

# The Legal Framework for the Participation of the European Union in International Institutions

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## Abstract

This article addresses to what extent the current EU Treaties regulate the position of the EU in other international institutions. This is a legal question, which explains the strong focus on competences and treaty provisions. The main findings are therefore related to what the EU can do, how it can do this (and has done it) and what the division of competences is in relation to its member states. In that respect, it can be concluded that the Treaties do allow for the EU to be engaged in international institutions and even to become a full member of other international organizations or participate in treaty-regimes, albeit that the Treaties do not at all present the relevant provisions in any coherent fashion.

## Keywords

European Union, legal status, Lisbon Treaty, participation in international institutions

## 1. Introduction

With the entry into force of the Lisbon Treaty, the European Union (EU) has entered a new phase. No longer is the world confronted with both the European Community and the European Union as actors on the international stage; since 1 December 2009 the European Union acts as the legal successor to the European Community (Art. 1 Treaty on European Union (TEU)), while maintaining one of its original policy fields: the foreign, security and defence policy. The EU has thus also replaced the Community in international institutions. In addition, the Lisbon Treaty increased the number of references to the role of the Union in the world and to its relationship with the United Nations.

Apart from its participation in international regimes in various policy fields, the institutionalization of the role of the EU in the world is reflected in its position in a number of international organizations. The question of whether the EU itself is an international organization is still open to debate, although legally there are not too

many reasons to deny the EU this status (Wessel 1997; 2000). Whereas the legal dimension of the EU's external relations in general – and also recently – has been given much attention in academic writings (Eeckhout 2005; Koutrakos 2006; Cremona 2008; Dashwood & Maresceau 2008; Cremona & De Witte 2008) this is less true for the position of the EU in international institutions. Yet, it is at these fora that a *structural* role of the EU in global governance becomes most visible. And it is this role that has become more interesting now that it becomes clear that many EU (and national) rules find their origin in decision-making processes in other international organizations (Follesdal, Wessel & Wouters 2008).

Both the position of the EU in other international institutions and the different academic approaches to the study of the EU's engagement in this area form the source of the questions raised by this contribution. Over the years the EU has obtained a formal position in some international institutions, either as a full member or as an observer. It is generally held that the participation in a formal international organization relates to the participation in its organs; i.e. the right to attend the meetings, being elected for functions in the organ and exercising voting and speaking rights. In that sense the term 'position' is related to a formal influence on the output of the international organization: decisions (often recommendations, in some occasions binding decisions) and conventions (international agreements prepared and adopted by an organ of an international organization) (Frid 1995; Marchisio 2002). In addition the EU participates in less formal international institutions (or regimes). The Lisbon Treaty heralds an increase of the engagement of the EU in other international institutions, including the future membership of additional international organizations such as the Council of Europe (Art. 6 TEU).

In political studies the legal framework governing the position and competences of the EU in other international institutions plays a role only occasionally. The starting point in the present contribution is that 'legal competences matter' and that knowing the legal framework may deepen the political analysis of the Union's international capabilities (Jørgensen & Wessel 2010; Basu & Schunz 2008). At a minimum level the legal framework creates political possibilities and sets the boundaries for any action by the EU. With the further development of the EU's external relations as for instance reflected in the newly established EU External Action Service (Crowe 2008; Vanhoonacker & Reslow 2010; Duke 2009), this legal framework will be helpful in understanding the structural position and role of the EU in global governance.

This contribution thus aims at answering the question of to what extent the current (post-Lisbon) EU Treaties regulate the position of the EU in international institutions, understood as both formal international organizations and so-called treaty-regimes. As in general EU external relations law, the division of competences between the EU and its member states forms an important part of this legal framework. Section 2 first of all aims to provide an analysis of the current treaty competences related to the participation of the EU in international institutions, by differentiating between implied

and explicit competences. Section 3 analyses the actual use of these competences by investigating in which international institutions the EU has a legal position and which different forms of legal positions can be discovered. Section 4 focuses on the position of the EU in the United Nations, an organization that seems to have been given more attention by the Lisbon Treaty. Finally, section 5 will be used to draw some conclusions.

