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Assessing EU Participation in United Nations Human Rights and Environmental Fora

Edited by Jan Wouters, Hans Bruyninckx, Sudeshna Basu and Simon Schunz

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Palgrave Studies in European Union Politics
Series Standing Order ISBN 978–1–4039–9511–7 (hardback) and
ISBN 978–1–4039–9512–4 (paperback)

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The European Union and Multilateral Governance

Assessing EU Participation in United Nations Human Rights and Environmental Fora

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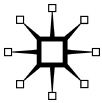

Softcover reprint of the hardcover 1st edition 2012 978-0-230-28231-5

First published 2012 by
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

ISBN 978-1-349-32827-7 ISBN 978-0-230-37591-8 (eBook)

DOI 10.1057/9780230375918

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

A catalog record for this book is available from the Library of Congress.

10 9 8 7 6 5 4 3 2 1
21 20 19 18 17 16 15 14 13 12

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Acronyms

ABS	Access and Benefit Sharing
ACP	African, Caribbean and Pacific Group of States
AGBM	Ad Hoc Working Group
AI	Amnesty International
AIA	Advanced Informed Agreement
AOSIS	Alliance of Small Island States
AU	African Union
BSWG	Biosafety Working Group
CA	Copenhagen Accord
CBD	Convention on Biological Diversity
CFSP	Common Foreign and Security Policy
CHR	Commission on Human Rights
COHOM	Working Party on Human Rights
COP	Conference of the Parties
CSD	Commission on Sustainable Development
DDPA	Durban Declaration and Programme of Action
DRC	Durban Review Conference
EAP	Environment Action Plan
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
EEAS	European External Action Service
EIDHR	European Instrument for Democracy and Human Rights
ESS	European Security Strategy
EU	European Union
EUMS	European Union Member State
FAO	Food and Agriculture Organization
FRA	Fundamental Rights Agency
GAERC	General Affairs and External Relations Council
GATT	General Agreement on Tariffs and Trade
GMO	Genetically Modified Organism
HRC	Human Rights Council
INC	Intergovernmental Negotiating Committee
IPCC	Intergovernmental Panel on Climate Change
IPM	Intergovernmental Preparatory Meeting
IR	International Relations
MFA	Ministry of Foreign Affairs

MOP	Meeting of the Parties
NAM	Non-Aligned Movement
NAMA	Nationally Appropriate Mitigation Action
NGO	non-governmental organization
OECD	Organisation for Economic Cooperation and Development
OEWG	Open Ended Working Group
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of the Islamic Conference
OPEC	Organization of Petroleum Exporting Countries
OPT	Occupied Palestinian Territory
PrepCom	Preparatory Committee of the Conference
QMV	qualified majority voting
REIO	Regional Economic Integration Organization
RIM	Regional Implementation Meeting
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice
SDS	Sustainable Development Strategy
TEC	Treaty on the European Communities
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNSG	United Nations Secretary General
UPR	Universal Periodic Review
US	United States
WEOG	Group of Western and Other States
WGRI	Working Group on the Review of Implementation
WPIEI	Working Party on International Environmental Issues
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

Acknowledgements

This volume emerged from an interdisciplinary research project entitled 'The European Union and global multilateral governance', conducted between November 2006 and November 2010 by the Leuven Centre for Global Governance Studies. Besides the editors of this volume, the project involved colleagues from the Institutes for International and European Law as well as from the Institute for International and European Policy of KU Leuven. We would especially like to thank Prof. Stephan Keukeleire, Prof. Koen Lenaerts and Dr. Tim Corthaut for their invaluable contributions to the project and this book. We would also like to acknowledge gratefully the funding for the project provided by the KU Leuven Research Fund.

The project and present volume in particular benefited greatly from innumerable exchanges with academics and policy makers in Europe and beyond. We are very grateful for the input they provided and would particularly like to thank all of the diplomats and representatives who took the time to speak to authors of this book about their specific contributions.

For their valuable input into earlier versions of the book itself, we are indebted to Katrien Meuwissen, Emilie Bécault and Stephanie Bijlmakers from the Leuven Centre for Global Governance Studies as well as to two anonymous reviewers.

Finally, we would like to express our sincere gratitude to Gilles Pittoors for his very diligent assistance with the finalization of the manuscript.

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Part I
Introduction

1

The European Union's Participation in United Nations Human Rights and Environmental Governance: Key Concepts and Major Challenges

Sudeshna Basu, Simon Schunz, Hans Bruyninckx and Jan Wouters

1. Introduction: the growing importance of the European Union in United Nations governance fora: empirical observations, academic debates

Within the span of a few decades, the European Union (EU or Union) has made a remarkable ascent as a global player, evolving from a comparatively marginal actor in world affairs to a resourceful and widely recognized foreign policy force in its own right. This has been most recently reaffirmed with the adoption of United Nations General Assembly (UNGA) Resolution 65/276 on 3 May 2011 entitled 'Strengthening of the United Nations System: Participation of the European Union in the work of the UN', which granted the EU further rights, such as the right to speak and right of reply, in the UNGA. The adoption of this resolution, with 180 states in favour, demonstrated the UNGA's formal recognition of the institutional changes in the EU brought about by the Lisbon Treaty and, more generally, the evolving nature of the global body (for a discussion of these changes see Chapter 13).

Today, the Union is implicated in a growing number of domains of global politics, ranging from security to economic, international development, human rights and environmental issues. Strikingly, many of its external activities are exerted in the framework of what can best be characterized as multilateral global governance fora. *Multilateralism* as a deep organizing principle of international life (Caporaso, 1993) refers to 'the practice of coordinating (...) policies in groups of three or more states' (Keohane, 1990, p. 731) 'on the basis of generalized principles of conduct' such as the '*indivisibility* among the members of a collectivity' and the notion of *diffuse reciprocity* (Ruggie, 1993, p. 11). It is best embodied in the various arrangements that were institutionalized and operate under the auspices of the

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United Nations (UN). Referring to multilateral *global governance* highlights the fact that multilateralism has become more complex since the inception of the UN, over 60 years ago, involving not just states but also non-state actors, stretching vertically across several levels of policy-making, from the global to the regional, and increasingly following informal rather than formal modes of decision-making (Weiss and Thakur, 2010).

The EU's growing implication in fora of this specific type can be explained with reference to the Union's alleged 'multilateral genes' (Mandelson, 2006). As the EU fundamentally operates on the basis of multilateral virtues internally, many of its strategic and foreign policy documents and declarations testify not only to the considerable global ambitions, but also to its commitment to realizing those within the framework provided by the UN: 'Strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority', according to the 2003 European Security Strategy (European Council, 2003). The Commission seconds the 'choice of multilateralism' by explaining that this priority flows 'from the deep commitment' to multilateral values, which commands 'a natural support by the EU for multilateral institutions, like the UN, and for multilateral solutions to global problems' (European Commission, 2003a, 2003b). The 2008 update of the European Security Strategy therefore recommends that 'at a global level, Europe must lead a renewal of the multilateral order' (European Council, 2008, p. 2). These ambitions resonate with calls from representatives of the three key EU institutions, who regularly present the Union as particularly well suited to play by the rules of the game that the multilateral mode of cooperation imposes, even considering it as Europe's *task* to shape the global governance system via striving for 'effective multilateralism' (e.g. Solana, 2007; Mandelson, 2006; European Parliament, 2004).

Yet, despite all this value-driven rhetoric and an observable growth of EU external activities within and through the UN system, the empirical record of the EU's implication in multilateral global governance seems prima facie quite uneven. It varies by virtue of its legal status: in a limited number of domains, the EU[1] is a full member of the multilateral institution it operates in (e.g. Food and Agriculture Organization [FAO]), in others it is a full participant (e.g. at summits such as the World Summit on Sustainable Development), and in most a simple observer (Emerson, Kaczyński, Balfour, Corthaut, Wouters and Renard, 2011; Wouters, Hoffmeister and Ruys, 2006). It is different, however, also in terms of the EU's investment into these domains. Its involvement is particularly strong in fields that represent beacons of its own values, such as the environment and human rights, the two topics that will be at the centre of this volume. In these domains, the Union regularly strives to claim a leadership role, whereas it makes its voice arguably less heard in areas such as global security governance. Finally, EU involvement in UN governance also appears to diverge in function of the external context: in a transforming global environment, some areas witness

greater EU multilateral activity and effectiveness, while others represent sites of failed leadership attempts, limited engagement or instances where the Union resorts to bilateralism instead of multilateralism.

This empirical manifestation of increased, yet uneven, EU activity in global multilateral fora – alongside its strong pro-multilateralism commitment as stipulated in Article 21 TEU that the Union 'shall promote multilateral solutions to common problems, in particular in the framework of the United Nations' – constitutes one of the main impetuses for the present volume.

With the intention of advancing the understanding of the EU's implication in multilateral, notably UN, governance fora, the book immerses itself into a thriving, but yet well-structured academic debate (Wouters, Hoffmeister and Ruys, 2006; Laatikainen and Smith, 2006). Sparked above all by the aforementioned Commission communication and the European Security Strategy, research has been conducted by both political scientists and legal scholars essentially since the early 2000s.[2]

In *political science*, and here above all in the domain of EU studies, this research has generally taken one of two forms. On the one hand, manifold investigations into the EU concept of effective multilateralism exist, asking what this concept can, does or should mean (Wouters, de Jong and de Man, 2010; Groom, 2006; Jasinski and Kacperczyk, 2005; Eide, 2004). On the other hand, a limited set of comparative or single case studies of EU implication in different UN fora have seen the light of day, either as monographies (e.g. Rasch, 2009), edited volumes (e.g. Smith and Laatikaainen, 2006) or journal contributions (e.g. Gstöhl, 2009; Morgera, Durán and Marin 2006; Dedring, 2004). Here, a distinction has to be made between studies examining the EU's activity within UN global governance fora (Kissack, 2009; De Grand-Guillaud, 2009; Magone, 2005; Creed, 2006) and studies of EU-UN cooperation (e.g. Knudsen, 2008; Ojanen, 2006; Tardy, 2005; Ortega, 2005; Graham, 2005).

In *legal studies*, the analysis of legal competences, the interpretation of case law, treaty objectives and the implications of the EU's legal status tend to take precedence when examining its participation in the UN. Moreover, attention is usually paid more to the EU's treaty-making activities in bodies outside of the UN system where it holds full membership status, like in the World Trade Organization (WTO) (Wouters, Hoffmeister and Ruys, 2006; Tancredi, 2004; Princen, 2004; De Burca and Scott, 2003), as well as to the consequences of 'mixity', i.e. the sharing of competence between Member States and the EU (Rosas, 1998, p. 125).

This brief overview of the literature triggers several observations (for the more detailed critique of the literature, see Chapter 2), which, in turn, provide the rationale for the approach taken in this book. The next section outlines this rationale, pointing to the particularities of the approach and the key themes and questions the volume addresses. It is followed by a short

definitional exercise regarding the main concepts permeating the volume (EU foreign policy, global governance, multilateralism). We conclude with a brief outline of the various parts of the book.

2. The rationale of this volume

The book parts from the observation of increased EU activity in UN governance fora and from a critique of the existing literature to address a number of questions through a unique approach designed to bridge gaps between various inter- and intradisciplinary divides, which it subsequently applies to two selected fields of study. This section briefly outlines the key questions the work will address, and how it will address them.

2.1. Key themes and research questions

The present volume's pursuits are two-fold: (1) advancing the understanding of the EU's participation in UN governance; and (2) uncovering elements which explain the underlying reasons why the Union performs the way it does in a select number of arenas. In so doing, the book draws on a number of concepts and themes raised in the disciplines of law and political science, combining interests of scholars from both camps.

Centrally, it is interested in understanding the EU's *position*, defined as the 'place' occupied by the Union, in UN human rights and environmental governance fora. This position is, in the analytical framework adopted for that purpose (see Chapter 2), dependent on the EU's *legal status* in a given governance forum and the *role* it performs in that arena. Examining status and role demands, in turn, a closer look at the external and internal legal-institutional and political contexts under which the EU operates, which together determine what the EU can and cannot do in multilateral governance contexts. Adding the Union's role performance to the picture allows for assessing its effectiveness and whether it really attains its aims of promoting multilateralism globally. In synthesis, the book essentially addresses the following questions:

- *What are the internal and external legal-institutional and political preconditions for EU participation in UN governance fora? To what extent do they enable or constrain EU activities? What is the Union's legal status in these fora?*
- *How does the EU actually fare when it participates in UN governance fora? What role does it play?*
- *What is the EU's position – as a function of its legal status and role – in the selected domains of UN governance?*
- *If compared across domains, how can its positions be accounted for? What is the relative relevance of the legal and political components of the EU's participation in UN governance fora?*
- *What is the EU's contribution to multilateralism under the UN umbrella?*

In answering these questions for the two studied domains of UN governance, the book sheds light on key determinants of EU performance under conditions of multilateralism, before and after the Lisbon Treaty entered into force. It will do so by pursuing an integrative approach, bridging inter- and intra-disciplinary gaps.

2.2. The approach: integrating research disciplines

Current academic literature testifies to the fact that scholars tend to limit the scope of their theoretical and methodological approaches in studying the EU in UN fora. This may be observed as a *first* of three shortcomings in existing literature: a systematic engagement between the two bodies of literature, legal and political science, has been lacking. Scholars from the two disciplines are confronted with similar problems in their analyses, using similar concepts, but have, to date, approached the subject predominantly from within their own discipline, regularly overlooking the added value of the other. For instance, in legal studies, attention is usually paid more to the EU's activities in bodies where it holds full membership status (e.g. FAO and WTO), thereby neglecting fora in which it may equally bear some weight despite lacking membership rights. Moreover, a focus on these legal constraints disregards an understanding of how the EU informally interacts with third countries. It therefore ultimately neglects the impact political reality has on the EU's participation in UN fora. As political processes have great bearing on legal processes, this impairs a comprehensive legal understanding. By contrast, political scientists often tend to place more weight on empirical surveys of the EU's participation in the UN system and largely discount any legal dimensions, such as the Union's competences and legal status. Exceptions to this narrow approach are being proposed (Koutrakos, 2011; Wouters, Hoffmeister and Ruys, 2006), however they are few and far between.

Second, beyond this disciplinary divide, research in this area has largely been characterized by an absence of cross-fertilization between multiple levels of analysis. The central dichotomy in this regard concerns the global/regional divide. In many political science analyses, the EU is treated as an actor capable of impacting global governance as long as it fulfills a set of internal preconditions, commonly summarized under the concept of 'actorness' (Caporaso and Jupille, 1998; Bretherton and Vogler, 2006). Little attention is paid to the external environment and the different contexts provided by a transforming, multipolarizing order of uneven global governance. A partial exception to this trend however can be discerned in legal studies. Both international and EU legal scholars have made efforts to take into account the interactions between the EU and international legal orders and vice-versa (Wouters, Nollkaemper and de Wet, 2008; Ahmed and Butler, 2006; Koskenniemi, 1998). Nonetheless, overcoming these intra-disciplinary divides promises to yield more concise understandings of the

Union's implication in UN governance fora, as they take account of the specificities of the external environment it operates in.

Third, and importantly, sound empirical investigations in a comparative perspective are scarce in the literature, but indispensible for advancing the understanding of EU participation in global governance.

Taking these three shortomcings together, it becomes clear that this area of study can benefit from a three fold rectification. It is this very point of departure that this volume ventures from. First, the identification of the virtues and limits of each discipline's approach to the topic provide the basis for designing an interdisciplinary framework for this area of study (see Chapter 2), allowing for a vertical integration of concepts used in both disciplines, most notably those of legal status and role. Second, to overcome the dividing lines between the regional and the global level of analysis, horizontally, concrete effort is taken within this framework to account for both equally. Third, to address the lack of comparative analyses in the literature, the analytical framework will be applied to two policy areas, chosen on the basis of a set of criteria explained in the next section.

2.3. The selection of policy areas: enabling systematic case studies

Against the backdrop of the EU's shared commitment to finding solutions to global problems through multilateral cooperation, it is not surprising to see it participate in the deliberations of most, if not all, UN bodies, agencies and conferences. The EU's chosen path and desire to be a *frontrunner* in the UN system is equally reflected in its increasing participation across numerous policy fields. Two domains that the Union has and continues to prioritize both internally and in its external relations are human rights and the environment. The commitment to these policies has been recently reinforced with the Lisbon Treaty coming into force (see Chapters 3 and 8). Treaty objectives with regard to both domains have been strengthened (Articles 6 Treaty on European Union [TEU] and 191 Treaty on the Functioning of the European Union [TFEU]), and institutional advancements have been made – with the EU's High Representative for Foreign and Security Policy (HR) and the European External Action Service (EEAS) – which stress the importance of integrating human rights and the environment into EU external relations.

Compared to many other parts of the world, the EU has some of the highest standards in the fields of human rights and the environment. Both fields rest at the heart of EU policies and both, independently, bring forth values that the Union is committed to promote inside and outside its borders.

Human rights, seen as universal and indivisible in the EU, has played a significant role in its efforts at placing it at the forefront of its relations with third countries. Specifically for its external action, the Union has developed an 'extensive human rights toolbox' (EEAS Website, 2011) consisting of inter alia human rights dialogues, the inclusion of human rights clauses in

agreements with third countries, human rights guidelines and demarches. This taken in conjunction with the complementary activities funded by its human rights financial instrument, namely the European Instrument for Democracy and Human Rights (EIDHR), demonstrates the extent to which human rights are of paramount importance for the Union. Recognizing this importance and its assiduous efforts to be a 'normative power' (Manners, 2002) in the field, it comes as a surprise that the Union's participation in UN human rights bodies has not been given that much attention in academic publications. From an international perspective, these human rights bodies represent the main forum where nations of the world can address and respond to grave human rights concerns. International cooperation and concerted effort is therefore of great consequence. The UN has and continues to work closely with the EU in the field of human rights and with the EU and UN being 'united by the core values of the Universal Declaration of Human Rights' (The Partnership between the UN and the EU, 2006, p. 6), there needs to be an understanding of how this underlying unity is translated in the multilateral institutional design of human rights fora established by the UN itself.

The EU equally plays an active role in 'implementing and shaping environment standards' (The Partnership between the UN and the EU, 2006, p. 8). It does so in all areas of the environment, but the following specific priority areas may be observed in its Environment Action Plan (EAP): combating climate change, preserving biodiversity, environmental health and quality of life, and sustainable development. In light of the fact that the threat to the environment is global, the EU's commitment and approach to environmental protection is something that it hopes will 'encourage other countries to adopt similar measures' (Civitas, 2011). With the myriad of UN bodies addressing environmental issues alongside the abovementioned endeavour to be a 'normative power' (Manners, 2002) also in this field, it is no coincidence that the Union's presence is observed *in* all UN environmental conferences and treaty negotiations. Like in the field of human rights, the EU also continues to work closely *with* the UN through partnerships with different UN environmental bodies, notably a strategic partnership with the UN Environment Programme (UNEP), which provides the latter and multilateral environmental agreements with the financial support to implement projects around the world (UNEP, 2011). Bearing in mind the bilateral relationships the Union has with UN bodies and the established intellectual capacity on how the partnership functions (Maillet, 2006; Damro, 2006), a deep-rooted cross-case understanding lacks on how the Union fares within various environmental bodies under the UN policy framework and, moreover, on how it uses the channels established by these fora to further its own environmental objectives.

Parting from the assumption that the policy fields of human rights and the environment represent two central policy areas for EU external action,

especially in the UN context, this volume sets out to examine, compare and contrast the EU's participation and position in UN environment and human rights bodies.

The UN framework hosts a number of fora which are dedicated to addressing issues falling under these domains. Moreover, it provides a range of bodies with different types of legal and institutional architectures to address these issues: permanent bodies; treaty-making bodies and ad hoc conferences on a case-by-case basis. Some have limited membership with non-legally binding outcome documents (e.g. Human Rights Council), while others have universal membership with binding treaties as outcome documents (e.g. negotiations on the Cartagena Protocol on Biosafety). Against this backdrop, the book embraces an institutional approach to studying the EU's position in the given UN fora. This allows not only for a cross-comparative study between policy fields, but also for comparing and contrasting the EU's position between different forms of UN architectural set-ups.

In sum, by focusing on the EU's implication in UN human rights and environmental governance and three distinct types of multilateral compositions in both policy areas (permanent institutions, treaty-making bodies and specialized conferences), the volume engages in a set of systematic case studies, which, in first instance, will serve to illustrate the diversity of EU activities and positions in arrangements falling under the UN system. In addition to this descriptive effort and within the strictly defined boundaries of generalizability, the extraction of patterns within and across these very different domains can further our understanding of the way the EU acts as a norm-driven global player. The book thus ultimately strives to provide building blocks of an explanation for the variance in the positions the EU occupies in the studied domains of multilateral global governance.

Before providing an overview of the specific contributions making up this volume, some of the central concepts that permeate all chapters require definition.

2.4. Global governance, multilateralism and EU foreign policy – defining key concepts

The chapters of this edited volume all analyse EU participation in UN governance fora. In other words, each of them investigates *EU foreign policy* in *global governance*, with a specific emphasis on *multilateral* fora under the *UN* umbrella. This raises a number of definitional and conceptual questions with regard to each of the three concepts of EU foreign policy, global governance and multilateralism in isolation, but also concerning the interlinkages between them.

Global governance has been one of the buzzwords of the 1990s, whose origins can be found in a two-fold rationale: in the face of observed changes in the international system – resulting in large part from the transformation processes associated with globalization – policy-makers and IR analysts felt

that the dominant ways of both making *and* thinking about international politics had to be reconsidered (Weiss, 2000, p. 796; Barnett and Sikkink, 2008, p. 78). Global governance is thus also many things at the same time: it can be an analytical concept used by scholars, a normative concept in the hands of both scholars and policy-makers to either criticize or praise the emerging structures of a global polity or a political programme, as it is for many EU decision-makers (Dingwerth and Pattberg, 2006; Smouts, 1998). In this book, the empirical-analytical use of the term is privileged. Global governance becomes a 'narrative' of (Barnett and Sikkink, 2008, p. 78) or 'a perspective on world politics', i.e. the non-normative attempt to grasp the changes we can observe in global policy-making (Dingwerth and Pattberg, 2006). It can usefully be defined as 'the complex of formal and informal institutions, mechanisms, relationships, and processes between and among states, markets, citizens and organizations, both inter- and non-governmental, through which collective interests on the global plane are articulated, rights and obligations are established, and differences are mediated' (Weiss and Thakur, 2010). This definition also allows for dissecting governance into a number of key constitutive dimensions. It refers essentially to forms of global policy-making that are (i) multi-actor (public and private: states, markets, citizens, governmental and non-governmental organisations) without having a clearly delimited locus of authority, (ii) multi-level, but not hierarchical (the notion of 'global' refers to this vertical dimension in the sense of 'encompassing' multiple levels as much as it does to a horizontal dimension of global in the sense of what used to be called 'international'), (iii) process-oriented, and that can be (iv) formal or informal, thus varying in shape according to issue areas (Held and McGrew, 2002; Mürle, 1998). In synthesis, global governance can be regarded as 'a broad analytical approach to addressing the central questions of political life under conditions of globalization' (Held and McGrew, 2002, p. 8).

Where global governance depicts thus a *political* form of organization of global collective action (Novosseloff, 2002, p. 305), multilateralism represents a form of *institutionalized* collective action (Telo, 2006). Adding the attribute 'multilateral' to global governance therefore considerably alters the quality of this governance, rendering the broad analytical concept more specific. This is even more the case if it refers explicitly to multilateralism within the United Nations.

What does *multilateral (global) governance* under the UN umbrella mean then? Just like global governance, the term multilateralism has been employed in manifold ways: as a normative or analytical concept, the depiction of a mode of cooperation and/or action, and as a type of organization or an instrument (Novosseloff, 2002; Telo, 2006). In this work, it is considered to be above all an empirical-analytical concept designed to adequately grasp the social reality of multilateralism as a key organizing principle of global governance and as an instrument in the hands of the

EU. Originally, it was mostly used to describe a form of interaction between States, defined quantitatively as 'the practice of coordinating (...) policies in groups of three or more states' (Keohane, 1990, p. 731). John Ruggie added qualitative elements to this numerical criterion to conceive multilateralism as an 'institutional form that coordinates relations among three or more states on the basis of *generalized principles of conduct'* (Ruggie, 1993, p. 11, emphasis added). These principles detail what is seen as appropriate behaviour by *all* actors involved in multilateral cooperation. This logically entails the '*indivisibility* among the members of a collectivity' (Ruggie, 1993, p. 11, emphasis added). Further – and in contrast to bilateralism[3] – multilateralism is fundamentally associated with *diffuse reciprocity*: actors expect to benefit from cooperation in the long run (Ruggie, 1993, p. 11). Although the core assumptions of Ruggie's conceptualization, namely, that 'the term 'multilateralism' is linked to the preference for, and institutionalization of, collective action in resolving problems that arise among several actors or entities' (Knight, 2000, p. 38) may be timeless, the concrete meaning of multilateralism is, like that of any concept, to be understood in a specific historical context, subject to (frequent) alteration (Cox, 1997). The concept is therefore, as Newman et al. note, 'constantly in flux' (2006, p. 1). What multilateralism concretely can and does mean at this point is therefore still debated (Bouchard and Peterson, 2009).

Recent developments have certainly brought the traditional conceptualization of multilateralism – still valid at the beginning of the 1990s – 'under challenge' (Newman, Thakur and Tirman, 2006). Questions must above all be raised as to whether the analytical understanding of multilateralism still fully incorporates what multilateralism as an organizing principle of international cooperation comprises in contemporary political practice under conditions of multipolarity (Van Langenhove, 2010). Most obviously, the centrality of sovereign state actors cannot remain uncontested in the face of a proliferation of non-state actors and transnational relations in global policy-making (Van Langenhove, 2010; Forman and Segaar, 2006: 221; Cox, 1997). At the same time, the *generalized principles of conduct* identified by Ruggie seem to perdure, even in times of multipolarity and crisis, and certainly within the more formalized UN context (Wouters, Basu and Schunz, 2008; Bouchard and Peterson, 2009). In essence, multilateralism today thus entails a form of cooperation among three or more state and/or non-state actors that functions according to 'principles which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence' (Ruggie, 1993, p. 11). This is particularly the case for the UN, where more or less standardized rules are applied throughout all its bodies, regimes and summits.

In sum, bringing the two concepts of multilateralism and global governance together enhances the analytical potency of both: while the notion of

governance opens the eyes of the analyst for other actors involved in it and for informal processes of policy-making, multilateralism gives the broad concept of governance a clearer focus. Multilateral governance thus refers to a form of global governance that is strongly institutionalized, functioning in line with the organizing principles of (UN) multilateralism.

In the context of multilateral governance, it is also warranted to refer to the EU's activity in UN governance fora as foreign policy, i.e. 'that area of politics which is directed at the external environment with the objective of influencing that environment and the behaviour of other actors within it, in order to pursue interests, values and goals' (Keukeleire and MacNaughtan, 2008, p. 19). While some have wondered whether foreign policy should be placed on the endangered species list in an era of multi-actor, multi-level global governance (Hill, 2003), the practice of global policy-making within the UN tells quite a different story. In that sense, any analysis of the EU's participation in UN governance fora is also frequently a focussed foreign policy analysis.

