arising from the lack of full membership.<sup>141</sup>

In the field of maritime issues, UNGA adopts an annual resolution on sustainable fisheries as well as an annual resolution on (oceans and) the law of the sea.<sup>142</sup> In accordance with the exclusive nature of Community competence, the preparatory process for the UNGA resolution on sustainable fisheries proceeds according to the settled Community method, *i.e.* the Commission negotiates the annual resolution on behalf of all EU Member States, in close cooperation with the Presidency and interested Member States. Specifically, the Commission prepares the negotiations in a technical meeting to which representatives of all EU Member States are invited. Draft documents are subsequently sent by the Commission to the Council Working Group on External Fisheries for discussion. Finally, on the spot coordination between the Commission and EU Member States continues in New York. Due to the restrictions placed upon the Commission in formal UNGA sessions in terms of speaking order and other limitations, the negotiations for the fisheries resolution typically take place in informal meetings, although the Commission may be allowed to speak in formal meetings as well if the matter falls within Community competence and if certain other conditions are met.<sup>143</sup> The end result of these consultations is carried out by the Member States adopting the final resolution in the UN General Assembly, whereby the Presidency normally makes a

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<sup>139</sup> See UNGA Resolution 3208 (XXIX) of 11 October 1974 on the Status of the European Economic Community in the General Assembly.

<sup>140</sup> E. Paasivirta and D. Porter, “EU coordination at the UN General Assembly and ECOSOC: A view from Brussels, a view from New York”, in J. Wouters, F. Hoffmeister and T. Ruys (eds.), *supra* note 107, 35, at 46.

<sup>141</sup> *Ibid.*, 47-48. See also I. Govaere, J. Capiua and A. Vermeersch, *supra* note 42, 178. See further on European coherence within UNGA, M.B. Rasch, *The European Union at the United Nations: The functioning and coherence of EU external representation in a State-centric environment* (Leiden – Boston, Martinus Nijhoff, 2008); J. Wouters, “The European Union as an actor within the United Nations General Assembly”, in V. Kronenberger (ed.), *The European Union and the international legal order: Discord or harmony?* (The Hague, TMC Asser, 2001), 375. Both note a clear trend towards increased coherence in recent years within the EU in the context of UNGA, with a remarkable drop of so-called three-way splits (EU votes divided between ‘yes’, ‘no’ and abstention). Rasch notes, however, that EU Member States form a less coherent bloc than other regional organisations and political groups such as ASEAN, the Arab League, CARICOM and ECOWAS. This is all the more striking since none of these groups have an institutionalised framework for cooperation, coordination and representation.

<sup>142</sup> See [http://www.un.org/Depts/los/general\\_assembly/general\\_assembly\\_resolutions.htm](http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm) (accessed on 12 February 2009).

<sup>143</sup> The Commission can take the floor in formal negotiation sessions if allowed by the Chair, and when not objected to by other States. Further, there must be prior agreement within the EC, in view of the Community competences at stake. The Commission also speaks on behalf of the EC in the annual meetings of the State Parties to the Law of the Sea Convention and the meetings of the Parties to the UN Fish Stocks Agreement. See E. Paasivirta and D. Porter, *supra* note 140, 45-46.

statement.<sup>144</sup> The resolution on sustainable fisheries is usually adopted by consensus.<sup>145</sup> As with ICCAT, some EU Member States take the view that coordination for preparation of the UNGA fisheries resolution could be further improved by establishing a clear time schedule and by calling for Member State contributions in a timelier manner.

The EU coordination method is substantially different, however, for the resolution on oceans and the law of the sea, which mainly deals with issues falling outside the scope of Community competence, although certain topics of Community interest are usually included as well.<sup>146</sup> COMAR, the Council Working Group on the Law of the Sea, organises four to six meetings per year in Brussels in order to prepare for this resolution, at which time the Commission and EU Member States can submit proposals. Positions are further fine-tuned in the course of international negotiations in New York in September and November. The working method is much more of an intergovernmental nature, with the Presidency being attributed a larger role than in the negotiations for the fisheries resolution. Discussions are held with representatives from foreign affairs ministries of EU Member States (in contrast to, for example, the practice in ICCAT and FAO). The EU is represented by the Member State holding the Presidency at the relevant UN meetings. Some Member States stressed that much depends on the manner in which the Presidency in question fulfils this role. Ultimately, consensus is strived for but not easily achieved due to the intergovernmental nature of the negotiations.<sup>147</sup>

The general success in reaching unified positions on maritime matters dealt with in the General Assembly is not always reflected in the outcome of the UNGA proceedings. For example, in 2005/2006, the EU moved for the establishment of a mechanism for setting up marine-protected areas on the high seas in the context of the UNGA resolution on the *law of the sea*, building on the relevant UNCLOS provisions on environment. These proposals were met with negative reactions, however, and no action could be taken on the matter. Conversely, the EU was successful in having the issue of bottom-trawling included in the UNGA *fisheries* resolution at its 60<sup>th</sup> session.

A specific issue in recent UNGA meetings pertains to the collection of genetic resources from micro-organisms from the high seas through mining. It has been claimed that mineral resources of this kind fall under the common heritage of mankind and are thus a matter for the International Seabed Authority (ISBA) to discuss. The Community, however, is rather reluctant to follow this line of reasoning although it is ready to show openness on the design of a future regime for access and benefit sharing for marine genetic resources in areas beyond national jurisdiction. The EC and all EU Member States are members of ISBA, but participation and coordination is very limited. This is due to the fact that the work of ISBA falls almost entirely within Member States competence, except the commercial aspects (related to future commercial exploitation of and trade in mineral resources). No coordination is carried out for many issues discussed within ISBA, even though some of the decisions taken could potentially influence Community policies. It is therefore deemed advisable for

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<sup>144</sup> See *ibid.* The same procedure is followed for the annual UNGA Resolution on trade and development.

<sup>145</sup> This was the case for, *inter alia*, the following UNGA Resolutions on sustainable fisheries: A/RES/58/14 (2003); A/RES/59/25 (2004); A/RES/60/31 (2005); A/RES/61/105 (2006); A/RES/62/177 (2007) and A/RES/63/112 (2008).

<sup>146</sup> See, for example, UNGA Resolution 63/111 of 12 February 2009 on Oceans and the law of the sea (Chapter VIII on Maritime safety and security and flag State implementation; Chapter IX on marine environment and marine resources).

<sup>147</sup> The past 15 UNGA Resolutions on (oceans and) the law of the sea (1994-2008) have all been adopted by a vote.

the Community to become a more active player in ISBA and spur coordination with or between the Member States on certain key issues.

#### 4.2.5. Informal consultations and other fora

Two additional fora for discussing maritime issues in the framework of the United Nations system are the Open-ended Informal Consultative Process on Oceans and the Law of the Sea and the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (Working Group on Marine Biodiversity). The former was established in 1999 by UNGA in order to facilitate the annual review of developments in ocean affairs and the law of the sea.<sup>148</sup> The latter was created in 2005 to survey the past and present activities of the United Nations and other relevant international organisations with regard to the conservation of marine biodiversity.<sup>149</sup> Both Working Groups convene normally once a year and mainly serve as fora to prepare for meetings of UNGA.

The working method followed in both Working Groups is quite informal and the distribution of competences is relatively unclear. UNICPOLOS mainly addresses issues pertaining to the sustainable development of oceans and as such can also touch upon matters falling within the scope of exclusive or shared Community competences. The Working Group on Marine Biodiversity often deals with issues of exclusive EC competence. EU interventions for both Working Groups are prepared by COMAR in Brussels and are further coordinated on the spot in New York. Positions are expressed by the Presidency in its capacity of contracting State, while making clear that it speaks on behalf of the Union. EU Member States can then speak in support of the position expressed by the Presidency. The Commission typically joins the Member State holding the Presidency to express the positions on matters of exclusive Community competence.

UNICPOLOS and the Working Group on Marine Biodiversity are of great importance due to the inclusive nature of their membership, the open character by which NGOs can participate and intervene and the general importance of the issues discussed, such as maritime security in the 2008 UNICPOLOS meeting. Even though neither Working Group can take binding decisions both are perceived as very important fora in the UN system dealing with various maritime topics of European interest.

Two other organisations dealing with matters of fisheries and law of the sea are the International Union for Conservation of Nature (IUCN) and the Global Forum on Oceans, Coasts and Islands (GFOCI). The member base of both organisations emanates from civil society and consists of a number of NGOs and semi-public organisations that meet regularly and propose resolutions to be adopted by States.<sup>150</sup> The Commission is a member of the GFOCI Steering Committee. The Community is not a member of the IUCN, but the Commission cooperates with IUCN where possible. The 2008 IUCN Congress was attended by representatives of the environment ministries of certain EU Member States and by some Commission representatives but a perceived lack of communication with national fisheries departments afterwards hampered coordination. A more concerted effort between the

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<sup>148</sup> UNGA Resolution 54/33 of 24 November 1999 on the Results of the review by the Commission on Sustainable Development of the sectoral theme of Oceans and seas: international coordination and cooperation, para. 2.

<sup>149</sup> UNGA Resolution 59/24 of 17 November 2004 on Oceans and the law of the sea, para. 73.

<sup>150</sup> Examples include resolutions on the conservation of bluefin tuna, whales and sharks.

Commission and the Member States (and their respective departments) that attend these meetings could possibly meet these concerns. Informal fora such as the IUCN and the GFOCI are of increasing importance and Community absence in these fora is feared to lead to a loss of influence.

#### 4.2.6. Interim conclusions

The analysis of the participation of the EC in FAO, as full member in concurrence with all EU Member States, yields a number of interesting insights. In general, the coordination process within FAO is clear and effective and most third countries appear to understand the role division between the Community and EU Member States. The framework provided by the inter-institutional agreement between the Commission and the Council, declared binding by the ECJ, serves as an important means of clarifying the respective obligations of all EU actors concerned and ensures compliance with the duty of loyal cooperation within FAO. Nevertheless, some concerns were voiced. During deliberations on the spot, much is said to depend on the Presidency's initiative to intervene. Moreover, especially in the case of shared competence (a situation not uncommon within FAO) the rules appear very complicated as well as biased against the Community. The fact that Member States can speak and vote on their own behalf in cases where no common position can be reached, illustrates this.

Further, the requirement for regular statements of competence and voting rights for many FAO meetings throughout the year creates a lot of administrative work. Doubts exist as to whether all these provisions are in proportion, especially bearing in mind that votes within FAO are only taken on a limited number of issues within the Conference and the Council and that the EC had full rights to speak at the organisation as an observer, alongside the Member States, before it joined FAO as a member.<sup>151</sup>

Declarations of competence can admittedly prove helpful for third countries in order to obtain more clarity as to the division of powers and the comport to be expected from the Commission and Member States at relevant FAO meetings. However, experience shows that the preparation of competence statements before each FAO meeting forms a heavy administrative burden. Moreover, due to the changing scope of Community competences, internally as well as externally<sup>152</sup>, the added value of these declarations seems rather limited.<sup>153</sup> The requirement of drawing up statements of competence before each meeting could be replaced by a periodical update of the original declaration of competence, yet it remains difficult to say whether enough support can be found to amend the General Rules of FAO to this end.

UNGA is an important organ in the areas of fisheries and the law of the sea with an annual resolution being adopted on both issues. Generally speaking, EU coordination within UNGA on these issues works rather well despite the absence of full membership and clear rules in this regard. Consensus is strived for on both topics, though less easily achieved on the law of the sea resolution.

In addition, the informal meetings of UNICPOLOS are also of great importance mainly due to the inclusive nature of its membership, the open character of the meetings and the general importance of the issues discussed. Although UNICPOLOS lacks the power to take binding

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<sup>151</sup> J. Sack, *supra* note 125, 1246.

<sup>152</sup> See *supra*, 1.2.

<sup>153</sup> R. Frid, *supra* note 111, 251.

decisions it is nevertheless perceived as a very important forum in the UN system that addresses maritime issues. Other organisations such as the IUCN and the GFOCI are seen as important fora where increased Community cooperation is deemed desirable.

### 4.3. International Maritime Organization

#### 4.3.1. Introduction

The Convention establishing the Inter-Governmental Maritime Consultative Organization (IMCO), renamed International Maritime Organization in 1982, was adopted in Geneva in March 1948. IMO is a specialised agency of the United Nations, consisting of 168 Member States and three associate members. IMO's main task is to develop and maintain a regulatory framework for shipping including safety, environmental concerns, legal matters, technical cooperation, maritime security and the efficiency of shipping.<sup>154</sup> To this end IMO is involved in maritime standard-setting functions (Conventions, Recommendations, Codes etc.), consultation activities and maritime cooperation.<sup>155</sup> IMO's five main committees are the Maritime Safety Committee (MSC), the Marine Environment Protection Committee (MEPC), the Facilitation Committee (FAL), the Technical Cooperation Committee (TCC) and the Legal Committee (LEC). The Committees and sub-committees<sup>156</sup> are responsible for the technical work of updating existing legislation and developing and adopting new regulations. Meetings are attended by experts from IMO Member States alongside interested intergovernmental and non-governmental organisations.

IMO can take binding decisions and the organisation is the depositary for many international agreements covering a broad range of issues including the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971, the Convention on the International Regulations for Preventing Collisions at Sea of 1972, the International Convention for the Prevention of Marine Pollution from Ships of 1973, the International Convention for the Safety of Life at Sea of 1974, the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 1974, the Convention on Limitation of Liability for Maritime Claims of 1976, the Convention on the International Maritime Satellite Organization and Operating Agreement of 1976, the Civil Liability Convention of 1992 and the International Convention on the Control of Harmful Anti-fouling Systems on Ships of 2001.<sup>157</sup>

#### 4.3.2. Community competence and status within IMO

In matters falling within the scope of the IMO Convention, the EC generally has shared competence with EU Member States.<sup>158</sup> A lot of measures and decisions adopted by IMO affect Community rules. Indeed, the EC has promulgated an impressive amount of legislation on a wide range of IMO topics such as maritime safety<sup>159</sup>, the pilotage of vessels<sup>160</sup>, standards

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<sup>154</sup> See Art. 1 IMO Convention.