## **2. Treaty Competences Related to the Participation of the EU in International Institutions**

### *2.1 No Legal Action without a Legal Competence*

As indicated above, legal analyses in the area of the EU's external relations show a strong focus on formal competences and formal international organizations. Thus, studies related to the position of the EU in other international institutions mainly aim to investigate – on the basis of an analysis of Treaty provisions, international agreements and decision-making procedures – what the EU and its member states can or should do. Quite often, case law is needed to interpret unclear or conflicting rules and principles (Koutrakos 2006).

Thus, the Treaties form the starting point for an analysis of the EU's engagement in international institutions. The two new (post Lisbon) EU Treaties – the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) – deal with the position of the EU in other international institutions in various ways. Generally, the possibility or need for the EU to occupy a separate position in an international organization or international treaty-regime depends on two factors: first, the division of competences between the EU and its member states in the particular issue area; and, second, the statute of the international institution. As only few international institutions allow for other international organizations to become a full member, one would assume the second factor in particular to stand in the way of an extension of the Union's role based on the further development of its external relations. At the same time, however, internal struggles between member states or between member states and EU institutions may form an obstacle to the accession of the EU to an international organization. Thus, even in areas where the EU has extensive competences, the EU may be barred from full participation in the global decision-making process (cf. the International Maritime Organization (IMO), the International Civil Aviation Organization (ICAO), the River Rhine Commissions, the International Energy Agency, the executive board of the UN High Commissioner for Refugees (UNHCR) or in bodies under the UN Convention on the Law of the Sea (UNCLOS) (Hoffmeister 2007; Hoffmeister and Kuijper 2006).

The general preference of member states to remain present and visible themselves in international institutions is perhaps even clearer in relation to international regimes that cannot be considered formal international organizations. Due

to its (perhaps even exclusive) competences in a particular area the EU nevertheless may need to participate as such in an international regime. In many cases, the participation of the EU as such is based not on formal negotiating procedures, but rather on the need to make sure that both legal and political arrangements that are the result of cooperation within a regime conform to the Union's political agenda and respect its competences. In these cases the legal EU decision-making machinery is limited to providing the content of the EU-position (for instance in relation to the EU's participation in the G8 and the G20). This implies that large parts of the EU's multilateral activities are not directly regulated by the treaties, but find their basis in numerous decisions and declarations which aim to present a unified EU position (see for a good example the 2003 Strategy against the proliferation of weapons of mass destruction or the many CFSP decisions in this area). The legal framework that is analysed in the present contribution then only sets the outer boundaries of the EU's actions (they may not conflict with EU or international law). However, when regimes do find their basis in an international agreement (treaty), the EU's formal participation depends on its legal competences to join a particular treaty-regime (see below).

## 2.2 *Implied and explicit competences*

From a legal perspective, the need for a formal role of the EU in international institutions is obvious whenever the EU has a competence related to the objectives and functions of the other international institution. This holds true in particular for areas in which the EU enjoys an exclusive competence, but seems equally valid when the competence is shared with the member states. However, despite an active role of the EU in international institutions in practice, one will look in vain for an explicit legal competence in the treaties. The absence of a clear and explicit competence means that the participation in (and the membership of) international institutions is based on implied powers only, which find their source in the general competences the Union enjoys in the different policy fields. Thus, the Union's membership of the Food and Agricultural Organization (FAO) is based on the Articles 43 TFEU (agriculture and fisheries), 207 TFEU (commercial policy) and 209 TFEU (development cooperation) (Pedersen 2006).

What comes closest to a competence-conferring provision is Article 211 TFEU: "Within their respective spheres of competence, the Union and the member states shall cooperate with third countries and with the competent international organisations." That this 'cooperation' may also lead to the establishment of legal relationships, can be derived from the provisions creating a competence for the Union to conclude international agreements. Thus, Article 216 (1) TFEU provides for international agreements to be concluded "with one or more third countries or international organizations" and Article 217 TFEU allows for association agreements to be concluded with both states and international organizations (the procedures to conclude these international agreements are to be found in Arts. 218 and 219 (3) TFEU). So called, 'constitutive agreements' by which new international organizations are created, or

accession agreements to acquire membership of an international organization, are not excluded. In fact, the European Court of Justice established that the European Community's competences in the field of external relation included the power to create new international organizations (ECJ, Opinion 1/76; Martenczuk 2001).

