

## Kaleidoscope

### The European Economic Community A Member of a Specialized Agency of the United Nations

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#### I. Introduction

From a pure legal theory approach this article could have been written in the seventies or, to be more precise, from the moment the EEC gained exclusive powers in some of the fields of activity of the Food and Agriculture Organization (FAO). If it had been written then, the principal conclusion would have been that the EEC should become a member of the FAO in its own right. More detailed assertions in the article would have been considered as no more than a cry in the dark.

The EEC membership of the FAO marks a step forward in both the law of international institutions and European Economic Community law. It is quite an unusual achievement since the phenomenon of an international organization becoming a member of another international organization is still quite rare. The fact that international institutional law has developed out of classical international law has left its mark with respect to membership in international organizations – this right is still reserved, in most cases, for states only. It is not the first time that the EEC has become a member in its own right of an international organization.<sup>1</sup> However its membership of the FAO is very significant because it is the first time that the EEC has joined an organization that falls within the United Nations family of international bodies.

The relationship between the EEC and the FAO is a unique case, but at the same time it features the general problems that arise from the EEC accession to international organizations.

This contribution will be limited to a discussion of the institutional problems related to the accession of the EEC, as a Regional Economic Integration Organization (REIO), to the FAO as an international organization.

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<sup>1</sup> Examples of EEC membership in other international organizations include various fisheries organizations, such as the North Atlantic Fisheries Organization (NAFO), and the North Atlantic Salmon Conservation Organization (NASCO). Also, on 27 April 1992 the Commission approved a proposal for a Council decision for the accession of the EEC to the International Energy Agency, Comm. Doc. No. SEC (92) 697.

## II. The Legal Position with Respect to Membership of the EEC in the FAO

Most constitutions of international organizations and conferences specifically provide that only states may become members. Other international organizations and other entities of a different character (non-independent territories, liberation movements, non-governmental organizations) may participate in the work of the host organization in the capacity of an observer.<sup>2</sup> The observer status entails the right to participate in the activities of the host organization, usually it includes the right to speak, but the right to vote is always excluded for observers.<sup>3</sup> The Community had the status of a non-permanent observer in the FAO. Before discussing the possible modalities which made the accession of the EEC to the FAO possible, it is useful to start with the following question:

Why was the accession of the EEC to the FAO necessary?

At first sight the fact that all the Community Member States are also members of the FAO and actively take part in its work might cast doubt on the need for the Community to become a member. Would it not be sufficient for the Member States to take a common position on matters which come under the Community's competence?

On the other hand, it can be argued that the powers held by the Community are vested in it by the transfer of powers from its Member States. The Community has explicit internal as well as external competence in the field of activity of the FAO. With respect to the common commercial policy and external fisheries policy the Community is in a possession of exclusive competence. Consequently, these powers can be exercised within international organizations only if the Community enjoys the same prerogatives as the States, namely membership.<sup>4</sup>

In fact, the phrasing of the question 'why was the accession of the EEC to the FAO necessary?' is implicitly based on the point of view of classical international law according to which only states are capable of becoming members of international organizations. This stands in contrast with Community law according to which, under the appropriate conditions, the Community should act on its own in international relations.

Therefore, I would suggest that the question should be phrased differently, and in the following terms.

Why is the Community not a member of international organizations which are active in fields of the Community's exclusive competence, and why are the Member States still members of these organizations although they have already transferred their competence on the matter to the Community?

The legal justification for the Member States to remain active members of the FAO exists as long as the Community does not have an exclusive competence over the major fields of activity of the FAO.

However, accession of one international organization to another is still the exception in international institutional law. Therefore, it is useful to examine the necessity of such an accession from both the point of view of the member organization (EEC) and the target organization (FAO).

From the point of view of Community practice, the Treaty establishing the EEC entrusts the Commission of the European Communities with the task of negotiating, on its behalf, all binding commitments under international law (Article 228 of the Treaty of Rome). Conventions under

2 See for example Article 75 of the Rules of Procedure of the Economic and Social Committee; Resolution 1995 (XIX) of 30 December 1964 concerning UNCTAD.

3 J. Groux and P. Manin, *The EC in the International Order* (1985) 46-53; R.G. Sybesma-Knol, *The Status of Observers in the UN* (1981), Chapters IV, VII Section c.

4 J. Groux and P. Manin, *ibid.* at 41-45.

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the auspices of international organizations are often open only to members of the organization. Furthermore, only members can take part in the body or conference which is drafting the text of a convention. As early as 15 December 1971, the Commission informed the Council in a note about the insufficiency of the Community's observer status in the FAO.<sup>5</sup> According to the Commission, the Community could not table any proposals, did not take part in the policy making of the organization, and was not able to fully participate in technical bodies established in the framework of the FAO.<sup>6</sup> Although in practice the Community stretched its observer status to its maximum, it is evident that the Commission could better fulfil the function of representing the Community and negotiating on its behalf in other international organizations with the authority of a member, rather than from the limited position of an observer.

From the FAO perspective there are some important advantages to be gained from admitting the Community as a member. It advances the cooperation between the organizations, and in the light of the powers of the EEC in fields of action of the FAO, its admittance as a member most certainly contributes to the fulfilment of the objectives of the FAO.<sup>7</sup>

The participation of the Community as a full member brings with it legal certainty concerning the fulfilment of obligations and liability in the event of their breach. The EEC is committed to the activities pursued by the FAO, and with it all its Member States are so committed (Article 228(2) of the Treaty of Rome). In particular, in fields of the exclusive competence of the Community some Member States of the EEC had great difficulties in implementing certain FAO decisions, if measures had not been taken at the Community level.

Cooperating with the Commission of the European Communities is more efficient since the Commission is best informed about Community policies and, in fields of competence of the Community, the Commission may speak on behalf of the whole Community. Finally, by acquiring rights of a member, the EEC is able to exercise its influence from inside the FAO and bring with it its expertise on the activities of the FAO.