<sup>155</sup> See further P. Boisson, *Safety at Sea* (Paris, Veritas, 1999), 66.

<sup>156</sup> IMO Sub-Committees dealing with issues of Community interest include the Sub-Committee on Flag State Implementation (FSI), the Sub-Committee on Standards of Training and Watchkeeping (STW) and the Sub-Committee on Safety of Navigation (NAV).

<sup>157</sup> See the complete list of IMO conventions at [http://www.imo.org/conventions/mainframe.asp?topic\\_id=260](http://www.imo.org/conventions/mainframe.asp?topic_id=260) (accessed on 14 February 2009).

<sup>158</sup> See Recommendation from the Commission to the Council in order to authorize the Commission to open and conduct negotiations with the International Maritime Organization (IMO) on the conditions and arrangements for accession by the European Community, SEC(2002) 381 final, 9 April 2002, p. 49.

<sup>159</sup> See, for example, the so-called Erika I Package, comprised of Directive 2001/105/EC of the European Parliament and of the Council of 19 December 2001 amending Council Directive 94/57/EC on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, OJ L 19, 22 January 2002, p. 9; Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001 amending Council Directive 95/21/EC concerning the enforcement, in respect of

for ship inspection<sup>161</sup>, working time of seafarers<sup>162</sup>, the transfer of cargo and passenger ships<sup>163</sup> and ship-source pollution.<sup>164</sup> Many of these directives and regulations are based directly on IMO conventions and resolutions. Pursuant to the *ERTA* doctrine, the EC has obtained exclusive competence on these issues at the international level.<sup>165</sup>

Nevertheless, the Community is not represented as such at IMO and it has not acceded to any of the Conventions administered by it.<sup>166</sup> The IMO Convention does not contain a REIO clause and accordingly full membership is only reserved for States. The Convention does however provide for cooperation mechanisms for international organisations.<sup>167</sup> Following an exchange of letters between the President of the European Commission and the Secretary-General of the then IMCO, a cooperation agreement was concluded on 28 June 1974 granting observer status to the Commission. The agreement provides for reciprocal consultations on topics of common interest and exchanges of information on planned projects and work programmes.<sup>168</sup>

Given the Community's increasing and rapidly developing powers in IMO matters, the Commission has consistently strived for enhanced Community participation within IMO.<sup>169</sup> This would enhance coherence between internal and external action of the Community.<sup>170</sup> As the existing arrangements were deemed both unsatisfactory and insufficient to guarantee effective representation of the Community position, the Commission submitted a recommendation to the Council for EC accession to IMO in 2002, in order to authorise the

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shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control), OJ L 19, 22 January 2002, p. 17 and Regulation (EC) Nr. 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) Nr. 2978/94, OJ L 64, 7 March 2002, p. 1. See also the Erika II Package comprised of Regulation (EC) Nr. 1406/2002, *supra* note 11, p. 1 and Directive 2002/59/EC, *supra* note 23, p. 10.

<sup>160</sup> Council Directive 79/115/EEC of 21 December 1978 concerning pilotage of vessels by deep-sea pilots in the North Sea and English Channel, OJ L 33, 8 February 1979, p. 32.

<sup>161</sup> Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, OJ L 319, 12 December 1994, p. 20, as amended.

<sup>162</sup> Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST), OJ L 167, 2 July 1999, p. 33.

<sup>163</sup> Regulation (EC) Nr. 789/2004 of the European Parliament and of the Council of 21 April 2004 on the transfer of cargo and passenger ships between registers within the Community and repealing Council Regulation (EEC) Nr. 613/91, OJ L 138, 30 April 2004, p. 19.

<sup>164</sup> Directive 2005/35/EC, *supra* note 22, p. 11.

<sup>165</sup> See *supra*, 1.2.

<sup>166</sup> It should be noted that the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea allows for accession by REIOs. The Commission proposal for a Council Decision concerning the conclusion by the EC of the 2002 Protocol (COM(2003) 375 final) is still pending in the Council. The Commission has also proposed a regulation incorporating the provisions of the 2002 Protocol in Community law (COM(2007) 645 final).

<sup>167</sup> Arts. 59-63 IMO Convention.

<sup>168</sup> Recommendation from the Commission to the Council in order to authorize the Commission to open and conduct negotiations with the International Maritime Organization (IMO) on the conditions and arrangements for accession by the European Community, *supra* note 158, p. 49.

<sup>169</sup> See most recently the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Strategic goals and recommendations for the EU's maritime transport policy until 2018*, COM(2009) 8 final, 21 January 2009.

<sup>170</sup> See also Commission, *White Paper. European transport policy for 2010: time to decide*, COM(2001) 370, 12 September 2001, p. 98.

Commission to conduct the necessary negotiations for the insertion of a REIO clause in the IMO Convention.<sup>171</sup> In particular, the Commission stressed the fact that the safety requirements imposed by the Community are gradually becoming *de facto* professional practice for all vessels operating in the European area. This practice should be reflected on the international scene.<sup>172</sup> However, the Council has not yet acted upon the Commission's recommendation.

#### 4.3.3. Community participation within IMO

The total absence of a formal status for the Community and the limitation of the Commission's status to that of observer clearly hamper effective participation by the Community within IMO. Specifically, the Commission cannot negotiate or express itself in the name of the Community on matters of exclusive Community competence. Any national position is in principle considered only as such, irrespective of the EU membership of the Member State expressing it. In practice, a Member State can declare that it expresses the position of all EU Members, which is then noted in the meeting. However, the existing coordination mechanism does not ensure effectively the establishment and expression of a Community position in all the fields for which the Community is responsible, thereby running the risk that Member States' oral interventions do not systematically reflect what has been decided on in the coordination process.<sup>173</sup>

In order to redress these concerns, specific measures have been taken over the years to improve Community participation. Since 1994, the Commission has been receiving all the documents on the agenda of IMO bodies. Further, the Commission has a permanent representative at IMO who takes part in all meetings of the IMO committees and sub-committees.<sup>174</sup> The permanent representative is part of the Maritime Safety Unit of DG TREN and is assisted by experts from the Commission and the European Maritime Safety Agency. Similarly, EU Member State delegations to the IMO are typically headed by high officials from transport ministries and seconded by experts.

In an attempt to improve the effectiveness of coordination the Commission has submitted a proposal for a procedural framework for the adoption and expression of Community and common positions at IMO meetings, thereby providing for a more formal involvement of the Member States in the framework of Council bodies.<sup>175</sup> On the basis of this proposal, the Council has prepared *Draft internal arrangements for the adoption and expression of Community, common or coordinated positions in the IMO* (Draft IMO Arrangements).<sup>176</sup>

The Draft IMO Arrangements can be summarised as follows. The Council Secretariat draws up a planning of EU coordination documents and coordination meetings for IMO meetings that will be held in each six-month Presidency period, indicating the respective deadlines for the various actions and tasks.<sup>177</sup> In preparation for a given IMO meeting, the Commission

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<sup>171</sup> Recommendation from the Commission to the Council in order to authorize the Commission to open and conduct negotiations with the International Maritime Organization (IMO) on the conditions and arrangements for accession by the European Community, *supra* note 158, p. 3.

<sup>172</sup> *Ibid.*, p.38.

<sup>173</sup> *Ibid.*, p. 37-38.

<sup>174</sup> See *supra*, 4.3.1.

<sup>175</sup> Procedural framework for the adoption of Community or common positions for IMO related issues and rules governing their expression in the IMO, SEC(2005) 449, 1 April 2005.

<sup>176</sup> Annex to Council Doc. 9676/05, *supra* note 52.

<sup>177</sup> Draft IMO Arrangements, point 2.1.

will submit to the Council Secretariat the draft agenda of the relevant meeting, specifying for each item whether and if so why the Commission considers that a Community or common position is necessary or desirable, and which type of competence is covering the issue treated. The Commission may also indicate the issues on which a coordinated position is desirable. The Secretariat communicates this Commission staff working document to the Council Shipping Working Party (SWP) for agreement regarding the type of competence, usually two to three weeks before the relevant IMO meeting.<sup>178</sup> EU Member States can then inform the Secretariat if they consider it important that a Community or common position be presented on certain issues. Member States are further invited to communicate whether they will issue a submission on issues of exclusive national competence, with a view of developing a coordinated position.<sup>179</sup> Proposals for Community or common positions are then submitted by the Commission within a given time limit. Member States shall respect the same limits for submitting draft submissions on issues of shared competence. They may also submit a proposal for issues falling exclusively within their competence, but this is optional.<sup>180</sup>

The procedure described above generally is more or less in use, despite its unofficial character. However, some EU Member States noted that it is not always followed. The time available to examine the Commission coordination document is deemed insufficient by some, who call for more time during the preparatory process in order to more thoroughly prepare for IMO meetings, despite the efforts of the Commission to have the coordination document available for the EU Member States one week prior to the meeting in which this paper is considered. Also, some EU Member States submit that the clarification given by the Commission of the type of competence on certain issues treated was lacking detail.

For the preparation of Community positions technical discussions may be held in the relevant existing technical committees, such as the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS)<sup>181</sup> or the Committee on Maritime Security (MARSEC)<sup>182</sup>, or, when appropriate, in technical meetings of Member States' experts with the Commission in addition to the proceedings of the SWP.<sup>183</sup> Further, the Council Secretariat can, acting on request of the Presidency, the Commission or any EU Member State, invite Member State and Commission representatives to on the spot coordination meetings, depending on the evolution of the work and the negotiations during the relevant IMO meeting. When necessary Community, common and coordinated positions can be modified following the same rules that applied when initially defining the position.<sup>184</sup> In practice, on the spot coordination meetings are usually held at lunchtime on the starting day of the relevant IMO meeting. Meetings are chaired by the Presidency and participation by all Member States and Commission representatives present at the IMO meeting is expected. For issues of Community competence or substantial Community interest a prior coordination meeting is

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<sup>178</sup> *Ibid.*, point 2.2. Additional information regarding the practice followed in this respect was gathered from interviews with various actors involved in the preparatory process.

<sup>179</sup> See *ibid.*

<sup>180</sup> *Ibid.*, point 2.3.

<sup>181</sup> Regulation (EC) Nr. 2099/2002 of the European Parliament and of the Council of 5 November 2002 establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) and amending the Regulations on maritime safety and the prevention of pollution from ships, OJ L 324, 29 November 2002, p. 1.

<sup>182</sup> Regulation (EC) Nr. 725/2004, *supra* note 34, p. 6.

<sup>183</sup> Draft IMO Arrangements, point 2.4.

<sup>184</sup> *Ibid.*, point 2.5.

held in Brussels some time before the relevant IMO meeting. The outcome of this coordination meeting is presented to the SWP for endorsement.<sup>185</sup>

Community positions are agreed by the Council on the basis of the relevant EC Treaty provisions dealing with the matter under consideration, which usually provide for qualified majority.<sup>186</sup> In practice consensus is always strived for. If the issue has already been discussed and agreed upon in a technical meeting of COSS or MARSEC simple endorsement of the Community position by the Council can be considered sufficient.<sup>187</sup> If no Community position can be adopted the Member States and the Commission will abstain from expressing any position on the matter concerned in IMO except where necessary to defend the *acquis communautaire*.<sup>188</sup> The respective representatives may, however, continue to contribute to the debate by providing information or through factual comments.<sup>189</sup> Commission sources noted that, in practice, Member States may express reservations through the insertion of footnotes in the Community position on specific points outside of Community competence, thus preventing the entire Community position from not being adopted.

For the time being and due to the status of the Community in IMO, Community positions are generally expressed by the Presidency making clear that the submission is done or the position is expressed on behalf of all EU Member States and the Commission. Other Member States and the Commission may speak in order to support the Community position or provide further arguments. The Commission suggests including a paragraph mentioning that Member States have transferred competence to the EC on the issues concerned in the written submission.<sup>190</sup> However, the inclusion of such a statement is not accepted by some EU Member States. The visible role of the Commission in IMO thus remains very limited, even on issues falling within exclusive Community competence. In practice, the Commission only presents submissions and positions in IMO meetings offering factual information on decisions and actions within the EC or intervenes to help defend submissions and positions agreed upon jointly between EU Member States and the Commission. The invisible role consists in coordinating and monitoring the presentation of and compliance with agreed Community, common and coordinated positions.

Common positions on issues of shared competence are agreed upon by the Council by common agreement. If no agreement can be reached, EU Member States, as in FAO, in principle retain their freedom to express their own position on the matter concerned. However, this position may not affect the *acquis communautaire*.<sup>191</sup> Common positions are generally introduced by the Presidency, which will make clear that the position is presented on behalf of the EU Member States and that it is supported by all Member States present, if such is deemed appropriate. Member States and the Commission may speak to support or develop the common position expressed by the Presidency.<sup>192</sup> Coordinated positions on issues falling exclusively within Member State competence are adopted by common agreement by the Member States meeting within the Council. Such coordinated positions should be supported by all Member States and the Commission in order to achieve the given

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<sup>185</sup> *De facto* the SWP meets either in the configuration “experts” or in the configuration “attachés”. Work by experts is checked/endorsed by attachés.

<sup>186</sup> Draft IMO Arrangements, point 3.1.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*, points 3.2-3.3.

<sup>191</sup> *Ibid.*, point 4.1.

<sup>192</sup> *Ibid.*, points 4.2-4.3.

objective.<sup>193</sup> Finally, it should be noted that, as per usual practice, matters can be referred to COREPER if no agreement can be reached at the SWP.

Importantly, Member States may not introduce on their own behalf submissions containing positions on issues of Community competence.<sup>194</sup> This was confirmed very recently by the ECJ in a case concerning the alleged failure of Greece to fulfil its obligations under Article 10 TEC by submitting to IMO a national proposal on an issue regulated by Community legislation and thus falling within the exclusive external competence of the EC.<sup>195</sup> Since the proposal, non-binding though it may be, could possibly affect the scope of a Community regulation Greece was held to have violated its duty of loyal cooperation under Article 10 TEC.<sup>196</sup> The ECJ also reiterated that “*the fact that the Community is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community’s interest*”.<sup>197</sup> The absence of legal status of the Community thus does not affect the coordination process to be followed within IMO as such. Ideally, Community positions should be expressed by the Commission, as should common positions if the thrust of the issue falls within the scope of Community competence, contrary to current practice. Given the limitations to the Commission’s observer status, such statements carry, for the time being, more political weight when expressed by the EU Member State holding the Presidency, in its capacity as a full IMO member. Furthermore, full IMO members benefit from procedural advantages in comparison to observers.