This analysis is rendered complex by the fact that the Union, although de facto a global player, is not a traditional foreign policy actor. Even if it possesses in some respects state-like features, it is not a state. This has considerable implications for how its foreign policy has to be understood, pointing to a number of themes that will re-appear in the course of this volume. EU foreign policy is not the sum of its Member States' foreign policies, but the sum of foreign policies defined and conducted by genuine EU institutions (the Council, the Commission, the High Representative for Foreign and Security Policy) *in conjunction with* its Member States' foreign policy activities, if these are developed through interaction with the EU (Keukeleire and MacNaughtan, 2008, p. 29). The book correspondingly operates with a relatively broad definition of EU foreign policy, which highlights tensions, but also potential for synergies between the EU and its Member States. Moreover, the definition of foreign policy employed emphasizes the purposefulness of foreign policy, which is a goal-oriented activity, and raises important questions about its effectiveness. Finally, foreign policy in global multilateral governance is to be understood as a foreign policy that follows the rules of multilateralism, and is thus conditioned by them, but that also tries to promote and advance those rules, which is the declared objective of the EU. All these themes will recur in the different case studies.

3. Structure of the book

The book is divided into five distinct parts. Following this introductory section, Chapter 2 introduces the conceptual framework that provides the key analytical units for the empirical case analyses. In parts III and IV of the volume, the EU's participation in a select number of UN human rights governance (Part III) and UN environmental governance fora (Part IV)

is then discussed. Both sections are developed along the same logic. An introductory legal chapter lays the groundwork for the understanding the foundations of the legal aspects for assessing the Union's participation in the two domains. This chapter equally highlights the novelties that come with the Lisbon Treaty, especially, as many of the case studies that follow primarily deal with pre-Lisbon contexts. The legal chapters are followed by a set of four chapters on each of the studied domains, which discuss, per policy area, EU involvement in (i) permanent UN bodies or long-standing UN treaty-based regimes, (ii) a UN-sponsored negotiation process and (iii) a world summit/conference under UN auspices. While each of these chapters addresses the key analytical units of the conceptual framework, they also provide insightful, stand-alone narrative analyses of the EU's participation in the analysed governance fora. The systematic application of the conceptual framework finally enables a cross-domain comparison, which is the subject of the concluding part of the volume.

In efforts to enhance interdisciplinary scholarly attention to the EU's participation in UN governance fora and in hopes of rectifying existing gaps in the literature, the book parts from a critique of current research approaches to the topic and subsequently introduces a comprehensive interdisciplinary framework that allows for a better understanding of the EU's position in the UN system. In Chapter 2 Simon Schunz, Sudeshna Basu, Hans Bruyninckx, Stephan Keukeleire and Jan Wouters conceptualize an analytical framework to serve as a thread between the selected case analyses in parts III and IV of the book. Distinguishing between the EU and international levels of analysis, the interdisciplinary analytical framework accounts for, on the one hand, the external environment the EU faces when engaging in global multilateral governance, while, on the other hand, focusing on the notion of EU 'actor capacity'. Actor capacity takes into consideration analytically significant aspects such as legal competences and diplomatic instruments, which represent preconditions for the Union to be an international actor in the UN system. By building upon the key analytical concepts of legal status and role, the authors explore the mutually reinforcing relationship between them and subsequently introduce the overarching concept of position, distinguishing between four ideal types (central, aspiring outsider, sidelined insider, marginal). This concept allows for determining where the EU is situated vis-à-vis other actors in the chosen human rights and environmental governance arenas. By allowing for a cross-case comparison, the analytical framework enables general assessments of the EU's position in the wider UN system.

Part III of the book begins by providing a sound understanding of the legal and institutional intricacies of the EU's participation in global human rights bodies. In Chapter 3, Davide Zaru and Charles-Michel Geurts do so by first analysing the emergence of the norm of human rights in the EU's legal order and, secondly, explicating the Union's legal and institutional

framework enabling it to participate in the UN human rights system. The chapter highlights the Lisbon Treaty coming into force on 1 December 2009 and its implications in the field of human rights and in the EU's external action. In so doing, it not only provides a background to where the EU's dedication and commitment to protect and promote human rights comes from, but also allows for the necessary understanding of the formal preconditions the EU needs to meet to participate in global human rights fora.

Building upon the framework of analysis expounded in Chapter 2, Emanuele Giaufret in Chapter 4 explores the participation and position of the European Union in the Third Committee of the UNGA. The Third Committee, representing the main forum to address social, humanitarian and cultural affairs in the UNGA, offers an interesting arena to examine as the European Community has held observer status in this principal organ of the UN system since 1974 and has strived hard to increase its clout on this human rights stage ever since. Taking this historical perspective into account, Giaufret compares and contrasts the de jure and de facto dimensions of the EU's participation in the committee and concludes by yielding insights into the EU's overall position as an aspiring outsider.

Chapter 5 examines the EU in the most recent addition to the UN human rights family, namely the UN Human Rights Council. Sudeshna Basu highlights the EU's commitment to establishing a new and more effective human rights body and analyses its participation in all areas of the Council's work including the Universal Periodic Review, renewal of special procedure mandates, plenary and special sessions. Being the only forum which exclusively addresses human rights issues on a regular basis, the Human Rights Council serves as the principal human rights stage for the EU. The chapter correspondingly pays particular attention to how the EU's contributions to the Council's output measure against its legal and policy objectives, bearing in mind its observer status in the body. Drawing from the exercise of employing the framework of analysis, Basu concludes with determining the EU's position in the Human Rights Council as aspiring outsider-marginal and explicates how its position is impacted by the strongly embedded bloc mentality in the workings of the Council.

Chapter 6 examines the EU in the negotiations and adoption of the landmark UN resolution on a moratorium on the use of the death penalty. Robert Kissack traces the historical developments of the resolution, the first of which dates back to 1994. Through taking an issue-based approach, Kissack provides an in-depth examination of the methods and means used by the EU to reach consensus on this markedly emotive topic on which UN Member States had been divided for more than a decade. Through applying the interdisciplinary framework, the author sheds light on the key components that led to the EU's success in 2007, compared to its failed attempts in 1994 and 1999. In a final analysis, insights are provided into

the underlying reasons why the EU's position can be assessed as coming close to that of an aspiring outsider in the negotiations of this milestone resolution.

The final chapter in Part III, Chapter 7, applies the analytical framework to analyse the EU's participation in a specialized UN conference addressing specifically the human rights issue area of racism, racial discrimination, xenophobia and related intolerance: the Durban Review Conference. Joëlle Hivonnet examines the EU in both the preparatory process and the proceedings of the conference itself and critically analyses the Union's non-cohesive approach to the latter. Hivonnet draws attention to the EU's treaty and policy objectives with reference to racism, racial discrimination, xenophobia and related intolerance, and contrasts it with that of the EU's actual performance which observably challenged its legal obligations. Hivonnet concludes by defining the EU's position as marginal, whilst stressing how its disengagement affected its overall position in the Durban Review Conference.

Part IV of the book again begins with an overview of the legal framework for EU participation in global environmental governance under the UN umbrella. In Chapter 8, Tim Corthaut and Dries Van Eeckhoutte provide a concise review of the legal intricacies the Union was and is faced with before and after the entry into force of the Lisbon Treaty. In a highly topical discussion of recent legal practice, they highlight the pitfalls that come with the entry into force of this treaty. The chapter provides the necessary background for the further analyses of EU participation in various UN bodies dealing with environmental issues.

Chapter 9 then deals with the EU's participation in one key UN body dealing with environmental issues as part of a broader sustainable development agenda. Karoline Van den Brande takes a look at the EU's legal status, role and, ultimately, position in the Commission on Sustainable Development (CSD). As a comparatively active functional commission of the UN Economic and Social Council (ECOSOC), the Commission represents an important arena for the EU to promote its sustainable development agenda, and Van den Brande highlights the difficult negotiation context the body provides for an EU that is often internally divided on the definition and implementation of its sustainable development policies. She concludes that while the EU has – by virtue of its strong presence – occupied a central position in this body, it still oftentimes fails to attain its objectives in an environment that regularly does not operate to its advantage.

A similar conclusion is drawn by Simon Schunz in Chapter 10 on the EU's participation in the UN climate change regime. His longitudinal analysis emphasizes the evolution of the Union's implication in this regime from the early 1990s and the negotiations on the UN Framework Convention on Climate Change (UNFCCC) over the talks on the Kyoto Protocol (1995–1997)

to the 15th Conference of the parties (COP) in 2009 at Copenhagen. Schunz finds that while the EU's actor capacity has generally improved considerably over time, the Union has failed to substantially leave its marks on various negotiation outcomes. This has been most visible at Copenhagen and can be explained by the changing nature of global climate politics as well as the EU's slow reaction to these trends. It raises the question whether the central position the Union has held in the UN climate regime in the past may not be coming under serious threat by the rapidly evolving geopolitical context.

Tom Delreux's Chapter 11 examines the EU's implication in the negotiations on the Cartagena Protocol on Biosafety, the first international legally binding agreement on the transboundary movements of genetically modified organisms (GMOs), concluded under the Convention on Biological Diversity (CBD). He provides an in-depth analysis of the various stages of this negotiation process, highlighting both the internal and external parameters of the EU's performance. Externally, the EU found itself in an intricate constellation between developing countries in favour of restrictive rules and flexibility-seeking GMO-exporting countries like the United States. Regarding the domestic context in the EU, Delreux shows how an evolution from a divided negotiation partner in the beginning of the talks towards a strong and unified negotiator in the final stages strengthened the Union's actor capacity. This evolution enabled it to positively impact on the content of the protocol. Consequently, the author's verdict is also that the EU was able to occupy a central position in this negotiation process.

The environmental governance part of the book is concluded by a lucid analysis of the EU's implication in the last big environment-related world summit, the 2002 World Summit on Sustainable Development (WSSD), held ten years after the Rio Earth Summit. Simon Lightfoot's Chapter 12 examines the EU's internal decision-making process, demonstrating how difficult it is for the EU to implement external policies for sustainable development. Added to a rather unfavourable external context, the restraints on the Union's activities at the summit were quite significant. Nonetheless, as Lightfoot argues, the EU was able to occupy a central position at the WSSD, based on a high degree of formal recognition and a functionally important role. He concludes by raising the question whether the EU will be able to repeat this performance at the Rio+20 Summit planned for 2012.

The volume concludes with Part V, which provides a summary of the key empirical insights of the various chapters of Parts III and IV, followed by an in-depth comparative analysis of the findings. To this end, Hans Bruyninckx, Jan Wouters, Sudeshna Basu and Simon Schunz firstly engage in an intra-domain comparison to extract patterns of similarities and differences of the EU's activities and performance in each of the two domains. Cross-domain

comparison allows them to then make more general observations about the EU's position and its determinants in the studied fields of multilateral governance. Drawing on these conclusions, Chapter 13 subsequently reflects on the broader implications of the results for the way the EU organizes and conducts its foreign policy in the domains of human rights and the environment. In this context, Bruyninckx et al. refer back to the introductory and conceptual chapters (Parts I and II) to evaluate the utility of the interdisciplinary approach taken and identify some key areas for future research on the Union's activities and performance in the selected domains, but also in other areas of EU activity in the UN system. To conclude, an assessment of the EU's approach to multilateralism in these domains is combined with a range of policy-relevant insights, formulated in the light of the new legal framework provided for by the Lisbon Treaty and addressed to the relevant actors within the EU.

Notes

1. In the literature, it has become common to refer to the external activities of the European Community as actions of the European Union, even if this is legally incorrect when referring to the situation prior to the Lisbon Treaty. In this chapter, as in the entire volume, reference to the EU will be privileged, whereas the EC will only be referred to when this is needed for the purposes of legal clarity.
2. For a comprehensive overview of the research area up to 2007, see Basu and Schunz (2008).
3. The 'specific reciprocity' of bilateral relations makes that two actors expect a particular gain and type of behaviour from one another (Ruggie, 1993, p. 11). The difference between bilateralism and multilateralism is therefore not solely numerical, but fundamentally related to the kinds of relations between actors (Diebold, 1988, p. 1).

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Part II
Analytical Framework

2

Analysing the Position of the European Union in the United Nations System: Analytical Framework

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1. Introduction

Chapter 1 underscored the growing importance of the EU's engagement in global multilateral fora under the UN umbrella. This tendency, emblematically reflected in the two influential EU policy documents of 2003 – the Commission communication on 'The EU and the UN: partners in effective multilateralism' and the European Security Strategy (European Commission, 2003; European Council, 2003) – sparked substantive research interest in the topic. Where the EU's participation in UN fora had been predominantly examined by legal scholars before (Brückner, 1990), analysts of EU foreign policy began to turn to the subject from the early 2000s onwards (Jørgensen, 2007, p. 509).

As a result, a new body of literature gradually emerged, comprising a range of insightful studies. A key characteristic feature of this literature is its diversity. Analyses were produced from the perspective of various disciplines, most importantly international law, international relations, EU law and EU (foreign policy) studies.

The multi-disciplinary nature of the literature can be regarded as an asset: having multiple views on the topic provides for a richness of empirical and analytical insights. What has been less than optimal with regard to this research domain, however, is the continued lack of dialogue *between* the disciplines. The EU's participation in multilateral governance raises a number of questions of interest to both legal and political science scholars and to experts of international relations as much as to scholars of EU integration.

Each of the disciplines would therefore benefit from taking into greater account the findings, but also the specific concepts, methods and thematic foci of the other disciplines when approaching this inherently complex subject matter. Dialogue between legal scholars and political scientists

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on this matter would help to build bridges, develop common conceptual language, yield more holistic, systematically produced accounts, and thus advance the knowledge on the topic in a synergetic manner.

Moreover, also *within* each of the disciplines, greater dialogue would be beneficial. On the legal side, the frontier between international and European Law, while still existent, has in a number of instances been successfully overcome in recent years. In political science, by contrast, the challenge of appreciating the 'increasing mutual relevance' of international relations and the regional approach of EU integration studies, which were 'previously connected only by a slim isthmus' (Hill and Smith, 2005: 389), has only recently been taken up.

Against this backdrop, this chapter attempts to exploit the synergies that exist between the disciplines and the various levels of analysis by designing an analytical framework for the study of the EU in the UN system that enables greater engagement across disciplines, moving from *multi*-disciplinarity to *inter*-disciplinarity. Interdisciplinary accounts of the EU at the UN would yield, from an empirical-analytical point of view, richer insights, highlighting elements that multi-disciplinary research without exchange and cross-fertilization might simply oversee. From a more normative perspective, if 'law informed by politics is the best guarantee of politics informed by law' (Slaughter-Burley, 1993, p. 239), then improving UN governance and the EU's role therein passes by a thorough understanding of all its facets.

Successful attempts at cross-disciplinary dialogues between international law and international relations (IR) – for a long time 'parallel yet carefully quarantined fields of inquiry' (Reus-Smit, 2004, p. 1) – have been made to advance our knowledge about international cooperation (Biersteker, Raffo, Spiro and Sriram, 2007; Slaughter-Burley, 1993). Pursuing this path appears to be particularly promising for the topic of EU participation in the UN. Political scientists would not only learn from legal scholars in terms of substance, but might also look to legal science for overcoming the intra-disciplinary divide separating EU foreign policy analysis and international relations. At the same time, legal scholars would be enabled to enrich their research with concepts and methods used in political science. This would help them gain more insights into informal processes of policy-making (the 'politics'), allowing for a complementary approach to legal interpretation. The challenge of conceiving an interdisciplinary approach to the study of the EU at the UN can best be met by joining legal and political science approaches at a conceptual level. It has indeed been argued that the prime task of the bridge-builder between these two disciplines was to 'critically reconsider (...) the foundational concepts on which these bridges' can be constructed (Reus-Smit, 2004, p. 2). Whilst 'at the heart of all social science endeavour' (Gerring, 1999, p. 359), concept formation remains a harshly contested field. For Max Weber, however, it was precisely this struggle over concepts that constituted the source of 'the greatest advances

in the sphere of social sciences' (1949, p. 105–106, quoted in Gerring, 1999, p. 359). Following this logic, the design of an interdisciplinary conceptual framework may be considered a first, valuable step in the direction of interdisciplinary theorizing (Goertz, 2006, p. 1) on the EU's participation and performance in complex global governance arrangements. Building on a set of criteria for concept (re)formation developed by Gerring (1999), this chapter advances such a framework for the exploratory study of EU participation in the UN system.

To do so, it first explores current literature addressing the EU's participation in the UN system, before gradually developing the interdisciplinary framework. It closes with a discussion of how this framework can be applied and be of added value to the empirical and analytical parts of the book.

2. Literature review: current legal and political science approaches to the study of the EU in the UN system

By contrasting legal and political science approaches to the topic of the EU's participation in UN fora with regard to their key analytical categories, methodology and preferred thematic foci, this section lays the foundations for the design of the analytical framework.

2.1. Legal approaches to the study of the EU in the UN system

Legal erudition on the EU in the UN system began almost a decade after the adoption of the Luxembourg Report on 27 October 1970, which contained the foundation of European Political Cooperation (Lindemann, 1978; Regelsberger, 1988; Bramsen, 1987; Weiler and Wessels, 1988). Legal scholars have since then traced the developments of EU participation in global organizations vis-à-vis the evolving nature of the legal and institutional landscape at both the international and EU levels. The legal foundations and institutional frameworks at both levels of analysis have been their primary foci, notably in view of the European Union not being a traditional actor in international bodies.

In both international and EU legal approaches to the study of the EU in the UN – prior to the entry into force of the Lisbon Treaty – the EU pillar structure and the distinction between the European Community and the European Union, vis-à-vis their respective competences, was central in analyses. The primary reason for this is that legal competences not only determined who represented the EU (depending on whether one deals with the first pillar, i.e. the Community, in which case the Commission represents; or with the second pillar (CFSP), i.e. the EU, represented by the Presidency of the EU Council), but also explicated the capacities and competences it can exercise in a given organization. Moreover, it highlighted the architectural complexities and challenges the EU faced to be a global actor.[1] This focus has now shifted, however, in light of the entry into force of the

Lisbon Treaty on 1 December 2009, which abolished the EC and its pillar structure and confers legal personality upon the European Union (Article 47 TEU).

Approaches to studying the EU's participation in multilateral institutions have principally taken two forms in legal studies.

In *EU legal studies*, scholars have primarily focused on treaty bases, case law and outcome documents/agreements of EU multilateral activity, particularly mixed agreements (Rosas, 2000) and international agreements containing a REIO (regional economic integration organization) clause, now more commonly known as a RIO (regional integration organization) clause. Other areas also explored include coordination and representation procedures in light of the EU pillar structure and areas of Community competence in its internal and external activities (Eeckhout, 2004; Koutrakos, 2006; Govaere, Capiau and Vermeersch, 2004; Lenaerts and de Smijter, 1999; Marchisio, 2002), both being imperative analytical units in examining the EU in international organizations as the exercise of the EU's rights and duties under international law is subject to the competences conferred upon it by its own founding Treaty.

In *international law*, the study of the European Union in the UN has tended to place an emphasis on membership status to global institutions (Sybesma-Knol, 1997; Frid, 1993; Schermers, 1983). As membership to UN bodies and agencies is limited to states, in accordance with Article 4 of the UN Charter, the Union finds itself constricted to observer status in almost all organizations falling under the UN umbrella. Apart from a few exceptions (Food and Agriculture Organization and Codex Alimentarius Commission), it thus faces the restrictions of inter alia having no vote and being able to intervene only after all full members have made their interventions. The latter however has been observably overcome with interventions made by the Member State holding the EU Presidency, in its capacity as both a full member to the UN and a representative (speaking) on behalf of the Union. Moreover, with the adoption of United Nations General Assembly (UNGA) Resolution 65/276 on 3 May 2011, the EU now holds stronger powers in the body, entitling it to enjoy rights such as the right to speak, submit proposals and the right of reply, just as any full member of the UN, the only difference being that the EU maintains not having a right to vote or put forward candidates in the UNGA.

Generally, both legal perspectives have focused for the most part on studying the EU's participation in UN and other global organizations operating in areas where the EU disposes of exclusive competences, i.e. above all in the domains of trade and agriculture (Antoniadis, 2004).

All in all, the international and EU legal dimensions provide the foundations and framework that condition the Union's space and capacity to participate in the UN system. However, they rarely, if at all, specify what the EU is actually doing as a foreign policy actor in those fields.

2.2. Political science approaches to the study of the EU in the UN system

Political scientists have shown great effort to examine and account for the EU's performance on the international scene on the whole, applying a variety of approaches, though they have published considerably less on its actual participation in UN fora. Broadly speaking, two main avenues to examine the EU's participation in the UN have been taken.

Firstly, some authors have taken inspiration from *international relations theories* or the newer field of *global governance studies*. Most accounts conceptualize and analyse international institutional architectures at length, but give considerably less attention to the EU itself as a fairly new actor on the global scene (Warleigh-Lack, 2007; Andreatta, 2005). Some exceptions do exist (Wunderlich and Bailey, 2011; Telo, 2009), notably the literature on global governance and regionalism, where the EU often serves as the prime example (Thakur and Van Langenhove, 2006; Söderbaum and Van Langenhove, 2005).

Secondly, the topic of EU participation in the UN system has induced a smaller, prima facie neither 'consistent, coherent nor systematic' (Jørgensen, 2007, p. 509) body of literature within the discipline of *EU (foreign policy) studies*. It is composed of a variety of case studies on, for example, EU involvement in UN bodies such as the General Assembly (Emerson, Kaczyński, Balfour, Corthaut, Wouters and Renard, 2011; Wouters, 2001; Stadler, 1993), the Security Council (Hill, 2006), in trade and financial institutions (Meunier, 2005; Kerremans, 2004), and in governance on specific topics such as biosafety (Rhinard and Keading, 2006), environmental issues (Vogler, 1999) or human rights (Smith, 2006) (cf. also Laatikainen and Smith, 2006; Wouters, Hoffmeister and Ruys, 2006). Often, these studies focus on particular pieces in the broader puzzle of EU activity at the UN. Some are interested in issues like voting cohesion or representation, others in aspects like internal coordination (e.g. Laatikainen and Smith, 2006; Rasch, 2008; Luif, 2003).[2] A closer survey of this literature reveals, however, that many analyses actually do display commonalities. They share a twofold interest not uncommon to general EU foreign policy analyses: a desire to understand (i) the EU's capacity *to be* an actor and (ii) the EU's actual role performance *as* an actor in the UN system.

Assessments of its performance *as* an actor have regularly made use of the concept of role, introduced into foreign policy analysis by Holsti (1970), and broadly defined as characteristic patterns of behaviour. In the analysis of the EU's role in the UN system, scholars have explicitly (Elgström and Smith, 2006, especially Aggestam, 2006) or implicitly mostly used the narrower concept of role performance (Bretherton and Vogler, 2006; Hill and Smith, 2005; Smith and Laatikainen, 2006; Ortega, 2005). It depicts the 'actual foreign policy behaviour in terms of characteristic patterns of decisions

and actions undertaken in specific situational contexts' (Aggestam, 2006, p. 20; Holsti, 1987). Results of such studies suggest that the roles the EU perform vary across different UN fora. Attributions range from proactive over supportive to reactive and passive, or from 'leader' and 'front-runner' to 'laggard' and 'outsider' depending on the policy field (Sbragia and Damro, 1999; Laatikainen and Smith, 2006, p. 10). Quite regularly, the reasons for the differences in EU performance across various fora remain obscure.

Many studies that culminate in a statement about the EU's role in the UN system have been conducted on the basis of analyses that focus upon the EU's capacity *to be* an actor. Such accounts regularly make direct reference to the concept of international 'actorness' either in its entirety (Groenleer and van Schaik, 2007; Laatikainen, 2004; Jokela, 2002; Kraack, 2000), or to elements of it, or use analytical frameworks that are inscribed in the same tradition (Bretherton and Vogler, 2006; Laatikainen and Smith, 2006).

Drawing on earlier works on the EU's international 'presence' and actorness (Allen and Smith, 1990; Sjöstedt, 1977), James Caporaso and Joseph Jupille (1998) originally developed 'actorness' as a conceptual framework for systematically studying the EU as a foreign policy actor. In their view, the EU is 'neither a full-blown polity nor a system of sovereign states', but displays various degrees of actorness in different contexts (Caporaso and Jupille, 1998, p. 214). To assess actorness, and, ultimately, as they claim, the 'EU's global political role', their conceptual framework comprises four analytical categories (Caporaso and Jupille, 1998, pp. 214–220):

1. *Recognition*, i.e. the formal (de jure) and informal (de facto) acceptance of the EU by others;
2. *Authority*, i.e. the EU's legal competence to act externally;
3. *Autonomy*, i.e. the EU's institutional distinctiveness and independence from others, notably its Member States; and
4. *Cohesion*, i.e. the degree to which the EU is able to formulate internally consistent policy preferences.

The EU's capacity to act is construed as a function of these four interrelated categories.

There are good reasons why this conceptual framework (or elements/variants of it) has (have) enjoyed popularity in EU foreign policy analysis. Its attraction, especially for the study of complex EU participation in various bodies of the UN system, lies, above all, in enabling for a thorough 'checklist' type analysis of the internal prerequisites of EU foreign policy activity. As a result, answers to the crucial questions about *what* type of actor the EU *can be* and what it *can do* in different settings become possible. However, its predominantly inward-looking perspective must at the same time be considered as a weak point. Solely the category of recognition touches explicitly on the external dimension of EU activity and sets the Union in relation

to other actors at the global level. Further difficulties arise when it comes to the empirical application of the concept. Recognition is, in spite of notable exceptions (Lucarelli, 2007; Elgström, 2007; Bretherton and Vogler, 2006, pp. 13–15), greatly absent in many studies. Moreover, despite the openness towards legal considerations demonstrated by Caporaso's and Jupille's framework, as especially the distinction between de jure and de facto recognition and the category of authority suggest, this has not found its way into mainstream political science practice.

On the whole, political science approaches to the topic of EU participation in the UN system testify thus to a multiplicity of perspectives in themselves, which do not necessarily interact with each other. International perspectives often do not pay sufficient attention to EU 'actorness', while EU foreign policy approaches regularly fail to take the external environment the EU operates in into due account. Moreover, concepts like actorness, role or role performance are sometimes used randomly and/or interchangeably, thus remaining underspecified or insufficiently delineated from each other. Finally, both approaches regularly limit themselves to sporadic references to the legal framework at the different levels of analysis.

2.3. From multi-disciplinarity to inter-disciplinarity

To sum up the brief literature review, Table 2.1 comprises a matrix that – taking the two central divides (global vs. regional level; legal vs. political science) as a starting point – distinguishes between the four currently dominant dimensions of analysis of the EU's participation in the UN system. Few scholars have explicitly worked on the interfaces between any two of the quadrants – the international/EU law frontier being an exception (Wouters, Nollkaemper, De Wet, 2008; Vanhamme, 2001).