Thus, once the necessity of accession of one international organization to another is established, the legal solution can be found in the form of an amendment to the constitutive instrument of the receiving organization concerned. However, the situation is not that simple since under the rules and practice of international organizations, the admittance of any member is largely a discretionary issue in the hands of the Member States, and is therefore a political rather than a legal matter.

However account must be taken of the reluctant attitude of relevant parties; these are the Member States of the EEC and third parties that are members of the FAO and the FAO as an organization. The Member States of the EEC are very reluctant to give up any aspect of their sovereignty, in particular in the field of external relations. This is also reflected in the relatively limited express competence of EEC for external activities under the Treaty of Rome. As for third parties, in the past the most consistent opponents of the EEC were the Eastern bloc countries. Nowadays, following the radical change in East-West relations, one may expect less resistance in relation to the EEC position as an international actor. However, the growing rivalry with the USA and Japan as demonstrated, for example, by their objections to the accession of the

5 Van de Voorde, 'De EEG als lid van een internationale instelling: het geval FAO', 4 *Studia Diplomatica* (1992) 49, 57.

6 The EEC, not being a member, was barred from becoming a party to any agreements concluded under Article XIV of the FAO Constitution, setting up FAO regional fishery management bodies. Some examples were the General Fisheries Council for the Mediterranean (GFCM), the Indo-Pacific Fisheries Commission (IPFC).

7 This aspect was stressed by the Conference of the FAO in its 26th session as a reaction to reservations of Member Nations in relation to the admission of REIOs as members of the FAO. See Report of the Conference, 26th session, November 1991 C 91/LIM/38 Suppl.1, 4 point 10.

Community to the FAO,<sup>8</sup> might continue to be an obstacle hindering the EEC to take up its appropriate position as an international actor.

From the side of the FAO the problem was quite complicated, since the FAO belongs to the classical type of organization that admits only states as members. The FAO belongs to the UN family, where the relatively weak position of the EEC in the organs of the UN also had an influence on the EEC chances of becoming a member of a UN Specialized Agency. Finally, it may well be that in a UN organization there is a fear of setting a precedent once the rules are changed, since the rest of the 'family' of UN organizations are governed by similar rules.

The capacity of the EEC to become a member of the FAO depends on three main factors, namely the possession by the EEC of an international legal personality,<sup>9</sup> the powers of the EEC under Community law, and the requirements of the FAO constitutive document.

#### A. Membership of the EEC in the FAO – Community Law Perspective

Since the EEC is in the possession of a functional international legal personality, the question is whether the EEC has the power under Community law to participate in another international organization as a member. Although the accession of the Community to the FAO is already a legal fact, at least theoretically Community law should be further examined. The question is what is the legal basis for an internal Community act on accession to the FAO from the perspective of Community law?

There is no explicit provision in the Treaty of Rome to empower the EEC to accede to another international organization. Article 229 of the Treaty charges the Commission with the task of maintaining appropriate relations with, *inter alia* the Specialized Agencies of the UN. It would go too far to interpret Article 229 as a legal basis for EEC membership in any Specialized Agencies, including the FAO.<sup>10</sup> Article 229 refers to cooperation between the Commission of the EEC and other international organizations in areas 'as are appropriate'.<sup>11</sup> Under appropriate relations one may include exchange of information and conclusion of agreements at the level of administrative cooperation. Indeed, this has been the level of the relationship between the EEC and the FAO thus far.

The EEC has explicit powers to act in fields of operation of the FAO. Some examples are: the common agricultural policy (Article 43 of the Treaty of Rome), approximation of laws of the Member States (Articles 100, 100a), research and technological development (Articles 130f-130q), environment (Article 130r-130t), development (Articles 235, 238), and various other policies such as transport, and economic and social policy when relevant to the activities of the FAO.<sup>12</sup> Furthermore, the EEC has exclusive competence in the fields of commercial policy (Article 113 of the Treaty of Rome) and fisheries (Article 102 of the Act of Accession of 1972).

8 'Europe', 16 November 1991, No. 5610, 5.

9 Articles 210 and 211 of the Treaty of Rome. The EEC is in the possession of a functional international legal personality: H.G. Schermers, *International Institutional Law* (1980) 777; M. Dolmans, *Problems of Mixed Agreements: Division of Powers within the EC and the Rights of Third States* (1985) 9; P.J.G. Kapteyn and P. Verloren van Themaat, L.W. Gormley (ed.), *Introduction to EC Law*, (1989) 58; Shachor-Landau, 'The International Legal Personality of the EC and its Treaty-making Power', 20 *Israel Law Review* (1985) 341, 344.

10 J. Mégret, *Le droit de la CEE*, Vol. 12 (1981) 66; H. Smit & P. Herzog, *The Law of the EC, A Commentary on the EC Treaty*, Vol. 6 (1989) on Article 229 of the Treaty of Rome.

11 J. Mégret, *ibid.*

12 These examples are based on the declaration of the Commission of the EEC on the competence of the Community in fields of action of the FAO, Annex II, Commission proposal for a Council's decision on accession to the FAO, OJ 1991 C 292/10.

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The exclusive nature of Community competence in these fields was confirmed by the European Court of Justice.<sup>13</sup> It entails that the Community is the only competent body to act, to the exclusion of the Member States, as a result of the transfer of powers from the Member States to the Community and the exercise of these powers by the Community.<sup>14</sup> Furthermore, the Court has ruled that Article 5 of the Treaty of Rome binds the Member States and the institutions of the Community to use every legal and political means at their disposal to ensure the participation of the Community in international conventions when the Community necessarily must do so in the exercise of its exclusive competence.<sup>15</sup> If the Community cannot exercise its powers, an alternative could be suggested in the form of a mandate to the Member States to act on behalf of the Community.<sup>16</sup> However, from a legal point of view such a situation would not be desirable, given that the Member States have transferred the relevant powers to the Community.

Thus, from Community law perspective the problem is that, although the EEC has a variety of external powers to act in fields of FAO's activity, it lacks an explicit power in order to accede to another international organization. The situation with regard to accession to international organizations is somewhat different from treaty-making by the EEC because different kinds of treaties are involved. Accession to international organizations is not merely a question of concluding a contract treaty but it also requires a concluding constitutive treaty. The latter establishes an international organization and therefore is of broader scope than a contract treaty. In addition, it normally sets certain conditions for accession.