During IMO sessions the Commission along with the Presidency monitors compliance by EU Member States to the agreed positions. In most cases Member States follow the position as agreed on Community level, although instances have occurred where some Member States have put forward national positions contrary to accepted Community competence.<sup>198</sup> On many issues addressed within IMO the distribution of competences does not appear clearly established, in spite of extensive Community legislation. A more detailed determination of what issues fall under exclusive or shared Community competence therefore seems warranted. For the sake of loyal cooperation, Member States would have to seek in advance the opinion of the Commission on whether the issues covered by the national submissions prepared actually fall within their exclusive competence.

In general, Commission officials noted that Member States’ cooperation during the preparatory process has increased in recent years. The coordination process however continues to remain a burdensome and time-consuming exercise and thus improvements are still needed. In this respect, it was suggested that the Council should encourage the Presidency and other Member States more strongly to make clear during their submissions in IMO that they are acting jointly in their capacity of EU Member States and point to the fact that the position expressed is the result of a Community process defining a position on matters for which Member States have transferred competence to the Community. Informal meetings between the IMO Secretary-General and the Commission were said to be useful in this context. Finally, it was noted that an important factor already contributing to the overall

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<sup>193</sup> *Ibid.*, point 5.

<sup>194</sup> *Ibid.*, point 3.2.

<sup>195</sup> *Commission v Greece*, *supra* note 35.

<sup>196</sup> *Ibid.*, paras. 20-23.

<sup>197</sup> *Ibid.*, para. 31, with reference to Opinion 2/91, *supra* note 32, para. 5. See also *supra*, 1.4.

<sup>198</sup> Commission, *White Paper. European transport policy for 2010: time to decide*, *supra* note 170, p. 98. See, for example, *Commission v Greece*, *supra* note 35.

coherence and effectiveness of EU policy within the framework of IMO is the recently emerged practice of having the Presidency's obligations regarding EU-IMO coordination fulfilled by the preceding or succeeding Presidency if the current Presidency is held by an EU Member State with limited maritime interests.

Positions prepared by the EC are often joined by third countries, most commonly, Norway and Iceland. The commitments of the latter under the EEA (European Economic Area) Agreement prove vital in guiding their comport within IMO. EC coordination within IMO has in the past led third countries to become frustrated, mostly because the process was perceived as being used to force IMO to accept the wishes of the Commission as the EU Member States form a significant and the only visible block in IMO. Other countries sometimes prepare a joint submission as well if they have a common interest on a given subject, but this is done on an *ad hoc* basis. Internal EC arrangements for coordination are not always clear towards third States and can sometimes prove difficult to grasp for outsiders. Various Commission officials noted that, even though external communication is being used to improve the perception of EC coordination in IMO, much work still needs to be done in this respect. Prominent shipping States such as Panama, Liberia, the Bahamas and several others all have permanent representations to IMO in London. To improve the perception of EC coordination among third States, increased contact between the permanent representations of these States and the Commission's permanent representative could prove effective.

#### 4.3.4. Interim conclusions

Community participation within IMO is hampered from an institutional point of view due to the lack of legal status. However, current practice shows that this does not seem to prevent the EC from participating in IMO with a reasonable degree of success. The described IMO coordination procedure enables the Community to make good use of the current possibilities within the borders of what is permitted through the limited status of the Commission. The judgement of the Court of Justice of 12 February 2009 in the infringement procedure against Greece further shows that the lack of legal status of the Community does not affect Member States' obligations under Article 10 TEC.

It is recalled that the lack of legal status of the EC at an IMAO does not legally affect the possibility of the Community becoming a contracting party to the conventions concluded under the auspices of that organisation. The absence of a REIO clause in existing IMO conventions does, however, pose an important legal barrier to the EC becoming a contracting party thereto. Much will depend on the political support that can be found for the insertion of such a clause in the Convention on the IMO and the agreements concluded under the auspices of that organisation.

Ultimately, the situation of the Community in IMO remains unsatisfactory. Given the extensive scope and level of Community legislation in the field of IMO matters, full membership should be granted to the EC. The Commission has once again repeated its stance on this issue in its recent Communication detailing the 2009-2018 Maritime Transport Strategy, emphasising that accession would not affect the rights and obligations of the EU Member States in their capacity as IMO Member States.<sup>199</sup> The long-term nature of the

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<sup>199</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Strategic goals and recommendations for the EU's maritime transport policy until 2018*, *supra* note 169, p. 15.

process of inserting a REIO clause<sup>200</sup> for this purpose should not deter the Council. Transitional measures and intermediate solutions such as granting the Community the status of observer or full participant can be adopted fairly easily, as the practice in the World Customs Organization has shown.<sup>201</sup>

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<sup>200</sup> See Recommendation from the Commission to the Council in order to authorize the Commission to open and conduct negotiations with the International Maritime Organization (IMO) on the conditions and arrangements for accession by the European Community, *supra* note 158, p. 39-41.

<sup>201</sup> See *supra*, 1.3.

## 4.4. International Whaling Commission

### 4.4.1. Introduction

The International Whaling Commission was established under the 1946 International Convention for the Regulation of Whaling (ICRW).<sup>202</sup> The purpose of the Convention is to provide for the proper conservation of whale stocks and to guarantee the orderly development of the whaling industry. The main duty of IWC is to keep under review and revise as necessary the measures laid down in the Schedule to the Convention which governs the conduct of whaling throughout the world. These measures focus on a variety of issues: they provide for the complete protection of certain species; designate specified areas as whale sanctuaries; set limits on the numbers and size of whales which may be taken; prescribe open and closed seasons and areas for whaling; and prohibit the capture of suckling calves and female whales accompanied by calves. Also required is the compilation of catch reports and other statistical and biological records. In addition, IWC encourages, co-ordinates and funds whale research, publishes the results of scientific research and promotes studies into related matters such as the humaneness of the killing operations.<sup>203</sup>

IWC decisions to amend the Schedule to the Convention have legal effects as they become effective with respect to the contracting parties ninety days following notification of the amendment (unless they present an objection), without the need for ratification.<sup>204</sup> The regulations are then implemented through the national legislation of the members, who appoint inspectors to oversee their whaling operations and may also receive international observers appointed by IWC.

### 4.4.2. Community competence and status within IWC

EC competence in the areas covered by IWC flows from Article 174(1) TEC. This provision stipulates, as an objective of the Community's environmental policy, the promotion of measures at international level to deal with regional or worldwide environmental problems. This includes the conservation of species, such as whales, on a global level.<sup>205</sup> Further, as is explicitly recognised in the Treaty of Lisbon<sup>206</sup>, the Community has exclusive competence for the conservation of biological resources of the sea under the CFP.<sup>207</sup> The Community has adopted legislation aimed at ensuring the highest level of protection of whales, among other species, through exhaustive rule harmonisation.<sup>208</sup> For example, the 1992 Habitats Directive specifically lists all cetacean species in its Annex IV and as such aims at protecting whales

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<sup>202</sup> Signed on 2 December 1946, Washington.

<sup>203</sup> International Whaling Commission, "Commission Information", available at <http://www.iwcoffice.org/commission/iwcmmain.htm> (accessed on 1 December 2008).

<sup>204</sup> Art. V(3) ICRW.

<sup>205</sup> See Communication from the European Commission to the European Parliament and to the Council, *Community action in relation to whaling*, COM(2007) 823 final, 19 December 2007, para. 16 and Proposal for a Council Decision establishing the position to be adopted on behalf of the European Community with regard to proposals for amendments to the International Convention on the Regulation of Whaling and its Schedule, COM(2008) 711 final, 6 November 2008, p. 2.

<sup>206</sup> Art. 3(d) TFEU.

<sup>207</sup> See also ECJ, Case 141/78 *France v United Kingdom* [1979] ECR 2923, para. 6 and *Commission v United Kingdom*, *supra* note 62, para. 17. Cetaceans fall within the scope of the CFP pursuant to Annex I to the EC Treaty. See also Council Regulation (EC) Nr. 2371/2002, *supra* note 98, p. 59.

<sup>208</sup> Communication from the European Commission to the European Parliament and to the Council, *Community action in relation to whaling*, *supra* note 205, para. 19.

from deliberate disturbance, capture and killing within Community waters.<sup>209</sup> Further, the regulation implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) bans the introduction of cetaceans into the Community for primarily commercial purposes.<sup>210</sup>

The Commission, though, makes clear that the use of the environmental legal basis is without prejudice to the exclusive competence of the Community in the field of the resources of the sea. The use until now of the environmental legal basis should not prejudge the decision on the legal basis of any future negotiations about the conservation and management of living aquatic resources.

The Community is not a member of IWC because it has not been able to accede to the 1946 Convention, which reserves membership of IWC to States only. A 1992 Commission proposal concerning the accession of the Community to the International Convention for the Regulation of Whaling<sup>211</sup> did not receive the necessary backing from the Council. With the absence of a REIO clause the status of the Community in IWC is that of observer, represented by Commissioners from DG ENV.<sup>212</sup> Currently 23 EU Member States are member of IWC.<sup>213</sup>

Given the migratory nature of whales, the effectiveness of Community protection and conservation measures on whales is hampered if not supported by international action. Therefore, coherent Community participation in IMAOs such as IWC is important. Only a coordinated approach on whaling can ensure effective protection of whales worldwide. Further, a coordinated EU approach could also assist the EU to use its full political and economic weight to counter the influence of leading whaling nations, including Norway and Iceland, with potentially conflicting interests.<sup>214</sup> To this end, the remaining EU Member

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<sup>209</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22 July 1992, p. 7.

<sup>210</sup> Council Regulation (EC) Nr. 338/97, *supra* note 26, p. 1. See also Council Regulation (EEC) Nr. 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products, OJ L 39, 12 February 1981, p. 1; Council Regulation (EC) Nr. 973/2001 of 14 May 2001 laying down certain technical measures for the conservation of certain stocks of highly migratory species, OJ L 137, 19 May 2001, p. 1 and Council Regulation (EC) Nr. 1936/2001 of 27 September 2001 laying down control measures applicable to fishing for certain stocks of highly migratory fish, OJ L 263, 3 October 2001, p. 1. See further Communication from the Commission to the Council and the European Parliament, *Thematic strategy on the protection and conservation of the marine environment*, COM(2005) 504 final, 24 October 2005 and Proposal for a Directive of the European Parliament and of the Council establishing a framework for Community Action in the field of Marine Environmental Policy, COM(2005) 505 final, 24 October 2005.

<sup>211</sup> Communication from the Commission to the Council, *The conservation of whales within the framework of the International Whaling Commission*, COM(92) 316 final, 15 July 1992. The Annex to this document includes a draft Decision authorising the Commission to negotiate on behalf of the Community a protocol amending the Convention to allow EC participation.

<sup>212</sup> Such a clause was inserted recently, for example, into the CITES Convention by the so-called Gaborone Amendment (still to enter into force).

<sup>213</sup> Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Netherlands, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom. Status as of 24 February 2009.

<sup>214</sup> Communication from the European Commission to the European Parliament and to the Council, *Community action in relation to whaling*, *supra* note 205, p. 21-23.

States who are not yet parties to IWC should accelerate their accession procedure in order to contribute to this coordinated approach.<sup>215</sup>

#### 4.4.3. Community participation within IWC

The limited status of the Community as observer in IWC in practice precludes the EC from voicing positions on proposals discussed within IWC, even if they cover issues falling within Community competence. Given the existing obstacles which do not allow the EC to accede to IWC as a full member, maximum coherence should be aimed for by having Member States express positions in unity and by acting jointly in the interest of the Community within IWC. This is in keeping with Member States' duty of loyal cooperation and the principle of unity in external representation as confirmed in the case-law of the ECJ.<sup>216</sup> In particular, it should be recalled that the ECJ has stressed in *Kramer* that EU Member States are “under a duty to use all the political and legal means at their disposal” to ensure the participation of the EC in an international organisation that covers matters of exclusive Community competence.<sup>217</sup>

The 2007 Commission proposal for a Council Decision establishing the position to be adopted on behalf of the EC in IWC<sup>218</sup>, adopted by the Council on 5 June 2008<sup>219</sup>, and the 2008 Commission proposal<sup>220</sup>, adopted by the Council on 2 March 2009, expressly refer to Member States' “duty of loyal cooperation under Article 10 of the EC Treaty”, stressing that Member States cannot take on obligations outside the framework of Community legislation which might affect EC rules or alter their scope.<sup>221</sup> Specifically, the Council decisions adopted on the basis of Article 175(1) TEC in conjunction with Article 300(2) second paragraph TEC, provide that common positions in relation to matters falling within EC competence are to be decided by the Council and expressed by the Member States acting

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<sup>215</sup> See Proposal for a Council Decision establishing the position to be adopted on behalf of the European Community with regard to proposals for amendments to the International Convention on the Regulation of Whaling and its Schedule, *supra* note 205, p. 4; Communication from the European Commission to the European Parliament and to the Council, *Community action in relation to whaling*, *supra* note 205, p. 8.

<sup>216</sup> See Opinion 2/91, *supra* note 32, para. 37; *Commission v Luxembourg*, *supra* note 61, paras. 57 and 58; *Commission v Germany*, *supra* note 61, paras. 63-66. See *supra*, 1.4.

<sup>217</sup> *Kramer*, *supra* note 14, paras. 44-45. See also *supra*, 1.4.

<sup>218</sup> Proposal for a Council Decision establishing the position to be adopted on behalf of the European Community with regard to proposals for amendments to the Schedule of the International Convention on the Regulation of Whaling, COM(2007) 821 final, 19 December 2007 (2007 Proposal).

<sup>219</sup> See List of “A” Items for the 2874<sup>th</sup> meeting of the Council of the European Union (Environment), Council Doc. 10084/08, 4 June 2008, p. 2.