Both the European Economic Area (EEA) and the 'associations' created by association agreements serve as examples of international organizations created by (at that time) the European Community (Schermers and Blokker 2003). Although not explicitly regulated, this also seems to imply a competence of the EU to fully participate in treaty-regimes, on the basis of a formal accession to a treaty (e.g. the UN Framework Convention on Climate Change and the Kyoto Protocol, which were formally ratified by the European Union in 1993 and 2002 respectively). As in formal international organizations, participation of the EU is either based on decisions by the participating states to grant the EU observer or full participant status, or on the inclusion of a Regional Economic Integration Organization (REIO) clause in international conventions (Art. II of the FAO Constitution was specifically modified to allow for the accession of 'regional economic organizations'). A REIO is commonly defined in UN protocols and conventions as "an organization constituted by sovereign states of a given region to which its member states have transferred competence in respect of matters governed by [...] convention or its protocols and [which] has been duly authorised, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it [the instruments concerned]." (see for instance Articles 4.1, 4.2, 4.3 and 4.5, 21 and 22 of the Kyoto Protocol; Basu & Schunz 2008). In the new Convention on the Rights of Persons with Disabilities the REIO clause seems to have evolved to a RIO (Regional Integration Organisation) clause, which does justice to the large scope of activities of the EU these days (see Art. 44: "'Regional integration organization' shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention.") Since member states usually have retained their own competences, 'mixed agreements' are the appropriate instrument for the EU and its member states to engage in international institutions in which both participate fully (Hillion & Koutrakos 2010).

Explicit competences are not always needed for the EU to conclude an international agreement. Ever since the 1971 *ERTA* case, the European Court of Justice also acknowledged the treaty-making capacity of the Community in cases where this was not explicitly provided for by the Treaty: "Such authority arises not only from an express conferment by the Treaty [...] but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions." In fact, "regard must be had to the whole scheme of the Treaty no less than to its substantive provisions." (ECJ, Case 22/70, *ERTA*, paragraphs 15-16; ECJ, Opinion 1/76; Koutrakos 2006, pp. 77-134; Eeckhout 2005; Ott & Wessel 2006). This means that international agreements, including the ones whereby the EU becomes a member of another international organization or participates in a treaty-regime (ECJ,

Opinion 2/94 WTO), may also be based on the external dimension of an internal competence. With the entry into force of the Lisbon Treaty, the ERTA doctrine was integrated in the general competence-conferring provision on the conclusion of international agreements (Article 216 (1) TFEU):

“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.”

At least to establish membership of the EU in international organizations, this provision seems to give a broad mandate to the EU to also conclude international agreements in order to become a member of an international organization or to join a treaty-regime.

### 2.3 *Specific Areas indicated in the Treaties and the Role of Member States*

Irrespective of these more *general* indications of a competence to engage in international institutions, the Treaties explicitly refer to a number of *specific* policy terrains or international organizations. Thus, Article 37 TEU allows for international agreements to be concluded “with one or more states or international organizations” in the area of the common foreign and security policy (CFSP). Similar provision may be found in relation to environmental policy (Art. 191 (3) TFEU), development cooperation (Art. 209 (2) TFEU), economic, financial and technical cooperation (Art. 212 (3) TFEU) and humanitarian aid (Art. 214 (4) TFEU). In the latter area, the Treaty refers to “international organizations and bodies, in particular those forming part of the United Nations system” to coordinate operations with (Art. 214 (7) TFEU). The United Nations (and its Charter) is also mentioned in relation to a number of other policy areas of the Union (Arts. 3 (5) TEU, 21 (1-2) TEU, 34 (2) TEU, 42 (1 and 7) TEU, 208 (2) TFEU, 214 (7) TFEU, and 220 (1) TFEU) (see also *infra*, section 3). In relation to development cooperation a number of provisions have been included to strengthen explicitly commitments of both the Union and its member states in that area. Thus, Art. 208 (2) TFEU provides: “The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.” And 210 (1) TFEU reads:

“In order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. They may undertake joint action. Member States shall contribute if necessary to the implementation of Union aid programmes.”

In addition one may come across some references in relation to the European Central Bank and the European Investment Bank (see Protocols Nos. 4 and 5 to the Treaty). More generally, Art. 220 (1) TFEU provides that the Union “shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialized agencies, the Council of Europe, the Organization for Security and Cooperation in Europe and the Organization for Economic Cooperation and Development” and that it “shall also maintain such relations as are appropriate with other international organizations.”