The problems with regard to accession of the EEC to an international organization create an interesting interaction between the law of international organizations and Community law. From the perspective of the law of international organizations, once an organization has taken the decision permitting membership, the Community can accede as soon as they fulfil the conditions set by the other organization followed by a decision of the competent organ of the organization concerned. However, from the Community law perspective, in the absence of explicit powers to accede to other international organizations, it is not possible to apply the provisions on the treaty-making power of the EEC to accession to international organizations. There are several possible solutions for this legal problem.

The power to accede to the constitutive treaty of another international organization can be based on the theory of implied powers, as has been developed by the European Court of Justice.<sup>17</sup> The test of necessity should be satisfied in order to support an interpretation of implied external powers.

Thus, a Community act approving the accession to the FAO can possibly be based on implied powers. The power to accede to the FAO should derive from the totality of explicit

13 Commercial policy – Opinion 1/78, *International Agreement on Natural Rubber*, [1979] ECR 2871. Fisheries – Cases 3, 4 and 6/76, *Officier van Justitie v. Kramer*, [1976] ECR 1279, 1311 (hereafter referred to as *Kramer*).

14 Opinion 1/76, *Draft agreement establishing a European laying-up fund for inland waterway vessels*, [1977] ECR 741. See in general on exclusive competence of the Community P.J.G. Kapteyn and P. Verloren van Themaat, L.W. Gormley (ed.), *supra* note 9 at 773.

15 Cases 3, 4 and 6/76, *Kramer*, *supra* note 13 at paras. 44-45.

16 Cases 3, 4 and 6/76, *Kramer*, *ibid.* There, the Court of Justice recognized the possibility of a mandate to the Member States to act in the field of fisheries under very strict conditions and on a transitional basis; In Case 41/76, *Donckerwolcke*, [1976] ECR 1921 the Court stressed that measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community.

17 Cases 3, 4 and 6/76, *Kramer*, *supra* note 13, at paras. 19-20; Case 22/70, *Commission v. Council*, [1971] ECR 263 (hereafter referred to as *ERTA*); Opinion 1/76, *Draft agreement establishing a European laying-up fund for inland waterway vessels*, *supra* note 14.

external powers to act in fields of activity of the FAO, combined with the need for the Community to accede to the FAO.<sup>18</sup>

However the existence of implied powers is a matter of interpretation by applying the test of necessity. If the institutions of the Community do not consider that the external competence provisions imply the power for the EEC to become a member of the FAO, there is still the possibility to resort to Article 235 of the Treaty of Rome.

This Treaty provision can be relied upon to create additional powers, when they are not specifically provided in the Treaty. This includes the potential for a power to accede to international organizations, provided that such a development falls within the framework of the objectives of the Treaty. The main obstacle in applying Article 235 in this case would be the possible existence of implied powers, because Article 235 may be relied upon only in the absence of any other powers, both explicit and implied.

Another possibility is to argue that the Community does have the power to accede to another international organization on the basis of its existing external powers, both explicit and implied. In the case of the FAO such an argument is mainly based on Articles 43 and 113 of the Treaty of Rome. Article 43 contains implied external powers in the field of agriculture and fisheries and Article 113 contains explicit external powers in the field of the common commercial policy. However, the power to accede to another international organization is not clear from the text of these articles, therefore it should be based on an element of interpretation. A broad interpretation in this respect is supported by the case-law of the Court of Justice. In *Opinion 1/76 Draft agreement establishing a European lying-up fund for inland waterway vessels*<sup>19</sup> the Court found implied external powers for the Community to participate in an international agreement creating an international lying-up fund in the field of transport policy, based on the internal powers under Article 75 of the Treaty of Rome. Further, the Court held that:

The Community is therefore *not only entitled to enter into contractual relations* with a third country in this connection but also has the power, while observing the provisions of the Treaty, to cooperate with that country in *setting up an appropriate organism...* (emphasis added).<sup>20</sup>

This is a very broad interpretation which goes further than accession to an existing international organization. The Court established that the Community may cooperate in the establishment of a new international organism with decision-making powers in a field where the external powers of the Community are implied powers, i.e. transport policy. This line of interpretation could be applied to the accession to the FAO in relation to Article 43 of the Treaty of Rome which contains implied external powers. Furthermore, in the field of the common commercial policy the Court shows a dynamic approach by taking into account new mechanisms of regulation of international trade such as international commodity agreements and the Community's system of Generalized Tariff Preferences (GSP) for developing countries.<sup>21</sup> The Court ruled that the common commercial policy comprises not only the traditional instruments in this field but also any new instrument introduced at the international level to regulate trade. In the case of accession to the FAO there are elements of commercial policy involved. Thus, in accordance

18 For the test of necessity see *Opinion 1/76, Draft agreement establishing a European lying-up fund for inland waterway vessels*, *ibid.*

19 *Ibid.*

20 *Ibid.*, at para. 5.

21 *Case 45/86, Commission v. Council*, [1987] ECR 1517, paras. 13, 18, 21 on the GSP; *Opinion 1/78, International Agreement on Natural Rubber*, *supra* note 13 at para. 45, on commodity agreements.

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with the broad interpretation of the Court, the Community's power to accede to the FAO can be based on a broad interpretation of Articles 43 and 113 of the Treaty of Rome.

A final possibility, probably the most legally correct one, is to amend the Treaty of Rome by adding a provision on the conditions for accession of the Community to international organizations.