<sup>220</sup> Proposal for a Council Decision establishing the position to be adopted on behalf of the European Community with regard to proposals for amendments to the International Convention on the Regulation of Whaling and its Schedule, *supra* note 205. The proposal has been distributed by the Council but is yet to be adopted. See Proposal for a Council Decision establishing the position to be adopted on behalf of the European Community with regard to proposals for amendments to the International Convention on the Regulation of Whaling and its Schedule, Council Doc. 15950/08, 18 November 2008 (2008 Proposal).

<sup>221</sup> 2007 Proposal, para. 10; 2008 Proposal, para. 10. See also para. 11 of the explanatory memorandum attached to both proposals, which is more explicit: “In accordance with the principle of loyal cooperation reflected in Article 10 of the EC Treaty and with the principle of the unity in the external representation of the Community, it is essential that Member States prepare the next meetings of the IWC by reaching a common position in the Council. Such position, due to the limitations intrinsic to the observer status of the Community should be expressed by the Member States acting jointly in the interest of the Community within the IWC. It is also essential that the remaining 7 Member States that are not yet Parties to the IWC accelerate their accession procedure. Only acting together and developing a Community position the EU Member States would stand a chance to ensure the development and enforcement of an adequate and strict [the 2008 Proposal uses the term “effective”] international regulatory framework for the protection of whales.”

jointly in the interest of the Community.<sup>222</sup> Further, where a Community position is likely to be affected by new scientific or technical information presented before or during the meetings of IWC or where proposals are made on the spot on matters which are not yet the subject of a Community position, a position shall be established on the proposal concerned through coordination, including on the spot, before the proposal is put to a vote.<sup>223</sup> Prior to the annual and related intersessional IWC meetings, coordination takes place. The actual preparation for a Community position does not always proceed without challenges because of the different views on whaling among the Member States. For example, Denmark, which in IWC also represents Greenland and the Faroe Islands, can deviate from the common position under certain conditions on the basis of Declaration 25 annexed to the Final Act of the 1992 Maastricht Treaty on the representation of the interests of overseas countries and territories.<sup>224 225</sup>

The practice of IWC shows that, on issues covered by the Council Decision, the Presidency expresses the Community position, which can then be complemented by EU Member States if they are so inclined. In order to further enhance coherence, practice has developed in IWC for EU Member States to agree upon speaking points in coordination with the Council Presidency at the eve of the annual IWC meeting. As the Santiago session has shown, this practice can be used effectively in order to settle disputes internally between Member States before discussing the contested matter within IWC, thus allowing the EC to appear as a unified group.<sup>226</sup>

Concerted action is all the more important given the strong diverging interests that exist between IWC Members on whaling. Indeed, a common strategic approach is needed in order to influence the whaling policy of some third countries such as Norway and Iceland, which continue to whale close to Community waters.<sup>227</sup>

#### 4.4.4. Interim conclusions

Community participation within IWC is not satisfactory. The observer status of the Community is incompatible with the scope of EC competences on issues discussed within the Whaling Commission, especially in the light of the exclusive Community competence regarding the conservation of marine biological resources under the CFP. Again, the fact that the Community is not a party to IWC does not affect the issues of EC competence and the need for coordination. The general legal requirements for coordination and unity of international representation as set out previously continue to apply.<sup>228</sup> The adoption of the Decision on 5 June 2008 by the Council allowed the Community to coordinate its position on

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<sup>222</sup> 2007 Proposal, Art. 1; 2008 Proposal, Art. 1.

<sup>223</sup> See *ibid.*, Article 2.

<sup>224</sup> See Proposal for a Council Decision establishing the position to be adopted on behalf of the European Community with regard to proposals for amendments to the International Convention on the Regulation of Whaling and its Schedule, Council Doc. 9818/08, 2 June 2008, p. 8. See also *supra*, 4.1.

<sup>225</sup> See *supra*, 1.4.

<sup>226</sup> See press reports BBC News Science & Environment, “Greenland denied on whale catch”, available at <http://news.bbc.co.uk/2/hi/science/nature/7476652.stm> (accessed on 2 December 2008) and Berlingske Tidende, “EU: Nej til ekstra hvaler til Gronland”, available at <http://www.berlingske.dk/article/20080626/politik/806260423/> (accessed on 2 December 2008). The issue at stake concerned the Danish annual aboriginal subsistence quota on humpback whales.

<sup>227</sup> See Communication from the European Commission to the European Parliament and to the Council, *Community action in relation to whaling*, *supra* note 205, para. 23.

<sup>228</sup> See *supra*, 1.4.

a number of issues during the 60<sup>th</sup> annual meeting of the IWC in June 2008 in Santiago de Chile. This practice will continue on the basis of the Decision adopted on 2 March 2009, which covers the next three annual IWC meetings, including the related intersessional meetings.

#### 4.5. Schematic Overview (Table 4.1)

	ICCAT	FAO	UNGA	IMO	IWC
<b>EC Competence</b>	Exclusive (fisheries)	Exclusive in field of fisheries; shared	Exclusive (fisheries resolution); shared (law of the sea resolution)	Generally shared competences with extensive Community legislation	Exclusive in area of conservation of marine biological resources
<b>EC Status (Convention)</b>	Full member	Non-permanent observer status (1962-1991); full membership (since 1991)	-	-	-
<b>EC Status (Depositary)</b>	-	-	Observer status	-	Observer status
<b>Status Commission</b>	-	-	-	Permanent observer status	-
<b>Status EU MS</b>	Obligation to retreat upon accession EC; France and UK member for interests overseas territories	All EU MS full members FAO; EC membership of FAO dependent upon FAO membership majority EU MS	All EU MS full UNGA members	All EU MS full IMO members	23 EU MS full IWC members
<b>EC Status conventions concluded in seat IMAO</b>	-	Full contracting party to FAO Compliance Agreement	Full contracting party to UNCLOS and UNFSA	Currently party to none of the IMO conventions	-
<b>Accession procedure followed</b>	Modification of ICCAT Convention through insertion of REIO clause by Paris Protocol	Observer status through exchange of letters; full membership status after insertion REIO clause after long negotiation process by Commission through REIO Committee	Invitation from UN Secretary-General upon request in UNGA resolution	Cooperation agreement granting Commission observer status following exchange of letters IMO Secretary-General and Commission President; Commission proposal for accession still pending before Council	Commission proposal for accession not acted upon by Council; accepted as observer
<b>Interim measures</b>	-	-	-	Transitional measures suggested in SEC(2002) 381 final: coordinated action in four IMO committees and permanent representation of Community	-
<b>REIO clause /Specific EC clause</b>	REIO clause (Art. XIV(4) ICCAT Convention)	REIO clause (Art. II(3) FAO Constitution)	No	No	No
<b>Nature IMAO measures</b>	Binding conservation and management measures	Generally non-binding recommendations; binding decisions possible as well	Non-binding annual resolutions	Power to adopt binding decisions	Decisions to amend Schedule produce legal effects 90 days after notification
<b>EC rights / obligations in IMAO</b>	EC has same rights and obligations as other contracting parties (Art. XIV(5) ICCAT Convention)	- 1962-1991: non-permanent observer with privileged speaking rights - since 1991: full member with alternative voting rights and limited rights of participation	General observer rights, occasionally preferential treatment in speaking rights and seating order	General observer rights, Commission receives all relevant documents on the agenda of IMO bodies and has permanent representative	General observer rights
<b>Declaration of competences</b>	-	Original declaration of competence upon accession; statements of competence before every meeting and upon request from other FAO members; duty of EC and MS	-	-	-
<b>Basis EC coordination procedure</b>	Art. 300(2) second paragraph TEC since 2008 session	Inter-institutional agreement Council and Commission; declared binding by ECJ	Informal	SEC(2005) 449 Proposal for procedural framework submitted by Commission, pending adoption by Council (Draft internal arrangements)	Article 300(2) second paragraph TEC since 60 <sup>th</sup> IWC session
<b>Positions</b>	Community positions expressed by Commission	- Community position expressed by Commission; - Coordinated position expressed by MS; - Common positions expressed by Commission or Presidency, depending on thrust issue; - MS vote and speak if no common position reached or if particular concern dependent territory	EU position typically expressed by Presidency, making clear that it speaks on behalf of all EU MS, who vote in accordance with position	- Community positions expressed by Presidency, making clear that it speaks on behalf of the EC. If no Community position reached, Commission and MS abstain; - Common positions expressed by Presidency, making clear that it speaks on behalf of all EU MS if appropriate. If no common position reached, MS speak and vote, but may not affect <i>acquis communautaire</i> ; - Coordinated positions expressed by MS or Presidency	Community positions expressed by MS

## CHAPTER 5

### IDENTIFIED SHORTCOMINGS AND RECOMMENDATIONS FOR IMPROVED EU COHERENCE

The present chapter examines in a transversal manner the shortcomings as regards EU participation and coordination in IMAOs, taking the case studies of the previous chapter as a point of departure. The identified shortcomings are analysed for their impact on EU coherence with a view of formulating recommendations to enhance the Union's ability of speaking with a single voice in IMAOs. The efficiency of the process of EU coordination within IMAOs and the effectiveness thereof depends on several institutional factors (5.1) as well as on a number of procedural variables (5.2). The selected case studies are indicative in this regard, as they differ with respect to both institutional and procedural elements.

#### *5.1. Institutional Elements impacting upon EU Coherence in IMAOs*

The division of competences between the EU and its Member States should typically be the point of departure for determining and reviewing the nature and scope of EC participation and coordination in a given IMAO. The EC is increasingly occupying the field in a wide range of maritime issues through the promulgation of a substantive body of Community legislation and the conclusion of a number of international agreements in these areas. To the extent that an IMAO deals with matters falling largely under Community competence, the EC should be awarded full membership status, especially if the competence is of an exclusive nature.<sup>229</sup> Community participation in regional fisheries management organisations is exemplary in this regard, with the EC being full member of, *inter alia*, ICCAT, the North East Atlantic Fisheries Commission (NEAFC) and the North Atlantic Salmon Conservation Organization (NASCO). The same should hold true for EC participation in IMAOs discussing matters of conservation of marine biological resources, such as the Commission for the Conservation of Antarctic Marine Living Resources.<sup>230</sup> The example of IWC shows that this is however not always the case. Further, in areas of exclusive Community competence, EC membership should be exclusive as well. This is also made clear in the ICCAT Convention, which stipulates that the Member States of a REIO and those which adhere to it in the future shall cease to be parties to the Convention upon accession by the REIO.<sup>231</sup> This increases transparency and serves to avoid confusion towards third countries, which might otherwise be led to believe that the competences on the issues at stake are shared or national.

The limited rights of observers and full participants, as compared to those of full members, obviously curtail participation and restrict the possibilities of coordination within IMAOs. The Community should thus always strive for full accession to IMAOs where possible and where needed to accurately reflect its expanding competences on maritime matters. If the legal status of the EC is thus an important element for ensuring Community participation and coordination within IMAOs, its effects are, however, mitigated by a number of factors.

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<sup>229</sup> See *supra*, 1.3.

<sup>230</sup> See the Communication from the Commission to the Council and the European Parliament, *Community participation in Regional Fisheries Organisations (RFOs)*, *supra* note 14.

<sup>231</sup> Art. XIV(6) ICCAT Convention.

First, the Commission should be mindful during negotiations that the conditions imposed upon the Community for becoming a full member should not in effect negate the benefits of accession. Full membership entails that the EC should have the same rights and obligations as State members of an IMAO.<sup>232</sup> The insertion of a REIO clause in the constituent treaty, required in most IMAOs to make it possible for the EC to join, should not be seen as an opportunity to impose restrictions upon the Community. This is true especially insofar as they would affect the ability of speaking and voting with a single voice, as this is typically the main benefit to be acquired from obtaining membership status in an IMAO, as compared to that of observer or full participant. Concurrent membership of EU Member States, alternative voting rights and the requirement of (repeated) statements of competence can act as legal and institutional impediments to effective EC cooperation and coordination which can be imposed upon accession of the Community to IMAOs, as practice has shown.<sup>233</sup>

Conditions for EC accession to IMAOs are usually included upon requests from third countries. These conditions can be useful for the EU to the extent that they can serve to improve the transparency and understanding of the EU coordination process for third countries. With regard to statements of competence, however, the ECJ has expressly held that “*it is not necessary to set out and determine, as regards other parties to [an international] convention, the division of powers [...] between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community [...].*”<sup>234</sup> Once accepted, however, Community compliance with conditions for accession laid down by the constituent instrument of an IMAO is mandatory. The ECJ has held in this respect that the Council, when it approves accession to an international agreement, has to respect the conditions for accession laid down by that agreement, since an accession decision that does not comply with those conditions would be in breach of the Community’s obligations from the moment it entered into force.<sup>235</sup> The condition imposed by the relevant agreement in the case at hand concerned the formulation of a declaration of competences which the Council was obliged to provide.<sup>236</sup>

The above shows that it is necessary to thoroughly balance beforehand the advantages of full membership status with the burden placed upon the EC by restrictions that could affect the Community’s capacity to speak with a single voice. This holds equally true for restrictions flowing from internal arrangements concluded between EU institutions on the adoption and expression of positions in IMAOs. When drafting both rules governing EC accession and rules regulating coordination in an IMAO one should be careful not to unequally burden the Community in comparison to the other players involved, as this could negatively affect coherence, especially in the field of shared competences. The various proposals on the adoption of common positions in IMO can form a useful example in this regard. When the Commission requested authorisation from the Council to accede to IMO in 2002, it proposed as a transitional measure the adoption of rules of coordination similar to those elaborated in the FAO arrangement between the Commission and the Council. These rules provide that,

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<sup>232</sup> See the situation in ICCAT, *supra*, 4.1.2.

<sup>233</sup> See especially the case study of FAO, *supra*, 4.2.2.

<sup>234</sup> Ruling 1/78, *supra* note 57. The case concerned the EAEC, but its principles can no doubt be transposed to the EC, as the ECJ itself makes the link between the two Communities by referring to the principle of loyalty and the *ERTA* judgment. Further, the Court referred to Ruling 1/78 in later decisions under the EC Treaty. See specifically Opinion 2/91, *supra* note 32, para. 36. See further P. Eeckhout, *supra* note 67, 210-211.