This short overview reveals that the competences of the EU in relation to international institutions are fragmented and scattered all over the Treaties. Apart from these competences of the EU itself, many of the provisions relate to ‘cooperation’ or to the role of member states. Thus, the idea to foster cooperation with third countries and competent international organizations returns in fields of education and sport (Art. 165 (3) TFEU), vocational training (Art. 166 (3) TFEU), culture (Art. 167 (3) TFEU) and public health (Art. 168 (3) TFEU). A similar promotion of cooperation with other international organizations is mentioned in relation to social policy (Art. 156 TFEU) and cooperation in Union research, technological development and demonstration (Art. 180 (b) TFEU). In addition, the Union’s foreign and security policy includes a number of rules on the way in which the EU wishes to present itself in international organizations. In line with his (or in fact her) upgraded position (Blockmans and Wessel 2009), the Union’s High Representative for Foreign Affairs and Security Policy “shall express the Union’s position in international organisations and at international conferences” (Art. 27 (2) TEU). She is also responsible for the organization of the coordination of the actions by member states in international organizations and at international conferences (Art. 34 (1) TEU).

In fact, and as shown by other contributions in this journal, effective multilateralism to a large extent depends on the (coordinated) actions by the member states. This explains, for instance, why the Treaty stresses the obligations of member states to uphold the Union’s positions “in international organisations and at international conferences where not all the Member States participate” (Art. 34). The need for coordination between the Union and its Member States (and their diplomatic missions and delegations) in international organizations returns in the obligation for the

diplomatic missions of the member states and the Union delegations to cooperate and to contribute to formulating and implementing a common approach (Arts. 32 and 35 TEU). Interestingly enough, the Treaty for the first time also mentions “Union delegations in third countries and at international organizations” which shall represent the Union (Art. 221 (1) TFEU). However, member states seem to be somewhat anxious about the developments in this area. In a special declaration to the Treaty (No. 13) they stated that:

“ [...] the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.”

### **3. International Institutions in which the EU has a Legal Position**

#### *3.1 Membership*

Part of the legal approach in this area is devoted to the way in which the EU made use of its external competences. Research then reveals that the EU can have a legal position in another international organization or body either through full membership or through an observer status with a variety of legal rights and duties. Full membership is mainly found in areas where the EU has extensive competences (such as trade, fisheries and largely harmonized dimensions of the internal market) (Hoffmeister and Kuijper 2006).

The EU is a *full member* of a limited number of international organizations only, including the Food and Agricultural Organization (FAO), the World Trade Organization (WTO), the European Bank for Reconstruction and Development (EBRD), Eurocontrol, the Energy Commission, the Codex Alimentarius Commission and the Hague Conference on Private International Law. In addition it is also a *de facto* member of the World Customs Organization (WCO), and also its participation in the Organization for Economic Cooperation and Development (OECD) comes quite close to full membership. In this case it is made known that “this participation goes well beyond that of a mere observer, and in fact gives the Commission quasi-Member status” ([www.oecd.org](http://www.oecd.org)), despite the more modest formal arrangement that the European Commission “shall take part in the work” of the OECD (Art. 13 of the 1960 Paris Convention in conjunction with Protocol 1). Accession to the Organization on International Carriage by Rail (OTIF) is pending.

Full participation is also possible in the case of treaty-regimes. Thus the EU (as such) has joined (or signed) a number of UN Conventions, including the Convention on



the Rights of Persons with Disabilities, United Nations Convention against Corruption, the United Nations Convention against Transnational Organized Crime and the UN Framework Convention on Climate Change. The Northwest Atlantic Fisheries Organization (NAFO) reveals that it is even possible for the EU to become a member of a treaty regime without its member states themselves being a member.

In most cases, however, there exists a situation of so-called 'mixture', based on the fact that many competences are shared between the EU and its member states (Sack 1995; Hillion & Koutrakos 2010). But, as in external relations law in general, the 'principle of sincere cooperation' (art. 4 (3) TEU) or as it is often referred to 'the duty of cooperation', may restrain member states in their actions, irrespective of the unclear practical implications of the principle in relation to the actions of the EU and its member states in other international institutions. As Eeckhout holds:

"The [...] case law on the duty of co-operation and the Community's experience with work in international organizations suggest that the principle's effectiveness is limited if it is not fleshed out. There is an obvious case for creating some EC (or EU) treaty language on this crucial principle for mixed external action. There is also an obvious case for basic legal texts on how to conduct co-operation in the framework of international organizations." (Eeckhout 2005, pp. 214-215; Hillion 2009).