The table brings schematically to the forefront one key observation: research on the topic of EU participation in the UN system has so far been characterized by an absence of interdisciplinary engagement and, as far as the political science side is concerned, multi-level exploration of the subject. To exploit further synergies between the various perspectives and promote systematic analyses so as to gain richer empirical insights into the topic,

Table 2.1 The four dimensions of research on the EU's participation in the UN system

	Legal studies	**Political science**
Global level	I International Law	III International Relations, Global Governance
Regional (European) level	II European Law	IV EU integration studies/ EU foreign policy analysis

we suggest therefore moving from the current *multi*-disciplinarity to a real *inter*-disciplinary approach to the topic.

Engaging in interdisciplinary research requires thorough concept development, building on existing concepts in the disciplines and exploiting conceptual proximities that (may) implicitly exist already.

3. An interdisciplinary analytical framework for the study of the EU's position in the UN system

An interdisciplinary conceptual framework for a more complete understanding of the EU's actual and potential role(s) in the UN system would have to incorporate the strengths of both the legal and the political science perspectives. The main task is therefore to build on existing analytical concepts and categories in both disciplines by (1) accentuating linkages between them and (2) attempting to integrate and refine them. To this end, a new, overarching concept will be introduced and developed. As a guideline for this exercise of concept (re)formation, elements from John Gerring's (1999) 'criterial framework' will be used.

Synthesizing different approaches to concept formation in the social sciences, Gerring proposes a catalogue of eight 'criteria of conceptual goodness' (1999: 361–367): familiarity (*Is the chosen term widely known?*), resonance (*Does it ring?*), parsimony (*Is it brief?*), coherence ('*How internally consistent (logically related) are the instances and attributes?'*), differentiation (boundedness vis-à-vis other 'most-similar concepts'), depth ('*How many accompanying properties are shared by the instances under definition?'*), theoretical utility and field (empirical) utility. He argues that this 'quick and ready schema' allows for assessments of the utility of concepts, while acknowledging that there is a trade-off to be made between (some of) the constitutive elements (Gerring, 1999, p. 367). The first five criteria may be considered as indispensible: all concepts should ideally be approachable, easy to understand, brief, coherent and sufficiently distinct from others. Greater depth, by contrast, which refers to the 'number of properties shared by the phenomena' that fall under the concept (Gerring, 1999, p. 380), is not per se seen as a necessary criterion for concept (re) formation. Finally, as the primary purpose is to devise an interdisciplinary conceptual framework that is capable of mapping – and therefore close to – empirical reality, priority will be given to the criterion of field/empirical utility.

3.1. Developing an interdisciplinary analytical framework

Catered specifically to the analysis of the EU's participation in the UN system, the analytical framework advanced here will be based on a concept introduced to build the bridge between existing conceptual considerations in legal and political science, namely the concept of *position*.

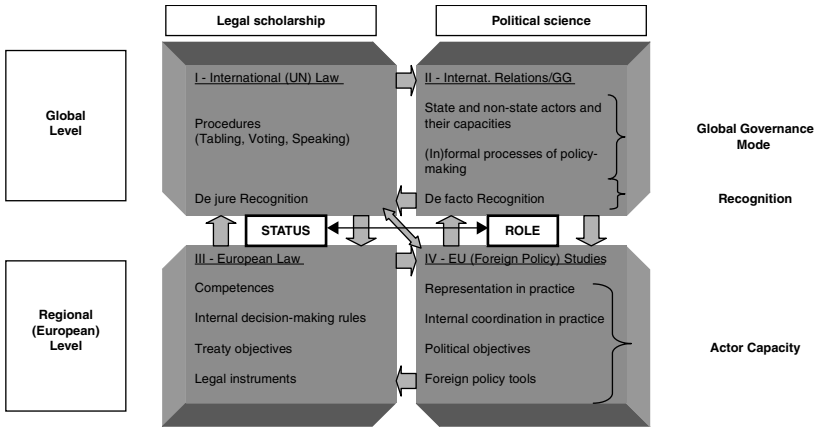

Figure 2.1 An interdisciplinary framework for the analysis of the European Union's position in the UN system

In everyday language, position is generally understood as a location, 'a place where someone or something is located' (Oxford Dictionary, 1999), situating a person or a thing vis-à-vis its surroundings.[3] For the purpose of the analysis carried out in this book, and to enhance its empirical utility, this *general* definition needs to be adapted to the particular context of research on EU participation in the UN. Position is therefore defined *contextually*[4] as the place occupied by the EU in a given multilateral body, which is a function of both the EU's legal status (a concept used in legal scholarship) and its actual role (a concept used in political science) in that forum. The legal status and actual role depend, in turn, on a number of analytical units developed in the two disciplines and joined together here across the disciplinary boundaries. The following three interdisciplinary analytical categories systematize – i.e. break down into smaller units that can, in turn, be more easily operationalized – what may be referred to as the 'background concept' (Adcock and Collier, 2001, p. 531) *position*:

1. Actor (EU) capacity;
2. Recognition; and
3. Global governance mode.

Figure 2.1 gives an overview of the systematized concept of position and its components and illustrates the linkages between them. The four quadrants represent the four disciplines engaged in the study of the EU in the UN system (international law, international relations/global governance studies (GG), European law, EU foreign policy studies).

From this discussion, it becomes clear that position as a concept used in the specific context of EU participation in the UN system meets the first four criteria selected from Gerring's approach. The term is well known within everyday language (familiarity), sufficiently catchy (resonance) and brief (parsimony). Moreover, as we defined it, it is distinct from similar concepts such as role. As will be demonstrated in the course of this discussion, the concept is also (i) coherent in that it builds on and links existing categories that refer to the same empirical instances from different (disciplinary) perspectives and that it fulfils (ii) the crucial criterion of empirical utility, as it can be aptly used to describe and thus understand EU participation in UN bodies and agencies.

The development of the conceptual framework starts out with the perspective of EU foreign policy studies (see Figure 2.1, Quadrant IV), which will, in an initial, horizontal reading of Figure 2.1, be contrasted and complemented with legal considerations. This will be done first at the regional level (Quadrant III), and then – extending it to a vertical reading of Figure 2.1 – at the international level (Quadrant I). Subsequently, the circle will be completed by relating international legal insights horizontally back to political science (IR and global governance, Quadrant II).

3.1.1. Actor capacity

At the regional level, parting from Caporaso's and Jupille's original concept of actorness and its critique, the category of EU actor capacity has been designed as a combination of distinct, but strongly interwoven legal, institutional and political dimensions that reach across from Quadrant IV (EU foreign policy studies) into Quadrant III (European law).

According to Caporaso and Jupille, the EU's capacity to act at the international level is, first of all, a function of its institutional distinctiveness from the Member States (autonomy). Measuring this institutional distinctiveness requires a two-fold analysis. Firstly, from a political science perspective, it demands for an investigation of the EU's institutional practice concerning external representation (who speaks on behalf of the EU? and to what extent does it act independently from the Member States?). This, in turn, cannot be regarded in isolation from a legal analysis of the EU's competences relating to its external activity, or what Caporaso and Jupille refer to as 'authority'. The analytical category of *external representation* displays thus two inextricably linked dimensions: the de jure dimension of who is, on the basis of its legal competences, to represent the EU and the de facto dimension of who is chosen to represent the EU in practice.

Secondly, effective representation of the EU requires a previously established common position. This depends, again in Jupille's and Caporaso's terminology, on a certain degree of cohesion among the constituent units of the EU (Member States, EU institutions) with regard to foreign policy

aims, internal procedures and desired output. This has been analysed from an EU foreign policy analysis perspective by looking at the *EU's declared and political objectives* and at how these are negotiated in *internal coordination* processes between Member States (Farrell, 2006; Ginsberg, 2001; White, 2001). Once again, political science research on this internal dimension of EU external activity is thus much more oriented towards actual practices, i.e. the pragmatic solutions that may be found to decide, for instance, which line to take in an international setting. Legal studies, by contrast, tend to focus on hard and soft law regulating EU internal decision-making prior to entering the international stage (Wouters, Hoffmeister and Ruys, 2006).

As a final element of what we denote as 'actor capacity', we introduce the crucial category of *foreign policy instruments*. Having addressed how the EU decides upon who represents it to achieve its objectives, this category explores the material and immaterial instruments it possesses to realize those very ends. On the one hand, the EU disposes of legal and economic tools in accordance with its objectives outlined in the treaties (e.g. for development cooperation see Article 209 TFEU, ex Article 179 (1) TEC and Regulation (EC) No. 1905/2006). These can range from military and civilian crisis management tools such the rapid reaction mechanism (RRM) to trade policy instruments such as association agreements and economic partnership agreements with African, Caribbean and Pacific Group of States (ACP) members. These legal and economic tools then have the capacity to be used as leverage in, on the other hand, the more immaterial foreign policy instruments such as political dialogues. As such, a mutually benefiting process between the formal and informal instruments at the EU's disposal is established. Other immaterial instruments include classical diplomatic techniques, but also informational or cultural diplomacy, including issuing demarches or declarations, country visits, imposing diplomatic sanctions, granting diplomatic recognition and launching exchange programmes or media campaigns (Smith, 2003, pp. 21–23; 60–61). On this category again, crossing the border between the legal (Quadrant III) and the political science dimensions (Quadrant IV) allows for a more complete view of the range of instruments the EU has in its tool box when entering the international scene.

In sum, actor capacity thus depends on four interdisciplinary analytical categories (external representation, internal coordination, objectives and instruments), each of which displays a clearly legal and a political science dimension. Actor capacity is distinct from actorness in two ways: (1) it yields a more complete, truly interdisciplinary analysis; (2) the EU and its Member States have control over it. Actorness, by contrast, depends additionally also on this actor's relations with other actors at the global level, as the EU acquires international actorness only through recognition by others.

3.1.2. Recognition

Turning to the international level of analysis, recognition has originally been explicitly designed as an interdisciplinary analytical unit comprising a de jure and a de facto dimension (Caporaso and Jupille, 1998, pp. 214–215).

Political scientists have shown little interest in the de jure and only limited interest in the facto dimension by analysing how others perceive the EU (Lucarelli, 2007; Chaban, Elgström and Holland, 2006). Perception also plays a crucial role in the willingness and preparedness of other actors to engage in anything between a loose dialogue and exchange to serious negotiations with the Union.

Perception and general preparedness to cooperate are, however, hardly sufficient conditions for accepting a state or a hybrid entity such as the EU as a full-fledged actor in the international arena. Formal recognition is indispensible. To understand the formal grounds for EU participation in a given multilateral forum, under UN law, three interrelated elements have to be considered: (i) the constitutional treaty of the multilateral body as that is what determines which subjects of international law can obtain a legal status in the body, which (ii) in turn, is closely connected to the internal legal competences of the EU. Only if the EU fulfils certain criteria (e.g. can guarantee that it will be able to follow up on the legal commitment it makes on behalf of its Member States in the international sphere) will the multilateral body be willing to grant it a specific set of rights. Finally, (iii) these rights are detailed in the rules of procedure, which determine the formal conduct of affairs in the multilateral body with regard to issues like sponsoring resolutions, voting and speaking. These three elements together determine the form and content of the *legal status* the EU is granted in a given forum (cf. Hoffmeister and Kuijper, 2006).

As it may be deduced, the regional and international levels are inextricably linked from a legal point of view. In a vertical reading of Figure 2.1, the concept of legal status has thus been firmly placed in the legal sphere, right at the intersection between the two levels.

The relationship between the regional and the global level in legal analyses, together with the apparent trend that emerges from the discussion of the legal categories, yields parallels in political science (and vice versa), providing a strong case in point for attempting to overcome also the final hurdle, namely the divide between EU foreign policy analysis and the discipline of IR.

3.2.1. Global governance mode

As it may be observed from above, the issues surrounding de jure recognition (legal status) and the rights and obligations therein, in addition to the rules on membership and rules of procedure guiding the interaction of actors in UN bodies, constitute the main analytical categories considered and employed by international legal scholars in this area of study.

If the logic applied so far is further pursued and parallel analytical units in political science are searched for, we inevitably enter the realm of international relations, traditionally the domain of a limited number of macro-theories. For two main reasons, these theories do not constitute the most appropriate pathways for approaching the subject of study. Firstly, as alluded to earlier, efforts at overcoming the gap between international law and IR can best begin at a conceptual, pre-theoretical level (Reus-Smit, 2004, p. 2). Secondly, to come to an *empirically* useful approach to the study of the EU at the UN, attempting to isolate concepts from the often complex theoretical assumptions of various IR theories may not be the most suitable way of proceeding.

It seems more useful to approach the topic with an alternative *conceptual* lens, namely that of global governance. For one thing, as a 'perspective on world politics' (Dingwerth and Pattberg, 2006), global governance is not a complex theoretical edifice, but a set of empirically rooted propositions, a 'narrative' of contemporary world politics (Barnett and Sikkink, 2008, p. 78). Secondly, and related to this, global governance possesses a high empirical utility when it comes to critically analysing world politics in a UN context (Rittberger 2001, see Chapter 1).

It highlights, above all, new phenomena such as the growing importance of non-governmental actors as well as the increasing informalization and multi-level nature of global policy-making processes (see Chapter 1; Dingwerth and Pattberg, 2006, p. 191). The concept emphasizes that the formal legal rules of procedure guiding the action and interaction of actors at the global level are more and more complemented by an increasingly complex array of informal encounters and processes involving multiple actors other than states beyond, but also within, the UN. It is in this environment – facing these actors and these processes – that the EU (just like any other actor) has to profile as a global player.

To complete the analytical framework, the category of *global governance mode* is therefore introduced in order to analytically join together the legal dimension of formal procedures on the one hand and the political science *analysis of state and non-state actors and their capacities and the formal and informal policy-making processes through which they interact* on the other hand. A thorough analysis of both dimensions allows us to come to statements about the specific modus operandi of a (UN) governance forum (cf. Koenig-Archibugi, 2002). This modus can vary considerably from one forum to the next, with options ranging from classical top-down governance via international governmental organizations over networks, i.e. 'horizontal rather than hierarchical channels of authority' (also under UN auspices) to private, market forms of governance (Rosenau, 2002, p. 77, 81). The multilateral fora discussed in the context of this book will mostly be characterized by strong intergovernmental relations, but surprising differences may exist in the way non-state actors are involved in policy processes or policy-making may go through informal channels involving limited groups of players.

Once this global governance mode has been described, it can be set into relation to the EU's actor capacity. This allows us to bring the category of *role* (defined narrowly, in the sense of role performance, as 'actual foreign policy behaviour in terms of characteristic patterns of decisions and actions undertaken in specific situational contexts', Aggestam, 2006, p. 20) into the graphical representation of position (see Figure 2.1). Role is essentially a relational and contextually defined concept: to perform a certain role, an opening or a demand for such role performance has to exist in the context of a particular global forum. Consequently, the EU's role depends not only on its own actor capacity, but also on its (above all de facto) recognition, and, especially, on its interaction with others in processes of governance that are characteristic of a multilateral body. Conceptualized as such, role can provide the necessary link between the regional (EU foreign policy analysis) and the global level of analysis (global governance). Accordingly, it has been placed between these two layers in the graphical representation of position (Figure 2.1).

As briefly indicated above, the EU may perform a range of roles. The continuum leader–laggard has been largely employed in studies of its participation in the UN system, but lacks specification. In his original study, Holsti listed 17 different role *conceptions*, which could be taken as a source of inspiration in order to specify the EU's role *performance* in a given context. The list comprised, inter alia, mediator, leader, supporter, ally or isolated player (Holsti, 1970). In the multilateral contexts analysed in this work, determining the characteristic patterns of EU behaviour as a function of the described three analytical categories requires essentially an assessment of its functionality vis-à-vis the overall purpose of multilateralism, as defined in Chapter 1, and the specific objectives of the analysed body (e.g. finding globally concerted solutions to the problem of climate change or racial discrimination). The following questions might guide a specification of the Union's role in multilateral contexts: *Does the EU actively promote multilateralism, e.g. by leading the way (leader), bringing others together (mediator) or both? Or does it simply follow others or even isolate itself from the group efforts?* Roles like leader or mediator must be considered as functionally important for successful and (in EU dictum) 'effective' multilateralism. Followers perform less significant roles, while isolated actors will hardly contribute to the success of multilateralism in any forum. Other roles which might emerge from analyses of the Union's participation in the UN could be further situated on a continuum functionally significant-dysfunctional role in the given multilateral context.

To summarize, the proposed interdisciplinary framework for the analysis of the EU's position in multilateral fora is based on three horizontal *inter*disciplinary analytical units (actor capacity, recognition and governance mode), which have been vertically linked across the respective *intra*disciplinary divides between the levels of analysis via the concepts of legal status

and role. Status and role can be seen as very much the two sides of the same coin: whereas the former is usually stable over a longer period of time, as its modification demands for a change in formal rules and proceedings, role can be understood as the 'dynamic aspect of a status' (Linton, 1936, p. 114), subject to frequent alterations. We can thus identify a de jure (*status*) and a de facto (*role*) dimension to the very question of what position the EU occupies within a multilateral forum.

The concept of position has been introduced to locate the EU, i.e. situate it vis-à-vis other actors, in the UN system by exploring its relations with them, and, as a consequence, to determine what place it fills in this system. By discussing its constitutive components in depth, the newly formed concept has been specified with regard to its empirical utility. For Gerring, this utility is highest when the concept is useful for the research purposes pursued and enhances 'the utility of neighbouring concepts' (1999, p. 382). For position, such neighbouring concepts are role and status, both of which have been subsumed under the umbrella of the new term without losing their prior utility. On the contrary, in developing the conceptual framework centred on these three concepts, all three of them have been clarified, and thus made more useful for application in the type of empirical research envisaged in this book.

4. How the analytical framework is applied in this book

Bringing parallel research tracks together, the analytical framework was designed to improve our understanding of the EU's participation in UN bodies. Given the yet fairly limited and unsystematic research on – and the lack of theoretical permeation of – the topic, which testifies above all to the diversity of EU performance across UN fora seemingly escaping generalization, it can usefully be employed as an empirical-descriptive and exploratory tool that allows for empirically rich, comprehensive assessments of the position the EU occupies in a specific UN forum. From a systematic study of a variety of cases, patterns of EU positions and its determinants will emerge and can be used in attempts at generalization.

Employing the components status and role, one can come to a basic typology of the EU's position in the UN system. In a UN body, the EU could have a high-grade legal status, with a set of rights comparable to that of sovereign states (full member, which is the highest, or full participant, which represents a medium to high degree of legal status, which is counted as high in the book) or a lower profile status (observer) or even no status at all. Furthermore, its role could be functionally significant, promoting the purpose of the multilateral forum (leader, mediator) or rather passive (follower, isolated). Combining the two, the EU's position in the UN landscape characterized by varying degrees of access to the inner circle of sovereign influential (state) actors could range from 'central' (high degree of

Table 2.2 EU's position in the UN system: ideal types

Role **Legal Status**	**Functionally significant**	**Dysfunctional**
High (full member/full participant)	Central	Sidelined insider
Low (observer, no status)	Aspiring outsider	Marginal

formal recognition, functionally important role) over 'inside, but sidelined' (high degree of formal recognition, but less significant role) to 'outside, but aspiring' (low or no status, but functionally significant role) and, finally, 'marginal' (weak status and weak role performance) (see Table 2.2).

These positions are, obviously, ideal types. Both status and role(s) have to be seen as continuums. Both are subject to modifications depending on changes in any of the elements of the concept of position. Moreover, position – though the term itself sometimes has a connotation of something static in everyday language – is not purely to be conceived of as a snapshot of EU participation in a particular UN body at a given point in time, but as a dynamic concept that takes account of changes in status and role over time.

In Parts III and IV of this book, the various components of the concept will be employed to explore and come to well-founded assertions about the EU's position in different settings of the UN system. Chapter 13 then draws the implications from these empirical insights. Generalizations will become possible through inter- and intra-domain comparisons, and the analytical framework provides for many possibilities to engage in explanation-building. Efforts at generalizing could focus on the relative importance of any of the analytical categories in the determination of the EU's position. To give but one example, the existing literature on the topic seems to suggest that the more developed the EU's actor capacity, the more central the position the Union will fill in a given arena. Generalization could also set into relation legal and political science dimensions of the analytical framework to allow for a truly interdisciplinary understanding on the link between politics and the law (and vice-versa). Legal restraints at both the EU and the international level can condition the EU's performance as a foreign policy actor. Further, various degrees of EU performance in UN bodies and agencies might impact differently on the (legal) outcome of negotiation processes.

Notes

1. In various types of non-legal research, it had become common, even before the entering into force of the Lisbon Treaty, to interchangeably refer to the external activities of the European Community and those of the Union. This however, in

a legal perspective, was a misnomer, especially in the context of membership to or status in UN institutions and the ratification of a great number of multilateral agreements, as it was legally the European Community and not the Union which accedes to UN bodies and ratifies international treaties. For reasons of legibility, the authors decided nonetheless to use 'European Union' throughout this chapter.

2. It has also been noted that some domains of EU activity at the UN have received very limited or no attention at all from academia (cf. Keukeleire and MacNaughtan, 2008, pp. 298–310).
3. Other common meanings of position such as 'point of view' are therefore explicitly dismissed.
4. For the difference between general and contextual definitions in concept formation see Gerring and Barresi (2003, p. 204).

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Part III

The EU in UN Human Rights Governance

3

Legal Framework for EU Participation in Global Human Rights Governance

*Davide Zaru and Charles-Michel Geurts**

1. Introduction and structure

On 1 April 2008, the President of the European Commission received a letter from a Belgian non-governmental organization (NGO), which called on the EU to withdraw from the UN Human Rights Council. The NGO's request was based on the argument that the agenda of the Human Rights Council had been hijacked by the South. President Barroso replied to the letter stating:

> The EU has explicitly supported the establishment of the Council and its institution-building process and values its crucial mandate, with particular reference to the development of human rights as well as to the capacity of promptly addressing the relevant thematic and country-specific situations. In light of this position and in spite of a persistently difficult negotiation environment, the EU recently confirmed that it will continue to cooperate with all interested states and other stakeholders in order to improve the authority and the effectiveness of the Council (...) Concerning your recommendation for the EU to withdraw from the Human Rights Council, you will note that the European Community has observer status at the UN as a regional international organisation, whereas only seven EU Member States are full members of the Human Rights Council; therefore, the EU's direct influence on the Council's proceedings is limited. However, the Commission is closely cooperating with EU Member States to promote common EU positions' (European Humanist Federation, 2008).[1]

This reply illustrates the complexity of the legal standing of the EU[2] at the UN, taking the UN Human Rights Council (hereinafter HRC) as a relevant case. The aim of this contribution is to unpack this complexity and to

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outline in general terms the institutional setting for the EU's participation in human rights multilateral fora.[3] A wide range of bodies fall within this description. Virtually all UN institutions and specialized agencies perform actions that are relevant for human rights promotion. The EU often contributes to this work. For instance, the EU participated in the negotiations of the Voluntary Guidelines on the Right to Food, adopted by the Food and Agriculture Organization in 2004.[4] On 16 June 2010, the head of the EU Delegation to the UN in New York took the floor in the Security Council on behalf of the EU on the issue of children affected by armed conflict and again on 26 October 2010 concerning women's rights in conflict and post-conflict situations. Another example relates to UN human rights treaty law. The EU has become party to the UN Convention on the Rights of Persons with Disabilities, in light of the fact that this convention, in its Article 44, foresees the possibility of participation by regional integration organizations.[5]

A final example of UN human rights fora is conferences promoted under UN auspices. The EU has participated as such in World Conferences promoted by the UN, such as the 2001 Durban Conference.[6] A noteworthy complementary dimension is the increasing cooperation on human rights between EU institutions and the UN secretariat, agencies and programmes.[7] This chapter however will only focus on the main UN Charter-based bodies having a specific mandate on human rights, namely the UN General Assembly Third Committee and one of its subsidiary organs, the Human Rights Council.[8]

Until the Lisbon Treaty, the European Union had no legal status at the UN, as it was the European Community that enjoyed legal personality. Besides its (in the past) general observer status at the UN General Assembly, the Community, represented by the European Commission sometimes in duet with the Council Presidency, gained over the years full membership in certain specialized agencies and the status of full participant in a number of UN conferences.[9] At the same time, with the development of the Common Foreign and Security Policy (CFSP), the EU rapidly developed as a key and cohesive political grouping of states in UN fora, enjoying considerable visibility thanks to its representation by the UN Member State that held the EU rotating Council Presidency. This has been particularly true in UN human rights fora, in light of the fact that it has been traditionally assumed that the positioning of the EU in these fora mainly fell within the remits of the CFSP.

This dual political and legal EU/EC setup has often been perceived by other members of the UN either as a source of confusion in EU action and representation, or as possibly leading to overrepresentation of European interests: too many bites at the same apple.[10] Against this background, the Lisbon Treaty introduced a revolution in the external action of the EU, which will contribute significantly to streamlining EU participation in UN

fora and making it more effective. However, at the time of writing, not all questions related to the implementation of the Lisbon Treaty concerning the EU's participation in the UN have been clarified.

Section 1 of this chapter addresses the issue of the interdependence of the EU human rights policy with UN human rights policy. Section 2 considers the EU's positioning in UN human rights fora from the perspective of EU coordination. In this respect, it is important to keep in mind two considerations: (i) EU Member States, traditionally, do not coordinate their position on electoral matters at the UN; (ii) the emergence and consolidation of an EU role in human rights fora has not eliminated EU Member States' capacity to promote, as UN Member States, national initiatives, including putting forward draft resolutions which do not necessarily reflect the political priorities of other Member States or the EU as a whole. Section 3 considers the issue of the EC – now EU – status as an observer in UN human rights fora. The chapter concludes by examining the impact of the Lisbon Treaty for EU participation in UN human rights fora.

2. Why the EU needs to participate in UN human rights fora

Human rights is at the core of the European integration project, and at the centre of the EU's foreign policy.[11] In line with its commitment to 'effective multilateralism', the EU values the UN as an indispensable level of governance and wants to contribute to the realization of the objectives of the UN Charter, which include '*promoting and encouraging respect for human rights and fundamental freedoms for all*' (Article 1.3 of the UN Charter).

