

Changes and Developments in the Law of International Organizations as a Consequence of the Appearance of the European Community and the European Union as Subjects of International Law: The Right Of Participation

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1. Introduction

The purpose of this paper is to show how the Law of International Organizations is changing because of the appearance of two new Subjects of International Law: The European Community and the European Union (hereinafter EC and EU). This last one as a development of the still existing European Community.

At present we all agree in recognizing the European Community as an international legal personality. This personality has gradually become more peculiar and different compared to the one enjoyed by most of the international organizations². The great number of agreements concluded with third countries and international organizations, and also the 170 representations from States and international organizations that have been accredited to the European Community -and now to the European Union- prove this further development of the international legal personality of the European Community³.

The problem arose when the Treaty on European Union -also known as the Treaty of Maastricht- established the European Union as a political entity without an international legal personality. Nor has the EU been awarded it throughout the successive reforms of its institutional Treaty (Maastricht - at 92-, Amsterdam -at 97- and Nice -at 2001 and in force at this moment-)⁴.

Notwithstanding this, the mysterious articles 24 and 38 of the EU Treaty – introduced by the Amsterdam Treaty - concealed a *treaty making power* with third States or international organizations within the Second and Third *pillars* (devoted respectively to Common Foreign and Security Policy -CFSP- and to Police and Judicial Cooperation in Criminal matters -PJCCM-). This power is, beyond any doubt, the most relevant capacity of a Subject of International Law. V.g., the EU has concluded agreements with the Federal Republic of Yugoslavia -actual Serbia

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² Actually there are more than 350 international organizations. Cfr. about the law of international organizations: M. DÍEZ DE VELASCO, *Las organizaciones internacionales*, (2003); H.G. SCHERMERS, N.M. BLOKKER, *International Institutional Law. Unity within diversity*, (1995). Cfr. about the EU and its unclear international legal personality: E. BRIBOSIA, A. WEYEMBERGH, 'La personnalité juridique de l'Union européenne', in *L'Union européenne et le monde après Amsterdam*, M. Dony (eds.), (1999), 37; M. PÉREZ GONZÁLEZ, N. STOFFEL VALLOTON, « La cuestión de la naturaleza jurídica de la Unión Europea : El problema de la personalidad jurídica », in *El Tratado de Amsterdam: Análisis y comentarios*, Oreja Aguirre (eds.), (1998), 187.

³ *Vid. Corps Diplomatique accrédité auprès des Communautés européennes et représentation auprès de la Commission*, Office des publications officielles des Communautés européennes, Luxembourg, 19.

⁴ The Treaty of Maastricht, the first Treaty on the European Union, was signed February 7th, 1992 and came into force on November 1st, 1993. The Treaty of Amsterdam –the second version of this Treaty- was signed October 2nd, 1997 and came into force on May 1st 1999. The Treaty of Nice was signed February 26th, 2001 and came into force on February 1st, 2003 till now.

and Montenegro- (2001), and the Former Yugoslav Republic of Macedonia (2001) regarding an EU Observation Mission, and with Bosnia and Herzegovina (2002) about an EU Police Mission.⁵

Practice has shown the necessity for the EU to become an International Legal Subject, putting an end to all possible misunderstandings.

This temporary situation added to the complex co-habitation of the European Community and the European Union explains why I am forced to use this unclear expression European Community/European Union -EC/EU-. This formula has been used, for example, in the preamble included in the agreement concluded between the European Union and the Former Yugoslav Republic of Macedonia about an EU Observation Mission⁶.

However, *our dearest* European Community is going to die. We are going to kill her allowing the European Union to survive enjoying *legal personality* –which means a positive sacrifice-. That is what article 7 of the *Treaty establishing a Constitution for Europe* states.⁷ This *Agreement on the Constitutional Treaty* was recently signed in October 29th, 2004 in Rome, although it needs the 25 Member States ratifications to be in force. This means that this *new* European Union will have to wait.