As we have seen, the Lisbon Treaty did not repair this deficiency.

The FAO and the WTO are the obvious examples of organizations in which the EU participates as a full member. While as a rule EU membership is still excluded both in the UN itself and in the Specialised Agencies (Art. 4 (1) of the UN Charter), the Community did join the FAO in 1991, after the provisions of the FAO Constitution had been amended to allow for the accession of regional economic organizations (Frid 1993). From the outset, the division of competences was a difficult issue to handle and was to be based on a declaration of competence that had to be submitted by the Community at the time of its application. In addition, EU competences need to be established before each FAO meeting and for each item on the agenda. Without that statement, member states competences are presumed (Cf. CFAO, Art. II, par. 6). In cases where the EU is entitled to vote, its vote equals the number of votes of the member states (CFAO, Art. II, par. 10). The requirement of constant statements of competences seems to form an obstacle for an efficient function of the EU in the FAO (Eeckhout 2005). In addition, the EU is excluded from the organizational and budgetary affairs of

the FAO. Thus, the EU is “not eligible for election or designation” to bodies with restricted membership, which include the Constitutional, Legal, Financial and Planning Committees (CFAO, Art. II, par. 9; Sack 1995, p. 1245). The actual and potential problems which this state of affairs raises will be addressed below. Following up on its FAO membership, the Community joined the Codex Alimentarius Commission (CAC) in 2003. The CAC was established by the FAO and the WHO and provides almost equal voting and participation rights to the EU as the FAO (Pedersen 2006; Chiti & Wessel 2010).

The EU’s membership of the WTO (Art. XI, par. 1 of the 1994 Marrakesh Agreement) differs in the sense that the Community was one of the founders of the WTO and a major partner in the Uruguay Round that led to the establishment of the WTO (Eeckhout 2005, p. 205). No difference is made between EU and state membership, although here also voting rights may either be used by the EU (in which case the EU vote has the weight of the number of its member states) or by the individual EU member states. However, due to the fact that voting rarely takes place in the WTO, the voting rules remain rather theoretical. Nevertheless, competence problems remain a source for a complex participation of both the EU and its member states in the WTO. In Opinion 1/94 the Court held that the Community did not have an exclusive competence to conclude agreements in the area of trade in services and trade related aspects of intellectual property rights (ECJ, Opinion 1/94 *WTO* [1994] ECR I-5267; Frid 1995, pp. 119-132, 345-359; Bourgeois 1996). Two areas which in the form of the Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) form part of the WTO system (next to the modified General Agreement on Tariffs and Trade – GATT). This has not prevented the EU from playing an active role also in relation to these areas. Billet (2006, pp. 901-905) pointed to two reasons for an active role of the Commission even in case where competences are (mainly) in the hands of the member states: 1. The strongly institutionalized setting of the WTO, in particular in relation to the system of dispute settlement strengthens the position of the Commission “both internally – vis-à-vis the member States – as well as internationally”; 2. The EU’s own decision-making procedure (already implying a strong role of the Commission) as well as the Commission’s expertise in the area.

### 3.2 *Observer status*

*Observer status* implies that the EU can attend meetings of a body or an organization, but without voting rights. Furthermore, the presence of an observer can be limited to formal meetings only, after all formal and informal consultations haven been conducted with members and relevant parties. In addition, formal interventions may only be possible at the end of the interventions of formal participants, which may have an effect on the political weight of the EU (Hoffmeister & Kuijper 2006). In areas where the EU does have formal competences, but where the statutes of the particular international institution do not allow for EU membership, this may lead to a complex form of EU involvement. A good example is formed by the International Labour Organization (ILO).

The 1919 ILO Constitution does not allow for the membership of international organizations. The existence of Community competences in the area of social policy nevertheless called for its participation in ILO Conferences. The Community was officially granted an observer status in 1989 (Hoffmeister 2007). The observer status allows the EU (represented by the Commission) to speak and participate in ILO Conferences, to be present at the meeting of the Committees of the Conference and to participate in discussions there. The status also allows for presence at the ILO Governing Body, where the Commission may participate in the Plenary as well as in the committees. However, it cannot become a party to any of the ILO Conventions (Delarue 2006). This complex division of powers between the EU and its member states in the ILO was addressed by the Court in Opinion 2/91, where – at that time in relation to the European Community – it held that “its external competences may, if necessary, be exercised through the medium of the member states acting jointly in the Community’s interest” (paragraph 5). Hence, in this case the member states are used to act as agents of the European Union to allow the latter to make use of its external competences in this field. Obviously, coordination issues arise, although both the EU and its member states increasingly see the need of a joint approach (Delarue 2006).