2.1. UN human rights law in the international EU human rights policy: general remarks

To quote Advocate General Poiares Maduro, 'international human rights standards and European human rights standards do not pass by each other like ships in the night'.[12] The treaties now define human rights, democracy and the rule of law as core values of the European Union. The proclamation of the EU Charter of Fundamental Rights and its inclusion in the Lisbon Treaty further contributes to the EU human rights legal framework. Article 53 of the Charter makes it clear that the level of protection provided by the Charter must be at least as high as that of the European Convention on Human Rights (ECHR). Accession to the ECHR has long been on the EU's agenda. A first attempt to negotiate an accession agreement failed in 1996 when the European Court of Justice delivered an opinion (Opinion 2/94) according to which there was, at the time, no legal basis in the treaties for such accession. The court's main argument was based on the fact that no treaty provision conferred at that time on the Community any general power to enact rules on human rights or to conclude international conventions in this specific field.[13] Regardless of the reinforcement of provisions of

the EU Treaty introduced by the Amsterdam Treaty, one should note that the general Community competence in the field of human rights did not substantially change between 1996 and 2004. The Lisbon Treaty, in Article 6 (2), provides that the EU shall accede to the ECHR, while Protocol No. 8 requires such accession to preserve the specific characteristics of the Union and of its own legal order. Here it is important to draw attention to the sensitive issue of 'functional succession' ('Funktionsnachfolge', or 'funktionelle Rechtsnachfolge', in the German doctrine) (Tomuschat, 2004). In the context of multilateral agreements concluded by Member States, agreements not concluded by the EC or EU are not part of Union law and therefore 'lawfulness of a Union instrument does not depend on its conformity with an international agreement to which the Union is not a party' (Von Bogdandy and Smrkolk, 2009). The doctrine however implies that treaties concluded by all Member States prior to the establishment of the EC/EU or prior to their membership are applicable if the respective competence has later been fully conferred to the EC/EU. This construction was used to describe the standing of the EC vis-à-vis the GATT before the accession to the WTO.[14] The same approach was also used to justify the applicability, in line with Article 63 (1) (1) TEC, of the UN Convention on Refugees and its protocol (Pescatore, 1988), or to argue that the Community is the destinatary of substantive obligations under the ECHR (Tomuschat, 2006). This doctrine relies on Article 351 TEU to underline that continued responsibility of states to implement the obligations assumed before the accession to the EU.[15] Nevertheless, this interpretation can hardly be reconciled with the principle that foresees the obligation for an inter-governmental organization to seek the agreement of its Member States before entering into a set of international obligations. On 1 July 2010, the chairpersons of UN Treaty Bodies chose to hold in Brussels their first meeting extra-moenia to discuss a background paper prepared by Prof. Israel de Butler, which argued, using similar arguments, that EU institutions are already, in the areas of their competence, bound by the human rights obligations to which EU Member States are bound.[16]

2.2. UN human rights law in the EU's external human rights policy

Speaking to the European Parliament on 15 December 2010, the High Representative/Vice-President Catherine Ashton stressed the need for the EU 'to speak up for human rights on the global stage, to strengthen its action at the UN, and to resist attempts to dilute universal standards' (Ashton, 2010).[17] Indeed, human rights norms and standards developed at the UN level, together with the proceedings of the Human Rights Council, the contribution of special procedures, concluding observations of treaty bodies and recommendations stemming from the Universal Periodic Review, are essential tools for the EU to engage with third countries on human rights. These international sources bear a level of legitimacy and a sense of common

norms that the mere projection of 'European values' or 'experience' related to human rights is less and less likely to reach (European Council on Foreign Relations, 2010).[18]

Increasingly, the EU makes use of authoritative conclusions of relevant UN bodies, as well as of regional human rights mechanisms, to base its assessment about the effective implementation by partner countries, of human rights obligations and commitments. In this respect, the work of UN human rights treaty bodies seems to bear a particular importance. To quickly flag a specific example, one could refer to the mechanism of the EU's Generalised System of Preferences 'plus', also known as 'GSP+'.

In addition, in its external assistance, the EU is dedicated to support the implementation of concluding observations and views received from human rights treaty monitoring bodies and by the UN human rights system as such, including the Universal Periodic Review mechanism. In this respect, it is worth recalling the judgement of the Court of Justice of the EU of 20 May 2008 in case C-91/5. The court reminds that 'Articles 177 EC to 181 EC, which deal with cooperation with developing countries, refer not only to the sustainable economic and social development of those countries, their smooth and gradual integration into the world economy and the campaign against poverty, but also to the development and consolidation of democracy and the rule of law, *as well as to respect for human rights and fundamental freedoms, in compliance also with commitments in the context of the United Nations and other international organisations'*.[19]

Hence the EU has a strong interest in promoting and defending a strong UN human rights architecture, and in participating therein. On the other hand, as a global intergovernmental organization based on sovereign states, the UN is not constructed to allow for strong EU participation in its proceedings, let alone in its decision-making process. Chapter VIII of the UN Charter addresses 'regional arrangements' with a focus on peace and security, and considers their role as a first level of dispute settlement before reaching out to the UN and as a platform to be used to enforce UN decisions. But the UN Charter does not recognize regional arrangements as actors within the UN system.[20] The EU remains an atypical organization by UN standards. With its strong supranational features, the EU is more integrated than other regional or international organisations represented at the UN. Still, unlike the African Union and in spite of its level of integration, the EU has no specific peace and security mandate on the territory of its Member States, which would, for instance, correspond to Chapter VIII expectations. But the EU has developed an extensive external mandate through its common foreign and security policy, including a common security and defence policy, and a web of external policies, such as development, trade or the external aspects of internal EU policies (environment, agriculture, justice and home affairs, internal market), which cover areas that are also part of the core business of the UN system worldwide. This places the EU as a kind

of sui generis actor at the UN, whose clout derives, on the one hand, from its cohesiveness and the wealth of its policies and external actions, but is constrained, on the other hand, by the acceptability by UN Member States of the EU's role as a global actor in the UN context.We will further discuss this issue when addressing the question of the enhanced status of the EU at the UN. The fact remains that, beyond various levels of coordination within regional groups or caucuses at the UN, Member States formally remain the sole decision-makers through their votes in UN organs and bodies. Whilst the observer status of the EU enables it – with some limitations – to voice its positions at the UN, it is through the votes of its Member States and the capacity to build coalitions in the wider UN membership that the EU ultimately affects UN decision-making. The willingness of the EU, as expressed in the Lisbon Treaty, to strengthen the coherence of its external action, whilst streamlining its external representation to speak with one voice, therefore faces complex challenges at the UN.

3. Coordination of EU positions in UN human rights multilateral fora

Since the beginning of European Political Co-operation in 1979, EU Member States declared their commitment to seek to co-ordinate their positions in international organizations and, in addition, to complement this with the coordination that takes place in the framework of the Group of Western and Other States (WEOG) (Smith, 2006).[21] Smith underlines that, de facto, this commitment was translated into concrete actions only in the early 1980s in New York and in the 1990s in Geneva with joint statements or draft resolutions presented altogether by the EU (Smith, 2008, p. 156).[22]

The Treaty of Maastricht further stipulated that 'Member States shall co-ordinate their action in international organizations and at international conferences. They shall uphold the common positions in such forums' (ex Article 19 TEU, Article 34 TEU-Lisbon). If Union action under CFSP rules would not affect Member States' ability to act individually in the same field, Member States are to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity (ex Article 11 TEU, Article 24 TEU-Lisbon). Article 21 (3) TEU tasks the Council and the Commission to ensure consistency in the external activities of the Union as whole and to co-operate to this end.

With a view to further promoting the development of common positions of the EU on human rights, a Working Group of the Council of the EU on human rights (acronym: COHOM) was created in 1987. Its original mandate included as one of the main tasks the co-ordination of positions of the Twelve (12 EU Member States) on human rights issues likely to arise within all relevant international fora; the mandate also underlined that the working group should meet at least twice a year (once before the session of the CHR

and once before the UNGA Third Committee).[23] Nowadays, COHOM meets almost every month in Brussels and includes the heads of the human rights divisions in the ministries of foreign affairs of each Member States. The guidance provided by COHOM covers a wide set of matters, ranging from the list of country situations of concern to be included in an EU statement to the EU negotiation positions on resolutions proposed by third countries. COHOM identifies the core priorities and objectives of the EU for its participation in UN human rights fora, as well as overall outreach strategies, leaving it then to 'Geneva and New York experts' – i.e. officials based in EU missions in the two cities – to use those instructions in their daily work, taking into consideration the fluidity of UN intergovernmental negotiations processes during HRC or Third Committee sessions. A wide margin of manoeuvre is therefore left to EU coordination in Geneva and New York, upon instructions coming from EU Member States' ' capitals to their respective diplomatic missions, and with little capacity so far to rapidly refer an issue back to Brussels-based EU structures – due notably to the monthly pace of COHOM meetings in Brussels – should it prove divisive in local EU coordination during UN sessions.

The rotating EU Presidency's task was to chair this extensive EU coordination in Geneva and New York, as well as to prepare and deliver the EU positions in both official and informal UN meetings. The fact that EU representation was embodied in an UN Member State – the one holding the rotating EU Presidency – allowed the EU to engage using that Member State's procedural rights. Thus the EU was ensured, in formal sessions, to have an early speaking slot among states as representative of a major group of countries (and not later in the debate in the slots allocated to observers); a longer speaking time than for observers; a right of reply; and the right to raise points of order or to table proposals and amendments. In many cases, following an 'alignment procedure', the statements are also endorsed, and therefore pronounced on behalf of, a growing number of EU partners, such as candidate countries, countries of the European Economic Area, of the Stabilisation and Association process in the Western Balkans or from the Eastern European neighbourhood. The rotating EU Presidency also assumed the task of presiding over the informal UN meetings in which the draft resolutions proposed by the EU are negotiated, as well as to table those resolutions on behalf of the Union.[24] The EU Presidency was also entrusted with the task of representing the EU in informal meetings in which draft resolutions tabled by third countries were negotiated. In relation to this latter task, it is important to recall that, at least since 2000, a system of burden-sharing among EU Member States was put into place in order to support the EU Presidency. The system foresaw the allocation of responsibilities to individual Member States, acting on behalf of the EU, including the attendance of informal negotiations of draft resolutions or outreach activities vis-à-vis third countries.

In sum, in recent years, the positioning of the EU in UN human rights fora mainly consisted in the strategic identification of common priorities,

in particular following up or on the basis of CFSP joint actions or common positions. These common priorities could be pursued mainly through statements, resolutions promoted by the EU or common positions concerning voting behaviour. Each EU Member State was committed to confirm its political standing behind these objectives, both informally – for instance in its contacts with third countries – and formally. For instance, EU Member States can backup EU initiatives by making references to such initiatives in the interventions delivered in their national capacity. In the case of resolutions tabled by the EU, this backup is reflected in the systematic co-sponsorship of the text, by all EU Member States and related supportive vote.

Beyond this, EU Member States are of course free to act in UN human rights fora, and exercise all prerogatives of full members (in the case of the Third Committee and General Assembly) or members/observers (in the case of the CHR/HRC), on the condition of not undermining the EU's objectives. A number of substantive aspects of the participation of states in UN human rights fora are not prejudged by EU coordination. For instance, apart from resolutions that are brought forward by the EU as such, EU Member States can decide independently whether or not to co-sponsor any specific text. In Geneva, the exercise of the Universal Periodic Review remains formally within the remit of national governments with no EU coordinated positions, in order to reflect and preserve the 'peer review' character of this mechanism between UN Member States.

Finally, it is worth underlining that the applicable UN rules of procedure provide few elements of specific guidance for the participation of entities such as the EU in the work of the UN. Rule of Procedure 7 (a) of the HRC clarifies that 'the Council shall apply the rules of procedure established for Committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements and practices observed by the UN Commission on Human Rights (hereinafter CHR), while ensuring the most effective contribution of these entities' (Rules of Procedure of the General Assembly, 2007). Concerning speaking time arrangements as well as the tabling of EU-led resolutions, the secretariat had consistently treated the EU as a political group or caucus of states, comparable to the Organization of the Islamic Conference (OIC, now Organization for Islamic Cooperation) and the Group of the Non-Aligned Movement.

4. The observer status at the UN

In a 'pre-Lisbon' environment, the recognition of the legal personality of the European Community, ex Article 302 TEC, allowed it to conclude an

agreement with an international organization.[25] In the UN context, this type of agreement most often included the granting to the Community of a specific status in a UN body, such as observer or full participant. Once this status was reached, the European Commission was expected, in principle, to represent the Community in that body. If such a status could be reached only by modifying the body's constitution, a negotiation mandate under Article 300 (1) TEC was required.

Accordingly, the European Community was granted an observer status in the General Assembly and, via Article 71 of the UN Charter, in the ECOSOC as well as in its functional bodies, respectively in 1974 and 1979. The European Community therefore became the first entity other than a state to enjoy permanent observer status in the UN. This observer status enabled the European Community to enjoy certain participation rights in the proceedings of the UN. As an observer within the UN, the EU has no vote as such but is party to more than 50 UN multilateral agreements and conventions as the only non-state participant. It has obtained a special 'full participant' status in a number of important UN conferences, as well as for example in the UN Commission on Sustainable Development and the Intergovernmental Forum on Forests. In 1991, the European Community was accepted as a full member of the UN's Food and Agriculture Organisation, the first time it had been recognized as a full voting member by a UN agency.

Specifically, in the area of human rights, the Commission delivered a number of statements from its observer seat on the basis of European Community competences, without the need for co-ordination with the EU Member States. Representatives of the European Commission have participated in general debates of high-level segments of the former CHR and now of the HRC (Bonino 1998; Arnault 2008).[26] The European Commission delivered in recent years a host of interventions during interactive dialogues with UN Human Rights Special Procedures, both in the HRC and in the Third Committee. These statements and interventions complemented the ones delivered by the rotating EU Presidency. Of course, the European Commission was fully associated in the drafting of EU statements delivered by the Presidency. However, the opportunity to deliver an intervention from the European Commission seat, in addition to the EU statement and to statements pronounced in their national capacities by individual EU Member States, was felt important by the European Commission, notably in relation to those areas in which there were significant developments in terms of EU policies and legislation. For instance, questions and comments delivered by the European Commission to UN Special Procedures working on issues such as the right to food, water and sanitation, health, toxic waste and business and human rights, were often followed up in meetings with the mandate-holders in Brussels.[27] This illustrates that the participation of the EU in UN human rights fora goes beyond the pure CFSP. UN human rights deliberations and output have impacted various policies, for example in

the areas of non-discrimination, the fight against racism, justice and home affairs, trade (e.g. child labour) and development. Activities in UN human rights fora – especially standard-setting and exchange of best practices on the implementation of human rights standards – are increasingly followed by 'line' departments of the European Commission, under the authority of the Vice-President of the European Commission in charge of fundamental rights, Mrs. Viviane Reding.[28]

5. Impact of the Lisbon Treaty

The key innovations brought by the Treaty of Lisbon in the EU external action are well known and include the establishment of the mandates of the new President of the European Council and the High Representative for Foreign Affairs and Security Policy/Vice-President of the European Commission,[29] and the continued responsibilities of the European Commission in external representation of the Union outside the CFSP area.

On substance, a significant innovation relates to policy objectives. Article 21 of the Treaty of the EU, as modified by the Lisbon Treaty, further consolidates and clarifies the EU vision of multilateralism. The article provides that the Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organizations which share the principles referred to in its first subparagraph, including the consolidation and support of democracy, the rule of law, human rights and the principles of international law. The same article stipulates that the Union shall promote multilateral solutions to common problems, particularly in the framework of the UN.

Article 34 (ex Article 19) TEU is especially relevant to the UN context. It foresees that:

1. 'Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the Union's positions in such forums. The High Representative of the Union for Foreign Affairs and Security Policy shall organise this coordination'. In international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the Union's positions.
2. In accordance with Article 24(3), Member States represented in international organisations or international Conferences where not all the Member States participate shall keep the other Member States and the High Representative informed of any matter of common interest.

   Article 24(3) TEU in spells out the duty of EU Member States to support the Union's external and security policy. It stipulates 'The Member States shall support the Union's external and security policy actively and

unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations'.

The Council and the High Representative have a mandate to ensure compliance with these principles. Moreover, the HR/VP is mandated to express the Union's position in international organizations and at international conferences (Article 27 TEU). In her tasks, the HR/VP is assisted by the European External Action Service (EEAS), whose operation started on 1 January 2011. The High Representative is also Vice-President of the Commission, and thus ensures the coherence between the EU's work in UN human rights fora and other EU policies, both externally and internally. Two considerations further reinforce this point. First, the EEAS is expected to continue to closely liaise with relevant Commission services, notably with a view to promote synergies between EU internal and external policies as well as to foster coherence. Second, the consolidated mandate of COHOM, as revised in 2003, stipulates that 'the mandate of the Human Rights Working Group to include first pillar issues so as to have under purview all human rights aspects of the external relations of the EU'.[30]

At the UN, a rapid and visible sign of the entry into force of the Lisbon Treaty has been observed since 1 December 2009 with the replacement in Geneva and New York, of the nameplates 'European Community' or 'European Commission' by the plate 'European Union' in UN meeting rooms (see also Chapter 8). This tangibly reflects the succession of the European Community by the European Union in its observer status.[31] Pending the full establishment of the European External Action Service (EEAS) and the adoption of working modalities for the participation of the EU in the work of the UN, the Union has stepped into its former Community observer status with a few transitional modalities. The Delegations of the European Commission in Geneva and New York became Delegations of the European Union under the authority of the High Representative for Foreign Affairs and Security Policy/Vice-President of the European Commission, Mrs. Ashton, incorporating the existing staff of the former Commission Delegations and, in New York, the staff of the former Council Liaison Office (the same integration process is ongoing in Geneva). Since January 2010, staff of the EU Delegations have gradually began to acquire a substantive role in coordinating and delivering the message of the EU as such – i.e. of the EU 27 Member States and of EU institutions – in UN human rights fora.[32] The Spanish Mission, holding the EU Presidency in the first half of 2010, worked in close coordination with the EU delegation in both New York and Geneva. Actual EU joint teams were shaped together with the Belgian Mission,

who was holding the EU Presidency in the second half of the year. Those Member States missions acted on behalf of the High Representative and not as rotating Presidencies. During this transition, the Spanish and Belgian Missions have proved indispensable in three ways.

First, in formal UN settings, they allowed the EU to deliver statements and act in good procedural conditions – i.e. from the seat of an UN Member State – pending the granting of a number of procedural modalities that the EU has requested under its observer status.

Second, the Spanish and Belgian Missions gave invaluable input on substance in the light of their long intergovernmental expertise at the UN, as well as input of staff pending the allocation of additional staff to the EU delegations.

Third, this involvement of Member State missions proved important to ensure continuity of business and confidence building in this delicate transitional phase both with EU Member States and with the wider UN membership in Geneva and New York.

The consolidation of burdensharing arrangements with the other EU Member State missions in the follow-up of specific resolution, notably in informal negotiation sessions of the HRC and third committee, also played a positive role in those three respects.

The EU delegations in New York and Geneva will continue to be phased into their new duties during 2011, with the view to effectively carry out the coordination tasks performed by former EU Presidencies and to represent the EU in line with the Lisbon Treaty (Article 221 TFEU).[33]

An important building bloc in this process will be the adoption of modalities for EU participation in the work of the UN within the ambit of its observer status. The EU aims at allowing the High Representative or her delegates to deliver statements on behalf of the EU in the speaking slots devoted to states, rather than in the subsequent slots reserved to observers.[34]

It has been clear that the acceptability by the wider UN membership of institutional arrangements negotiated – often with difficulty – within the EU 27 cannot be taken for granted.[35] In such discussions, the EU faces concerns among UN Member States that the inter-governmental nature of the UN might be altered or that the delicate balance between regional groups might be tilted in favour of the West, in an UN that is still often polarized by a logic of blocs (see also Chapter 13 and the discussion of the EU's recent status upgrade in the UN General Assembly).

This polarization in the UN may particularly be observed in the human rights area. Think tanks, civil society and the European Parliament have called for innovative EU approaches to increase its efficiency at the UN (Andrikiene, 2008; Gowan and Branter, 2008),[36] notably through the building of cross-regional coalitions as successfully done in the case of the UNGA resolution calling for a moratorium on the death penalty (see Chapter 6). Whilst the Lisbon Treaty holds promises in terms of better coherence in the EU's external action and the streamlining of its representation, the Union needs to proceed

with caution so as to not further feed into this bloc effect through 'monolithic' attitudes. Once again, the strength of the EU at the UN derives from the votes of its Member States and its capacity to forge coalitions beyond its membership and likeminded countries. It is important for the EU to clearly voice its positions through its representatives in UN human rights fora. It is equally important that EU Member States fully play their role as UN Member States in support of and complementing EU positions, which would in turn gain in being focused rather than reflecting the full patchwork of EU Member States' interests. In this sense, the 'EU single voice' after Lisbon would gain in efficiency if it articulated as a common script or a song sheet, based on increased coordination of EU and Member States' actions, fully using the expertise and capacities of Member States to burden share and use their respective clouts and web of relations with third countries. This would mean, for the EU, a gradual change of paradigm, moving from an 'existentialist' attitude at the UN – much-needed recognition of the EU, its unique state of integration and contributions to global issues including human rights – to an attitude of an actor within the UN system with the aim to make it work better, in line with the EU's own objective of 'effective multilateralism'.

Notes

* European External Action Service, Human Rights Directorate. The views expressed in this contribution are those of the authors and do not necessarily reflect the views of EU institutions and services.

1. See the reply of 30 May 2008 to the European Humanist Federation, posted on the website of that same organisation.
2. As of 1 December 2009, with the entry into force of the Lisbon Treaty, the European Union replaced and succeeded the European Community pursuant to Article 1, Treaty on European Union, OJ C115, 9 May 2008, 16. However, in the present contribution, the appropriate references to the 'European Community' will be kept when referring to events, policies or competences related to the period before 1 December 2009. We will refer to the 'EU' when writing about events, policies or competences relating to the period that follows 1 December 2009, but also in all general remarks.
3. See also for further references, Fries and Rosas (2006), Gowan and Brantner (2008), Clapham (1999), King (1999).
4. See Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food securiy, adopted by the 127th session of the FAO Council.
5. The text of the UNCRPD, notably Article 44, clarifies that 'regional integration organization' shall mean an organization constituted by sovereign states of a given region, to which its Member States have transferred competences in respect of matters governed by the convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

6. The Rio Summit of 1992 accepted a footnote according to which the word 'Governments' is deemed to include the European Community, within its areas of competence. UNGA, Report of the UN Conference on Environment and Development, UN A/CONF/151/26/Rev. 1.
7. For example, human rights are part of the regular dialogue between the EU and UN Secretary-General. Since 2001, a sustained cooperation has been put in place between the EU and the UN High Commissioner for Human Rights, and her Office (OHCHR). This cooperation is reflected both in policy statements in support of the independence and effective work of OHCHR as well as in the funding accorded to OHCHR under the European Instrument for Democracy and Human Rights. In addition to significant contributions from individual EU Member States, the EU allocates annually €4 million to the voluntary budget of OHCHR, without earmarking for specific projects. This cooperation was further enhanced in October 2010 by the opening of a regional office of the OHCHR in Brussels. On this occasion, the High Commissioner Navi Pillay underlined the significant potential to forge stronger partnerships with regional organizations such as the EU and its relevant institutions for the implementation of international human rights standards.
8. There are other subsidiary organs of the General Assembly whose role includes the promotion and protection of human rights, and where the EU is an active player, i.e. the Commission on the Status of Women.
9. In particular, the EU has full membership in the Food and Agriculture Organization (FAO) since 1991. Outside of the UN system, the EU also holds full membership status in the World Trade Organization (WTO) since 1995. The European Commission speaks for and acts as negotiator for the EU and its Member States in areas where powers have been transferred to it (e.g. trade, fisheries, agriculture and aspects of development and environmental policy).
10. Image used by an US diplomat to describe the cumulative effect of EU, EC and EU Member States when discussing in 2006 EU/EC participation in the then newly established UN Peacebuilding Commission.
11. See notably Articles 2, 3 and 21 of the Treaty on European Union, Official Journal of the European Union, C115, 9 May 2008, 17, 28 and 29.
12. See Opinion of Advocate General Poiares Maduro delivered on 23 January 2008 on Case C415/05 P *Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, par. 22.
13. See Court of Justice of the European Communities, Opinion 2/94 on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms; and Opinion pursuant to Article 228(6) of the EC Treaty, Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, 28 March 1996, [1996] ECR I-1759.
14. See joined cases 21-24/72 before the European Court of Justice, *International Fruit Company NV v. Produktschap voor Groenten en Fruit Joined*, ECR 1219, 1972, par. 18: 'in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement [on Tariffs and Trade], the provisions of that agreement have the effect of binding the Community'.
15. In the cases *Kadi* and *Yusuf,* during the first phase, the Tribunal of First Instance recognises that 'in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the

Charter of the United Nations, the provisions of the Charter have the effect of binding the Community'.

16. See Background Paper: The Applicability of Human Rights Obligations under the UN Charter and Human Rights Treaties to the European Union. Hard copy with the authors.
17. Speech of Catherine Ashton, High Representative to the European Parliament in the plenary debate on the Annual Human Rights Report, Strasbourg, 15 December 2010.
18. See the policy brief 23 of the European Council on Foreign Relations, '*Towards an EU Human Rights Strategy for a post Western World*', September 2010, www.ecfr.eu, in which Susi Dennison and Anthony Dworkin discuss the decline of Western legitimacy and model against the background of global power shifts.
19. Cf. par. 65. See also C-403/05 *Parliament v Commission* [2007] ECR I-0000, paragraph 56.
20. The EU supported the resolutions at the Human Rights Council on 'regional arrangements for the promotion and protection of human rights' (see, for instance A/HRC/12/15) although it has not pro-actively participated in the series of seminars organized on the basis of these resolutions (see, for instance, A/HRC/11/).
21. See, for a comprehensive overview, Karen Smith (2006) at 114 and idem (2010) at 224.
22. The Twelve jointly introduced a resolution, for the first time, in the CHR in 1989; the resolution concerned the human rights situation in Iran. In 1992, the Twelve introduced a joint resolution in the Third Committee.
23. The mandate of COHOM was further extended in 1999 and 2003, notably to cover elements of human rights policy pertaining to Community external actions.
24. E.g. the resolution on the rights of the child.
25. Article 302 of the treaty establishing the European Community provides that the European Commission shall ensure the maintenance of all appropriate relations with the organs of the United Nations and of its specialized agencies. For a comment, see Frank Hoffmeister and Pieter-Jan Kuijper (2006) and Sergio Marchisio (2002).
26. See the statement delivered by Commissioner Emma Bonino during the high-level segment of the CHR on 16 March 1998, or the statement pronounced by Ms Véronique Arnault, director for human rights and multilateral affairs of the European Commission, on 12 March 2008.
27. There are consistent references to EU policy on corporate social responsibility in the reports of the UN Secretary-General Special Representative on business and human rights (e.g. his report to the 14th session of the HRC, dated 8 April 2010 and contained in UN document A/HRC/14/27, par. 13). Additionally, Regulation (EC) No. 1013/2006 on shipments of waste is made reference to in the 2009 report to the HRC of the Special Rapporteur on adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (see para 42 of UN document A/HRC/12/26 of 15 July 2009).
28. Mrs. Reding's new portfolio mirrors the increased internal commitments taken by the EU on human rights in the Lisbon Treaty, granting in particular the Charter of Fundamental Rights of the EU the same legal value as the Treaties, and providing the necessary legal base for the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms,

thus submitting the EU legal order to the same pan-European human rights scrutiny as the EU Member States' own national legal orders. Mrs. Reding had already taken part in the 2009 session of the UN Commission on the Status of Women. Another important component of the EU human rights system is the EU Agency for Fundamental Rights (FRA). The FRA cooperates and maintains working relations with many organizations within the UN system, including the Office of the High Commissioner for Human Rights, UNESCO and UNICEF, as provided for by Article 8(2)b of Regulation (EC) n° 168/2007, establishing the agency. The same regulation clarifies that the agency should act only within the scope of application of Community law. For this reason, the participation of FRA in diplomatic processes in UN human rights fora, so far, has been limited. A remarkable exception has been the inclusion of the director of the FRA in the Delegation of the European Commission to the Durban Review Conference.