<sup>235</sup> ECJ, Case C-29/99 *Commission v Council* [2002] ECR I-11221.

<sup>236</sup> The declaration provided was deemed incomplete, however, and the ECJ annulled the Council Decision.

when no common position can be agreed upon in areas of shared competence, the individual EU Member States retain their right to vote and speak in the relevant IMAO.<sup>237</sup> This rule is not conducive to fostering coordination, and hence coherence, since it does not provide the Member States with an incentive to contribute to reaching a common position in areas of shared competence.<sup>238</sup> Conversely, chances of the EC speaking with a single voice could improve markedly if EU Member States were obliged to abstain in the absence of a common position, as is foreseen if no *Community* position can be agreed, in the 2005 Draft IMO Arrangements.<sup>239</sup>

Second, it is clear that the applicability of the general principles of EC coordination does not depend upon the Community having a formal legal status at a given IMAO. Coordination should still be pursued in the absence of full membership and can be reinforced through the conclusion of inter-institutional arrangements between the Commission and the Council, which the ECJ has declared binding.<sup>240</sup> Member States are further subject to special duties of action and abstention in the event the proposal for concerted action submitted by the Commission is not yet adopted by the Council.<sup>241</sup> This is confirmed by practice in the International Labour Organization, which is governed by rules formulated in a Commission proposal on which the Council failed to conclude its discussions.<sup>242</sup> The duty of loyal cooperation in Article 10 TEC can prove a powerful means of ensuring coherence in this respect.<sup>243</sup>

The ECJ has emphasised on numerous occasions that all EU Member States are bound by positive and negative obligations derived from Article 10 TEC “[to act] jointly in the Community’s interest”<sup>244</sup> “in all the areas corresponding to the objectives of the Treaty”<sup>245</sup>, “both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into”.<sup>246</sup> This duty of genuine cooperation between the EU and its Member States is “all the more necessary” if the Union cannot, due to the state of international law, itself

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<sup>237</sup> Compare FAO Arrangement, para. 2.4 and Recommendation from the Commission to the Council in order to authorize the Commission to open and conduct negotiations with the International Maritime Organization (IMO) on the conditions and arrangements for accession by the European Community, *supra* note 158, p. 41. The latter document on this point also includes an express reference to Member States’ obligations under Art. 10 TEC. See *infra*.

<sup>238</sup> The same can be noted with respect to the FAO rule providing that Member States are thought to retain competence on all matters not specified in the declaration of competence. See *supra*, 4.2.2.

<sup>239</sup> Point 3.2.

<sup>240</sup> *Commission v Council*, *supra* note 57. The ECJ has recognised the binding nature of inter-institutional agreements in other cases as well. See J. Monar, “Interinstitutional agreements: The phenomenon and its new dynamics after Maastricht”, *Common Market Law Review* (1994), 693.

<sup>241</sup> *Commission v United Kingdom*, *supra* note 62, para. 28, *Commission v Luxembourg*, *supra* note 61, para. 59; *Commission v Germany*, *supra* note 61, para. 65.

<sup>242</sup> Proposal for a Council Decision on the exercise of the Community’s external competence at international labour conferences in cases falling within the joint competence of the Community and its Member States, COM(94) 2 final, 12 January 1994. See P. Nedergaard, “Coordination Processes in International Organisations: The EU at the International Labour Conference in 2005”, 8 July 2008, available at [http://www.eiop.or.at/eiop/index.php/eiop/article/view/2008\\_003a/75](http://www.eiop.or.at/eiop/index.php/eiop/article/view/2008_003a/75), 8 (accessed on 19 February 2009).

<sup>243</sup> P. Eeckhout (*supra* note 67, 214) argues that “if it is possible to materialize the duty of co-operation by adopting a binding interinstitutional agreement, [there could also be] some form of obligation [...] for Member States’ participation in the work of organizations of which the Community cannot become a member, despite its competences in the matter [...]. Such an obligation could be enforced through an action for failure to act under Article 232 EC.”

<sup>244</sup> Opinion 2/91, *supra* note 32, para. 5 and *Commission v Greece*, *supra* note 35, para. 31.

<sup>245</sup> Opinion 2/91, *supra* note 32, para. 10 and Opinion 1/03, *supra* note 30, para. 119.

<sup>246</sup> *Commission v Council*, *supra* note 57, para. 48.

conclude the relevant agreement<sup>247</sup>, “does not depend [...] on whether the Community competence concerned is exclusive”<sup>248</sup> and is furthermore not affected by “[t]he mere fact that the Community is not a member of an international organisation”.<sup>249</sup> As noted previously, the ECJ has very recently expressly affirmed these principles in a judgment on EU coordination and cooperation in the context of IMO<sup>250</sup>, an IMAO (1) with the power to adopt binding decisions on issues generally falling under shared Community competences; (2) to which only EU Member States have acceded, excluding the Community; (3) at which the Commission merely has an observer status; (4) under the auspices of which several conventions were concluded, none of which includes the EC as a contracting party; and (5) in which the process of EU coordination is merely governed by Draft Arrangements which are yet to be adopted by the Council and which provide that even in the case of exclusive EC competences, Community positions are to be expressed by the Presidency.<sup>251</sup>

A specific issue pertaining to the duty of loyal cooperation in international maritime fora concerns the representation of the interests of the overseas territories of EU Member States.<sup>252</sup> Declaration 25 annexed to the Final Act of the 1992 Maastricht Treaty and the FAO inter-institutional agreement in principle allow for separate action by a Member State if it proves impossible to reach agreement between the interests of its overseas territories and the EU. However, Declaration 25 stresses that this is limited to ‘exceptional circumstances’ and the duty of loyal cooperation in any case remains fully applicable.

## 5.2. Inhibiting Factors

The effects of the factors identified in the previous section on the EU coordination process in IMAOs vary depending on a number of elements and hinge upon the specific context of the IMAO in which coordination takes place. Nevertheless, it is possible to distinguish several generic factors that may affect the EU coordination process within IMAOs and inhibit the ability for the Union to speak with a single voice on the international maritime stage: the heterogeneity of interests of Member States (5.2.1), the nature of measures adopted within IMAOs (5.2.2), the time available for preparatory coordination (5.2.3), the improper application of established coordination procedures (5.2.4) and the lack of procedural guarantees during the on the spot coordination process (5.2.5).

### 5.2.1. Heterogeneity of interests

Interests of EU Member States in maritime affairs are generally rather heterogeneous with sometimes strong diverging views being expressed on certain issues discussed within IMAOs.<sup>253</sup> This heterogeneity impacts upon both the chances of the EC obtaining legal status at a given IMAO and the efficiency of the process of coordination. Member States are typically reluctant to abandon their role in an international organisation if they have a strong national interest in the issues at stake. This should be taken into account when assessing the political viability of proposals to increase the Community’s status within an IMAO. The

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<sup>247</sup> Opinion 2/91, *supra* note 32, para. 37.

<sup>248</sup> *Commission v Luxembourg*, *supra* note 61, para. 58; *Commission v Germany*, *supra* note 61, para. 64.

<sup>249</sup> *Commission v Greece*, *supra* note 35, para. 30.

<sup>250</sup> *Ibid.*

<sup>251</sup> See *supra*, Table 4.1.

<sup>252</sup> See the practice at IWC, FAO and ICCAT.

<sup>253</sup> For example, within ICCAT not every EU Member State has an equal interest in tuna and industry pressures per Member State differ to a great extent.

degree of heterogeneity will further affect the potential for success in achieving coherence, both directly, through increasing or decreasing the challenges that are involved in achieving compromise and consensus, and indirectly, through the effect it has on the nature of delegation. The less homogeneous the interests of Member States, the more likely it is that the margin of manoeuvre of the Commission and the Presidency will be reduced during preparatory meetings and coordination on the spot.<sup>254</sup> Differing interests of EU Member States in maritime matters can thus impact on the degree of coherence achieved in the process of coordination.<sup>255</sup> The actual effects of this heterogeneity will however depend, *inter alia*, upon the nature of the measures adopted by the relevant IMAO.

### 5.2.2. Nature of measures adopted within IMAOs

From the case studies it becomes clear that coordination will typically be a lengthier and more difficult process when the measures negotiated within an IMAO produce legally binding effects that ultimately will have to be transposed into Community law. Indeed, it is to be expected that the binding nature of measures will accentuate more strongly the individual interests of the actors involved, thus complicating both internal coordination between the Commission and the Council/EU Member States and the external negotiations within the IMAO concerned and with the other contracting parties/third countries. Generally speaking, the need for coherence through clear rules of coordination will be even stronger in IMAOs that can adopt binding measures and when dealing with issues on which players have strong diverging views.<sup>256</sup>

As such, EU coordination within UNGA on the annual resolutions on fisheries and the law of the sea is generally perceived to be working rather well, despite certain complications arising from the lack of full membership. Deliberations within FAO on fisheries matters typically pertain to non-binding measures and the coordination process in this respect is generally seen as being efficient and effective, issues concerning statements of competence set aside. When negotiating measures producing legally binding effects, however, disputes appear to arise more often and coherence is achieved less easily, even though the EC is a full member of FAO. This is illustrated by the ongoing discussions concerning an international legally binding instrument on port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing.<sup>257</sup> Coordination on this issue is rather difficult, despite the clear negotiating mandate the Commission has obtained from the Council on the basis of exclusive Community competence.<sup>258</sup> The interests of the EU Member States and the nature of the measures adopted can thus negate to some extent the benefits gained from full membership and a clear authorisation to negotiate.

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<sup>254</sup> See further A. Dür, "Assessing the EU's role in international trade negotiations", *European Political Science* (2006), 362 and C. Damro, "EU delegation and agency in international trade negotiations: A cautionary comparison", *Journal of Common Market Studies* (2007), 883.

<sup>255</sup> See for example the invoking of Declaration 25 on the representation of the interests of overseas countries and territories by Denmark during the 60<sup>th</sup> IWC meeting and *Commission v Greece*, *supra* note 35.

<sup>256</sup> See, for example, the process of EC coordination within IWC.

<sup>257</sup> See *supra*, 4.2.3.

<sup>258</sup> See the Recommendation from the Commission to the Council in order to authorise the Commission to conduct negotiations for the elaboration of an international legally-binding instrument on port State measures to prevent, deter and eliminate, illegal, unreported and unregulated fishing, COM(2008) 333 final, 28 May 2008.

### 5.2.3. Time available for preparatory coordination

Chances of a position being reached and subsequently supported during IMAO meetings increase markedly when sufficient time is given to all actors involved in the context of the preparatory meetings organised by the Commission and the relevant Council Working Group. Moreover, adequate preparation will limit the need for additional coordination on the spot, when circumstances generally allow for less opportunity to coordinate efficiently.<sup>259</sup> In this respect, sources have repeatedly stressed the need for the Commission to request for Member State contributions in a timelier manner. At the same time, Commission officials emphasised the need for Member States to more promptly submit information which the EC has to report to a given IMAO in fulfilment of its obligations thereto. Further, both EU and Member State officials noted the late submission of documents by IMAOs as creating a bottleneck situation which hampers efficient coordination.

Timely contributions by all actors could further increase the chances of having conflicts resolved without confrontation before the start of an IMAO session, by indicating strong national interests which the Commission can subsequently take into account during further negotiations. The Guidelines for ensuring Community coordination in the light of EC membership of the World Customs Organization (WCO Guidelines)<sup>260</sup> in this respect expressly provide that Member States have to communicate to the Commission their specific concerns or comments regarding a Commission submission which notes that a certain matter requires the establishment of a Community or common position.<sup>261</sup> Some Member States noted in this regard that the division of competences indicated in submissions of the Commission could benefit from more detail. Enhanced cooperation in this context could help to address conflicts internally and obviate the need for the Commission to resort to procedures before the ECJ.

### 5.2.4. Improper application of established coordination procedures

Article 300(2) second paragraph TEC provides, as it may be recalled, that the Council shall adopt, upon proposal from the Commission, decisions for the purpose of establishing the positions to be adopted on behalf of the Community in a body set up by an international agreement, when that body is called upon to adopt decisions having legal effects. A formal decision on measures relating to matters falling within Community competence is an important means of ensuring coherence and should be aimed for whenever binding measures are established in the framework of a given IMAO. Further, clear coordination frameworks reflecting established practice serve to increase legal clarity for all actors involved including third countries. Indeed, internal Community arrangements for coordination are not always clear in the eyes of third States and can sometimes prove difficult to grasp for outsiders.

The case studies support the finding that an unclear framework for coordination and unsystematic application of established practice negatively impact upon the ability of the EU to speak with a single voice. For example, coordination within ICCAT prior to 2008 was based on an *ad hoc* procedure without clear legal basis, a situation which was perceived as untenable by some Member States. When the Commission subsequently acted with a clear mandate to negotiate for the first time in 2008, this was noted to have improved coherence within ICCAT. Conversely, decisions within IMO are still adopted without following the

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<sup>259</sup> See *infra*.

<sup>260</sup> Council Doc. 8594/08, *supra* note 46.

<sup>261</sup> WCO Guidelines, *supra* note 50, para. 22.

procedure under Article 300(2) second paragraph TEC even though they often produce binding effects. Guiding Draft Arrangements have been prepared in this respect but not yet formally agreed. In practice, they are applied routinely but are not always followed.

Preparatory coordination efforts within the EU are only effective when the EU can subsequently express these positions with a single voice on the international stage. Therefore, under established practice Community positions should always be expressed by the Commission. This also helps to present third countries with an accurate reflection of the division of competences between the Community and EU Member States. If the Commission is, for whatever reason, inhibited in an IMAO from expressing positions on issues falling within exclusive Community competence, this *ipso facto* affects EU coherence. It further creates an inaccurate reflection of the internal division of competences towards third countries.