The extensive observer status enjoyed by the EU in the ILO is not unique and can be found in many Specialised Agencies and programs of the United Nations, as well as in the UN’s General Assembly and in ECOSOC. With regard to a number of international institutions (including the ICAO, UNESCO, OECD, and the Council of Europe) the arrangements have been referred to as ‘full participant’ status, indicating that the only element that separates the EU from membership is related to the voting rights (Hoffmeister 2007, p. 54).

Finally, the European Union may even participate in treaty-regimes or informal international networks in areas which are deliberately left to the member states. Prime examples in this area include the regimes on non-proliferation and on export controls. On the basis of Art. 347 TFEU member states have always claimed their own competence in relation to commodities related to the maintenance of peace and international security. At the same time this provision calls upon them to ensure that any measures taken in this respect do not prevent the functioning of the internal market and are in line with the common commercial policy (Trybus 2005). In turn, this forms a reason for the European Commission (not the EU as such) to participate in some of these regimes, as a ‘permanent observer’ (for instance in the Zangger Committee to harmonize the interpretation of nuclear export control policies for parties to the Non-Proliferation Treaty) or even as a ‘full participant’ (as in the Australia Group which aims to ensure that exports do not contribute to the development of chemical or biological weapons) (Kienzle 2008).

#### **4. The European Union and the United Nations**

In the new post-Lisbon EU Treaties the United Nations and its Charter are presented as the guiding legal framework for the EU in its external relations. Article 3 (5) TEU mentions “respect for the principles of the United Nations Charter” as part of the “the strict observance and the development of international law” which are to be pursued by the EU. Similar wordings reappear in Article 21 TEU of the general provisions on the Union’s external action. In fact, the promotion of “multilateral solutions to common problems” should be done “in particular in the framework of the United Nations”. Finally, as reflected in the Preamble to the Treaty of the Functioning of the European Union (TFEU), UN law not only guides the external relations of the Union, but also its internal relation with its overseas countries. The member states announced that they intent to “confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations.”

Over the years, empirical political studies revealed the difficulties of presenting a common EU position in the UN General Assembly. It has been noted that “national interest [drives] the policies of the EU countries and the processes within the CFSP at the UN. In New York, the CFSP-regime is simply an instrument for intergovernmental dealings between the EU MS.... There is little room for a single European voice on the East River, i.e. for a truly *common* foreign policy” (Rasch 2008, p. 301). More in general, there seems to be some consensus that “EU cohesion in the UNGA varies over time and by issue area” (Birnberg 2009, p. 52). Recent attempts to upgrade the position of the EU to a ‘full participant’ with full rights to speak and make proposals met with opposition in the UNGA (Emerson & Wouters 2010). Even more difficult would be to set national sentiments aside in the UN Security Council. Nevertheless, a specific provision (Article 34 (2)) aims to ensure that CFSP outcomes are also taken into account by EU members in the UN Security Council:

“Member States which are also members of the United Nations Security Council will concert and keep the other Member States and the High Representative fully informed. Member States which are members of the Security Council will, [...] defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.”

The new Treaty even allows for the possibility that the Union’s position is not presented by one of the EU member states, but by the High Representative of the Union for Foreign and Security Policy. In that case the member states which sit on the Security Council shall forward a request to that end to the Security Council. Given the

traditionally sensitive nature of the special position of (in particular the permanent) members of the Security Council, this provision can certainly be seen as a further step in facilitating the Union to speak with one voice. Obviously, the ultimate decision to accept a presentation by the High Representative lies in the hands of the Security Council.

In order to prevent these new diplomatic competences of the Union from affecting the member states' own powers, they adopted a special Declaration (No. 14) during the Lisbon Intergovernmental Conference:

“The Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each member state in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a member state's membership of the Security Council of the United Nations.”

Irrespective of the interpretative character of this type of Declarations they can never be used to evade the actual treaty provisions. Any further development will therefore depend on the use by member states of the new treaty provisions allowing for a stronger diplomatic representation by the High Representative.