To sum up, from the Community law perspective, there is no explicit provision under which an internal act on accession to another international organization can be legally based. The most recent amendments to the Treaty of Rome in the Maastricht Treaty on Union<sup>22</sup> do not indicate a possibility, at least not in the near future, for granting the Community with explicit powers to accede to other international organizations. Therefore, a legal basis for an internal EEC act on the accession to the FAO can be found by broadly interpreting the external Community powers to act in the FAO. The Commission in its proposal for a Council decision on the accession of the EEC to the FAO used Articles 43 (implied external powers), 113 (explicit external powers) and 235 (additional external powers) as its legal basis.<sup>23</sup>

### B. Membership of the EEC in the FAO – the FAO's Perspective (prior to November 1991)

In the Constitution of the FAO a distinction is made between original members and admitted members. The admitted members become members not as of right but by virtue of an admission process.<sup>24</sup> An application for membership was open only for nations.<sup>25</sup>

Under Article II(3) of the Constitution of the FAO the possibility of becoming an associate member is open to any territory or group of territories which is not responsible for the conduct of its international relations. In the light of the powers of the EEC this possibility is not legally suitable.

As for relations of the FAO with other international organizations, Article III(5) of the Constitution reads as follows:

The Conference may invite any international organization which has responsibilities related to those of the Organization to be represented at its meetings on the conditions prescribed by the Conference. No representative of such an organization shall have the right to vote.

- 22 Treaty on European Union, 'Europe' Documents, No. 1759/60 7 February 1992, 13 para. 31, not yet in force.
- 23 Commission proposal for a Council Decision on the accession of the European Economic Community to the FAO. OJ 1991 C 292/8. Although the addition of Article 235 was in any case necessary to supply a legal basis for action in the field of the FAO's development activities, the above discussion seems to be useful in order to ascertain what legal basis is available for the Community in order to accede to an international organization. If the Treaty on European Union does enter into force, the Community shall have explicit external power (although not exclusive) in the field of development cooperation, see: Articles 3q and 130u in particular paragraph 3 on cooperation with other international organizations in the field of development, Treaty on European Union, *ibid*.
- 24 D.W. Bowett, *The Law of International Institutions* (1982) 118-121; Article II.2 of the Constitution of the FAO lays down the requirement of two-thirds majority of votes in the Conference provided that the majority of the Member Nations of the organization is present. The applicant member is required to submit an application for membership and a declaration made in a formal instrument that it will accept the obligations of the Constitution as in force at the time of admission.
- 25 The constitutive document of the FAO refers to Member Nations and not to Member States.

This provision presents the conservative approach of granting an observer status for other international organizations. In the case of the FAO the status granted is not even a permanent observer position but is dependent on an optional invitation from the Conference. The content of cooperation with other organizations may be determined by an agreement.<sup>26</sup> Thus, according to the Constitution of the FAO the EEC could be granted no other status than that of a non-permanent observer. Consequently, the only legal way to admit the EEC as a member was by an amendment to the Constitution. The amendment procedure is expressly provided under Article XX of the Constitution.<sup>27</sup> The original Constitution has been modified more than 15 times in the past.<sup>28</sup> At the 26th session of the Conference important amendments to the FAO Constitution were adopted allowing the accession of REIOs to the FAO as members.

### III. The Procedure of Accession of the EEC to the FAO

The accession of the EEC to the FAO is a result of several years of negotiations. On 22 October 1990 the Council of the EEC sent a letter requesting a commencement to accession negotiations to the FAO<sup>29</sup>, which were opened on the 1 February 1991. The Commission of the EEC conducted the negotiations with the FAO while acting in close cooperation with the Presidency of the EEC Council, and in the framework of a negotiating mandate from the Council. The negotiations were successful, but the Community was not able to submit a formal request for accession to the FAO until after the Conference of the FAO had adopted the final text of the amendments regarding the accession of REIOs to the organization.<sup>30</sup> In this situation, in order to align the decision-making processes of the FAO with those of the Community, the Council of the EEC had to decide in advance to follow the procedure leading to accession, while making the decision to submit a formal request for accession conditional on the Community's achieving the objectives it had set in the course of the negotiations.<sup>31</sup> The result of the negotiations indicated to the Council of the EEC that the new Constitution and General Rules of the FAO were compatible with the requirements of the Community and its Member States. Hence, on 25 November 1991 the EEC Council acting on a proposal from the Commission endorsed by the European Parliament, formally decided to request the admission of the Community as a member of the FAO.<sup>32</sup>

The application of the Community was accepted by the Conference of the FAO. At the conclusion of the vote by the Conference of the FAO the EEC was accepted on 26 November 1991 as a full member of this UN Specialized Agency.<sup>33</sup>

From the perspective of the FAO the EEC had to fulfil the requirements for accession set by the FAO's amended Constitution. Once the requirements for accession were met by the EEC, voting took place in the Conference of the FAO, and the accession was thereby established.

26 For details see Article XIII of the Constitution of the FAO.

27 For a more detailed description of the amendment procedure under the Constitutions of the Specialized Agencies, see Phillips, 62 *AJIL* (1968) 662.

28 L.B. Sohn (ed.), *International Organization and Integration* (1986) 482.

29 COM (91) 387 final, 18 October 1991, 5, point 4.

30 *Ibid.*, 5-6, point 6.

31 *Ibid.*, 6, point 7.

32 *BulleC* (1991/11), point 1.3.64. The endorsement by the European Parliament is published in OJ 1991 C 326; The Council decision of 25 November 1991 is not published.

33 25th General Report EEC 1991, point 994; 'Europe' 27 November 1991, No. 5617, 11; *NRC Handelsblad* 19 November 1991, 5. The results of the vote were 98 pro, 6 against, 3 abstentions.



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From the Community's perspective, the Council decision on the official request for accession functioned equally as the Council decision authorizing the accession itself, since no further Council decision was taken. Furthermore, the decision of the Council was made at a stage when the results of the accession negotiations between the Community and the FAO were already known. A more appropriate procedure would have been to conclude an accession agreement with the FAO to be approved by the Community institutions, i.e. by a Council decision *sui generis*, as is usual for accession to other multilateral treaties. The admission of the Community to the FAO without the conclusion of any accession agreement between the two organizations means that the procedure of Article 228 of the Treaty of Rome for the conclusion of agreements was not followed. As a consequence, it became more difficult to apply for an opinion of the European Court of Justice as to the compatibility of the Constitution of the FAO, which the Community accepted, with Community law. As will be shown,<sup>34</sup> there are some serious question marks over the limitation of competence of Member Organizations of the FAO and their compatibility with the external and internal competence of the EEC.