29. In particular, the Lisbon Treaty implies the disappearence of the rotating EU Presidency in EU external representation. The Lisbon Treaty foresees the establishment of the mandate of an EU High Representative, with the task to conduct the Union's common foreign and security policy. He/she shall contribute by his/her proposals to the development of that policy, which he/she shall carry out as mandated by the Council.
30. In relation to EU internal human rights policy, it is worth recalling the reactivation of a Working Party of the Council of the European Union on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP), whose work has thus far focused on the EU's accession to the EU of the European Convention of Human Rights.
31. This succession was put into effect on 29 November 2009 through a simple notification letter to the UN Secretary-General Ban Ki-moon, signed by European Commission President Barroso and the President of the Council of the EU.
32. This implied, already in 2010, an increasing role of EU officials to deliver EU statements – i.e. in interactive dialogues with UN Special Procedures – representing the Union as such in informal negotiations of draft resolutions and chairing or co-chairing the internal EU coordination meetings.
33. Article 221 of the treaty on the functioning of the European Union, provides: '1. Union delegations in third countries and at international organisations shall represent the Union. 2. Union delegations shall be placed under the authority of the High Representative for Foreign Affaire and Security Policy. They shall act in close cooperation with Member States diplomatic and consular missions'.
34. The draft resolution is contained in the UN document A/64/L.67. The main operational paragraph of the resolution reads: 'Decides that the representatives of the European Union, for the purposes of participating effectively in the sessions and work of the General Assembly, including in the general debate, and its Committees and working groups, in international meetings and Conferences convened under the auspices of the Assembly, as well as in United Nations Conferences, and in order to present positions of the European Union, shall be invited to speak in a timely manner, similar to the established practice for representatives of major groups, shall be permitted to circulate documents, to make proposals and submit amendments, to raise points of order, but not to challenge decisions of the presiding officer, and to exercise the right of reply, and be afforded seating arrangements which are adequate for the exercise of the aforementioned actions; the European Union shall not have the right to vote or to put forward candidates in the General Assembly'.

35. A previous reminder had been the refusal by the UN in 2006 of the modalities of EU representation to the Peacebuilding Commission agreed by the EU Coreper in Brussels. See Stefano Tomat and Cesare Onestini (2010).
36. See notably the Andrikiene report of the European Parliament on 'the development of the Human Rights Council including the role of the EU', adopted on 10 December 2008.

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4
The EU in the UNGA Third Committee

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1. Introduction

This chapter examines the EU's participation in the Third Committee of the United Nations General Assembly (UNGA). After a brief introduction to the Committee, including its functions and the main issues debated therein, the chapter focuses on the EU's activities in the body, explaining first the mechanics of EU coordination and representation in the UNGA and then reviewing the main priorities of the EU's agenda for the Committee. The chapter concludes by assessing the position of the EU in the UNGA Third Committee and by evaluating its contribution to UN multilateralism.

Drawing on the analytical framework elaborated in Chapter 2, the analysis of the EU's position in the Third Committee contained in the present chapter will take into account both the legal dimension and political dynamics that together contribute to determining the EU's capacity to be a recognized actor in this specific multilateral context.

2. Global governance mode: The Third Committee – social, humanitarian, and cultural affairs – formal and informal dimensions

The UNGA is the universal body of the United Nations where all its 193 Member States are represented, each of them with one vote, regardless of its demographic, economic or political weight. A reflection of this fundamental principle of equality among nations is that when it comes to voting in the UNGA, San Marino counts as much as China. The UNGA is therefore the main representative and deliberative forum of the organization where all issues can be discussed, 'any questions and any matters within the scope of the [UN] Charter' (Article 10, UN Charter). On the basis of Article 22 of the UN Charter, the UNGA established six main committees.[1] These committees are tasked to examine questions presented by Member States in the form of a resolution, before being brought to the attention of the plenary. There are

J. Wouters et al. (eds.), *The European Union and Multilateral Governance*

however, at times, exceptions to this general rule, as some resolutions are directly discussed in plenary without being first filtered by one of the main committees. However, by and large, most UNGA resolutions are first examined by one of the main six committees, where they are either adopted by consensus, which is the general rule, or submitted to a vote, which remains the exception. Once adopted by one of the committees, they are adopted in plenary, and if a vote occurred in the committee, usually a vote is also called in plenary. The plenary adoption is, however, in most cases a simple confirmation of what the committee had already decided. As a matter of fact, as all UN Member States are represented also in the six main committees, their composition is identical to the one of the plenary, which explains why the decisions of the GA plenary are consistent with those taken within the committees. The six GA committees are: the first (the Disarmament and Security Committee), the second (Economic and Financial Committee), the third (Social, Humanitarian and Cultural Committee), the fourth (Special Political and Decolonization Committee), the fifth (Administrative and Budgetary Committee) and the sixth (Legal Committee).

As it may be observed, not one of the six main committees is openly and exclusively entrusted to address human rights questions. This is an indication that shortly after the UN Charter was adopted (1945), and before the proclamation of the Universal Declaration of Human Rights (1948), the political circumstances were such that UN Member States were still reserved to openly accept that human rights were to feature among the questions to be debated in the General Assembly. The Charter in its Article 2, Paragraph 7, states that 'nothing contained [in it] shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state', thus offsetting the language on human rights contained in the preamble of the Charter and scattered in cryptic references throughout its text (Steiner and Alston, 2008).[2] The early resistance of the staunch supporters of an extensive interpretation of the principle of non-interference in domestic affairs did however not withstand the push of those advocating the universality of human rights and thus the need to put them at the centre of the UN. The debate between 'universalists' and the supporters of the sanctity of national sovereignty is far from over and it has re-emerged with renewed vigour in recent years at the United Nations. However, for the purpose of this chapter, it suffices to say that the progressive development of the modern international human rights regime and the evolving political circumstances of the world have indeed entrenched the respect and promotion of human rights as one of the three pillars of the UN, together with Peace and Security and Socio-economic Development. As a consequence, the agenda of the Committee on Social, Cultural and Humanitarian Affairs of the General Assembly, the Third Committee, which is the subject of this chapter, has become dominated by civil, political, economic, social and cultural rights and no one questions it any longer (Kennedy, 2006).[3]

The Third Committee meets annually for one long session that runs from the beginning of October until the end of November, during which it adopts several resolutions. Its report is transmitted to the General Assembly in late December and all of its resolutions are then re-adopted in plenary. Subsequently, the Third Committee then suspends its activities and de facto resumes its work only one year later. This program of work makes the Third Committee unfit to address urgent human rights situations suddenly emerging in specific contexts, a role that should be instead fully assumed by the UN Human Rights Council (see Chapter 5). The agenda of the committee during the intense eight/nine weeks of its work contains also non-human rights issues like social development and the fight against organized crime and the trafficking of narcotic drugs. These issues are usually discussed during the first week. Gender issues and the promotion of the rights of the child dominate the second week of the committee. The agenda then proposes thematic human rights questions, followed by specific country situations, to conclude with the agenda items on the self-determination and the fight against racism and xenophobia. One interesting feature of committee is that all Member States delegates are, or quickly become, human rights experts. They therefore think and act first and foremost with the human rights priorities of their respective country in mind. This contributes to reinforcing the character of the committee, as human rights perspectives remain often predominant and are certainly always present even when the committees debate resolutions addressing social matters or the fight against organized crimes. Although the Third Committee deals also with humanitarian issues, and the UN High Commissioner for Refugees regularly reports to it, the humanitarian experts of Member States are generally marginal to the work of the committee as they focus on a very limited number of resolutions discussed therein.

Even if delegates of many Member States' delegates generally share the same approach, strikingly, the Third Committee counts among the committees where UN membership is the most divided. The frequency to which resolutions are put to a vote demonstrates this very dynamic. As an example illustrating this state of affairs, in 2010, during the 65th session of the UNGA, 16 out of 55 resolutions were voted upon in the Third Committee. Other committees of the UNGA operate on a much more consensual basis. For example, in the Sixth Committee (legal affairs), consensus is a strict rule, and in the Second (economic and financial issues) and, particularly, Fifth Committee (budgetary affairs) voting on resolutions is a rare exception and the search for consensus dominates the proceedings. Yet, the Third Committee is by no means the only committee that faces division in the UNGA. The First (disarmament) and Fourth Committees (political and decolonization issues) also vote as frequently, if not more often. During the 65th session of the UNGA, the First Committee adopted with a vote of 20 resolutions out of 55 and the Fourth Committee 16 out of 24.

It can be deduced that for human rights issues, as for disarmament and political issues, the margins of the gap between UN Member State's positions are sometimes too wide to be bridged. Under these circumstances, a Member State presenting a resolution, even when facing stiff opposition from several other countries, sometimes prefers to take its text to a vote to demonstrate that its views enjoy the support of a majority of countries. The recourse to a vote is thus sometimes preferable to a consensual decision. In fact, the search for consensus during the lengthy negotiations which resolutions are subjected to can water down a text to the point of distorting its original objective. Albeit UNGA resolutions not having a legally binding force, their adoption, even through a vote, can have a powerful political impact. Moreover, UNGA resolutions are binding policy documents for the work of UN agencies and the UN Secretariat. These considerations motivate Member States to face the uncertainty of a vote. The peculiarity of the Third Committee, compared to the First or the Fourth Committees, is that the results of votes are often difficult to predict as the margins between yes and no can be razor thin.[4] This implies that the outcome of a vote can sometimes be highly uncertain and the sponsors of an initiative, which can generate controversy in the UNGA, need on the one hand, to take a political risk, and on the other hand, to mobilize their resources in lobbying efforts to maximize the chance of success. As a matter of fact, often both supporters and adversaries of an initiative launch opposing lobbying campaigns, which usually weigh substantially on the final result. This makes the Third Committee one of the main battlegrounds of the UNGA.

The high degree of conflict in the Third Committee should come as no surprise as human rights, despite their universal character, have traditionally stirred controversy and the UNGA is no exception. The Third Committee, much like its sister forum, the Human Rights Council, is called to debate, from a human rights perspective, most of the controversial issues that define the headlines of international affairs and on which seldom there is a unified view within the international community. Specific human rights country situations, international migration, the death penalty, trafficking in human beings, freedom of religion or belief, terrorism, women's rights, racism, the rights of Lesbian, Gay, Bisexual and Transgender persons (LGBT), freedom of expression, the right to development and the right to food are just a few of the questions that have featured in the Third Committee's agenda in its recent sessions. The Third Committee is a net collecting some of the most contentious issues that are at the heart of the international debate and Member States are asked to seek a common understanding on those issues using existing international human rights standards and previously agreed language as the parameters for a possible compromise. It is sometimes impossible to reach such a common understanding and it is certainly always difficult.

3. EU actor capacity: the mechanics of EU action in the Third Committee

3.1. Treaty and policy objectives

The EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respects for human rights (Article 6TEU). The promotion of human rights and the principles of international law are also among the main objectives of the EU's external action (Article 21(2)(b) TEU). On the basis of these key treaty objectives, the EU over the years has developed a substantial human rights policy, and in this context, it has identified a number of thematic priorities that are under constant review by the competent European Council Working Group, in close dialogue with the European Parliament and civil society. The EU human rights guidelines offer an excellent example of areas that the EU has specifically prioritized.[5] The abolition of the death penalty, the fight against torture and violence against women are examples of areas on which the EU has focused its attention, through political and financial means.

The action in the UNGA Third Committee is part and parcel of this overall EU human rights policy, as the committee is a major forum to set international human rights standards and a key venue for the promotion of EU priorities.

3.2. The double identity of the EU in the UNGA

The EU is a key actor in the Third Committee, but some light should first be shed on what is exactly meant by referring to the European Union, as an international actor, in this context. The EU is simultaneously a sui generis regional organization, which has reached an extremely sophisticated level of integration encompassing the transfer of sovereignty to common institutions in certain areas, and a club of 27 countries who are all full members of the United Nations. This distinction is internally often blurred, but it remains pertinent in the UNGA context vis-à-vis the rest of the UN membership. As a regional organization, the EU is a key partner to the UN in a large number of fields, from socio-economic development to peace and security and also in the area of human rights. Not only does the EU partner with the UN to develop policy frameworks and implement concrete programs promoting the enjoyment and respect of human rights, but with the ratification of the UN Convention on the Rights of Persons with Disabilities,[6] the Union has also acquired in its own right clear competences and obligations in the UN context for the implementation of a major human rights convention.

However, in the UNGA, which is one of the intergovernmental bodies par excellence, the EU – and before the entry into force of the Lisbon Treaty the European Community[7] – as a regional organization was, for a long time, a simple observer among many others,[8] with no voting rights and limited speaking rights.

Nevertheless, the EU, as a group of 27 UN Member States, had and has a full role to play in the UNGA and in its Third Committee. In this context, the Union presents pre-coordinated positions through its spokesperson, previously the rotating Presidency, and acts in a similarly coordinated fashion to promote values and a set of pre-agreed priorities. Internally, of course, the manners in which the EU agrees to these positions and priorities are defined by a set of rules enshrined in the EU Treaty, which makes the distinction drawn above, to an extent, artificial. What is relevant here is that whenever the EU exercises its role as a driving force in the Third Committee, it does so in representation of its 27 Member States, which are full members of the United Nations and can confirm the positions expressed by the EU with their votes if so required by the circumstances. In this context, the other UN members recognize the EU as a cohesive political club of UN Member States, rather than a regional organization and, in that respect, the EU is similar to other major groups in the UNGA, like the Non-Aligned Movement (NAM), the Group of the 77 (G-77), the African group and others. Certainly, the EU is characterized by a much higher degree of cohesiveness than these groups. It presents joint positions on basically all issues and its Member States vote cohesively on almost all instances. Additionally, its sophisticated internal decision making process is based on codified rules and procedures. Nevertheless, the EU in the Third Committee is perceived first and foremost as the political expression of the collective will of its 27 Member States.

The difference between the EU as a sui generis regional organization and as a cohesive group of 27 UN Member States came to the forefront with the entry into force of the Lisbon Treaty on 1 December 2009. Before Lisbon, the rotating Presidency was ensuring the coordination and representation of the EU in the UNGA. As the Member States' holding the EU Presidency were also full members of the UNGA, the process was rather simple, as the Presidency could then exercise its full membership rights, including being on the speakers list with other full members to the UN. Thus, this enabled the EU, in a sense, to be on equal footing with other sovereign states.

3.3. EU internal coordination and external representation post-Lisbon

The Lisbon Treaty introduced some fundamental changes on how the EU organizes its internal coordination and external representation, without changing the nature of its decision-making process. These changes also affect the manner in which the EU operates in the Third Committee. The Lisbon Treaty created new structures to increase the effectiveness and coherence of EU external action, which replace the role previously played by the rotating Presidency. These structures are the High Representative of the Union for Foreign Affairs and Security Policy, who is also the Vice-President of the European Commission and the European External Action Service (EEAS), which assists the High Representative and is composed of EU delegations accredited to third countries and international organizations,

including the UN. The treaty also innovated the working methods of the EU in terms of coordination and representation. It should be stated from the outset that the implementation of the Lisbon Treaty at the United Nations is a complex matter, mainly because, to fully reflect the new EU internal legal order within the United Nations, the UN themselves have to recognize the changes that have occurred within the EU.[9]

The Lisbon Treaty stipulates that EU Member States shall coordinate their action in international organizations and that the High Representative shall organize such coordination in matters pertaining to the Common Foreign and Security Policy (Article 34(1)TEU). This implies that in the context of the Third Committee, the EU seeks to coordinate its position on all issues, including EU statements, draft resolutions presented by third countries and EU positions on its own initiatives. The coordination of the EU positions in the Third Committee take place upstream in Brussels, in the Council Working Group responsible for the Human Rights Policy of the EU (COHOM) (see Chapter 3). Since 1 January 2011, COHOM, which in the past was chaired by a representative of the rotating Presidency, has a permanent chair, who is a staff member of the EEAS. Usually during the summer period, COHOM agrees on the priorities that the EU will pursue in the autumn session of the Third Committee and provides general guidance to EU experts in New York throughout the eight-week session of the committee. However, as COHOM members are based in capitals and the group meets only on a monthly basis, many of the decisions pertaining to the concrete implementation of the agreed priorities are left to EU experts in New York. Given the fast moving negotiating scenarios in New York and the need for the EU to adjust its positions accordingly, the EU human rights experts often enjoy a rather wide margin for manoeuvre and, proportionally, of responsibility. To achieve common positions on all Third Committee subjects, the EU human rights experts representing the 27 EU Member States and the EU delegation meet daily in EU coordination meetings in the premises of the EU delegation (Paasivirta and Porter, 2006).[10] As mentioned above, internal coordination was previously organized and chaired by the rotating Presidency, which took over the leadership role for a semester. Another innovation of the Lisbon Treaty is that the EU delegation, which is part of the EEAS, has progressively taken up this role and now chairs EU coordination meetings, so that the internal coordination arrangements in New York mirror the ones established in Brussels. Traditionally, rotating Presidencies in New York were reinforced during their semester and in particular during the busy autumn session of the UNGA to meet their increased responsibilities of coordination and the representation of the EU. As the EU delegation has not yet reached adequate staffing levels to meet similar responsibilities and currently is assisted by diplomats of EU Member States that are integrated in EU teams. Apart from this organizational aspect, the provisions of the Lisbon Treaty pertaining to internal coordination are already fully implemented in the

context of the Third Committee. In the future, the EU delegations should be adequately staffed to fully assume their new tasks, while continuing to rely on EU Member States to burdenshare part of the workload (see infra).

The Lisbon Treaty further stipulates that the High Representative shall represent the Union (for matters relating to the common foreign and security policy) and express the Union's positions in international organizations (Article 27(1) TEU). According to this article of the treaty, the EU delegation at the UN should represent the EU in Third Committee proceedings, but the rules set by the Lisbon Treaty on the external representation of the EU at the UN have not yet been fully implemented as they do require UN agreement. A distinction has to be drawn between formal and informal settings. In all the situations that are not subject to the strict rules of procedure of the UNGA, the EU delegation can already take up its responsibility to represent the EU. As matter of fact, the EU delegation already negotiated, on behalf of the EU, several Third Committee resolutions during the 65th session of the Third Committee in informal negotiations and intervened in more than thirty interactive dialogues with special procedures, as in these dialogues observers can intervene alongside Member States. However, when the Third Committee operates under the UNGA rules, which stipulates that observers can intervene only after members of the UN, the EU delegation cannot deliver the EU position in a timely manner, i.e. at the beginning of any debate to help set the tone of a discussion. As a matter of fact, it is an established UN practice that representatives of the major UN groups, such as the G-77, the Non-Aligned Movement, the EU and others are given the floor at the beginning of a debate in order to set the main parameters of the ensuing discussion. However, the EU is here considered by the UN rules as a regional organization and not as the representative of a 'club' of 27 UN Member States. As previously mentioned, the problem did not exist in the pre-Lisbon era as the rotating Presidency was simultaneously representing the organization, a club of 27 countries and it was itself a UN Member State. The EU is currently seeking change in spokespersonship, from the former rotating Presidency to the competent EU institutions and services[11] to be able to continue to participate effectively in the work of the UN, including in the Third Committee. For the purpose of the question under examination, it is sufficient to say that pending a solution to the problem, the EU adopted transitional arrangements whereby EU positions in all format settings of the UNGA, including the Third Committee, continue to be presented by the country which holds the rotating Presidency for internal EU affairs.

3.4. EU decision-making

The workload in the Third Committee is particularly heavy for the EU also because of the importance it attaches to the promotion and protection of human rights, which is reflected by the number of its initiatives and interventions in the committee. During the 65th session of the UNGA, the EU

presented, alone or in partnership with other countries, initiatives on the rights of the child, the moratorium on the use of the death penalty, freedom of religion, Democratic People's Republic of Korea and Burma/Myanmar. Given the amount of issues requiring coordination during the approximately eight-week session of the Third Committee, EU experts are divided into two parallel clusters, the first one focusing on civil and political rights and the second one on economic social and cultural rights. During the 65th session of the Third Committee, there were more than 70 coordination meetings among EU human rights experts. To facilitate the sharing of information and to accelerate the decision-making process, the EU has developed a web-based information system that gives access to documents through a password protected internet site.

The rules governing the EU decision-making for human rights are those of the Common and Foreign Security Policy, which means that unanimity is required to reach an EU common position. This basic rule explains why the EU allocates substantial amount of time to internal coordination, to the detriment of external outreach with non-EU partners. This tendency to an excess of introspection has been criticized by several external observers (Gowan and Brantner, 2008), and it is often a source of genuine frustration among EU human rights experts, who are sometimes forced to spend long hours to forge an agreement and, in rare circumstances, to conclude that a disagreement persists. It should be noted that the EU has been using this time devoted to internal coordination productively as it has been able to reach a high degree of unanimity on human rights issues in the Third Committee (Peral, 2003). During the last session of the Third Committee, EU Member States split on only two resolutions and the division was among those that objected to the texts and the abstentions – the G-77 resolution on the follow-up to the Durban Conference and the Cuban resolution on the Right to Development – and in both instances it was still possible to agree upon a common statement explaining why the EU, as a whole, was not in a position to support these two texts. In the last years, the EU has often failed to reach a common position mainly on questions related to the Middle East Peace Process, which reflects the internal political debate within the EU on this question. The other areas where disagreement has often surfaced are those linked to Sexual and Reproductive Health and Rights, as the diverging views among EU Member States on the sensitive issue of abortion have been often unbridgeable. Whenever EU human rights experts are unable to reach a consensus, and a decision is urgently needed as the EU has to deliver a statement or present a negotiating position, it is always possible to raise the level of the negotiations and bring it to the attention of the EU heads of mission, who sometimes have been able to break the deadlock and reach a common position. Without a common position, the EU negotiator can no longer speak and EU Member States must express their national positions, in an often confusing cacophony, which is surely detrimental to the credibility

of the EU. The lengthy internal deliberations might therefore be a necessary evil to reach a unified position, while respecting the different political sensitivities that characterize national positions of the 27 EU Member States. There is, however, great added value in EU coordination as it offers the possibility to all EU Member States, large and small, to be informed and influence the negotiation of all resolutions discussed in Third Committee, and by extension in the whole of the UNGA. Without the EU coordination system, individual EU Member States could not follow and comment on all resolutions; in addition, once the position presented by one EU Member State is accepted by all, it becomes the EU position, and thus carries much more weight in negotiations. In that respect, the EU coordination mechanism is a multiplier of influence for each and every EU Member State.

With the innovations brought forth by the Lisbon Treaty, and with the introduction of permanent EU coordinating structures both in Brussels and in New York, it is hoped that the EU will increase the efficiency of its coordinating procedures as it will be able to count on staff that will accumulate experience over the years and it will no longer be subject to the switching priorities of the rotating presidencies. Externally, the EU delegation will also offer a more stable counterpart to all partners, both among UN Member States and UN bodies. These innovations should in principle contribute to increasing the effectiveness of the working methods and, over the years, may also reduce the time devoted to internal coordination and eventually allow for more resources to be put towards outreaching and communicating to external partners.

Despite the implementation challenges described above, the Lisbon Treaty has already shifted the centre of EU operations from EU Member States, and specifically from the former Presidency, to common institutions and services, which for the human rights policy in New York means the EEAS Department for Human Rights and Democracy, the permanent chair of COHOM and the Human Rights Team in the EU Delegation. This shift is important, as it is meant to increase the efficiency of EU action and the coherency of its policies. However, EU Member States will continue to play a key role, both in general and from the perspective of the promotion and protection of human rights in the UNGA Third Committee. Firstly, decisions on EU positions in the Third Committee continue to be governed by the CFSP unanimity rule, and therefore the EU delegation can only facilitate a common position but certainly never impose it. Secondly, EU Member States are those that eventually vote in the UNGA and therefore continue to express their national positions visibly. Thirdly, EU Member States continue to contribute, with their network of contacts in the UN membership, to the promotion of EU views across the board. Fourthly, given the large number of resolutions to be negotiated in a short period of time, the EU continues to make extensive use of the system of 'burden-sharing', whereby a Member State delegate is tasked to represent the whole

of the EU in informal negotiations on the basis of pre-coordinated positions. Finally, EU Member States remain free to develop their own national initiatives in the Third Committee and they often do so. As a matter of fact, during the 65th session of the Third Committee, there were nine national initiatives run by EU Member States.[12] The ownership of the overall EU action in the Third Committee by its Member States remains essential to ensure a successful outcome.

4. The EU in the Third Committee: activities and recognition as an actor

Having provided elements on the nature of the Third Committee and on the mechanics of EU decision-making, coordination and representation in this context, the question remains on what is the position of the EU in this forum and how is it perceived by other members of the UN system. The EU has been an increasingly active actor in the Third Committee since the creation of the Common Foreign and Security Policy, as the UNGA Third Committee lies at the intersection of two main EU priorities, i.e. the support for a rule-based international system founded on multilateralism and the promotion of human rights.

4.1. EU instruments and the promotion of human rights in the Third Committee

It is important to underline at the outset that EU action in the Third Committee is not developing in a vacuum, but is part of a larger strategy to promote EU human rights policy and priorities. The promotion of human rights, the rule of law and fundamental freedoms is at the centre of the European project (Article 2; 21(2)(b) TEU)[13] and the EU has consequently developed a comprehensive human rights policy. In the area of external relations, participation in multilateral fora, such as the UNGA Third Committee, is one of the many tools that the EU has used to promote its priorities. Other tools are political and human rights dialogues with partner countries, diplomatic demarches, public statements, trade incentives, financial support to concrete projects and technical assistance.[14] As an example, the EU objective to abolish the death penalty worldwide has been pursued through all these instruments: the EU regularly raises the death penalty in its political dialogues with countries that still retain it; when certain criteria are met, it conducts ad hoc demarches on specific cases; it has financed NGO campaigning for the abolition; finally, in partnership with other countries, it has promoted a resolution in the Third Committee calling for a moratorium on the use of the death penalty (see Chapter 6). In general, this comprehensive approach has allowed the EU to build solid relationships with several countries on the basis of a long-term dialogue encompassing both bilateral and multilateral issues.

4.2. EU participation in the debates and negotiations of the Third Committee

As it may be observed from the previous section, the EU is one of the main players in the Third Committee, since it greatly contributes to its agenda setting and is one of the most vocal participants in its debates and negotiations. To illustrate this point, it is worth mentioning that during the 65th session of the Third Committee, in the fall of 2010, the EU delivered eight general statements on the main agenda items and 20 statements in relation to the introduction and adoption of resolutions (four statements in the introduction of resolutions, eight explanations of vote, six explanations of positions[15] and two general statements) and made 34 interventions during the informal interactive dialogues with human rights special procedures and UN high officials. These dry figures are a measure of the level of EU's active participation in the Third Committee. The EU was also present with a single negotiator in all informal discussions on all Third Committee resolutions.[16] Some of these negotiators are staff members of the EU delegation, while others are delegates of EU Member States that burdenshare a specific resolution on behalf of the EU. They all negotiate on the basis of a mandate agreed in EU coordination and after each round the EU negotiator comes back to the whole group to receive a new set of instructions. This practice is well understood by all UN Member States and there is a general expectation to hear one EU voice around the negotiating table. The capacity of the EU to count on all EU Member States to share the burden of the multiple negotiations between EU delegation staff and EU Member States delegates, while retaining a well-structured and centralized system of coordination, is a great advantage over most other members of the UN that have to face a vast number of negotiations alone or with the assistance of more loosely coordinated groups. In practice, smaller non-EU Member States usually focus on a limited number of resolutions that are considered national priorities, and rely on groups' leaders for the remainder of the resolutions, de facto delegating their decision to others. Even larger delegations do not usually have the capacity to cope with the entire Third Committee agenda and are obliged to make strategic choices to allocate their resources. The EU as a whole, on the contrary, manages to intervene on all issues and maintains to keep a good overview of all discussions through its centralized system of coordination.