With the coming of age of the EU's Common Security and Defence Policy (CSDP), relations between the EU and the UN have also gained importance in that area. Article 42 (1) TEU provides that the Union may use its civilian and military assets missions outside the Union for peace-keeping, conflict prevention and strengthening international security, and again this should be done “in accordance with the principles of the United Nations Charter.” In fact, the Treaties foresee the possibility of EU missions operating in a UN framework. The preamble of Protocol 10 to the Treaties refers to the fact that “the United Nations Organisation may request the Union's assistance for the urgent implementation of missions undertaken under Chapters VI and VII of the United Nations Charter.” And, Article 1 of the Protocol considers a ‘permanent structured cooperation’ between able and willing EU member states necessary “in particular in response to requests from the United Nations Organisation”.

Similarly, UN law forms the legal framework for actions in relation to the new collective defence obligation in Article 42 (7): “If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation

of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter [the provision on (collective) self-defence – RAW].”

Also development cooperation (a shared competence between the Union and its member states) will have to be based on decisions taken by and in other international organizations, including the UN. Article 208 (2) TFEU provides that “The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.” The same holds true for humanitarian aid operations, which are to be “coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system” (Article 214 (7) TFEU).

The attention to the United Nations and its principles in the EU treaties is thus overwhelming. In fact, the United Nations is referred to 19 times in the current EU treaties (including the Protocols and Declarations). Irrespective of the ECJ’s judgment in the 2008 *Kadi* case, which seemed to emphasise the Union’s own principles (Eckes 2010; Wessel 2008), the EU obviously regards many of its actions as being part of a global governance programme. With a view to the legal regime governing the EU-UN relations, one may conclude that most of the provisions aim to regulate EU policy in a *substantive*, rather than an institutional manner. EU foreign policy is to take place within the limits set by UN law. This holds true for external relations in general, and for CFSP, CSDP, and development cooperation in particular. Much less the Lisbon Treaty offered *institutional* improvements to allow the EU and the UN to become ‘partners in multilateralism’ (cf. Ferrero-Waldner 2005). The establishment of the External Action Service, together with the new provision which allows for the High Representative to present EU positions in the UN Security Council (alongside her potential role in the General Assembly plenary) offer options that may be used by the member states.

#### **4. Concluding observations**

The main question raised in the contribution was to what extent the current EU Treaties regulate the position of the EU in other international institutions. This is a legal question, which explains the strong focus on competences and treaty provisions. The main findings are therefore related to what the EU can do, how it can do this (and has done it) and what the division of competences is in relation to its member states. In that respect, it can be concluded that the Treaties do allow for the EU to be engaged in international institutions and even to become a full member of other international organizations or participate in treaty-regimes, albeit that the Treaties not at all present the relevant provisions in any coherent fashion. The EU made full use of its possibilities, but is often hampered by either the rules of the international institution, or reluctance by its own member states to allow the EU to act on their behalf. A case in point is the EU’s position

in the United Nations, an organization that receives abundant attention in the new treaties, but the substantive rather than institutional innovations are presented in terms of restrictions rather than as opportunities. At the same time, the complex division of competences between the EU and its member states often block the EU from fully taking over.

This is not to say that law has nothing more to offer. On a day-to-day basis the legal services of the Council and the Commission answer legal questions which also relate to the existence of a legal basis for external actions of the EU, the conclusion of international agreements with other international organizations or third states or the division of competences with the member states. With the increasing international role of the Union, the question which rules of international law are applicable – both in relation to external actions as within the EU's own legal order – has also gained more attention. Thus general international rules on the responsibility of international organizations or on the division of international responsibility between the EU and its member states become increasingly relevant. Internally, this may also call for possibilities for the EU to oblige its member states to keep the international commitments (Sack 1995, pp. 1235-1236).

Irrespective of its valuable contribution to the visibility of the institutional legal framework which defines the EU's role in other international institutions, its limitations are obvious. The legal approach has no answer to the question of why the EU would opt to use a certain competence, or why member states are reluctant to hand over powers. These are questions that are raised by political scientists in particular. The participation of the EU in international institutions reflects the flexibility of the EU's external relations regime. As legal competences are divided over the Union and its member states, the actual use of these competences depends to a large extent on the possibilities offered by the particular institution and the willingness by member states to be represented by the EU.

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