Anomalies in this regard were identified in the case studies concerning IMO and IWC. The fact that the EC is not a member of these IMAOs does not affect the need to follow established coordination procedures and no legal inhibitions exist at EU level that should preclude the Commission from expressing Community positions. This finding is confirmed by practice at UNICPOLOS and the Working Group on Marine Biodiversity, where the Commission on behalf of the Community, in spite of the latter's mere observer status, can join the seat of the Member State holding the Presidency to express the positions on matters of exclusive Community competence. Practice at UNGA confirms that informal arrangements can soften the effects of the Community's observer status at some IMAOs.<sup>262</sup> Further, the WCO Guidelines provide that “[t]he Commission maintains close contacts with the WCO Secretariat in order to guarantee that the Community or common positions of the Community and its Member States can be properly taken into account.”<sup>263</sup> This provision expressly links the task of the Commission under Article 302 TEC of maintaining appropriate relations with IMAOs with finding means of ensuring the proper expression of unified positions.

If, despite extensive coordination efforts, no positions on maritime issues can be agreed upon, a maximum level of EU coherence on the international stage should nevertheless still be pursued. This can be attained by providing that, in the case of failure to reach a Community or a common position, both the Commission and the Member States are to abstain from expressing a position and from voting on the issue concerned in an IMAO. Current practice in IMAOs, such as IMO, which only calls for abstention in case no Community position can be reached, is insufficient and negatively affects EU coherence. The duty of loyal cooperation entails that the adoption of a unified position should be pursued by all means possible. This could, if need be, include such informal arrangements as the adding of footnotes to Community positions on specific points falling outside Community competence, indicating therein potential reservations expressed by certain EU Member States.<sup>264</sup>

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<sup>262</sup> The Commission is sometimes allowed to take the floor in formal meetings of the UNGA. See *supra*, 4.2.4. This could allow the Commission to present Community positions on matters falling under exclusive EC competence.

<sup>263</sup> WCO Guidelines, *supra* note 50, point 25.

<sup>264</sup> See, for example, practice at FAO and IMO.

### 5.2.5. Lack of procedural guarantees during the on the spot coordination process

The effectiveness of the preparatory work carried out during meetings in Brussels depends to a large degree upon how the process of follow-up coordination is organised subsequently during relevant IMAO sessions. The role of the Presidency in this regard is particularly important especially within IMAOs to which the Community, for whatever reasons, has not (yet) acceded and in which the formal role of the Commission thus remains limited. In this context, the Presidency must be able to coordinate and manage the interdependencies stemming from the sometimes diverging views of the Commission and Member States.<sup>265</sup> Its tasks during IMAO sessions are multifarious and encompass the preparation and initiation of policy statements as well as a number of logistic and practical tasks, such as calling and chairing meetings and ensuring the proper exchange of information.

However, few procedural safeguards are in place that help to ensure consistency in the quality of on the spot coordination. The case studies show that the rotating nature of the Presidency in combination with the varying interests of EU Member States in maritime issues impacts strongly upon EU coordination in-between and during IMAO sessions. Coordination on the spot and its impact upon EU coherence depend to a large extent upon the qualities and interests of the Member State holding the Presidency. The Union's ability to speak with a single voice on the international maritime stage would benefit from procedural guarantees to remedy this level of contingency in the process of on the spot coordination. Practice in IMO, an IMAO in which the EC lacks official status, shows that coherence in this respect can be improved through informal cooperation between the succeeding Council Presidencies. Indeed, in IMO, as it may be recalled, the Presidency's obligations of EU coordination are typically fulfilled by either the preceding or the succeeding Presidency, if the current post is held by a Member State with limited maritime interests.<sup>266</sup>

Similar practice has evolved in other areas of EU external policy. For example, at the 2005 Conference of the International Labour Organization, an international organisation at which the Community has observer status, the Luxembourg Presidency reportedly recognising its limited knowledge of and interests in the area of fisheries decided to map out the activities beforehand and left coordination to the Netherlands.<sup>267</sup> Further, in the EC's external climate policy, an area in which the Community is seen as a frontrunner<sup>268</sup>, coordination and coherence is enhanced by having the current Presidency flanked by the incoming Presidency. Moreover, since 2004 the Presidency has adopted in areas of external climate policy the practice of having the Community represented at various international negotiating groups over longer periods of time by so-called lead negotiators from the Commission and from different Member States other than the country holding the current Presidency.<sup>269</sup> This helps to ensure both the quality of coordination by the Presidency during climate negotiations and consistency in-between sessions.

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<sup>265</sup> P. Nedergaard, *supra* note 242, 16.

<sup>266</sup> See *supra*, 4.3.3.

<sup>267</sup> P. Nedergaard, *supra* note 242, 12.

<sup>268</sup> See, *inter alia*, S. Oberthür, "The EU as an international actor: The protection of the ozone layer", *Journal of Common Market Studies* (1999), 641; J. Vogler, "The European contribution in global environment governance", *International Affairs* (2005), 835; J. Vogler and H.R. Stephan, "The European Union in global environmental governance. Leadership in the making?", *International Environmental Agreements* (2007), 389 and S. Oberthür and C.R. Kelly, "EU leadership in international climate policy: Achievements and challenges", *International Spectator* (2008), 35.

<sup>269</sup> S. Oberthür and C.R. Kelly, *supra* note 268, 38.

### 5.3. Recommendations

The present section formulates specific recommendations that may help facilitate to overcome the identified shortcomings in the process of EU participation and coordination, with the goal of enhancing the Union's ability to speak with a single voice. The recommendations are categorized per actor and address in turn the Commission (5.3.1), the Council and the Commission (5.3.2), the Presidency (5.3.3), the Member States (5.3.4) and, finally, all EU actors involved (5.3.5).

#### 5.3.1. Commission

- Bearing in mind considerations of political viability, the Commission should always strive for full membership of the EC to an IMAO whenever this is needed to effectively exercise and accurately reflect Community competences on maritime issues covered by the relevant IMAO. Transitional measures such as granting interim membership rights and obligations, formalizing existing coordination practice and appointing a permanent representative to the IMAO should be used increasingly to mitigate the effects of the often long and complex procedure of EC accession through the insertion of a REIO clause in the constituent treaty of the IMAO at hand.
- The Commission should make full use of the possibilities offered by Article 302 TEC to soften procedural obstacles to participating and speaking with a single voice in IMAOs if full membership for the EC cannot be attained for the time being. Full participant status entailing enhanced speaking rights can be granted through an exchange of letters and should be considered if conditions imposed upon the EC for full membership would negatively impact upon EU coherence. Other more informal arrangements should be pursued as well, in line with the task of the Commission to ensure all appropriate relations with international organisations. These efforts should have the aim of, *inter alia*, ensuring that Community positions can be expressed by the Commission during formal IMAO meetings, or that the Presidency can make clear that it speaks on behalf of all EU Member States and the Commission. Such informal arrangements would have the additional benefit of enhancing transparency towards third countries in cases of exclusive Community competence.
- A requirement of submitting and regularly updating statements of competence should be agreed upon only if and to the extent it can actually serve to clarify the distribution of competences for third States, as well as between the Community and Member States themselves, keeping in mind the constantly changing scope of Community competences. For the same reason, it should be stressed that the distribution of competences as laid down in such a statement does not serve as a precedent for future negotiations, in light of the evolving nature of Community law.
- During negotiations for EC accession to an IMAO it should be avoided that conditions for drawing up declarations of competence provide that issues not covered by the declaration are automatically assumed to fall within the scope of Member States' competence.
- Commission proposals on issues of Community competence should set out in more detail the legal basis on which the competence rests for a given agenda item upon communication to Member States. A clearer reference to Community law could serve

to enhance legal clarity and facilitate deliberations on issues concerning the distribution of competences.

- More time should be taken for preparatory meetings with a view to coordinate positions in upcoming sessions of IMAOs and Member State contributions should be requested in a timelier manner. This should help to ensure that all views are taken on board in time to address concerns by all relevant actors before the start of IMAO sessions and reduce the need for additional on the spot coordination.
- In the same vein, the Commission should make good use of the opportunities offered by Article 302 TEC and act within its powers to ensure a timely reception of all documents from IMAOs needed for proper coordination, pursuant to its task of maintaining appropriate relations with international organisations.
- If no other options prove viable, and in line with its duties as guardian of the Treaties, the Commission should not refrain from instituting proceedings against Member States or the Council to enforce compliance with Article 10 TEC. Case-law of the ECJ shows that such legal actions are an important means of ensuring EU coherence in IMAOs.

#### 5.3.2. Council and Commission

- The Council Secretariat, with the support of the Commission, should guarantee timely preparation of a schedule of all upcoming meetings and sessions of a given IMAO in order to ensure smooth preparation of the coordination process.
- The Commission should insist on full compliance with Article 300(2) second paragraph TEC whenever the adoption of decisions having legal effects is being considered within an IMAO on an issue falling within Community competence. The Council should cooperate to this end by adopting the proposed decision. In doing so, it can take due account of Member States' views and concerns by issuing sufficiently detailed negotiating directives which should nevertheless leave the Commission with enough flexibility during negotiations. A clear mandate serves to enhance legal security for all actors throughout the coordination process.
- A procedural framework should be established for the adoption of Community, common and coordinated positions for IMAOs, clearly setting out rules governing their expression and detailing the respective voting rights. Inter-institutional agreements can play a useful role in this respect, not only because of their binding character for EU institutions but also because they enhance legal clarity within the EU and towards third countries as regards the coordination procedure followed. The submission of proposals by the Commission in this respect is encouraged, due to the important function they fulfil in guiding the actions of the EU institutions, the Presidency and the Member States.
- Inter-institutional agreements and procedural frameworks on the adoption and expression of Community, common and coordinated positions within IMAOs should be formulated so as to ensure that both EU institutions and Member States have proper and mutually reinforcing incentives to arrive at such positions. Arrangements providing that in the absence of a common position speaking and voting rights on

issues of shared competence shall be exercised by the Member States should be avoided. This practice unfairly burdens the Community in trying to reach a common position and severely restricts the ability to speak with a single voice. Coherence in this respect can be improved by providing that both the Commission and Member States should both refrain from speaking and voting on issues on which no common position can be reached. At the very least, in case the Member States were to retain their right to speak and vote in the absence of a common position, the procedural framework should expressly recall that national positions may not affect the *acquis communautaire*.

- To ensure the adoption of Community, common and coordinated positions, more use could be made of informal arrangements allowing for a larger degree of flexibility during the preparatory process of coordination. Both the Council and the Commission should always strive for positions being agreed without reservations. Therefore, informal practices such as adding footnotes to position papers should be kept to a minimum.

### 5.3.3. Presidency

- Procedural guarantees should be established ensuring more consistency and coherence in on the spot coordination during IMAO sessions, emphasising thereby the crucial role of the Presidency in this regard. If the current Presidency is held by a Member State with limited maritime interests its coordination tasks should be fulfilled by the preceding or succeeding Presidency.
- Presidencies should work towards establishing and further consolidating the practice within IMAOs of having Community positions put forward by the Commission, *inter alia* through clearly indicating to the chair of the relevant IMAO meeting that the Commission shall express these positions.

### 5.3.4. Member States

- Member States should indicate in a timely manner which issues on the agenda of an upcoming IMAO meeting are considered to be of particular interest, as practice shows that obtaining EU coherence is a more complex and time-consuming process in cases of strong heterogeneity. Indicating issues on the basis of relative priority serves to structure the agenda for coordination, possibly aiding the convergence of interests among the actors involved.
- Member States should see to it that contributions and necessary data are sent to the Commission in a timely manner in order to ensure an efficient proceeding of the coordination process.
- Member States should highlight more clearly and in more detail potential concerns pertaining to issues falling within the scope of a Commission proposal under Article 300(2) second paragraph TEC, in order to allow the Council to issue more effective directives guiding Commission negotiations.

#### 5.3.5. All actors

- All actions of EU Member States and EU institutions in the process of international maritime negotiations are to be carried out with due respect for the duty of loyal cooperation enshrined in Article 10 TEC and the principle of unity in the Community's external representation. Compliance with these principles can be enforced, as a last resort, through procedures before the ECJ.
- All EU actors should cooperate to enhance the visibility of the EU at the international scene by explaining its specific competences.
- All EU actors should cooperate in ensuring that difficulties arisen during internal coordination are resolved in a timely manner before the start of an IMAO session. To this end more use should be made of the possibility to refer issues to COREPER if no agreement can be reached at Working Group level.

## CHAPTER 6

### IMPACT OF THE TREATY OF LISBON

The present chapter provides an overview of the changes the Treaty of Lisbon will or is likely to bring to the process of EU participation and coordination in IMAOs. The new Treaty on European Union (TEU-L) and the Treaty on the Functioning of the European Union (TFEU) contain several provisions that may affect Union coherence in this respect (6.1). Specific amendments have been inserted that increase the powers of the European Parliament under the CFP (6.2) and the Union's competences on matters of fisheries have been explained (6.3). In the following sections, each of these points and their likely impact on the ability of the EU to speak with a single voice in international maritime fora will be analysed.

#### *6.1. Union Coherence in External Relations under the Treaty of Lisbon*

One of the main goals of the Treaty of Lisbon was to enhance the coherence of the EU's external relations.<sup>270</sup> To that end, the various provisions on external relations currently found scattered around in the Treaties on the European Community and European Union have been assembled under specific sections in the TFEU<sup>271</sup> and the TEU-L.<sup>272</sup> Article 3(5) TEU-L describes the general objectives to be pursued by external Union action, which are further elaborated in Article 21 TEU-L. The formulation of such a common set of goals is a prerequisite for a coherent external policy and may in and of itself serve to enhance coherence. Moreover, the duty of loyal cooperation under current Article 10 TEC has been rephrased in stronger terms of 'sincere cooperation' in Article 4(3) TEU-L.<sup>273</sup>

Under the Treaty of Lisbon, several players will be involved in ensuring Union coherence in external actions. The TEU-L provides that the Council and the Commission are responsible for ensuring consistency between the different areas of the Union's external action and between these and its other policies, and must cooperate to that effect.<sup>274</sup> For this task, they shall be assisted by the High Representative of the Union for Foreign Affairs and Security Policy (HR), a position that combines the function of the current High Representative for CFSP assisted by a European External Action Service (EEAS)<sup>275</sup> with that of Vice president of the Commission and should thus serve to bridge potential divides between the Commission and the Council. In his functions as Vice president, he is explicitly tasked with ensuring the

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<sup>270</sup> See, *inter alia*, the mandate of the Inter-Governmental Conference (IGC) called to prepare the Lisbon Treaty, annexed to the Presidency conclusions of the European Council of 22-23 June 2007, para. 1 ("The IGC is asked to draw up a Treaty [...] amending the existing Treaties with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action").