To conclude, the accession of the Community to an international organization is still an exception both in international institutional law and in Community law. Consequently, the procedure for such an accession is not well developed. The procedure for the accession of the EEC to the FAO was affected by special circumstances in that both the application of the Community for membership and the amendments to the FAO Constitution authorizing it were approved in the same FAO session.<sup>35</sup> In future cases, the adherence to a constitutive treaty by the Community should find its expression in internal Community procedures. This should be done by two distinct Council decisions. First, a decision should be made authorizing the application for membership and the opening of accession negotiations, then a second decision should authorize the actual accession as approved by the other organization; the latter measure being necessary for the purpose of the Community internal legal order. It is also proper that in such a significant Community activity the role of the European Parliament be guaranteed by making the assent of the European Parliament an obligatory element for a Council decision on accession to another international organization.<sup>36</sup> Further, in order to open the way for judicial review on the compatibility of such an accession, there should be an accession agreement concluded between the Community and the target organization.

### IV. The Amendments to the FAO Constitution with Regard to Membership of REIOs

Already at this stage one can reflect on some effects of the EEC membership of the FAO, although the future practice of the relations between these two organizations will certainly

34 See the discussion *infra* text section IV.

35 COM (91) 387 final, 18 October 1991, 5-6, points 6, 7; For example Rule XIX(1) of the General Rules of the FAO provides that the formal instrument of application for membership should reach the Director-General not later than the opening day of the Conference session at which the admission of the applicant is to be considered. The 26th session of the FAO Conference was opened on 9 November while the EEC Council decision to apply for accession was taken on 25 November. Consequently the EEC application could not have reached the Director-General before the opening of the session. One has to conclude that the FAO showed a certain amount of flexibility with its rules of procedure by allowing the EEC to apply for membership at the 26th session. Strictly speaking the rules could have obliged the EEC to wait another two years until the 27th session of the Conference.

36 In the case of accession of the EEC to the FAO the European Parliament was only consulted see: COM (91) 387 final 18 October 1991, 8, footnote 1; OJ C 326.

reveal more problematic issues. The main amendments to the FAO Constitution which were necessary to allow EEC membership, and indeed the membership of other REIOs, are analysed below.

#### **A. Membership of a REIO: Mixed or Dependent Membership?**

Article II of the FAO Constitution on membership has been amended in the following manner.

Paragraph 3 lays down that REIOs may apply for membership. Paragraph 4 lays down the conditions under which an REIO may become a member of the FAO. First, the majority of the Member States of the REIO should be members of the FAO. Second, the REIO should possess competence, transferred to it by its Member States, on matters dealt with in the FAO. Third, it should be able to take decisions on these matters which bind its Member States.<sup>37</sup>

A very important principle is laid down in Article II paragraph 3, namely that any reference in the FAO Constitution to Member States applies in principle to Member Organizations unless otherwise provided.<sup>38</sup> This principle is important, in particular, as a guideline for legal interpretation of the rules of the FAO. When in practice questions arise as to the status of Member Organizations, the assumption will be that it brings with it the same rights and obligations as the status of Member Nations, unless otherwise specifically provided. The question arises as to what extent the Constitution imposes specific limitations on rights and obligations of Member Organizations in comparison with rights and obligations of Member Nations. Does it go so far as to turn the above mentioned principle into a mere declaration with very little legal effect?

Article II(3) lays down the principle of equality of members of the FAO. In the same article a specific reservation is placed on Member Organizations, namely that the field of application of this principle is limited by Article II(8). Paragraph 8 stresses the principle of attributed powers. A REIO may act within the FAO in the limits of its competence. The presumption in Article II(8) is that the REIO and its Member States will always share competence in the fields of activity of the FAO.

This becomes clear from the first part of Article II(8):

A Member Organization shall exercise membership rights on an alternative basis with its Member States that are Member Nations of the Organization in the areas of their respective competences (...)

Thus, membership of a REIO is always a 'mixed membership', i.e. combined with the membership of its Member States. First, membership is possible only under the condition that the majority of the Member States of the REIO are members of the FAO (Article II(4)). Second, the exercise of rights of membership should be divided between the REIO and its Member States according to their respective competence (Article II(8)). The term 'mixed membership' in this context is not completely accurate. Once the REIO and its Member States are all members of the FAO the nature of their function as members can be described as a mixed membership. However, when examining the conditions for accession the term 'dependent membership' better describes the legal situation in relation to membership of REIOs under the Constitution of the FAO. The fact is that Member States of an REIO can become or may remain members of the FAO without the

37 Among REIOs only the EEC is capable of taking binding decisions for its Member States. Hence, this requirement renders the application for membership impossible for most currently existing REIOs. See Survey of REIOs prepared for FAO by the Research Centre for International Law of the University of Cambridge, FAO Council Doc. CL 99/21.

38 The same principle is repeated under the new Rule XL of the General Rules of the Organization.

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REIO becoming a member itself. But the membership of the REIO, which is a distinct legal person, is dependent on the requirement that the majority of its Member States are members of the FAO.

If an REIO fulfils both the requirements, namely that at least in some fields of action of the FAO competence was transferred to it from its Member States, and that it has the competence to take binding decisions for all its Member States in these fields, the REIO can function as a member in its fields of competence. Why is it relevant, as a condition for membership, that a majority of its Member States should also be members?

From a strict legal perspective the requirement for concurrent membership of Member States to the REIO is not correct. A political explanation for this requirement is that third parties fear that the Member States of an REIO could obtain rights through the REIO, while not being members of the organization. Given the requirement of the FAO Constitution that the REIO as a Member Organization should have the competence to take binding decisions for all its Member States, the result is that Member States of an REIO which are not Member States of the FAO would receive, through their membership in the REIO, both the rights and the obligations of FAO membership. Therefore, the fear of Member Nations is unfounded. This so-called 'free rider' view is based on the unfounded idea that Member States of an REIO obtain only rights through the REIO, whereas in law the REIO is a distinct personality. Legal analysis and perceived political reality do not parallel in this matter.