Nowadays, the Treaty of Nice –as well as the last and former versions: Amsterdam and Maastricht- states that the European Community exists inside the European Union⁸. This situation has had an impact in the EC/EU participation in international organizations. For example, the observer or member *status* are officially granted to the European Community; however, practice has shown how, in many cases, EC delegations act as European Union ones - even in the areas covered by Titles V and VI of the EU Treaty (the Second and Third *pillars*).

2. The Participation of the European Union and the European Community in International Organizations

I will focus on the developments in the Law of International Organizations through the current participation of the European Union and the European Community in International Organizations as an *observer* -this is the traditional status for a secondary Subject inside an International Organization- and as a full *member* -an exceptional status for an entity other than a State-.

⁵ Cfr., respectively, OJ 2001 L 125/2; OJ 2001 L 241/1; OJ 2002 L 293/1. Police and judicial cooperation agreements, concluded as a consequence of the September 11th attacks, have found a base in articles 24 and 38 Treaty on European Union. Article 24 states: 1° ‘When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency’. ... 6° ‘Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union’. It is curious how this Article tries to hide that it is the European Union the Subject that has the power to conclude agreements with other States or international organizations.

⁶ Cfr. OJ 2001 L 241/2.

⁷ Article 7 reads: ‘The Union shall have legal personality’. Cfr. Treaty establishing a Constitution for Europe, CIG 87/1/04 REV 1, Brussels, 13 October 2004, <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-re01.en04.pdf>

⁸ Article 1 (3) of the Treaty establishing the European Union reads: ‘The Union shall be founded on the European Communities, supplemented by policies and forms of cooperation established by this Treaty’.

I will start with the observer status first and continue with the full member participation.

A. The Observer Status

The European Community has acquired the observer status in most of the existing international organizations. The United Nations General Assembly granted this status to the Community delegation through Resolution 3208 (XXIX)⁹. The measure confirmed this as the future model of its participation in different subsidiary organs, Specialized Agencies of the United Nations system and others international organizations. This participation of the European Community delegation has been modified including different powers as a consequence of the particular legal nature of this entity, more than an international organization since the beginning in 1957 but always less than a State.

The European Commission clearly explained this difficult situation as follows:

L'UE échappe en effet à toute tentative de classification dans la typologie classique des organisations internationales. Elle représente une construction unique en son genre et ne peut être assimilée ni à une organisation intergouvernementale (bien qu'elle soit fondée sur un accord entre Etats souverains et qu'elle soit considérée comme organisation internationale à l'ONU), ni à une organisation d'intégration économique régionale (elle est bien davantage, surtout depuis l'entrée en vigueur de l'Acte Unique et du TUE), ni bien évidemment à un Etat (fédéral).¹⁰

This *sui generis* legal nature for the European Community allowed it to gain some privileges compared to other representations. Practice in different international organizations (United Nations, World Health Organization, International Labour Organization, World Intellectual Property Organization, etc.) has shown, for example, how European Community Organization representatives enjoy more flexible capacities to express the Community will when they attend meetings in different organs of international organizations¹¹; these special prerogatives can be *physically* perceived if we consider that the European Community delegation is usually located between States and observers in the meeting room. In some cases, the European Community status can be placed half way between the observer status and full membership. This is the case at the Council of Europe and the Organization for Economic Cooperation and

⁹ *Vid.* GA Res. 3208 (XXIX), 11 October 1974. It is curious how the United Nations General Assembly also granted the status of observer to the Council for Mutual Economic Cooperation (COMECON) through Resolution 3209 (XXIX) that same day.

¹⁰ Prepared by F. Génisson DG IA/A-3 Commission Européenne, sur la base de notes de MM. Boselly et Garzón, de documents émanant de Nations Unies et de recherche personnelle. Note de dossier : *Organisation régionales et maintenance de la paix et de la sécurité internationales –le cas de l'Union européenne*, Bruxelles, le 24 juillet 1994, 2.

¹¹ This happens also in the United Nations Conference on Trade and Development (UNCTAD) and in subsidiary organs such as the United Nations High Commissioner for Refugees (UNHCR) and the World Food Programme (WFP).