<sup>271</sup> Part Five TFEU ('External Action by the Union').

<sup>272</sup> Title V TEU-L ('General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy').

<sup>273</sup> The full text of Article 4(3) TEU-L reads as follows: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

<sup>274</sup> Art. 21(3) TEU-L.

<sup>275</sup> Article 27 TEU-L.

consistency of the Union's external action.<sup>276</sup> Pursuant to Article 27 TEU-L, the EEAS “shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States”.<sup>277</sup>

The High Representative's task of ensuring coherence in the Union's external action is formulated in general terms, even though his main responsibilities lie in the area of CFSP.<sup>278</sup> However, Article 18(4) TEU-L provides that the High Representative shall also as Vice president of the Commission “be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action.” The function of HR should thus not only serve to bridge the divide between the Commission and the Council, but also between the various Commissioners as far as their portfolios have an external dimension. As such, the newly created function could potentially become an important factor of increased coherence in external areas dealt with by the Commission, including in maritime affairs.

Coherence and consistency could further be enhanced by the abolition of the six-month rotational system of the Council Presidency, at least for the Foreign Affairs Council (which will be presided by the High Representative)<sup>279</sup> and for the meetings of the European Council, which will be presided by a President elected for two and a half years.<sup>280</sup> However, as the Presidency of other Council configurations than that of Foreign Affairs will continue to be held on a rotational basis<sup>281</sup>, rotation will continue in most areas covered by IMAOs.

Coherence is also enhanced under the Treaty of Lisbon through the codification of the ECJ's case-law on implied external competences.<sup>282</sup> Article 216 TFEU provides that “the Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.” It is further recognised that this external Union competence is generally of an exclusive nature.<sup>283</sup> Whether the new Treaty provisions correctly reflect the current case-law of the ECJ is subject to much debate. To the extent that they would not do so, it is generally submitted that the TFEU increases the Union's powers to act on the external level.<sup>284</sup> In any case, the external competences enshrined in Article 216 TFEU and the express recognition of the exclusive nature thereof will be important for the enforcement

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<sup>276</sup> Art. 18(4) TEU-L.

<sup>277</sup> The organisation and functioning of the EEAS shall be established by a decision of the Council, acting on a proposal from the High Representative after obtaining the consent of the Commission and after consulting the European Parliament.

<sup>278</sup> See, for example, Arts. 24(3) third paragraph, 26(2) second paragraph, 27, 32, second paragraph, and 34 TEU-L.

<sup>279</sup> Art. 18(3) TEU-L.

<sup>280</sup> The President of the European Council must “at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy” (Art. 15(5) TEU-L). A clear division of tasks with the HR is lacking.

<sup>281</sup> Art. 16(9) TEU-L.

<sup>282</sup> See *supra*, 1.2.

<sup>283</sup> Art. 3(2) TFEU.

<sup>284</sup> See M. Cremona, “The Union's external action: Constitutional perspectives”, in G. Amato, H. Bribosia and B. De Witte (eds.), *Genesis and destiny of the European Constitution* (Brussel, Bruylant, 2007), 1173, at 1182-1189.

and consolidation of the external powers of the Union in areas where the Community has increasingly occupied the field through internal legislation, such as in maritime affairs.

One of the main innovations of the Lisbon Treaty is the replacement and succession of the Community by the Union<sup>285</sup>, which is explicitly granted legal personality (Article 47 TEU-L). The Union will therefore have to replace the Community also within IMAOs. The succession of the EC by the EU after Lisbon could and should be seized as an occasion to reflect upon ways to improve participation in IMAOs where this is currently deemed insufficient.

One of the consequences of the formal abolition of the pillar structure is the unification of the procedure to negotiate and conclude international agreements. Article 218 TFEU sets out the procedure in this respect, merging current Articles 300 TEC and 24 TEU.<sup>286</sup> The main innovations of the procedure of Article 218 TFEU are the enhanced role of the European Parliament (see *infra*, 6.2) and the nomination by the Council of a Union negotiator or head of the Union's negotiating team, depending on the subject of the agreement envisaged. Proposals to negotiate shall be made to the Council by the Commission or the HR where the agreement relates exclusively or principally to the CFSP.<sup>287</sup> Hence, whereas under the TEC the Commission was always representing the Community in international negotiations, this is less obvious under the TFEU. In maritime issues, it can be assumed that the Commission shall generally retain its right of initiative to negotiate international agreements. However, to the extent that CFSP issues become involved, a mixed negotiating team may be likely, the head of which will then be appointed by the Council. Difficulties are to be expected in determining when an agreement 'principally' relates to the CFSP when nominating the head of the negotiating team.<sup>288</sup>

Finally, the Treaty of Lisbon delegates the task of maintaining all appropriate relations and forms of cooperation with the UN and other international organisations to the Commission and the HR<sup>289</sup>, unlike the current Article 302 TEC which reserves this right to the Commission exclusively.<sup>290</sup> It is recalled that Article 302 TEC can serve as the basis for obtaining the status of observer or full participant at IMAOs, which currently is the prerogative of the Commission. The High Representative will also have authority over Union delegations at international organisations.<sup>291</sup>

## 6.2. Increased Legislative Powers of the European Parliament

One of the main innovations of the Treaty of Lisbon, as already envisaged in the Constitutional Treaty, is the increased role in the legislative field of the European Parliament (EP), which shall "*jointly with the Council, exercise legislative and budgetary functions*".<sup>292</sup>

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<sup>285</sup> Art. 1, third paragraph, last sentence TEU-L.

<sup>286</sup> The Lisbon Treaty still contains no specific provision regulating the accession of the European Union to international organisations and Article 218 TFEU is thus applied by analogy, as is currently Article 300 TEC. See further I. Govaere, J. Capiau and A. Vermeersch, *supra* note 42, 183-184.

<sup>287</sup> Art. 218(3) TFEU.

<sup>288</sup> R. Passos and S. Marquardt, "International agreements – Competences, procedures and judicial control", in G. Amato, H. Bribosia and B. De Witte (eds.), *supra* note 284, 875, at 889.

<sup>289</sup> Art. 220 TFEU.

<sup>290</sup> Art. 302 TEC provides that "[i]t shall be for the Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations and of its specialised agencies. The Commission shall also maintain such relations as are appropriate with all international organisations." See also Arts. 303-304 TEC.

<sup>291</sup> Art. 221 TFEU.

<sup>292</sup> Art. 14(1) TEU-L. See also Art. 16(1) TEU-L.

Reflecting these increased powers of the Parliament is the generalised applicability of the co-decision procedure to all fields of Union action, the CFSP being the sole exception. The procedure is hence labelled the ordinary legislative procedure and is set out in Articles 289 and 294 TFEU.

Article 43(2) TFEU states that the European Parliament and the Council shall establish the provisions necessary for the pursuit of the objectives of the CFP in accordance with the ordinary legislative procedure. This procedure shall thus be applicable to all matters of fisheries, except for the determination of total allowable catches (TACs) and quotas. This marked increase in power of the EP in the context of fisheries on the internal level also impacts upon the EP's involvement in the external relations in this field. Indeed, Article 218 TFEU provides that the Council shall adopt the decision concluding an agreement after obtaining the consent of the European Parliament in the case of, *inter alia*, agreements covering fields to which the ordinary legislative procedure applies.<sup>293</sup> Read together with Article 43(2) TFEU, this provision thus implies that the EP's consent will be required for every agreement covering the field of fisheries once the Treaty of Lisbon enters into force.

The increased powers of the EP in fisheries on the internal level also implies that the ordinary legislative procedure in principle will have to be followed for EU measures implementing decisions of international organisations in this area. Concerns were expressed about the possibly adverse effects which the increased length and complexity of this procedure may have on EU participation within IMAOs.<sup>294</sup> According to some interviewees, the length of the ordinary legislative procedure might impinge upon the possibility of the Union to transpose IMAO measures in a timely manner, thereby impacting upon the positions to be taken by EU delegates within IMAOs. Implementation issues already exist under the current procedures, as is evidenced by, for example, recent practice in ICCAT. However, other interviewees point at the possibility that if the political will is present, an act could already be adopted after the first reading by the EP. According to EP interviewees the new procedure should not overly complicate matters if the Parliament is thoroughly involved in the process of coordination, for example through (informal) consultation of the Parliament during the coordination meetings prior to an IMAO session.

However this may be, several provisions remain in place that would allow limiting or countering some of the effects the increased role of the EP in fisheries may have on the efficiency of external EU action in the maritime field. First, the Council and the EP may, in an urgent situation, agree upon a time-limit for consent by the latter to an international agreement covering a field to which the ordinary legislative procedure applies, such as fisheries.<sup>295</sup> Second, the Council can provide for provisional application of an international maritime agreement at the time of signature.<sup>296</sup> Finally, the EP remains bound by the duty of loyal cooperation in its relations towards the Council and can thus not unduly postpone the adoption of maritime agreements or the implementation of measures agreed upon within an IMAO. EP interviewees stressed in this regard the Parliament's obligation to transpose IMAO measures as faithfully as possible. The EP must cooperate with the Council and the Commission in order to achieve efficiency in external Union action. Conversely, it stands to reason that the Council and the Commission are bound by the same duty of sincere

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<sup>293</sup> Art. 218(6)(a)(v) TFEU. Under the current Article 300(3) TEC, assent of the EP is only required when the conclusion of an international agreement amends an act that was concluded by means of co-decision.

<sup>294</sup> Compare the current procedure under Article 37 TEC.

<sup>295</sup> Art. 218(6)(a) TFEU.

<sup>296</sup> Art. 218(5) TFEU.

cooperation and should thus not unduly rely upon the first two mechanisms described above to limit the EP's influence in international maritime relations.

### 6.3. Competences

The Treaty of Lisbon aims at giving a clear overview of the division of competences between the Union and its Member States. To this end, Article 3 TFEU lists the areas in which the Union shall have exclusive competence which includes “the conservation of marine biological resources under the common fisheries policy” (Article 3(1)(d)). All other issues in the field of fisheries (“fisheries, excluding the conservation of marine biological resources”) fall under the Union's shared competences pursuant to Article 4(2)(d) TFEU.

One can wonder whether these provisions present an accurate image of the current state of play in the fisheries field. It is generally accepted that the Community has exercised its powers in the area of fisheries to such an extent that its competences in this area have become exclusive. The substantial amount of internal Community legislation, coupled with the *ERTA* effect, implies that only very little, if any, powers remain for the Member States to exercise in the area of fisheries both internally and externally.<sup>297</sup>

As the Treaty of Lisbon is meant to codify existing competences and not to reduce Community or Union competences and the *ERTA* doctrine of the ECJ is being codified as well (Article 3(2) TFEU), it should not be read as a departure from the existing state of play in the area of fisheries.

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<sup>297</sup> See *supra*, 1.2. This is reflected in the current EC membership of many RFMOs. See the Commission's Communication *Community Participation in Regional Fisheries Organisations (RFOs)*, *supra* note 14.

## CONCLUSION

The European Community is increasingly occupying the field in a wide range of maritime issues through the promulgation of a substantive body of legislation and through concluding an increasing number of international agreements. This should be reflected in the legal status granted to the Community in IMAOs dealing with matters falling largely under Community competence. The Community should consistently become full member in such IMAOs. Consistency between legal status and the nature of Community competences has the additional benefit of increasing clarity and transparency towards third countries.

However, the present study has shown that the legal status of the EC to IMAOs is often not a correct reflection of the nature and scope of Community's competences in maritime matters. The limited rights of observers and full participants, as compared to those of full members, obviously curtail participation within IMAOs. Transitional measures such as granting interim membership rights and obligations, formalising existing coordination practices and appointing permanent representatives can significantly mitigate the impact of the potentially lengthy procedure of acquiring full membership to a given IMAO.

Apart from the Community's legal status and other institutional elements, several procedural factors were identified that affect the process of EU coordination within IMAOs and inhibit the Union's ability to speak with a single voice on the international maritime stage. In this regard, the study has demonstrated a clear need for the proper application of established coordination procedures as complemented by the incorporation of procedural guarantees during on the spot coordination. Full and accurate compliance with, and if need be enforcement of, the duty of loyal cooperation in all actions of EU Member States and EU institutions in the context of IMAOs, pursuant to the principle of unity in the Community's external representation, is a forceful means of further increasing coherence.

A truly integrated maritime policy can only take root if the concerns identified in this study are sufficiently addressed. This as a result will ensure and further enhance the coherence and consistency of the Union's external activities in the maritime field.