Further, there is an internal conflict in the 'dependent membership' requirement. In the light of the requirement for a transfer of competence from the Member States to the REIO, it is clear that in some fields of activity of the FAO, those Member States do not have the competence to act. Moreover, under Article II(8) of the Constitution, competence should be exercised on an alternative basis. In such a situation the logical rule to be applied is that where an REIO has exclusive competence in fields of activity of the FAO, and where its Member States have competence in other fields, their membership must be mixed, i.e. Member States may not be members without the REIO becoming a member and *vice versa*. The reason is that in such a situation none of these legal persons, neither the REIO nor its Member States, has the required competence to be an effective member of the FAO on its own. Furthermore, in cases where the REIO has exclusive competence for most of the activities undertaken by the FAO, it should be possible for such an REIO to accede as a member instead of its Member States.

There are differences between the political and the legal realities with regard to the specific requirement of membership of a majority of Member States.<sup>39</sup> From the perspective of the receiving organization (the FAO) the logical answer to both the legal and political uncertainties should be a requirement that in cases of mixed competence all Member States, not only a majority, should accede to the REIO. However, politically this is not acceptable for the candidate REIO (the EEC), since such a requirement gives one Member State a veto over the accession of the EC.

The solution as laid down in the Constitution of the FAO is a one-way dependency for membership of REIOs. The EEC for its part fulfils the conditions for membership in the FAO. Not only the majority but all its Member States are members of the FAO. The EEC possesses the required competence, and in FAO fields of competence, Community decisions bind the Member States. In the case of the EEC, however, one should note the dynamic evolution of its powers. It

39 On the majority requirement compare Article 2 Annex IX of the United Nations Convention on the Law of the Sea 1982 with the critical arguments by Temple Lang, 'The Ozone Layer Convention: A New Solution to the Question of Community Participation in 'Mixed' International Agreements' 23 *CML Rev.* (1986) 157, 159-160; see also Simmonds, 'The Community's Declaration Upon Signature of the UN Convention on the Law of the Sea', 23 *CML Rev.* (1986) 521, 525-528.

is theoretically possible that at a further stage of integration the Community will acquire exclusive powers over the major issues dealt with in the framework of the FAO. In such a case, it is legally not acceptable for Member States to give their support to such a clause, which has the effect of preventing the Community from becoming a member on its own without the majority of the Member States. Where the Community is exclusively competent, it follows from the case-law of the Court of Justice that such a clause would be inconsistent with Community law.<sup>40</sup> In any case such a clause would interfere with the powers of Community institutions because their decision on membership would be dependent upon, and could thus be frustrated by, a decision of Member States concerning their own participation. Thus, for future cases of EEC accession to international organizations I would suggest an analogous solution to that which was formulated for the Vienna Convention for the Protection of the Ozone Layer. Under this Convention, if the REIO takes all the obligations upon itself, whether or not it exercises concurrent competence in order to do so, it can participate alone.<sup>41</sup>

#### B. Declaration on the Division of Powers

Article II(5-7) of the FAO Constitution requires that an REIO acceding to the FAO must supply a list of the powers transferred to it from its Member States. Any powers not mentioned in this list will be assumed to belong to the Member States. All members of the FAO are entitled to demand a clarification of the division of powers on specific subjects, and by virtue of new rule XLI of the General Rules, the Member Organization and its Member States are under an obligation to supply such information. More procedural arrangements are regulated under rule XLI. For example, paragraph 2 lays down that before each session of the FAO, the division of powers in relation to all questions to be discussed and the division of voting rights should be declared by the Member Organization or its Member States. Furthermore, under paragraph 3 of the same rule a distinction is made as between two stages: in the first stage, i.e. during a debate, both the REIO and its Member States may participate. Whereas in the second stage, i.e. when taking a decision, the session will only take into consideration the remarks of the party who has voting rights. These procedures are so complicated that it is doubtful whether they will be successfully applied in practice.<sup>42</sup>

The requirement for a declaration on the division of powers between the REIO and its Member States is a common practice with regard to mixed agreements.<sup>43</sup> Following this model, it is also a requirement with regard to a mixed membership in an international organization such

40 See, e.g. Opinion 1/75, *Understanding on a Local Costs Standard* [1975] ECR 1361; Opinion 1/76, *Draft agreement establishing a European laying-up fund for inland waterway vessels*, *supra* note 14

41 See Article 13(2) Vienna Convention for the Protection of the Ozone Layer, signed 22 March 1985, *Comm. Papers No. 9652* [Misc. No. 13].

42 On 17 December 1991 a detailed arrangement was achieved between the Council and the Commission of the EEC for Community coordination procedures regarding statements and voting in FAO sessions. See Council Doc. No.10478/91 RELEX 73 18 December 1991; Van de Voorde, 'De EEG als lid van een internationale instelling: het geval FAO', 4 *Studia Diplomatica* (1992) 49, at 65-68. 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.

43 See for example Article 2 Annex IX of the United Nations Convention on the Law of the Sea 1982; Articles 13(3), 14(2) Vienna Convention for the protection of the Ozone Layer, *supra* note 41.

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as the FAO. The Community did supply such a declaration,<sup>44</sup> but it remains questionable whether this requirement is useful.

From the point of view of the Community, one of the advantages of mixed participation with its Member States is to avoid difficult internal discussions about the extent of the Community's competence. The requirement for a declaration on the division of powers nullifies this advantage.