Development (OECD), where it has been awarded a privileged observer status known as *participant in the works* of the Organization, which constitutes a new category of participation¹².

Thus, it can be stated that a new type of participation at international organization is arising as a result of the legal needs of the EC/EU of working inside Organizations -for example, taking part somehow in the resolution adoption process of an international organization if the EC/EU has powers in that concrete area- and also as a consequence of the difficulties in modifying the institutional treaties of international organizations to allow Subjects of International Law other than States to take part as members.

B. The Full Member Participation

We also have to take into consideration that membership, which has traditionally been reserved to States, is currently being granted to the EC. This was the case some decades ago when the European Community became the only member in some fisheries organizations instead of its member States, such as the North-West Atlantic Fishery Organization (NAFO), the North-East Atlantic Fishery Commission (NEAFC), the North Atlantic Salmon Conservation Organization (NASCO) and the International Commission for the Conservation of the Atlantic Tuna (ICCAT)¹³. The same happened at some Base Products Organizations -the International Olive Oil Council and the International Sugar Organization- and at the International Sea Bed Authority (ISBA), in this last case respect their member States.

The examples have multiplied since then: European Bank for Reconstruction and Development (EBRD), the Food and Agriculture Organization of the United Nations (FAO), the World Trade Organization (WTO) and EUROCONTROL (the European Organization for the Safety of Air Navigation). In these organizations the EC and the EU member States have a joint participation due to the existence of mixed competences in the field of those international organizations. This kind of participation demands an effective coordination, for example, through arrangements that are not easy to make and apply -as for the FAO-¹⁴. This means that neither the EC nor its member States are really *full* members in this joint participation.

The EC will join international organizations as a member as the European integration process goes on, overcoming different obstacles. In fact, in some international organizations - such as International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO)- negotiations have been held to obtain the European Community membership.

3. Final Considerations

The European Union will need to make a great effort to face the new challenges. I am thinking about the recent enlargement and about the new officially legal personality awarded by the *Treaty establishing a Constitution for Europe*.

¹² Vid. C. PÉREZ BERNÁRDEZ, *Las relaciones de la Unión Europea con organizaciones internacionales*, (2003), 442.

¹³ The European Community is a member in different fishery organizations without their member States. In spite of this, a few EU member States also have a *special* membership. For example, Denmark is a NAFO member State in relation to the Faroe Islands and Greenland. France is also a member State of NAFO in relation to Saint-Pierre and Miquelon.

¹⁴ Vid. Case C-25/94, *Commission v. Council*, [1996] ECR, 1469.

New changes are imminent in the Law of International Organizations. Maybe these developments could be extended in the future to other secondary Subjects of International Law, such as MERCOSUR, the Andean Community or the Association of the South East Asian Nations (ASEAN), as long as they can be framed inside the 'Regional Economic Integration Organizations' category. For example, the Constitution of FAO includes this concept, leaving a door open in the future to other international organizations that could be identified as *Regional Economic Integration Organizations*¹⁵.

Once this *Constitutional Treaty* is in force, international organizations, in which the EC/EU is a member or has an observer or a privilege status, will be compelled to change the *European Community* name into *European Union*. This ornamental measure will have a real meaning only if the new EU is able to prove that it is a solid political and juridical entity in a double field, internal and external. In this respect, in 1961 Professor Pierre Pescatore said that 'le problème des relations extérieures ... n'est que l'aspect externe de l'activité des Communautés, la manifestation de cette activité à l'égard du monde extérieur »¹⁶. The creation of the post of the EU *Minister of Foreign Affairs*, merging the present tasks of the High Representative for the Common Foreign and Security Policy with those of the Commissioner for external relations, will help towards this aim. However, all EU institutions and member States will have to work in this trend to enable the EU to play a more visible and real role in world affairs, especially inside international organizations.

¹⁵ *Vid.* Article II (3), (4) and (5) of the Constitution of FAO.

¹⁶ *Vid.* PESCATORE: 'Les relations extérieures des Communautés Européennes. Contribution à la doctrine de la personnalité des organisations internationales », 103 *RCADI*, [1961], 9.