4.3. EU representation in the Third Committee and perception by non-EU Member States

One recurrent question is whether the EU should continue to speak with one voice in negotiations, or whether several EU Member States should be encouraged to take the floor alongside the designated EU negotiator. The argument put forward is that the EU negotiator, representing the 27 Member States, can sometimes appear in a minority position if attacked

by a few national delegations. The argument has merits and there is no golden rule that can be applied. It is certainly true that the impact that the EU can have in a negotiation depends also on the credibility and perceived strength of its main negotiator. It is therefore essential that all EU delegates remain fully committed to support the EU's agreed line if they intervene in informal multilateral discussions alongside the main EU negotiator, as well as, equally important, when they discuss bilaterally in the margins of negotiations with third countries.

The EU is generally perceived by other Member States as a unitary actor in the Third Committee. The perception among Third Committee delegates is often that EU Member States convene in the premises of the EU delegation, shutting the rest of the world out to agree on a line to take. It is furthermore believed that when, after difficult negotiations, a common position is agreed, that position cannot be changed regardless of how persuasive the arguments of other parties can be. This characterization of the EU as an inflexible negotiator in the Third Committee is, however, not fully accurate, as many times the EU has come back on its previously agreed positions to meet demands of other groups. It does however reveal two basic facts of the dynamic of the Third Committee; the first is that the EU is indeed considered as a very cohesive group that has created effective rules to reach common positions; the second is that these rules often offer limited flexibility to EU negotiators and reduce their margins of manoeuvre, thus impairing the EU's ability to swiftly navigate in complicated human rights negotiations. The constant quest for a method of work that can deliver a flexible negotiating mandate has characterized the work of many former EU Presidencies and a solution has yet to be found.

The EU has a longstanding policy of supporting civil society organizations, including in the promotion of human rights. The role of NGOs is certainly less extensive in the Third Committee than at the Human Rights Council, as they have very limited rights and their access to the intergovernmental negotiations is often restricted. The EU and its Member States have an open door policy for NGOs and sometimes they can be a vehicle to express NGO positions in the negotiations. Generally, the NGOs, while often familiar with the internal differences, tend to perceive the EU as unitary actor and a main ally in the Third Committee and sometimes even offer language suggestions in the course of negotiations.

4.4. The EU as a unitary actor and its implications on bloc politics

The fact that the EU is perceived as a unitary actor in the UNGA opens the question on whether the EU is a 'bloc'. Usually, in the context of the UNGA political dynamics, the bloc mentality is considered as a negative phenomenon, as it tends to push UN Member States to take a position simply out of solidarity with the political group they belong to, sometimes regardless of their national views. It is argued that this creates a straightjacket that

prevents a constructive and real dialogue between UN Member States and crystallizes the debate always along the same lines, entrenching the division among the blocs. Some have suggested that the EU, by behaving systematically as a cohesive group in the UNGA, reinforces the bloc mentality and contributes to these negative dynamics; instead EU Member States should give the example and act more independently, and in so doing, encourage other UN Member States to be more independent from the bloc they belong to. This characterization simply reflects the EU reality in the context of the UNGA and ignores the fact that the EU exists first and foremost beyond the UN system and as a political project grounded in a set of legal rules and common values. EU Member States have no hesitation to object and argue among themselves whenever they consider that EU proposed positions are not fully reflecting this set of values or do not conform to national interests and views. It could therefore be argued that the EU is more than a bloc in its negative characterization, but is rather a cohesive group anchored to a set of common values, which has developed a sophisticated set of rules to reach consensus on a variety of issues.

Fragmenting the EU to give more margin of manoeuvre to its Member States therefore might not be the ideal solution to overcome the problems posed by the blocs dynamic and other options should be explored to pursue this important objective.

4.5. The EU's approach to key human rights issues

As mentioned above, EU action in the Third Committee is an element of the broader EU human rights policy. EU positions in the Third Committee therefore reflect the priorities of this policy. There are some horizontal elements that characterize EU positions in the Third Committee, which include the defence of the universality of human rights, the protection of the independence of human rights bodies, like the special procedures and the Office of the High Commissioner of Human Rights, gender equality, the promotion of the participation of civil society and the possibility of raising country-specific human rights concerns. The EU has also used the Third Committee to put specific issues, like the freedom of religion and belief or the abolition of the death penalty, on the international human rights agenda.

The EU has demonstrated a certain degree of flexibility in the approach chosen to promote its priorities, a flexibility that is perhaps surprising given the principle of unanimity that rules its decision-making procedures. In certain instances, the EU opted to promote its human rights objectives through dialogue and outreach across regional alliances. This approach was taken especially in the context of new initiatives that need to be nurtured in a more long-term perspective. In other instances, the EU opted to press its case alone, or with the support of a few like-minded countries, e.g. for resolutions on human rights situation in individual countries.

4.6. EU external coalition building in the Third Committee

The EU, as a leading voice in the Third Committee, can count on a few solid allies that have established links of partnership with Brussels, which are reflected in a close cooperation in New York as well. The first ring of allies consists of the so-called 15 alignment countries. The name derives from the fact that these countries are regularly invited, by virtue of the special relationship they have established with the organization,[17] to align themselves to statements pronounced by the European Union. In addition to those countries, there are several small European States (like Monaco, San Marino and Andorra) that usually follow the voting pattern of the EU. Finally, there are the so-called like-minded countries, which include Switzerland, CANZ (Canada, Australia and New Zealand) and the United States and a few others which have often positions – although not always – in line with those expressed by the EU. Taken together, these countries represent about 50 votes, which is a considerable force, but not enough to promote any innovative initiatives in the 193-member UNGA. Therefore the EU needs to go beyond its closest circle of friends and look for allies in UN geographical groups other than the Western Europe and Other states Group (WEOG) and the Eastern Europe states Group (EEG) where most EU Member States come from,[18] and build cross-regional coalitions. The search for allies on other continents is much in line with the idea of the EU as a bridge-builder, which promotes compromise solutions and bridges the gaps between extreme positions, with a view to promoting an effective multilateralism that can deliver concrete results. The argument is often heard in the Third Committee that Western countries are seeking to impose their own views and values on the rest of the membership. In this context, the cross-regional approach has the additional advantage of sidestepping this objection and, at the same time, dismantling the negative bloc dynamics described above. To develop this cross-regional approach, the EU can mobilize its multiple resources and its vast network of relations, which stretches far beyond the UNGA. The EU can count on its various human rights instruments: human rights dialogues with over 40 partners, even more numerous political dialogues, and its network of 136 EU delegation as well as the fundamental contribution of the 27 Member States, to develop contacts, agree on common objectives and strategies with partner countries across the world. It is therefore in a wider context that the EU can work on the establishment of cross-regional coalitions around specific issues to be promoted in the Third Committee. To be effective as a cross-regional coalition, it needs firstly to be built around partner countries that are genuinely committed to a given cause for their own domestic reasons. Secondly, the ownership of the initiative needs to be truly collective, which implies that the participants sometimes have to accept that the position expressed by the group as a whole does not fully reflect all aspects of their national positions. One of the most successful

examples of cross-regional coalition building by the European Union in the Third Committee was its partnership with the Latin American and Caribbean States Group (GRULAC) for the omnibus resolution on the rights of the child. For several years, GRULAC and the EU have jointly drafted this text, alternating every year the responsibility to produce the first draft, which is then subject to intense negotiations between the two groups. The process is not without problems. As mentioned before, none of the parties can hope or expect to see the entirety of its initial position reflected in the final text and this is even more so when negotiating with such a politically heterogeneous group as GRULAC. As a consequence, the discussions between the two groups are often difficult and the negotiations are often cumbersome. The second problem is that once the text is agreed upon between the EU and GRULAC, it is then tabled in the Third Committee and presented in open negotiations to the rest of the UN members, who often have their own amending proposals. However, the EU and GRULAC have limited flexibility to agree upon modifications as they have to go back to their own groups and agree among themselves on any change. This three-layered negotiating process (within the EU, within GRULAC, between the EU and GRULAC and in open consultations) is extremely complex and the omnibus resolution on the rights of the child is often negotiated for the whole duration of the Third Committee and sometimes adopted on the very last day, as was the case in the 65th session. However, this resolution remains a flagship of the cooperation between GRULAC and the EU. It is noteworthy that the resolution was adopted without a vote in the last two sessions after the United States decided to join consensus.

A second example of successful coalition building is the initiative on the death penalty, which has taught the EU important lessons. Firstly, it took a systematic stand in several international fora, and across a long period of time, in favour of the abolition of the death penalty, thus becoming a credible champion of the cause. Secondly, in New York, to promote the adoption of a resolution against the death penalty, the EU developed a genuine cross-regional alliance identifying countries that were truly committed to the cause on the basis of their own domestic considerations. Finally, the EU accepted to move the focus of the resolution from abolition to moratorium to permit to a much larger number of countries to adhere to the initiative. In the last four years, the GA has adopted, with a vote, three resolutions on the moratorium on the use of the death penalty with increasingly large margins. The EU's participation in the adoption of this landmark resolution will be examined in depth in Chapter 6.

One of the lessons that can be learned from this experience is that a step-by-step approach is sometimes necessary to create a committed cross-regional coalition to push the EU's human rights agenda forward. The Union cannot always, from the outset, see all of the elements of its position fully reflected

in the cross-regional coalition position. Adopting a progressive approach might therefore be necessary at times.

The EU does not however always rely on cross-regional coalition to promote initiatives, as in some cases it is simply not possible, for example for resolutions on country-specific human rights situations. The EU considers that even after the creation of the Human Rights Council and the Universal Periodic Review[19] (UPR), the UNGA – as the universal UN body – must retain the right to address serious situations of human rights violations. This view is questioned by part of the UN membership that considers that the UPR, which non-selectively examines the human rights situation of all UN members, is sufficient to address the human right record of all countries. Under these circumstances, it is difficult to find countries from all regions ready to spend political capital in taking the lead in promoting country resolutions and the EU has to act alone and/or with the support of a few like-minded countries only. The EU in the recent sessions presented resolutions on Burma/Myanmar and on the Democratic People's Republic of Korea (the latter together with Japan), which have always been adopted with a vote.[20] These kinds of resolutions are not discussed in open informal meetings, but only with a group of co-sponsors and, bilaterally, with several delegations, including some opposing them. The success of these initiatives depends on the balance of the text itself as well as on an effort to convince undecided countries through a lobbying campaign.

5. Conclusion

A recent study of the European Council on Foreign Relations argued that the EU was undergoing a slow motion crisis at the UN and was a declining human rights power (Gowan and Brantner, 2008). The conclusions were based on the analysis of the voting patterns in the Third Committee that were showing an erosion of EU influence. It is certainly true that the world has changed in the last two decades and the increased assertiveness of several emerging powers has also been reflected in the human rights dynamics of the UNGA. However, it would be wrong to present the EU in a defensive position. It is imperative to look at the political importance of each vote, and supplement the quantitative analysis with a qualitative one. For example, the resolutions promoted by a cross-regional initiative on the moratorium on the use of the death penalty, which introduced a new item on the international human rights agenda, have a high political relevance and cannot be put on the same level with other resolutions that the EU opposed and that have a much lesser impact on the international human rights debate. In that respect, what really matters is the capacity, which the EU has proven to have, to set the agenda. In addition, it must be remembered that it takes time to make gains in advancing the development of international human rights and sometimes it is necessary to stick

to a position of principle and accept successive defeats in order to lay the foundations for a real change. As an example, the EU has unsuccessfully opposed for over a decade the Organization of Islamic Conference (OIC) resolution on the defamation of religions, arguing that the concept risked limiting other fundamental rights and that, on the basis of international human rights law, only human beings and not abstract concepts, as religions, are right holders. The EU's clear and firm position has contributed to a progressive and steady erosion of the support to the OIC initiative and the OIC has now started looking at alternative ways to address the problem of religious hatred, which are more congruous with the EU's position and international human rights law.

The EU, because of its very nature, has over time consistently promoted a stable set of priorities, which are not dependent upon changes in administration as a result of elections. Consistency in policy positions is pivotal to building the credibility of a proposal and in that respect the EU has been a reliable partner. It has maintained the capacity to shape the human rights agenda in New York and present new and innovative initiatives, and thus being often on the offensive in human rights debates. Likewise, the capacity to win votes on important resolutions, such as country resolutions, demonstrates that on important questions the EU is a very effective UNGA actor. The innovations introduced by the Lisbon Treaty should increase the consistency and coherence of EU action and, hence, its effectiveness.

Finally, the EU has been providing an important contribution to the functioning of multilateralism. The interaction between two multilateral bodies like the EU and the UNGA is extremely complex, and the limitations imposed on the EU by its observer status at the UN are highlighting this complexity. However, the energy that the EU devotes to feed the Third Committee debates, its initiatives, and its efforts to act as a bridge and coalition builder, do contribute to reinforcing the multilateral system. Concrete results have emerged from these efforts and hence also reinforced the relevance and legitimacy of the body. At the UN, the EU also offers to other regional groups and countries a very visible and successful model of multilateral cooperation.

Together with the functionally significant role it plays in the examined body, the EU's legal status at the UN as an observer places it in the category of aspiring outsider, although its double identity, described earlier in this chapter, as both a sui generis regional organization and a club of UN Member States, as well as its leading role in the UNGA, make the EU more of a de facto central player. The successful adoption of UNGA resolution 'Participation of the EU in the work of the United Nations' on 3 May 2011, granting the Union with more rights and ensuring that it, in its post-Lisbon configuration can effectively act in the UNGA, was simply to give legal recognition to this political reality (see Chapter 1).

Notes

* European External Action Service, EU delegation to the United Nations in New York. The views expressed in this contribution are those of the author and do not necessarily reflect the views of EU institutions and services.

1. Cf. Rules of Procedure of the UNGA, A/520/Rev. 16, Rule 98.
2. Article 1(3) states that the purpose of the charter is also to 'achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Article 13 (1) (b) states that the GA shall initiate studies and make recommendations for the purpose of 'promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. See also Steiner and Alston (2008, p. 134–135).
3. For a historical perspective of the development of human rights in the UN system, see Kennedy (2006).
4. A motion of no-action presented by Iran against a draft resolution on the human rights situation in Iran was defeated by a single vote in the 62nd session of the Third Committee.
5. For a list of the EU human rights guidelines see: http://eeas.europa.eu/human_rights/guidelines/index_en.htm
6. The instrument of formal confirmation of EU accession to the convention was deposited at the UN Treaty Office on 23 December 2010 after the EU and its Member States had concluded the negotiation of a Code of Conduct to govern their respective participation in the convention. The convention entered into force for the EU on 22 January 2011.
7. With the Lisbon Treaty, the European Union acquired legal personality and it replaced and succeeded the European Community in all UN bodies through an exchange of letters with the UN Secretary-General.
8. The EU's status at the UNGA changed in May 2011, after this contribution was written, which is why the latter covers only the situation prior to the enactment of this new status.
9. This recognition had not taken place yet when this contribution was first written. The implementation of the Lisbon Treaty at the UN was still in a transition phase and the EU was seeking the adoption of a UNGA resolution, which would allow it to effectively participate in the UNGA's work in its post-Lisbon configuration, while preserving its observer status at the UN. The UNGA resolution on the 'Participation of the EU in the work of the United Nations', A/RES/65/276, was eventually adopted on 3 May 2011. Its implementation started immediately thereafter.
10. On EU coordination at the UNGA, see Paasivirta and Porter (2006).
11. From a legal point of view, the European External Action Service is not an institution.
12. It is worth mentioning that EU Member States' national initiatives are the only resolutions for which they do not formally coordinate.
13. The EU is founded on the values of respect of human rights and the promotion of human rights is also one of the main objectives of the EU's external action, see Articles 2 and 21 (2)(b) of the Treaty on the European Union.

14. For a more comprehensive overview of the EU human rights priorities and tools see: http://eeas.europa.eu/_human_rights/index_en.htm
15. An explanation of vote can be presented when a vote is requested on a resolution, and it serves to explain the position that a Member State is about to take; an explanation of position can be presented when a resolution is adopted by consensus. Both can be delivered before or after action is taken on the resolution.
16. The only exception are the initiatives of EU members for which, as mentioned above, there are no strict EU pre-coordinated position and each EU member is free to present its national position.
17. The alignment countries are: Turkey, Croatia, the former Yugoslav Republic of Macedonia, Iceland and Montenegro, that are candidate countries to EU membership, Albania, Bosnia and Herzegovina and Serbia, which are countries of the Stabilisation and Association Process and potential candidates, and Liechtenstein and Norway, which are members of the European Economic Area, as well as Ukraine, the Republic of Moldova, Armenia, Azerbaijan and Georgia.
18. EU Member States are actually scattered across three regional groups since Cyprus belongs to the Asian States group.
19. The Universal Period Review is one of the main innovations introduced with the creation of the Human Rights Council. On the basis of the principles of non-selectivity and non-politicization, all UN members accept to have their human rights record periodically examined by the other UN Member States on the basis of a report they have to present and an interactive dialogue with fellow states in Geneva. The first UPR cycle, during which all 193 UN Member States have to present and defend their human rights situation, is about to be completed.
20. The country resolutions have often been adopted only after a motion to adjourn the debate had been defeated. These procedural attempts to avoid a discussion on a specific question are serious threats to the country resolutions as Member States might be tempted to support them, arguing that they are not taking a position on the substance of the matter, but simply on a procedural issue.

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5
The European Union in the Human Rights Council

Sudeshna Basu

The European Union (EU) has for years placed human rights at the centre of its internal and external policies. It has proclaimed that the EU itself is 'based upon and defined by its attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law' (EU Annual Human Rights Report, 2007, p. 9) and that as a global player it has a 'global responsibility to protect and promote human rights' (EU Annual Human Rights Report, 2007, p. 9). The Union continues to be strongly committed to promoting and upholding human rights internally and beyond its borders and has demonstrated this through its utilization of instruments such as the European Instrument for Democracy and Human Rights (EIDHR).[1] It moreover continues to be dedicated to promoting not only human rights cooperation, but also better ways to address and respond to dire human rights situations around the world (EU Guidelines on Human Rights Dialogues, December 2001, Article 4).

Scholars are often quick to criticize the lack of a formalized EU human rights policy, especially in view of the EU being a *staunch* defender of human rights both inside and outside the EU (Weiler and Alston, 1999; Clapham, 1999). Arguably the complex nature of human rights, making it an area which is not easily compartmentalized, generates a myriad of obstacles, giving rise to difficulties for the EU to develop a coherent approach to addressing human rights issues, markedly at the global level. With the absence of a directorate general and commissioner responsible solely for human rights in addition to the controversy over the EU's legal competences in the field, many jump to the conclusion that no policy or pattern can be deciphered (Williams, 2003). Because of this, they argue that the EU does not fill the *leadership void* in promoting human rights on the international stage (Roth, 2007). Much of the literature dealing with EU in human rights fora take for granted its legal order and the advancements brought forward in the area of human rights through the adoption of the Lisbon Treaty. Additionally, many analyses omit the impact of the external environment in which the Union operates in. Against this backdrop, this chapter examines

J. Wouters et al. (eds.), *The European Union and Multilateral Governance*

the participation of the EU in a human rights body that may be observed as the principal human rights stage in the whole of the global human rights governance arena, namely the Human Rights Council. Through applying the interdisciplinary framework (see Chapter 2), the Union's achievements and drawbacks in the body as well as the reasons behind it will be uncovered. Deducing from the observations, the EU's position in the Human Rights Council will be determined.

1. Background: the need for a new UN Human Rights Body and the EU's support for the Human Rights Council

Prior to analysing the position of the EU in the Human Rights Council, it is first important to gain an understanding of why there was a need for a new UN human rights body. It was not until March 2005 when Kofi Annan issued his report 'In Larger Freedom: Towards Development, Security and Human Rights for All' that the formal and explicit declaration and initiative were made with regards to rectifying the challenges of the UN human rights system, more specifically the UN Commission on Human Rights, in respects to its 'credibility deficit' (UN, 2005, para 182) and its work being undermined by *politicization* and *selectivity*. Correspondingly, Annan called for the establishment of a new Human Rights Council. On 16 September 2005 the UN Summit of Heads of State endorsed the creation of such a body and on 15 March 2006 the Human Rights Council was established through the adoption of UNGA Resolution 60/251. The main new features of the body may be summed up as follows (Muller, 2007):

(i) Status: the Council has a higher institutional status and (unlike the former Commission) does not report to the Economic and Social Council (ECOSOC) but has links with the UN General Assembly as its subsidiary organ.

(ii) Meetings: the body meets 10 weeks per year with three or four sessions held throughout the year, unlike the Commission which only held one six-week session. Further, special sessions may be convened much easily as only one-third of the Council's member's endorsement is needed and not half like in the former Commission.

(iii) Composition: The geographic distribution has been slightly adjusted providing more seats for African, Asian and Eastern European countries compared to that of Western European and Others (WEOG) and Group of Latin America and Caribbean Countries (GRULAC) states. The number of members has also decreased from 53 to 47 and furthermore a system of individual and direct election is now in place, by secret ballot, including allowing candidates to make voluntary pledges and commitments. In efforts to improve the quality of membership, a majority vote is needed in the UNGA for a state to be elected to the

Council. When electing, members must take into account the 'candidates' contribution to the promotion and protection of human rights and their voluntary pledges and commitments made thereto' (UNGA Resolution 60/251, 2006, para 8); and

(iv) The Universal Periodic Review Mechanism: a new mechanism that will examine the fulfilment of human rights commitments and obligations of all countries independent of the existing treaty body reporting system. The rules of procedure of the new body follow suit of the rules of procedure of the UN General Assembly (UNGA Resolution A/520/Rev.17), and accordingly remains unchanged. The only changes in the decision-making procedures of the body, as mentioned above, is in its election procedures and in convening special sessions.

Following arduous negotiations on the President's Text (Institution Building Package) (A/HRC/5/L.2, 2007), members finally came to an agreement and adopted the text, pursuant to its founding resolution, a year after the Council's inception. Subsequent to the adoption of the modalities of the new body – including those on the new universal periodic review (UPR) system and a Code of Conduct for Special Procedures Mandate Holders – the Human Rights Council was seen to be in an even a better position to serve its function vis-à-vis rectifying the failures of its predecessor and to demonstrate that it is a sound and competent body to address all human rights concerns.

From the beginning, the EU had been a strong supporter and advocate of setting up a new Human Rights Council. The EU was determined to take an active role in both the institution building process and the actual functions of the body itself in order to ensure that it would be a strong and effective Council, one that would have the capacity to address and resolve grave human rights violations.[2] The EU in the course of the first two years of the Council's existence, through its Presidency, made numerous statements in formal and informal consultations, negotiations and the plenary in efforts to demonstrate its support and will to make certain that the Human Rights Council 'remains the key forum in the worldwide promotion and protection of human rights' (EU Annual Human Rights Report, 2007, p. 35). The day after the Council's founding resolution was adopted, the EU Presidency proclaimed that 'The EU will make every effort to ensure that the Human Rights Council will be able to fulfill its mandate responsibly and effectively. The European Union will work closely with all UN Member States in the implementation of the resolution in order to make sure that the Council will be able to start its work in such a way as to turn our expectations into reality'.[3] Since its declaration, the EU has vigorously tried to contribute to all the discussions both by making oral statements and by introducing resolutions so as to corroborate that its contribution is a fundamental component of the Union's external action. However, the degree to which these *contributions* have actually contributed to its position in the Human Rights Council

are yet another matter, and as such, through applying the interdisciplinary framework parallels must be drawn between the output and deliverables of the Human Rights Council to examine if and how the EU played a part in them. According to Smith, the EU's success in this regard is dependent upon not only 'internal effectiveness' (the extent to which the Member States and EU institutions can agree on 'output' to present to the rest of the UN, in the form of statements, resolutions, proposals and so forth) but also in its 'external effectiveness' (its influence on other states and actors within the UN system) (Smith, 2008; Laatikainen and Smith, 2006). It is indeed imperative to account for both dimensions when observing the Council's deliverables vis-à-vis the position and/or role the EU took therein. However, it should not stop there. Other elements, as observed in the interdisciplinary framework, bear equal weight and the EU's role in each area of the Council's work will be examined accordingly, so as to make a holistic assessment of the EU's position therein.

2. EU actor capacity: stable but with deficits

2.1. Treaty and policy objectives

The notion of human rights has for years occupied a central position in the EU's legal order. While direct reference to human rights as such was not originally made in the Community treaties,[4] the European Court of Justice (ECJ) through its case law 'developed the notion of fundamental human rights as a general principle in EC law' (Duquette, 2001, p. 365).[5] The entry into force of the Maastricht Treaty, as already explored in Chapter 3, reinforced this commitment by making express reference to human rights in its Articles 6(1)(2). Moreover, the entry into force of the Lisbon Treaty in 2009 brought forward significant advancements in the Union's internal legal order by obliging the EU to accede to the European Convention on Human Rights and by incorporating the Charter of Fundamental Rights into the treaty, thereby providing it with a legally binding force (Article 6 TEU). Whilst these explicit commitments to human rights do not alter the powers or competences of the Union itself, the treaty nevertheless places a greater emphasis on human rights internally and demonstrates to the wider world the EU's legal commitment to support human rights and the principles of international law. The Union's efforts to mainstream human rights in its policies additionally demonstrate this commitment (Council of the EU, 2006). Arguably, this altogether for the EU gives rise to 'challenges to ensure consistency between external and internal policies' (Sunga, 2010).

2.2. Representation, coordination and decision-making

Like in most international bodies, the EU holds observer status in the Human Rights Council. Thus, it does not have the right to vote or table resolutions,

and it can only speak after all full members of the Council have made their interventions. Membership to the Council, as observed above, is limited to 47 countries, and of those only seven to eight are from EU Member States (including the Member State holding the EU Presidency). Correspondingly, EU statements in plenary are presented by the EU Presidency, with EU Member State interventions aligning themselves with it. Although this practice largely continues to be maintained in the Human Rights Council, more recent practice shows that the EU is at times being represented by the Permanent Delegation of the EU in Geneva on certain agenda items such as UN Special Procedures. With this membership and representation composition paralleled with the Union's observer status, it is essential for the EU to coordinate regularly to ensure that the Union's objectives and initiatives can be put forward successfully.