A declaration on division of powers within the Community is desirable for parties external to the EEC in the interest of legal certainty. In practice, however, such a declaration does not meet this need. Activities within the FAO are not designed to accord with the distribution of Community competence. Therefore, the knowledge that the common commercial policy, for example, is under the Community's exclusive competence will be of little use for a lawyer of a Member Nation of the FAO who is trying to determine whether the Community or the Member States should exercise certain obligations. When taking a closer look at the draft declaration on Community competence, one realizes that the declaration supplies the same information which one can find in textbooks on Community law. The possibility under new rule XLI of the General Rules to submit the question on the division of powers to the Community only has theoretical value. The exact division of powers remains a controversial and changing issue within the Community. As a result of the so-called ERTA effect,<sup>45</sup> the extent of the exclusive competence of the Community increases *inter alia* as the latter adopts internal measures creating 'common rules', which might be 'affected' by external arrangements. The evolving nature of the Community's external powers also explains the Community's reluctance to lay down a definitive division of powers. Finally, what parties external to the EEC in fact require is an understanding of who has to meet a specific obligation, the Community or the Member States. For outsiders the extent of the Community's competence whether exclusive or concurrent is largely irrelevant. It would have been much more effective to require a statement from a Member Organization declaring that the Member Organization and its Member States share the responsibilities in cases where obligations are not being met. As for the question of who may take responsibility for such an obligation, it would better be left as an internal matter for the Member Organization and its Member States.<sup>46</sup>

### C. Voting Rights

Another important issue is the voting rights of Member Organizations. Article II(10) provides that if the Community votes on a question, the Member States should refrain from doing so, and vice versa. This 'no plural voting' clause is in accordance with the case-law of the Court of Justice which excludes in principle any concurrent exercise of powers of the EEC and its Member States on the same question.<sup>47</sup> At the same time, it guarantees the other Members of the FAO that the EEC and its Member States will never have more than 12 votes.

The rule with regard to voting in the Conference and Council of the FAO is one state one vote, and except as otherwise provided all decisions are taken by a majority of the votes cast (Articles III(4)(8) and V(1)(5)).<sup>48</sup> Organizations invited by the Conference, i.e. observers, have

44 Commission proposal for a Council's decision on accession of the Community to the FAO, Annex II, OJ 1991 C 292/8.

45 Case 22/70, ERTA *supra* note 17.

46 This view is shared by Temple Lang, *supra* note 39 at 160-163, 171-175.

47 Opinion 1/75, *Understanding on a Local Costs Standard supra* note 40.

48 The issues on which the Conference is obliged to vote in plenary session, with a required two-thirds majority, are the amendments to the Constitution and to the General Rules, recommendations to the members, submission of conventions, admissions, approval of the budget, etc.

no voting right (Article III(5)). With regard to Member Organizations, theoretically there are two main possibilities. Firstly, the Member Organization is equal with other members of the Organization and therefore it should be able to cast only one vote. Secondly, when both the REIO and its Member States are members, the REIOs vote should represent that of its Member States because they have transferred their powers on the subject to the REIO. Therefore, the Member Organization should cast the number of votes equal to the number of its Member States entitled to vote.

From the Community point of view the first arrangement should be rejected because it would create an imbalance between votes cast by the Community and by its Member States which would not reflect any political and economic reality. This imbalance in voting rights might create more resistance from the Member States to the accession of the Community to international organizations. The rules of Community law and their autonomous status could only suffer as a result.<sup>49</sup>

Under the new Article II(10) of the FAO Constitution the second solution was adopted, i.e. when the Community may vote, it casts the number of votes equal to the number of its Member States who have the right to vote in the session. Juridically, one can see this solution as an achievement for the Community. However, in practice, for all the essential items on the agenda of the Conference, particularly the evaluation of the principal food and agriculture trends, a consensus is required and thus no vote takes place.<sup>50</sup> In plenary voting the maximum number of votes that the Community may cast is 12, while in order to reach a majority one needs at least 82 votes out of a total of 162 members. Thus, the influence of the Community is not a direct consequence of the number of votes, but results from its economic power. Moreover, none of the organs of the FAO are competent to take binding decisions for the members.

Hence, the practical value of the Member Organization vote should not be overestimated. Yet, from an institutional law point of view the fact that Member Organizations have the right to vote clearly distinguishes them from the status of observer. In this way a significant step has been taken towards the acceptance of international organizations as international actors.

#### D. Contribution to the Budget

An important issue in relation to participation in international organizations is the contribution to the budget. The group of Western industrialized nations plays a leading role in the financing of the FAO, both in terms of statutory contributions and trust funds. These contributions are fundamental to any large-scale food security action. The Western industrialized countries are self-sufficient in food supplies many times over, and they have problems of surplus production which have an effect on FAO policies. The Member States of the Community, together with other Western countries (e.g. USA, Canada, Australia), exert considerable influence on the development of the FAO's activities and field programmes by providing the additional funds needed to enlarge its sphere of action.<sup>51</sup>

The issue of the contribution to the budget is regulated under Article XVIII. The rule is that Member Nations and Associated Members undertake to pay contributions to the budget as

49 J. Groux and P. Manin, *supra* note 3 at 88.

50 The minority positions are recorded in the verbatim report, and the resolutions adopted appear to reflect the position of all the Member Nations, in S. Marchisio and A. Di Blase, *The FAO* (1991) 185.

51 *Ibid* at 173-176. On the division of powers between the institutions of the FAO during the procedure of preparing the budget, see *ibid* at 186-187.

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apportioned by the Conference, which takes into account the difference in status between Member Nations and Associated Members (Article XVIII(2)). In relation to Member Organizations the principle is that they do not pay a full member contribution to the budget. Member Organizations are only expected to pay a sum to cover the administrative costs caused by their participation as members of the FAO (new Article XIII(6)). Furthermore, Member Organizations may not take part in voting on the budget in the Conference.

The logic behind this amendment is quite sound. The basic assumption in Article II is that REIOs can become Member Organizations only in tandem with their Member States. Since the Member States pay their full contribution to the budget of the FAO, there is no justification to make them pay double. It is equally logical to exclude the Member Organization from voting on the budget, given that they make no substantial contribution to it.