## Annex I: Overview Official Status EC in International Agreements and IMAOs

Acronym	Zone	Date of the convention	Year into force	Full title	Ratified by:																												Convention: EC Status	Depositary: EC Status
					EC	AT	BE	BU	CY	CZ	DK	EE	FI	FR	DE	GR	HU	IE	IT	LV	LT	LU	MT	PL	PT	RO	SK	SI	ES	SE	NL	UK		

### 0. UNCLOS

UNCLOS	Global	1982	1994	United Nations Convention on the Law of the Sea	X	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	+ 129 other States	Contracting Party (EC + MS)	Observer UNGA
	Part XI UNCLOS	Global	1994	1996	Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea	X	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	+ 107 other States	Contracting Party (EC + MS)

## 1. MARINE RESOURCES AND ENVIRONMENT

### 1.1 CONSERVATION & ENVIRONMENT

#### 1.1.1 GLOBAL CONSERVATION

GLOBAL CONSERVATION	Acronym	Zone	Date of the convention	Year into force	Full title	Ratified by:																												Convention: EC Status	Depositary: EC Status		
						EC	AT	BE	BU	CY	CZ	DK	EE	FI	FR	DE	GR	HU	IE	IT	LV	LT	LU	MT	PL	PT	RO	SK	SI	ES	SE	NL	UK			Others	
	CSD	Global	-	1992	United Nations Commission on Sustainable Development		x																												USA, Russia, Switzerland + 39 other States	-	Observer ECOSOC
	RAMSAR	Global	1971	1975	Convention on Wetlands	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	131 other States	-	Observer (subject to invitation) at RAMSAR sessions



FISHERIES	Regional Fisheries Management Organisations				EC	AT	BE	BU	CY	CZ	DK	EE	FI	FR	GR	HU	IE	IT	LV	LT	LU	MT	PL	PT	RO	SK	SI	ES	SE	NL	UK	Others			
	GFCM/FAO	Mediterranean	1949	1952	General Fisheries Commission for the Mediterranean (FAO)	x		x	x				x		x			x				x			x		x	x				Turkey	-	Full Member (EC + Some MS)	
	IATTC	East Pacific	1949	1950	Convention for the Establishment of an Inter-American Tropical Tuna Commission								x														x				USA	-	Cooperating Non-Party IATTC		
	ICCAT	Central-South Atlantic	1966	1969	International Convention for the Conservation of Atlantic Tunas	x							x																	x	Russia, Turkey + USA	Contracting Party (EC only)	Full Member ICCAT		
	IBSFC	Baltic Sea	1973	1974	Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and Belts	x					x							x	x				x								Russia	Contracting Party (EC + some MS)	Full Member IBSFC		
	NAFO	North Atlantic	1978	1979	Convention on Future Multi-Cooperation in the Northwest Atlantic Fisheries	x				x			x																		Norway, Iceland, Russia + USA	Contracting Party (EC only)	Full Member NAFO		
	CCAMLR	Antarctic	1980	1982	Convention on the Conservation of Antarctic Marine Living Resources	x	x	x				x	x	x	x			x					x				x	x	x	x	USA, Russia, Norway + 18	Contracting Party (EC + MS)	Full Member CCAMLR		
	NEAFC	North Atlantic	1980	1982	Convention on Future Multi-Cooperation in North-East Atlantic Fisheries	x				x																					Iceland, Norway + Russia	Contracting Party (EC only)	Full Member NEAFC		
	NASCO	North Atlantic	1982	1983	Convention for the Conservation of Salmon in the North Atlantic Ocean	x				x																					Iceland, Norway, Russia + USA	Contracting Party (EC only)	Full Member NASCO		
	IOTC/FAO	Indian Ocean	1993	1996	Indian Ocean Tunas Commission / FAO	x								x																	x		Contracting Party (EC only)	Full Member IOTC	
	CCSBT	Southern Hemisphere	1993	1994	Convention for the Conservation of Southern Bluefin Tuna																													-	Cooperating Non-Member CCSBT
	WCPFC	Central-West Pacific	2000	2004	Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean	x								x																		USA	Contracting Party (EC only)	Full Member WCPFC	
SEAFO	Central-South Atlantic	2001	2003	Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean 2001	x																										Norway	Contracting Party (EC only)	Member FAO		

**1.2.2 OTHER LIVING RESOURCES**

					EC	AT	BE	BU	CY	CZ	DK	EE	FI	FR	DE	GR	HU	IE	IT	LV	LT	LU	MT	PL	PT	RO	SK	SI	ES	SE	NL	UK	Others			
OTHER LIVING RESOURCES	IWC	Global	1946	1948	International Convention for the Regulation of Whaling		x	x		x	x	x	x	x	x	x	x	x	x			x				x	x	x	x	x	x	x	x	+ 61 States	-	Observer to International Whaling Commission
	CITES	Global	1973	1975	Convention on International Trade in Endangered Species of Wild Fauna and Flora	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	+ 148 States	*Gaborone amendment allowing REIOs is still to enter into force	Observer UNEP
	CMS (Bonn)	Global	1979	1983	Convention on the Conservation of Migratory Species of Wild Animals	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	+ 82 States	Contracting Party (EC + MS)	Observer UNEP
	CBD	Global	1992	1993	Convention on Biological Diversity	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	+ 163 States	Contracting Party (EC + MS)	Observer UNEP
	AIDCP	East Pacific Ocean	1998	1999	Agreement on the International Dolphin Conservation Program	x																											+ 14 States	Contracting Party (EC only)	Cooperating Non-Party IATTC	

### 1.3 PREVENTION & CONTROL OF MARITIME POLLUTION

#### 1.3.1 POLLUTION-GLOBAL

		EC	AT	BE	BU	CY	CZ	DK	EE	FI	FR	DE	GR	HU	IE	IT	LV	LT	LJ	MT	PL	PT	RO	SK	SI	ES	SE	NL	UK	Others		
POLLUTION-GLOBAL	MARPOL 73/78	Global	1973	1983	International Convention for the Prevention of Marine Pollution from Ships, 1973 as modified by the Protocol of 1978 relating thereto																								Norway, Russia, Turkey + 118 States	-	European Commission Permanent Observer IMO	
	Vienna Convention	Global	1985	1988	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	USA, Norway, Turkey + 163 States	Contracting Party (EC + MS)	Observer Status UNEP
	Basel	Global	1989	1992	The Basel Convention for the Control of Transboundary Movements of Hazardous Wastes and their Disposal																							x	+ 142 States	Contracting Party (EC + MS)	Observer Status UNEP	
	OPRC	Global (IMO-coordinated)	1990	1995	International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990																								Norway, Turkey + 75 States	-	European Commission Permanent Observer IMO	
	UN Framework Climate Change	Global	1992	1994	The United Nations Framework Convention on Climate Change																							x	USA, Norway, Turkey + 161 States	Contracting Party (EC + MS)	Observer Status UNEP	
	Rotterdam	Global	1998	2004	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade																							x	+ 99 States	Contracting Party (EC + MS)	Observer Status UNEP	
	POPs	Global	2001	2004	Stockholm Convention on Persistent Organic Pollutants (POPs)																							x	+ 134 States	Contracting Party (EC + MS)	Observer Status UNEP	
	AFS 2001	Global	2001	NIF	International Convention on the Control of Harmful Anti-fouling Systems on Ships																								Norway + 19 States	-	European Commission Permanent Observer IMO	

**1.3.2 POLLUTION REGIONAL**

						EC	AT	BE	BU	CY	CZ	DK	EE	FI	FR	DE	GR	HU	IE	IT	LV	LT	LU	MT	PL	PT	RO	SK	SI	ES	SE	NL	UK	Others			
POLLUTION-REGIONAL	Long-range Transbound. Air Pollution	ECE	1979	1983	Convention on Long-range Transboundary Air Pollution (LRTAP)	Σ	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	USA, Norway, Turkey + 20 States	Contracting Party (EC + MS)	Observer UNECE	
	Bonn	North Sea	1983	1989	Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and other Harmful Substances, 1983 (Bonn Agreement)	Σ		x				x			x	x																		Norway (Ireland will join shortly)	Contracting Party (EC + some MS)	-	
	Lisbon	North-East Atlantic	1990	NIF	Cooperation Agreement for the Protection of the Coasts and Waters of the North-East Atlantic Against Pollution	Σ									x												x								Morocco	Contracting Party (EC + some MS)	-
	Transbound. Effects of Industrial Accidents	ECE	1992	2000	Convention on Transboundary Effects of Industrial Accidents	Σ	x	x	x	x	x	x	x	x	x	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	x		Norway, Russia + 9 States	Contracting Party (EC + MS)	Observer UNECE

## 2. MARITIME SAFETY AND SECURITY

### 2.1 VESSEL SAFETY

		EC	AT	BE	BU	CY	CZ	DK	EE	FI	FR	DE	GR	HU	IE	IT	LV	LT	LU	MT	PL	PT	RO	SK	SI	ES	SE	NL	UK	Others																											
VESSEL SAFETY	IMO Convention	Global	1948	1958	Convention on the International Maritime Organization, 1948																							x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	168 contracting States altogether	-	European Commission Permanent Observer IMO
	SOLAS	Global	1974	1980	International Convention for the Safety of Life at Sea (SOLAS), 1974																							x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	Norway, Russia, Turkey +128 States	-

### 2.2 SAFETY OF NAVIGATION-SHIPPING-TRAFFIC

		EC	AT	BE	BU	CY	CZ	DK	EE	FI	FR	DE	GR	HU	IE	IT	LV	LT	LU	MT	PL	PT	RO	SK	SI	ES	SE	NL	UK	Others																											
SAFETY SHIPPING	COLREG 1972	Global	1972	1977	Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG)																							x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	Norway, Russia + 123 States	-	European Commission Permanent Observer IMO







## Annex II: Overview of Contacted Stakeholders

Name	Institution	Department	Function	Contacted on	Interviewed
Mr. Wieland	European Commission	DG MARE F4	Head of Unit – Legal Affairs	ICCAT, IMO, Legal Issues & Lisbon Treaty	Yes
Mr. Langendorff	European Commission	DG ENV E2	Deputy Head of Unit - Environmental agreements and Trade	IWC	Yes
Mr. Zeidan	European Commission	DG ENV E2	Legal Officer - Multilateral Environmental Agreements (MEAs)	IWC	Yes
Mr. Berrozpe-Garcia	European Commission	DG ENV D2	Policy Officer - Team Leader for Marine Environment and International Water issues	General	Yes
Mr. De Rotalier	European Commission	DG Environment E2	Policy Officer - for Coordination of CITES issues	FAO	Yes
Ms. Lamaison-Clave	European Commission	DG MARE B1	Interviewed in conjunction with Mr. De Rotalier	FAO	Yes
Mr. Economou	European Commission	DG TREN G1	Policy Officer Maritime transport policy: Regulatory questions, maritime safety & seafarers	IMO	Yes
Mr. Boschen	European Commission	DG TREN G1	Policy Officer Maritime transport policy: Regulatory questions, maritime safety & seafarers	IMO	Yes
Ms. Boelaert	European Commission	SJ – Legal Service 1	Member of the Legal Service	General	Yes
Mr. Valero-Jordana	European Commission	SJ – Legal Service 1	Member of the Legal Service	General	Yes
Mr. Van Nuffel	European Commission	SJ – Legal Service 1	Member of the Legal Service	General	Yes
Ms. Banks	European Commission	SJ – Legal Service 1	Member of the Legal Service	General	Yes
Mr. Paasivirta	European Commission	SJ – Legal Service 1	Member of the Legal Service	General	Yes
Mr. Hoffmeister	European Commission	SJ – Legal Service 1	Member of the Legal Service	General	Yes
Mr. Koopmans	European Commission	DG TREN G1	Permanent Representative to IMO	IMO	Yes
Mr. Moulinier	European Commission	Relations with UN Agencies in Rome	Head of Section for relations with UN agencies in Rome	FAO	Yes
Mr. Akesson	Swedish Ministry of Agriculture	Food & Fisheries	Swedish representative to FAO	FAO	Yes
Mr. Molenaar	Utrecht University	Netherlands Institute for the Law of the Sea	Consultant to the Netherlands government	FAO	Yes
Ms. Bertlund	Swedish Ministry of Transport	Not specified	Swedish representative to IMO	IMO	Yes
Mr. Brincat	Perm. Rep. of Malta to the EU	Fisheries	Fisheries Attaché	ICCAT	Yes

<b>Name</b>	<b>Institution</b>	<b>Department</b>	<b>Function</b>	<b>Contacted on</b>	<b>Interviewed</b>
Ms. Leguerrier	French Ministry of Agriculture	Maritime Fisheries and Aquaculture Direction	Head of European and international desk. French representative to ICCAT & UNGA	ICCAT, FAO & UNGA	Yes
Mr. Bolomini	UK department of Transport	Shipping Policy 1	Head of Shipping Policy 1	IMO	Yes
Mr. Cockburn	UK Department of Transport	Not specified	UK permanent representative to IMO	IMO	Yes
Mr. Skovsholm	EU Council	General Secretariat: Directorate-General B3-Unit A	Not specified	ICCAT & FAO	Yes
Ms. Zoi-Varfi	EU Council	General Secretariat: Directorate-General 1 – Environment Unit	Not specified	IWC	Yes
Mr. Asanger	EU Council	General Secretariat: Directorate-General C3-Unit A	Not specified	IMO	Yes
Mr. Gosalbo-Bono	EU Council	Council Legal Service	Director Council Legal Service	Lisbon Treaty, & General issues	Yes
Ms. Grandy	IWC	Secretariat	IWC Secretary	IWC	Yes
ICCAT Secretariat	ICCAT	Secretariat	Not specified	ICCAT	Yes
Mr. Al-Khafaji	FAO - International Institutions and Liaisons Office	Secretariat Fisheries and Aquaculture	Liaison and Meetings Officer	FAO	Yes
Mr. Unlu	IMO	Secretariat	Legal Officer	IMO	Yes
Mr. Musquar	European Parliament	Committee on Fisheries	Head of Unit Secretariat of the Committee on Fisheries	Lisbon Treaty	Yes
Mr. Morillon	European Parliament	Committee on Fisheries	President of the Committee on Fisheries	Lisbon Treaty	No
Mr. Kastelic	Slovenian Ministry of Environment	Environment Directorate	Slovenian IWC Commissioner	IWC	No
Mr. Bibic	Slovenian Ministry of Environment	Environment Directorate	Alternate Slovenian IWC Commissioner	IWC	No
Ms. Jamarche	French Government	Secrétariat Général de la Mer	Not specified	FAO / UN	No
Mr. Ortiz	Perm. Rep. of Spain to the EU	Transport & Telecommunications	Attaché Transports & Communications	IMO	No

<b>Name</b>	<b>Institution</b>	<b>Department</b>	<b>Function</b>	<b>Contacted on</b>	<b>Interviewed</b>
Ms. Schröder	Perm. Rep. of Germany to the EU	Not specified	Attaché Transport	IMO	No
Mr. Tricot	European Commission	EC delegation in New York	Member of the Legal Service Legal Officer – Legal Counselor	EC – UN relations	No
Ms. Hivonnet	European Commission	EC delegation in Geneva	Head of Section – Un Section of the EC Delegation	EC – UN relations	No

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