Prior, during and following all regular Human Rights Council sessions and Council Special Sessions, EU Member States engage in coordination meetings so as to ensure that whenever possible a common position can be presented in not only the plenary but also in the processes of negotiating Council resolutions (Article 34 TEU, ex Article 19 TEU). This, as many would argue, is a key component and indicator for the EU's effectiveness in international fora (Smith, 2006a, Smith, 2008; Wouters, Hoffmeister and Ruys, 2006), and as a result, also a key component for the EU's success in achieving its human right objectives. Bearing in mind the coordination and preparation activities that take place in Brussels in the Council's Working Party on Human Rights (COHOM), coordination meetings convened by ambassadors and diplomats that take place in the Palais des Nations or Council Liaison Office – also known as the 'blue box'– in Geneva are in essence the 'heart' of the EU's coordination mechanism for Human Rights Council sessions.[6] The number of coordination meetings depends on the types of session and therefore can vary from one every two days to three or four meetings per day. Under the guidance of the Presidency, discussions in such meetings can range from deliberations on specificities of certain resolutions to more procedural matters. It is important to stress, however, that coordination meetings are not only limited to the format of formal meetings, it is not uncommon to see EU Member States gathered behind the Presidency placard discussing issues as they arise in plenary. Furthermore, electronic correspondence seemingly serves as the primary coordination tool for Member States in drafting EU statements, exchanging views and making concrete comments on resolutions and explanation of votes, etc. Moreover, a noteworthy coordination mechanism which commonly fails to be addressed in the literature is the 'EU burden-sharing' mechanism. The burden-sharing mechanism enables the 'composite' EU to follow all initiatives of each session by way of having one Member State responsible for each initiative. The Member State following the initiative then reports back in the coordination meetings to determine the EU's state of play. However,

determining whether there should be EU co-sponsorship or an EU position continues to be an arduous and cumbersome exercise leading many meetings to conclude with a question mark on consensus and with certain Member States co-sponsoring certain resolutions and not others. In spite of uncertainties which may arise in the coordination meetings, since the inception of the Human Rights Council there has only been one split vote, on the Israeli military incursions in the Occupied Palestinian Territory (OPT).

3. Global governance mode: situating the EU in the Human Rights Council

Since the Council's inception, the EU has tried to vigorously contribute to all areas of the Council's work. The underlying factors contributing to its achievements and drawbacks observably have more to do with the external environment it operates in over its internal dimension. There is a deeply rooted bloc mentality in the workings of the Council, and with the strong presence of the Organization of the Islamic Conference (OIC) and the African Group, EU Member States at times fall short on the ability to move forward with initiatives at ease. The primary reasons of the EU's achievements and drawbacks in the workings of the Council will be examined by observing the Union's participation in the plenary of the Human Rights Council, the review process of Special Procedures, Special Sessions and the UPR.

3.1. The EU in the plenary of the Human Rights Council

Against the background of the EU having a solid coordination mechanism(s) in place and strong voting cohesion in the Human Rights Council, to what extent does it make substantial contributions to achieve its human rights objectives and, moreover, how does this translate to the EU's position in the Council? Reverting back to the EU's voting scheme, while it has been strong in voting cohesion, it has on numerous occasions failed to effectively lobby on certain resolutions and has equally taken a moderate stance just to reach consensus, leading many to criticize its passive approach to addressing human rights issues in the Council (Human Rights Watch, 2008). This was the case in the failure to renew the Expert Mandate for the Democratic Republic of Congo, to which the EU in its intervention declared 'that it was joining the consensus but was disappointed to see the mandate of the Independent Expert go (...)' (ISHR, 2008a, p.8), and furthermore did not even call for a vote. The EU felt that it had contributed great efforts to renew the mandate, leading State Secretary Janez Lenarcic in his address to the European Parliament on 20 February 2008 to state: 'The European Union made a huge effort to renew the mandate of an independent expert for the Democratic Republic of Congo, but unfortunately was not successful'. Others, however, conversely argued that EU Member States agreed to abandon it for a weak compromise that provides for a discussion on the human rights

situation in Congo at the Council only in March 2009 (Gowan and Brantner, 2009). Other examples of where the EU would have liked the Council to vote against, but was unsuccessful in influencing other members of the Council include the resolution on the promotion of democratic and equitable order and the resolution on the Right to Peace.[7] It should be noted here that the EU however has been avid in making numerous interventions and statements in plenary and in consultations. Since the Council's inception, the EU has made approximately 420 statements and interventions in interactive debates and dialogues, thus becoming a visible actor in the Council.[8] In addition, as already mentioned above, every time an EU Member State speaks, either as a member of the Human Rights Council or as an observer, it always aligns itself with the statement made by the state holding the EU Presidency, thus giving more 'oral' weight to the EU's position in the debate. This has contributed positively to the EU's de facto recognition by third countries.

In observing EU output, in the first 12 regular sessions the EU, through its Presidency, has introduced 26 resolutions, all of which have been adopted. In respect to introducing resolutions, some are quick to criticize the EU in that 'it speaks more often than any other single grouping – and on a much wider range of issues – but is less active in sponsoring resolutions than the OIC and African Group' (Smith, 2008, p.15). However, only Presidency resolutions are taken into account in this context, the total number of resolutions sponsored by the 'composite' EU is wholly disregarded. Taking the 8th Human Rights Council session as an example, while there was only one EU Presidency sponsored resolution on Burma/Myanmar, there were eight EU Member State initiatives, presenting a total of nine resolutions sponsored by the EU and EU Member States out of the 13 resolutions introduced in the session. Whilst accounting for Member State initiatives adds a layer of complexity to the analyses,[9] it is nevertheless important to address them, as such initiatives, on many instances, supplement much of the EU's efforts to promote human rights in the Human Rights Council, and accordingly is recognized to the least by other Council members if not beyond. In respect to EU-sponsored thematic and country-specific resolutions, the EU's 'tip-toe' approach to introducing resolutions only when it knows it will receive consensus, and thus avoiding addressing more difficult and dire human rights issues, continues to be in stark contrast to its human rights objectives.

3.2. The EU in the review process of special procedures

The review process of the Special Procedures (Gutter, 2007; Hannum, 2007) is also an important component to observe when examining the EU's position in the Human Rights Council. Many would argue that the Special Procedures are the crown jewels of the UN human rights system (Annan, 2008) and are an imperative tool in promoting international human rights

law, due to mandate holders having the competences to address country-specific and thematic human rights issues in all parts of the world.[10] The renewal of the mandates is therefore viewed as a very important agenda item in Council sessions.

The EU in the process has demonstrated mixed results. As previously discussed, it was unsuccessful to gain the support needed to renew the very important Expert Mandate on the Democractic Republic of Congo. In addition, the EU also could 'not prevent the termination of the country mandates on Belarus and Cuba, as well as the creation of a permanent agenda item focussing exclusively on the situation in the Occupied Palestinian Territories (which, in the EU's view, should have been subsumed under the agenda item on Human Rights Situations)' (EU Annual Human Rights Report, 2007, p. 61). It did nevertheless, in the reviews of the other thematic and country-specific mandates, manage to gain the support needed to endorse their continuation. In the case of Sudan, for example, the Council in September 2008 decided to extend the mandate of the UN expert on Sudan for only a period of six months, as opposed to a conventional one-year term. Against this background, the EU in the Council's eleventh regular session in 2009 submitted amendments to the proposed resolution on Sudan, sponsored by the African Group, to 'maintain independent scrutiny over the country for a period of one year' (A/HRC/11/10, 2009, Article 19). The original resolution called only for the government's cooperation with the Office of the High Commissioner for Human Rights (OHCHR) and praised the Government of National Unity's progress and measures taken to address human rights concerns (A/HRC/11/10, 2009, Articles 2 and 6). The EU challenged many parts of the resolution and succeeded in securing its most important proposed amendment, by one vote, which called for an *independent expert* to maintain scrutiny over Sudan. The choice of utilizing the term independent expert rather than *Special Rapporteur* was believed by diplomats in Geneva to be the very compromise needed to win votes from those countries that are generally opposed to criticizing their peers. Although the functions of both are almost the same, the role of an independent expert is viewed by many as a demotion to that of a Special Rapporteur (UN Watch, 2009). In sum, despite a few debates over the continuation of the mandate holders, the mandates themselves generally gained broad support by the Council members.

3.3. The EU and special session initiatives

The Human Rights Council since its establishment until January 2011 has held fourteen special sessions, four of which have been at the initiative of the EU.[11] In December 2006, the EU, joined by the African Group and 35 other Council members 'introduced an innovative new approach in dealing with human rights violations' (Frick, 2007, p.173) through the special session initiative on Darfur. The combination of forces between different

Special Rapporteurs and Special Representatives in addition to the trustful cross-regional dialogue, coordination and bilateral talks between the African Group and EU diplomats, incited many to view the special session on Darfur as exemplary (Frick, 2007). Furthermore, the collaborative efforts made with the Special Procedures mechanisms proved to demonstrate the value of their contribution to the council and thus led to the conclusion that similar efforts should be replicated in the future.

The fifth special session on the present human rights situation in Burma/Myanmar in October 2007 was also at the initiative of the EU. The EU received cross-regional support in its initiative and, following only one full day of deliberations, consensus was reached and resolution S-5/1 was adopted. While the resolution, in addition to its many other recommendations, 'urged the government of Myanmar to cooperate with the Special Rapporteur' (Resolution S-5/1, 2007, OP9), it was noted in the Council's 8th session that Special Rapporteur Mr Tomas Ojea Quintana still awaited an invitation from the government of Burma/Myanmar and thus no progress had been made or achieved since October 2007 in this regard. In the 8th session, the EU accordingly was quick to introduce another resolution on the human rights situation in Burma/Myanmar and in spite of opposition by many Non-Aligned Movement (NAM) countries, who perpetually expressed that it is not a timely resolution, the EU managed to keep the resolution on the table and reached consensus, without a vote.

The 8th special session in November 2008 on the Democratic Republic of Congo was an initiative taken by France on behalf of the EU. It was applauded by a number of human rights NGOs especially in view of the fact that the special mandate on the Democratic Republic of Congo had been terminated. The initial resolution proposed by the EU was, however, rejected by the majority of Council members, leading the EU to draft a compromise text with the African Group, and thus having to soften its original position. While the text successfully included a provision to send seven independent experts to the Democratic Republic of Congo,[12] it excluded the EU's proposal to send the experts on torture and extrajudicial executions. Furthermore, the EU's wish to include a provision requesting the government of Democratic Republic of Congo to cooperate with the International Criminal Court was also quickly rejected by the African Group. The resolution of the special session was adopted without a vote.

The last special session initiative taken by the EU was the 11th special session that took place in May 2009 on the human rights situation in Sri Lanka. The feat to hold it was an achievement in itself as both the African Group and OIC were strongly opposed to dedicating a special session to Sri Lanka at that time. As a result, the session did not provide a favourable external environment for the EU to manoeuvre in. The Czech Republic on behalf of the EU, together with Switzerland, Chile, Argentina, Mauritius and Mexico, had tried to introduce a resolution with stronger language

than that of the one tabled by Sri Lanka itself, however could not manage to receive majority support. The EU's attempt to propose amendments to the resolution also failed, as Cuba motioned for a 'closure of debate'.[13] This was supported by the majority of the members of the Council, since third country members wanted to prevent any form of debate over the EU's introduced amendments. Moreover, the resolution, which was adopted with 29 states in favour, largely commended the government of Sri Lanka for its policies and its alleged commitment to the promotion and protection of all human rights (S-11/1, 2009), rather than addressing the critical situation at hand, making the special session deemed as a failure by much of the international community.

In conclusion, the four special session initiatives taken by the EU demonstrate its will to enhance its position in the Human Rights Council and moreover promote its objectives through bringing much needed attention to diverse dire human rights situations. Interestingly, the EU managed to outreach effectively to other blocs in certain instances, such as the session on Darfur, yet failed to do so in other cases like that of the session on Sri Lanka. Nevertheless, it may be observed that the external environment, more specifically the influence of other blocs like the Organization of the Islamic Conference (OIC) and African Group, played a key role in both the EU's achievements and failures.

3.4. The EU and the universal periodic review process

The last noteworthy area to observe when examining the EU's participation in the Human Rights Council is the Union's position vis-à-vis the UPR process. The new mechanism is the key facet of the Human Rights Council and is what makes it distinct from that of its predecessor (Gaer, 2007). The UPR mechanism was pioneered to overcome the criticisms over naming and shaming and on occasion its silence in selected cases of gross human rights violations, all of which was causing a 'shadow to be casted on the reputation of the United Nations system as a whole' (A/59/2005/Add.3. para 182). The EU has and continues to be a strong supporter of the new mechanism. It has proclaimed that it can lead by example with respect to both being *reviewed* and *reviewing* others. Moreover, the Union has declared its dedication to 'strive for maximum transparency and efficiency of the process (...) because the manner in which the review is conducted will have significant repercussions on the overall credibility of the Human Rights Council' (statement by State Secretary Lenarcic on behalf of the EU Council, 2008). One hundred and sixty countries, of which 20 are members of the EU, have been reviewed in the first 10 sessions of the UPR and all outcome reports have been adopted by the Council. Against the backdrop of the Union's declarations to want to lead by example in the review process, surprisingly, an EU Member State was the first, and thus far the only, state under review not to be present in the UPR working group meeting during the adoption of its own report. Cyprus

contested that the report contained non-UN terminology with regard to sovereignty, territorial integrity and that the language used runs contrary to the agreed UPR basis, as defined by the Human Rights Council in paragraph 1 of the annex to its resolution 5/1 on institution building of the Council.[14] On 17 March 2010, in the presence of the Cypriot delegation, its outcome report was nevertheless adopted in the Council's 13th session.

Interestingly, the EU agreed that it would not issue any common statements on individual country reviews. Reasons for this may vary from recognizing the onerous debates it will entail on the basis of having to deal with individual differences on each state under review to that of wishing to keep the integrity of the UPR as an individual state review process and thus yielding to individual state interventions. However, when taking a closer look into plenary sessions and its consideration of the UPR reports one may observe the 'continuing decline of the number of states taking the floor to comment' (ISHR, 2008b, p. 1), including those of EU Member States both as members and observers of the Council. Furthermore, EU Member States do not coordinate very much at all for the UPR processes, unlike other areas of the Council where Member States regularly coordinate all actions. In the UPR of China for example, each EU Member State prioritized different areas: the UK placed an emphasis on Tibet, for instance, while France stressed the use of the death penalty in China. Although EU Member States have thus far shown very little coherence in the UPR process, the EU does nonetheless at times issue a common statement under agenda Item 6 debates.[15]

The UPR process as a whole has proven to demonstrate its added value to the overarching human rights system. Pursuant to recommendations made in the UPR, many countries have followed up on them in a coherent and concrete manner. For example, after having undergone the review process, Tunisia has adopted a national law providing for the withdrawal of reservations to the Convention on the Rights of the Child. Bahrain, e.g. adopted all UPR recommendations and is already in the process of establishing a national human rights institution, as observed in its report. While the process is still at its nascent stage, it has proven to be 'off to a good start' (Amnesty International, 2008). There is however naturally, like all new mechanisms, room for improvement, notably in regards to double standards, the interactive dialogues not corresponding to the UPR outcome documents, states lining up with their allies and echoing complements – thus pronouncing politicization – and the lack of more active dialogue between all stakeholders.[16] These shortcomings have the potential to be rectified in forthcoming reviews and therefore the UPR, in view of this and the positive steps already taken by many countries pursuant to the recommendations made in the reports, may be considered as a strong tool to promote human rights compliance. The EU's role therein could nevertheless be improved at both the EU and composite EU levels.

4. Summary of findings and conclusion

As it may be observed in the overview of the EU's participation in the different facets of the Human Rights Council, the EU has, on the one hand, been a strong and visible actor in some areas of the Human Rights Council like through its special session initiatives and its numerous statements and interventions in interactive debates and dialogues. On the other hand, it has fallen short on other areas of the Council's work like the renewal of important mandates such as the one on the Democratic Republic of Congo. Its consensus-based approach to addressing human rights issues, consequently conceding to initiatives because of its unsuccessful lobbying efforts to gain the support needed also raises an area of concern. A partial explanation for this may rest in the EU's numerical inferiority of having only eight EU Member States as Council members from 2006 to 2007, seven EU Member States as Council members from 2007 to 2009 and eight EU Member States as Council members from 2009 to 2010. However, another and more fundamental reason may rest in the external environment the Union faces and its inability to know how to approach the evolving bloc mentality that is deeply rooted into the day-to-day activities of Human Rights Council sessions. The United States' recent engagement and membership to the Human Rights Council was therefore welcomed in this regard, namely because of the assumption that its transatlantic partnership would come into full effect in the Council. In the past, this has not always been the case, markedly in the area of freedom of expression where the United States attempted to bridge the North–South divide on its own with the help of Egypt rather than collaborating with the EU during the resolution negotiations.

As mentioned above, the main challenge the EU faces is the regional bloc mentality that is embedded in the practices of the Council. With the strong presence of the OIC and the African Group, WEOG states at times fall short on the ability to move forward with initiatives at ease. This unfavourable external environment for the EU gives rise to questions surrounding how it can better manage its external coalition building strategies and how it can utilize its existing bilateral and inter-regional legal frameworks to better translate it on a multilateral level in the Council.

Deducing from the challenges faced by the EU, it may be discerned that the EU does not utilize its foreign policy instruments very effectively vis-à-vis its aspirations to take a leadership role in the Human Rights Council. The Union has a wide range of financial, legal and diplomatic human rights instruments at its disposal that, observably, it does not use to better translate its objectives and relationships with third countries. Only recently has the Union begun to integrate reinforcing cooperation in the Human Rights Council in its bilateral summit meetings, as it did with India in early 2009. The EU needs to go beyond only using diplomatic instruments and should better employ its financial (e.g. EIDHR) and legal (e.g. Cotonou Agreement)

instruments to further its relationships in terms of concrete cooperation in the Human Rights Council. The lack of effective outreach continues to be a leading cause of why EU initiatives are not always successful.This negatively impacts the EU's position in the Human Rights Council.

The application of the interdisciplinary framework yielded interesting insights into the Union's achievements and drawbacks in the Human Rights Council and, moreover, allowed for a general assessment of the EU's position therein. It may be concluded that the EU places on the cusp of *amarginal* and an *aspiring outsider* position in the Council. I would argue that in certain areas of the Council's work, like in its special session initiatives, the Union holds an aspiring outsider position. However, in other areas, like in the UPR process where it does not even issue any statements, the EU holds a marginal position. Thus, overall, the EU has one foot in the marginal quadrant and the other foot in the aspiring outsider quadrant of matrix presented in Chapter 2.

Although the intricate nature of the EU's institutional and legal framework points to a wide range of compounded issues when attempting to examine the EU in international human rights fora, surprisingly, the legal and institutional aspects are not the main obstacles to the EU in achieving a stronger position in this specific human rights body. Albeit not possessing full membership status in the Council and with only very few of its Member States as full members per Council term, through its Presidencies – and more recently through the EU Delegation – the EU has demonstrated that it possesses the actor capacity to translate its human rights objectives on this human rights stage. The Presidency as a full member and the delegation as an observer (when given the floor) represent the Union as such and therefore its initiatives, expressed messages and visibility in the Council to third states are seen accordingly. Thus, inevitably, the EU's (role and) position in this body stand(s) out against its legal status. This finding gives rise to a very important question: why does the EU's position stand in such contrast to its actor capacity?

Arguably, the EU's marginal position is a result of three main factors: (1) the external environment; (2) the need to develop means and ways to forge better relationships with third countries in the Human Rights Council; and (3) the lack of utilizing its foreign policy instruments. These three factors in essence have a domino effect. The regional bloc mentality that is ingrained in the Council's activities is a demanding characteristic, and necessitates the EU to develop ways to build stronger relationships with other regional blocs. This then points to the utilization of the instruments at the EU's disposal, as it is these very instruments that carry the potential to bridge the EU's much needed inter-regional coalition building exercise.

Notwithstanding the EU's special session initiative on Darfur, it has not been overly successful in coalition building and receiving the endorsement needed for its initiatives from other regional blocs. This has also led the EU to take a more consensus-based approach in the Council. How does this

consensus-based approach translate the EU's choice of multilateralism and its commitment to 'build alliances with its partners so as to create the 'critical mass' necessary for the success of important multilateral initiatives'(COM / 2003/0526) vis-à-vis its human rights aspirations? Moreover, what consequences does this have for UN multilateralism as a whole?

In most, if not all, UN bodies one can always witness a strong North–South divide, notably in discussions on sensitive issue areas like human rights where universalism vs. cultural relativism is a never-ending debate. With the EU being seen as a representative of 'Western' human rights norms, its efforts in the Human Rights Council are at times overshadowed by this very point of departure. With this, the bloc mentality only gets stronger and the evolution of multilateralism rotates in a vicious cycle of the 'West vs. the Rest'. As observed in the EU's participation in the Council, the dynamics of global human rights governance have led the Union to have to soften many of its positions and concede to initiatives which it may not have originally envisaged. While international cooperation is a key characteristic of effective multilateralism, a balance needs to be maintained between an actor's objectives and state of play. A tip-toe approach to human rights issues in the Human Rights Council will only exacerbate the current state of practice and thus will continue to undermine both the Union's aspirations to be a frontrunner in the UN system (COM /2003/0526, 1.1) and the very existence of the Council itself.

Notes

1. See EIDHR project 'Enhancing respect for human rights and fundamental freedoms in countries and regions where they are most at risk', which can be found at: http://ec.europa.eu/europeaid/cgi/frame12.pl.
2. See the EU's explanation of vote on the draft resolution on the Human Rights Council (L.48). The Statement was given by Ambassador Gerhard Pfanzelter, Permanent Representative of Austria to the United Nations, on behalf of the European Union on 15 March 2006.
3. The EU was very avid in making sure that third countries were aware of its position and commitment to guarantee the Human Rights Council functions effectively and rectifies the failures of the UNCHR. See the Declaration by the Presidency on behalf of the European Union on the establishment of the UN Human Rights Council, Brussels, 16 March 2006.
4. It should be stressed here that the Single European Act of 1986 in its preamble made a reference to human rights in which it states 'DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice' (OJ 1987 L 169/1).
5. See Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle Getreide* (1970) ECR 1125; Case 4/73 *Nold v. Commission* (1974) ECR 491; *Case Wachauf v. Germany* (1989) ECR 2609; Case C-36/02, Omega (2004) ECR I-9609.

6. I would like to thank all of the EU diplomats I interviewed and spoke to in the 8th Session of the Human Rights Council from 2 to 18 June 2008. Their hands-on experiences and practical insights have greatly contributed to complementing the application of the interdisciplinary framework.
7. It needs to be stressed here that the EU did call for a vote on both resolutions in the Human Rights Council's 8th session, June 2008.
8. At the time of the calculation, the Human Rights Council's 9th session could not be incorporated as the final report was not available on the OHCHR website.
9. Authors examining the role of the EU in international fora have on many occasions been faced with the question of the EU vs. composite EU, especially in cases addressing the EU's budget/financial contributions in, for example, development cooperation, to international organizations, etc.
10. Currently there are 31 thematic and 8 country-specific mandates.
11. This calculation was taken at the time of drafting this contribution. Since the Council's inception until January 2012, 18 special sessions have convened, seven of which have been at the initiative of the EU. The three additional sessions include: (1) the 15th Special Session on the Situation of human rights in the Libyan Arab Jamahiriya (25 February 2011); (2) the 17th Special Session on the situation of human rights in the Syrian Arab Republic (22 August 2011); and (3) the 18th Special Session on the human rights situation in the Syrian Arab Republic (2 December 2011).
12. The seven independent experts include: gender-based violence, internal displacement, the independence of the judiciary and the legal profession, human rights defenders, the role of multinationals, children in armed conflict and the right to health.
13. This motion is based on Article 117 of the UN General Assembly's Rules of Procedure, which states 'A representative may at any time move the closure of the debate on the item under discussion, whether or not any other representative has signified his wish to speak'.
14. See letter from Ambassador Andreas Hadijichrysanthou, Permanent Mission of the Republic of Cyprus, Geneva, to HE Mr Alex Van Meeuwen, President of the Human Rights Council, on 4 December 2009 at 17:20, Geneva, Switzerland.
15. Taking the 8th Human Rights Council Session as an example, the EU Presidency, on behalf of the EU made an oral statement under Agenda Item 6 stating 'The first 32 reviews undertaken in April and May and the outcome documents adopted last week by the Human Rights Council – on the whole – have not disappointed'.
16. These concerns are equally expressed by international NGOs including Amnesty International, ISHR, The Asia Forum, etc.

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The EU in the Negotiations of a UN General Assembly Resolution on a Moratorium on the Use of the Death Penalty

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The Nobel Laureate Gabriel García Márquez begins *A Chronicle of a Death Foretold* with a description of a brutal murder. The novel then proceeds to tell the story of the events leading up to the murder, of coincident, chance and (mis)fortune during the previous day. The reader's knowledge of what happens reinforces a belief in destiny, despite the haphazardness of the protagonists' actions. In this chapter, something not altogether dissimilar will be presented; there is no suspense, nor drama. The Member States of the European Union (EU) were part of broad coalition that supported a resolution in the 62nd Session of the United Nations General Assembly (UNGA) calling for a moratorium on the use of the death penalty (A/RES/62/149). That the EU should have been part of this process seems so obvious as to be trivial, considering the commitment to effective multilateralism articulated in the 2003 European Security Strategy, or the centrality of outlawing the death penalty in the context of EU normative power (Manners, 2002, pp. 245–52). It appears on the surface to be a straightforward example of the EU promoting human rights externally, consistent with treaty principles and its international identity.

However, by using the framework of analysis presented in this volume based on the EU's position in a matrix of EU studies, international relations, international law and EU law, the story of how this outcome came about becomes far more nuanced. While I cannot promise a sequence of events comparable to García Márquez's magical realism, I will demonstrate that successful cooperation between the EU and the UN in the death penalty resolution was not a foregone conclusion. The EU was forced to adapt its coordination method, change its policy objectives and lower its profile in order to assist the passing of the resolution in the Third Committee and the

J. Wouters et al. (eds.), *The European Union and Multilateral Governance*

UNGA. Had these steps not been taken, the final outcome could have been very different. Failure to pass the resolution, or worse still, the insertion of what diplomats colloquially refer to as a 'wrecking' amendment would have set the abolitionist cause back ten years, according to one senior Amnesty International official.[1] Why was 2007 successful when previous attempts by the EU in 1994 and 1999 failed?

The chapter begins with a brief overview of the 2007 resolution calling for a moratorium on the use of the death penalty. It then considers in separate sections the four analytical questions of EU actor capacity, EU recognition, the global governance mode of the UNGA and the EU's role in passing this resolution in 2007 and the follow-up resolution in 2008 (A/RES/63/168). It concludes with some remarks on the position, legal status and role of the EU in the UNGA and the impact of this resolution on UN multilateralism.