The logic behind the rules on the contribution to the budget in relation to Member Organizations is applicable to most international organizations where the budget is financed solely by the Member States. However, the case of the EEC is quite different since the Community has its own income resources and can pay its own contribution to the budget independently of its Member States.<sup>52</sup> Thus, neither the argument of 'double payment' by the Member States necessarily applies, nor the reasoning behind the limitation on the right to vote of the Community on budget matters. Furthermore, from a Community law point of view the fact that the Member States finance the budget of the FAO combined with the Opinion of the Court of Justice in case 1/78 *International Agreement on Natural Rubber*,<sup>53</sup> implies that the Member States are fully justified in remaining Member Nations of the FAO alongside the Community, even if the Community is competent for most issues dealt with in the framework of the FAO. A more appropriate arrangement on this issue would be to allow the Community to pay its own share to the budget of the FAO, thereby enabling it to vote on the budget and exert the influence appropriate to its position as a large trading bloc.

### E. Limitations on Member Organizations in the Organs of the FAO

More limitations on Member Organizations are found in other amendments. Under the amended General Rules of the Organization there are specific restrictions imposed on Member Organizations. With regard to the FAO Conference, rule XLII(2) provides that a Member Organization may not participate in different commissions of the Conference. Furthermore, Member Organizations may not fulfil any functions in the Conference or in the Council nor in any of their subsidiary organs (see respectively rule XLII(3), rule XLIII). Under rule XLIV a Member Organization may not vote on elective places. Rule XLV provides that Member Organizations may not participate in committees of restricted composition: that is the Programme Committee, the Finance Committee and the Committee for Constitutional and Legal Matters.

The limitations are mainly on elective posts in organs of restricted composition or committees. Participation in sessions of the Conference and the Council is open for Member Organizations

52 P.J.G. Kapteyn and P. Verloren van Themaat, L.W. Gormley (ed.), *supra* note 9 at 215-219.

53 *Supra* note 13, the Member States were authorized to participate in the agreement together with the Community if the funding of the buffer stock was to be borne by direct contribution from the Member States budgets. At para. 60 the Court considered the financial clauses of the agreement to occupy a central position in the structure of the agreement. It is submitted that the Court should be criticized for not having established that the Community could finance the buffer stock from its own budget.

where the sessions are relevant to their competence (Article II(9)).<sup>54</sup> From reading the Constitution one might form the impression that the Conference is the dominant organ of the FAO,<sup>55</sup> and that consequently participation and voting in the Conference is an achievement for the Community. Under the Constitution of the FAO it is the Conference which 'shall determine the policy and approve the budget of the Organization', and which may make recommendations to members; the Council shall only have 'such powers as the Conference may delegate to it', and there is a list of powers which cannot be so delegated. The Conference may review any decision taken by the Council or by any Commission or Committee (Article IV – functions of the Conference; Article V – Council). However, given that the Conference meets every two years and that the FAO's functions are operational, decision-making power is conferred in practice upon the Director General and upon Council Committees. Consequently, the Conference determines the general policy merely by ratifying the decisions adopted elsewhere.<sup>56</sup> A more significant power of the Conference is the authority to approve the budget, but in this vote the Member Organization may not take part.

The limitation on participation of a Member Organization in committees and policy-making organs is an obstacle for its effective participation in the activities of the FAO. From a legal point of view it remains unclear why it is not possible for a Member Organization like the EEC to replace its Member States, or to concurrently participate in all organs of the FAO where the Community has the required competence!

## V. Conclusions

It has now become clear that the legal problems relating to the accession of the EEC to the FAO were surmountable. A legitimate question is why did it take so long for the EEC to become a member of a Specialized Agency? A purely legal answer is inappropriate since there are political factors involving the Member States of the Community, the Member Nations of the FAO and the organization itself.

From the perspective of the FAO, the EEC with its variety of external powers fulfils the requirements for accession. From the Community law perspective, the EEC has the necessary powers to act in the framework of the activities of the FAO. However, it lacks a specific power to make an internal Community decision on accession to another international organization, i.e. it lacks the treaty-making power for concluding or adhering to a constitutive treaty. As long as the Treaty of Rome is not amended in such a manner as to grant the Community express powers to accede to international organizations, the capacity to do so should be based on a broad interpretation of the external powers authority, both explicit and implied powers, which the Community has in fields of activity of the FAO, e.g. Articles 43 and 113 of the Treaty of Rome. The Member States may remain members of the FAO only if the Community does not have exclusive competence over the major fields of action of that organization.

In summary, the amendment to the FAO Constitution to allow the accession of REIOs marks an important step in the relationship between the EEC and the FAO and constitutes an

54 The participation in sessions of the Conference is guaranteed for the EEC as a Member Organization owing to the fact that the Conference is a plenary organ. The Council on the other hand is composed of 49 elected members which must be chosen from Member Nations. In the case of the EEC the practice is that the EEC has 'seat No. 50' and in such a manner it is a permanent participant in sessions of the Council, provided that some of its Member States are elected members of the FAO Council.

55 For such an opinion see D. W. Bowett, *supra* note 24 at 123-124.

56 S. Marchisio and A. Di Blase, *supra* note 50 at 185.



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important development in the field of international institutional law. However, in the context of EEC law, and in particular the Community's internal distribution of competences, some outstanding problems remain. It is important to bear in mind that the EEC is at an advanced stage of economic integration. The fact that membership to the FAO of a REIO is dependent on the membership in the FAO of a majority of Member States of the REIO may in future give rise to a breach of Community law. This will occur if the extent of Community integration reaches a point where the EEC could become an effective member of the FAO in its own right. At the same time the fact that the EEC as a Member Organization does not pay a contribution to the budget creates, in the specific situation of Community law, a permanent justification for the participation of the Member States as members of the FAO. The specific limitations imposed on participation of Member Organizations in organs of the FAO makes it clear that the EEC as a Member is able to act on economic technical issues but not on general policy issues.

The EEC accession to the FAO is very significant because it can create a precedent to be followed by other UN bodies. However, I do not consider the model of membership of REIOs in the FAO in its present form as a suitable standard to be followed by future accessions of the EEC to other international organizations. Given the evolving character of EEC competences, one can predict even at this early stage that further amendments to the Constitution of the FAO will be necessary in order to open the way for independent membership of REIOs, with all the rights and duties that such membership may imply.