1. Background: a very brief history of UN resolutions on the death penalty

On the 18 December 2007, at the 62nd session of the UNGA in New York, a 'landmark' resolution was narrowly passed calling for a moratorium on the death penalty by all UN Member States (Amnesty International 2007; UN 2007a). It was a landmark resolution for at least three reasons. Firstly, the abolition of the death penalty is a core objective of the global human rights regime. Although EU-sponsored resolutions passed in the UN Commission on Human Rights (UNCHR) between 1999 and 2005 called for the abolition of the death penalty (as did the 2006 statement read out in the General Assembly by Finland on behalf of 84 states),[2] securing a resolution in a vote of *all* UN members was a qualitative step forward that more than compensated for the concession of accepting a moratorium. Secondly, passing the resolution represented a major challenge to prevailing views about the distribution of power in the UNGA. Since resolutions are passed in this body by simple majority, it has long been regarded as a bastion of the Global South, whose members from Africa, Asia and Latin America constitute around 120 states (Malone and Hagman, 2002). In terms of the dynamics of the UN system, the resolution demonstrated how traditional blocs have become splintered, and how a trans-regional coalition could secure a majority of votes on a progressive human rights issue. Finally, the resolution was a landmark because an issue previously regarded as a question of domestic law and criminal justice in the Sixth Committee was shifted to the human rights arena of the Third Committee (Bantekas and Hodgkinson, 2000, p. 29). While the legality of the death penalty was not challenged, the ethics of its application were. Retentionists, as those in favour of capital punishment are known, are often more concerned about the implications of the resolution for the norm of non-intervention in state sovereignty than they

are about their right to execute criminals. As the Singapore Ambassador to the UN argued:

> The death penalty is not a human rights issue but more a criminal justice matter allowed under international law (...) The basic issue in question before us today is not capital punishment per se. That is not at all what this resolution is about. It has nothing to do with the merits or demerits of the death penalty, which is a question too complex to be resolved easily. *It is about whether a country has the right to decide on this matter for itself*'. (emphasis added)'[3]

One year later at the 63rd session of the UNGA, a second moratorium resolution was passed with a slightly increased majority that acknowledged the findings of a report produced by the office of the Secretary-General and called for the item to be placed on the agenda of the Third Committee once again in 2010 (A/RES/63/168).

The EU has long campaigned for the abolition of the death penalty. In 1994, Italy presented a resolution against capital punishment in the Third Committee and attracted 49 co-sponsored (neither the Netherlands nor the UK participated), but was defeated by a retentionist majority (UN 1994; Bantekas and Hodgkinson, 2000, p. 28). Three years later, Italy sponsored a resolution in the UNCHR calling for an abolition of the death penalty that was passed by the 53-member committee (Bantekas and Hodgkinson, 2000, p. 30). The following year it repeated its sponsorship, and in 1999, the Finnish Presidency presented the resolution on behalf of the European Union (Bantekas and Hodgkinson, 2000, p. 23; Smith 2006, p. 160). The EU continued to enjoy success with the resolution until 2005, when the UNCHR was replaced by the Human Rights Council (HRC), and the membership of the new body reduced from 53 states to 47 (Smith, 2008). Headline reforms included the Universal Periodic Review mechanism and a secret ballot to elect states to the Council by a majority vote of the members of the UNGA, but equally significant was the re-weighting of regional representation that increased the number of African and Asian states while reducing the number of Eastern European and Western European and Others (WEOG) states. In the HRC, the EU can no longer count on a coalition of WEOG, Eastern Europe and Latin American states forming a winning majority, as it could in the UNCHR (Smith, 2008, p. 3; Kissack, 2010, p. 47). The skewed representation that profited the EU until 2005 came to an end, and the EU needed a new forum to promote its HR agenda.

The Finnish Presidency of the EU attempted to pass a resolution on the death penalty in the UNGA in 1999. With hindsight, EU diplomats working in New York acknowledge that valuable lessons were learnt about how to operate in the Third Committee that proved crucial in 2007. At the time, however, the appraisal was considerably different. As Bantekas and

Hodgkinson set out in detail, so anxious was Italy (a long-term supporter of the abolition of the death penalty) to agree a resolution that it was on the verge of accepting a retentionist amendment asserting the principle of non-intervention enshrined in Article 2(7) of the UN Charter, and in effect nullifying abolitionists' aspiration to re-cast capital punishment as a human rights issue (Kissack, 2008, p. 10–13). Discussions promptly ceased before the amendment was voted on, and the resolution was immediately dropped. The question of abolishing the death penalty did not reappear in the UNGA until 2006, when Finland presented its statement and requested the item be placed on the agenda of the Third Committee in 2007. As already noted, when the issue did reappear it called for a moratorium on the use of the death penalty, not its abolition. This major concession helped tip the balance in favour of supporting the resolution, even though the decision divided the EU. This, as well as a number of other examples, illustrates how the wider political environment of the UN system impacted on the behaviour of the EU.

2. EU actor capacity

2.1. EU representation

The EU is not a member of the United Nations, although the European Community has been an observer since 1974 (Hoffmeister and Kuijper, 2006, p. 18). Although the Lisbon Treaty grants the EU a legal personality and makes obtaining observer status for the Union in the UN a possibility, it cannot become a member. Article 4(1) of the UN Charter stipulates that only states may join the organisation, and will remain so until such time as the UN Charter is revised. EU treaties confer upon the Presidency of the Council authority to speak on behalf of the Member States when they have agreed common positions either in Brussels or New York, but its articulation to the UN is through the membership of the sovereign state holding the Presidency. In terms of political practice, the EU challenges the boundaries envisaged for regional actors by the original drafters of the UN Charter. UN membership is divided into five regional constituencies that choose members to participate in UN bodies with restricted membership, such as the Security Council, ECOSOC or the Human Right Council. The EU straddles three regions (WEOG, Eastern Europe and Asia) and in recent years tensions have grown between EU states and non-EU WEOG members, who perceive that the Union is dominating the region. In September 2010, at the final session of the 64th Session of the General Assembly, this division was brutally exposed. An EU-sponsored resolution proposing enhanced participation for the post-Lisbon Treaty EU was rebuffed by counter-resolution deferring the debate (UN 2010a, 2010b). While the EU had to cope with the embarrassment of a narrow defeat (losing by five votes), it suffered the

humiliation of Australia, Canada and New Zealand abstaining instead of supporting the EU. Without doubt, the 'intersecting multilateralisms' of the EU's supranational regional integration and the UN system's conception of a region, as a caucus for sovereign states within the universal organisation, remain at loggerheads (Laatikainen and Smith 2006).

2.2. Internal decision-making and coordination

Until such time as the external representation envisaged in the Lisbon Treaty can be turned into a practical reality in the UN system, the Presidency of the Council will continue to play a significant role in coordinating EU positions. The case of the death penalty resolution also provides considerable insight into how the Presidency can serve as a powerful interlocutor between the EU and the wider UN membership. The Portuguese Presidency of the second semester of 2007 played a significant role turning a EU blueprint for action into a working strategy in the UNGA. The resolution was drafted with Portugal operating in two roles, one as the Presidency representing EU Member States and the other as an equal partner among ten co-authors, two from each of the five regions and drawing heavily on the Lusophone world.[4] Balancing the roles was at best difficult and at worse impossible. EU Member States wanted to strictly oversee negotiations and reign in the Presidency when they felt it had conceded too much. Conversely, co-authors refused to allow the EU to be a *primus inter pares* participant, with the shadow of the 26 hanging over proceedings. Interviews with diplomats closely involved with the process speak of how the rigidness of the EU negotiating position presented by the Portuguese (and generated from EU coordination meetings) quickly became a bone of contention between the nine co-authors and the EU-27. A modus operandi emerged, which gave the Portuguese considerably more leeway to negotiate, partly due to ultimatums from the co-authors that they would not be puppets of the EU, and partly due to the EU-26 (all minus the Presidency) realising that they had to concede control of the process. As a result, in the language of principal–agent analysis, the Portuguese agent became considerably freer vis-à-vis its 26 principals, and was able to use informational asymmetry to further enhance its room for manoeuvre.[5] Why did the other EU Member States concede control? Portugal's status as a small EU Member State, unburdened with the trappings of power and vested interests that the 'Big Three' are weighed down with, made EU Member States more willing to trust it as a neutral and unbiased negotiator (Arter, 2000).

2.3. Treaty and policy objectives

The Lisbon Treaty includes 'a range of provisions (...) designed to promote human rights in the EU's external relations and development cooperation' (Hazelzet, 2006, p. 184) including Articles 6 TEU, 208 TFEU 211 TFEU. More specifically, there are the EU Guidelines on the Death Penalty.[6] Turning to

political objectives, as we have already seen, Italy has been a leading protagonist in driving the EU's agenda in this area and was the original sponsor of a death penalty resolution in the UNGA in 1994. Outlawing capital punishment enjoys support across the spectrum of Italian national politics and this help explains why Italy has been relatively successful at pursuing this goal in its foreign policy despite the changes of government over the period 1994–2007 (Kissack, 2010, pp. 40–41). However, for all the support found among Italian politicians and NGO communities alike, they remain pragmatists when it comes to getting results and were willing to concede abolition for a moratorium on usage if it made the likelihood of passing a resolution higher. By contrast, Denmark, the Netherlands and Sweden have traditionally advocated abolition and were initially reluctant to endorse a moratorium. Consensus was reached after discussions within the EU and with like-minded states that co-authored the draft resolution. In order to secure enough votes in favour from the UN membership – requiring the capture of about 15 'swing' states in the UNGA – the decision was taken to favour pragmatism over idealism. Considering the previous UNCHR resolutions, the statement of 2006 and the EU Council conclusions of summer 2007, it is clear that EU political objectives were altered to accommodate the political reality of the UNGA.

2.4. Legal and foreign policy instruments

Legal instruments supporting a moratorium on the use of the death penalty are few and far between. By far the most significant, as Manners (2002) points out, is the Protocol 6 (1983) of the European Convention on Human Rights (ECHR) in which the abolition of the death penalty is outlawed. The convention is not part of EU law and although the Lisbon Treaty has paved the way for EU ratification of the Convention, until it does so the EU will remain legally unaccountable to the human rights standards it holds others to (Clapham, 1999, pp. 641–644). Manners argues that since the Amsterdam Treaty, the EU has become the 'abolitionist vanguard' despite the Council of Europe's longer engagement with the issue (Manners, 2002, p. 251). Within the European neighbourhood, countries wishing to join the EU have to adopt Protocol 6 of the ECHR to demonstrate their commitment to human rights protection. Further afield, the influence of the EU wanes, hampered not least by the fact that the death penalty is permitted under international law.[7] For over a decade, Common Foreign and Security Policy (CFSP) common statements have raised awareness of death penalty usage around the world, based on guidelines for démarches issued in June 1998.[8] The EU has addressed six countries through this method (Cuba, Trinidad and Tobago, Uzbekistan, Lebanon, India and Indonesia) and commended the American state of Illinois for enacting a moratorium (the closest the EU has come to rebuking death penalty usage elsewhere in the United States).[9]

The European Community has drafted law preventing the export of goods that could be used for capital punishment or torture,[10] while in 2008 the Council and European Parliament issued a joint declaration establishing a European Day against the Death Penalty.[11] In parallel, the European Parliament has maintained its vocal condemnation of capital punishment globally through resolutions. Hazelzet argues that the European Parliament is often more willing to brandish the most powerful 'stick' at its disposal, 'the delay or refusal to sign cooperation or association agreements with third countries on the basis of lack of respect for human rights' (Hazelzet, 2006, pp. 184–185).

In summary, the EU has increased its capacity to act in the UN. While the enhanced observer status gained in May 2011 will be significant in the future, in this case study EU actor capacity derived from the enhanced cooperation and coordination of the Member States through the institution of the Presidency. Success in this case required EU representation to adapt to the UNGA environment, both in mode and message. The increased autonomy of the Presidency in co-authoring meetings and the concession to a moratorium both exemplify adaptation. Furthermore, in promoting a moratorium on the death penalty, EU actor capacity has been built more on political actions than legal competencies.

3. EU recognition by third countries

According to the common analytical framework (see Chapter 2), international organisations will only grant de jure recognition to the EU when the Union demonstrates that it has the legal competency to fulfil all that is demanded of it with respect to membership of the organisation. Granting recognition when there is no 'value added' by EU legal recognition, or when the EU 'falls short' as an actor, does not make sense. However, in cases when recognition is formally granted, we would expect to see specific procedures put in place to facilitate EU participation. Our three sub-sections in assessing recognition are competences divided between the EU and its Member States, de jure and de facto recognition, and institutional procedures. We are, therefore, in this section, primarily concerned with the legal status of the EU.

As Laatikainen and Degrand-Guillard point out, the United Nations in New York is 'first and foremost a political arena' (2010, p. 10). They contrast this to the policy orientation of Brussels, 'where development monies are disbursed, trade issues are determined, and where a good number of policy areas have for many years already been communitarized' (Laatikainen and Degrand-Guillard, 2010, p. 9). Contrasting norm establishment and consolidation to policy action leads them to conclude that 'effective multilateralism at the UN is to prevail in the battle of ideas' (Laatikainen and Degrand-Guillard, 2010, p. 10; Kissack, 2010, pp. 150–152). The division

of competency between the EU (or the Community as it was prior to the Lisbon Treaty) and the Member States is a question of which actor is legally entitled to take a particular policy decision, and as such is not a strictly relevant consideration when the nature of the political process is normative. While Article 17a of the Lisbon Treaty 'directs EU states to seek a 'common approach' in their diplomatic representation', they 'have not lost their prerogatives as members of the UN' (Laatikainen and Degrand-Guillard, 2010, p. 9).

Given the enormous breadth of policy issues considered on the UNGA agenda, some issues are directly relevant to the European Community's competences. For this reason, the EC held observer status in the UNGA from 1974 to 2011, and correspondingly the Commission has a long history of speaking on behalf of the Community (Hoffmeister and Kuijper, 2006, p. 16). If we take into consideration the Lisbon Treaty's reorganisation of external relations and foreign policy under the single heading of 'external action',the endowment of an international legal personality on the EU, and the EU's new participant rights in the UNGA (2011) we can speak of the EU having a de jure recognition in the UN. However, this is not the end of the recognition story. De facto recognition, that which is practiced through the daily operation of the EU and its Member States in the UNGA, and in the perception of third parties of the EU, reemphasises the centrality of the Member States and the Presidency speaking on behalf of the EU at all formal meetings of the UNGA. Only the Member States can vote, be nominated for positions or be involved in budgetary negotiations, to name but a few of the actions prohibited for observers. The reality of the sovereign state intergovernmental structure of the UN is a check on the ambitions of the EU set out in the Lisbon Treaty, where the internal streamlining of decision-making and improvements in coherence resulting from the creation of the post of High Representative for Foreign Affairs and Security Policy are expected to yield dividends. There are limitations to the role Lady Ashton can play in New York, and the rotating Council Presidency will continue to be a prestigious role for Member States in UN affairs.

The final sub-section of recognition is a survey of the procedures put in place to facilitate EU participation. The procedures to allow the EC (now EU) to participate in the UNGA are the same as any other observer (e.g. concerning the right to address meetings) and are not specific to the EU. Most frequently, the Presidency speaks on behalf of the EU Member States (and oftentimes other states in the EU's sphere of influence too) and circumvents the procedural rules of observers, using the membership of the state holding the Presidency to elevate its position in the discussion (Hoffmeister and Kuijper, 2006,p. 10).[12] The case of the death penalty reveals an interesting anomaly in expected EU behaviour. Instead of promoting the EU as an actor by raising its profile, the co-authors of the resolution attempted

to *lower* the profile of the EU. They recognised that the chances of passing the resolution decreased the easier it was for retentionist opponents to label the resolution 'European', contra the intentional trans-regional authorship that spoke of truly universal values. A lower EU profile in the authorship of the resolution is one of the major differences between 1999 and 2007. Another is the skilful orchestration of responses to the expected arguments and criticisms of retentionists. One of the major failing in 1999 was that by 'all accounts there was little or no oratory in defence of the draft resolution from within the EU camp' (Bantekas and Hodgkinson, 2000, p. 33). The Portuguese Presidency in 2007 and the Chilean mission in 2008 prepared co-authors and co-sponsors with effective rebuttals against wrecking amendments in order to staunchly defend the resolution from attack (UN 2007b; UN 2008a). The preparation of a rigorous and robust defence of the resolution in an articulated manner helped the EU and its supporters achieve in 2007 what it had failed to do in 1999.

4. Global governance mode

In order to bring international relations into the framework of analysis, the study moves horizontally from the consideration of the legal status of the EU in the UNGA and the Third Committee, to the political roles of state and non-state actors. In order to do this, the focus will be on the intergovernmental nature of the UN and Amnesty International as an NGO heavily involved in the drafting, defence and adoption of the death penalty resolution.

As Katie Laatikainen and Karen Smith argue, while UN multilateralism involves bloc and regional political groupings in its institutional and political processes, it is foremost an intergovernmental organization premised upon, and protective of, state sovereignty: states are the key members, states control the decision-making, and membership is a reflection of the sovereign equality of Member States (Laatikainen and Smith, 2006, p. 3).

This echoes the analysis of Puchala, Laatikainen and Coate who argue that the UN is one of the last bastions of state sovereignty, somewhere the increasingly composite nature of global governance encompassing sub- and supra-state authority, private sector and civil society has not (yet) impacted upon its operating mode (Puchala, Laatikainen and Coate, 2007, chapter 2; Scholte, 2004). Decision-making in the UNGA is on majoritarian principles, where each state has one vote and resolutions are passed by a simple majority (Kissack, 2010, pp. 25–30). Based on the legal sovereign equality of all Member States of the UN, states participate in collective decision-making regardless of their respective power capabilities. As Rittberger and Zangl note, decisions taken by the UNGA very rarely have any binding legal authority over members (Rittberger and Zangl, 2005, p. 89). By contrast, 'hard law' is either found in UN Security Council resolutions under Chapter VII of the

UN Charter, or by accession to international legal treaties drafted through consensus. The significance of UNGA resolutions is not their capacity to legally bind states into following particular patterns of behaviour. Rather, it is to define the normative standards that determine what constitutes acceptable behaviour in the first place. As has been briefly commented on above, the death penalty resolution challenged a number of established traditions concerning norm promotion through UNGA resolutions. We will consider three of them: the relationship between the majority votes and state power, traditional bloc politics in the UNGA, and whether normative innovations must be furthered by consensus.

Since the 1960s, the process of decolonisation in Africa and Asia and the accession of new sovereign states to the UN shifted the numerical balance away from Western control and towards states in the Global South (coordinated through the G-77 and NAM). Attempts to establish a New International Economic Order (NIEO) in the early 1970s failed, but political efforts to promote the agenda of decolonisation, disarmament, and development remainder focused on international organisations in which the numerical superiority of the G-77 held sway. Although the outputs of majoritarian decision-making remained non-binding, the permanent minority of developed states dutifully cast their negative votes according to institutional protocols (while ignoring these resolutions when making government policy). In short, poor and/or small states were given a voice that rich and powerful states paid only lip service to listening to. This pattern of behaviour can be mapped onto the blocs of states coordinating their positions in the UN, where the G-77 is composed of African, Asia, Caribbean, and small island states, with Latin America participating on most issues except human rights, where it has traditionally sided more often with Western states. The EU is viewed by opponents from the South with suspicion, who regard it as opaque and difficult to deal with because of the mixed messages it emits, its complicated decision-making and representation structure, and the incredulity of suggestions that it works for the benefit of all states in the system, and not national/European self- interest. This was summed up by one influential diplomat from the South as 'disagree first and decide why later' (Kissack, 2010, p. 8). Degrand-Guillaud has also noted similar sentiments in her research (2009b, p. 612). Critics of the EU seek to paint it as a (neo-)colonial power, rhetoric that makes it harder for states in the South to justify cooperation with the EU either within their regional groups or to domestic constituents.

The co-authors of the death penalty resolution tackled these partisan politics head on. Two states from each group were brought together to draft the resolution, and within each region co-authoring states formed a caucus to lobby within their region for the adoption of the resolution. A commonly noted failing of the EU is its inability to outreach into the wider UN membership. By creating a multiregional authorship this problem was

overcome, yet we must be absolutely clear on the fact that the co-authoring states did a great deal of the 'heavy-lifting' involved with this outreach. This was especially true in Africa, the continent that in effect holds the balance of power on capital punishment. It was diplomats from the Global South that were accused of being puppets of the West, and who faced criticism from their peers for their decision to work with the EU on this issue. This intra-regional pressure on co-authors was a key factor in the non-EU co-authors' demands for greater say on the content of the resolution and an end to the EU's attempts to shape the resolution via the narrow mandate granted to the EU Presidency. Additionally, the death penalty resolution challenged the prevailing wisdom that the UNGA was a bastion of the Global South. Instead, a progressive human rights issue was successfully furthered in the face of a considerable amount of hostility from powerful developing states (for a full elaboration on the 'axis of sovereignty', see Gowan and Brantner, 2008, 2009). Moreover, the cohesion of the Global South was unpicked through the strategic targeting of wavering states known to be sympathetic to the death penalty issue.

Resolution A/RES/62/149 was passed with 104 votes in favour, or 54% of the UN membership (and in 2008 with 106 votes) (UN, 2007b; UN, 2008b). Given the number of abstentions cast (29 in 2007 and 34 in 2008), the resolution could, in theory, have been passed by a majority of less than 50% of the UN membership. Only two of the 10 most populous states in the world voted in favour of the resolution (Brazil and Russia), illustrating the limited support for curbing capital punishment among the UN's largest members. In combination, these facts point us in the direction of an extremely important question: how much support is needed to legitimately challenge the prevailing norms of the international community? Contention over this point was at the heart of the Singaporean ambassador's comments cited above. The death penalty resolution sought to re-define the normative acceptance of the use of capital punishment in domestic legal systems. While international law permits it, the resolution sought to make it morally unacceptable and therefore force states to change their domestic practice. The larger picture in which the resolution is situated concerns the sovereign autonomy of the state vis-à-vis the power of the international community of states to condition the behaviour of its members. The death penalty resolution appears to be about midway in the life cycle of a norm (Finnemore and Sikkink, 1998). Norm entrepreneurs from abolitionist states and NGOs (which we shall presently discuss) have succeeded in promoting the norm widely, to the extent that just over half of the Member States of the UN accept taking preventative measures against its use. According to Finnemore and Sikkink's theory, the norm is at (or close to) a tipping point, where we would expect a cascading effect to begin and for the norm to gain widespread acceptance. Retentionist states fear not only international condemnation of the death penalty, but also the establishment of a process

in the UN Third Committee and UNGA that undermines the legal rights of states to carry out actions deemed to violate human rights. Their argument is that such important changes to the norm of non-intervention cannot be made by narrow victories in majoritarian forums like the UNGA, but by all states through consensus. For opponents of the death penalty resolution, it is the thin end of a wedge eroding state sovereignty and promoting progressive human rights norms. It uses the norm-creating power of the UNGA to undermine legal practices, and it challenges the status quo of North–South gridlock, unpicking the cohesion of the South by building trans-regional coalitions. The death penalty resolution is a Trojan horse inside the intergovernmental UN system, potentially laying the foundations for a change in the mode of governance employed. The EU is justified in taking some of the credit for its success (along with the co-authors) and in theory it would appear to be consistent with its goal of effective multilateralism. However, in practice, some EU diplomats are concerned that the death penalty resolution is souring working relations with retentionist states in unrelated policy areas elsewhere in the UN system, to the detriment of overall effectiveness in the UN system.

To complete the assessment of the mode of global governance, let us briefly examine the role of the human rights NGO Amnesty International (AI) (Kissack, 2010, p. 39). Despite the formal intergovernmental character of UN politics, AI played an important role in shaping the behaviour of all states, be they abolitionist, retentionist, or undecided. AI's network of offices around the world and capacity to mobilise its supporters allow it to lobby governments in their national capitals as well as diplomats based in New York. AI was extensively involved in the entire death penalty resolution process. In the initial stages it was reluctant to support any resolution without the prior declaration of 100 co-sponsors. This was seen as the minimum number required to ensure any resolution would be successful, and the 2007 resolution did not fulfil this criterion. Moreover, the limited ambition of a moratorium in the place of abolition signalled a weakening of a long-term policy objective of AI. In combination, AI staff feared another failure like 1999 would do significant damage and wondered if it was better to wait until they could be guaranteed more support for the resolution they wanted. AI, as with the staunch abolitionist EU Member States of Denmark, the Netherlands, and Sweden, saw time as being on their side. However, once convinced that the initiative could work, they started informally consulting with a number of the co-authors (especially Portugal and New Zealand) during the drafting process, drawing in particular on AI's 35 years of experience campaigning against the death penalty to orchestrate the defence of the resolution during the Third Committee. Intensive preparations identified likely retentionist amendments and then produced succinct counter-arguments, which proved invaluable in securing the passage of the resolution, unamended, through the Third Committee to the UNGA.

Although the UN system is first and foremost run by states and is for states, AI played a crucial role in the margins, informally, but nevertheless demonstrating the significance of non-state actors in the governance mode.

5. The role of the EU in the negotiations of a UN Resolution on a Moratorium on the Use of the Death Penalty

Role is conceived of here as the 'actual foreign policy behaviour' of the EU in the UNGA in the broader context of a set of expectations about the capacities and characteristics of the EU held by non-EU actors. Put differently, the EU 'supplies' something that other actors in the UNGA 'demand'. The role of the EU, seen in this light, by definition is distinct from the roles other actors (be they states, regional blocs or non-state actors) either *actually* play or are *capable* of playing. Role amounts to internal EU policy goals mediated through the mode of global governance, the outcome of what the EU seeks to do and what the multilateral environment permits it to do.

Building on the statement prepared by the Finnish Presidency in the second semester of 2006 and read out in the 61st session of the UNGA, the German Presidency of the first semester of 2007 began preparations for follow-up action. The death penalty was on the agenda of the January General Affairs and External Relations Council meeting, as well as of COHOM.[13] By the beginning of June, the issue of the death penalty was included on a Council document setting out the priorities of the EU in the 62nd session of the UNGA,[14] while the Political and Security Committee was putting the final touches to a document titled 'EU action in UN fora for the abolition of the death penalty: Presidency proposal for the way ahead'.[15] The June General Affairs and External Relations Council meeting discussed the Presidency's strategy paper under the agenda heading 'EU anti-death penalty initiative' and it was clear from these documents, as well as interviewing diplomats in New York, that the EU's goal in the early summer of 2007 was a resolution calling for the abolition of the capital punishment. As discussed above, this goal was consistent with that of AI and favoured by Finland, Sweden, and the Netherlands. But pragmatists argued that there was not enough support among the wider UN membership to guarantee success. Abolitionists inside the EU advocated waiting another year, seeing the diplomatic resources of the 2008 French Presidency as better suited for a large-scale campaign in favour of abolition.

As the Portuguese Presidency took over in the summer of 2007, and the policy making of Brussels gave way to the politics of New York, the dynamics of Council meetings also changed. The death penalty only appeared twice again on the agenda of the General Affairs and External Relations Council, once in August and once in November. Both times the item was listed as 'death penalty moratorium' and both times it was 'not discussed during formal sessions'.[16] From this, it is evident that divisions between the EU

Member States on the most appropriate strategy given the reality on the ground in New York were being taken to the highest EU level to resolve back in Brussels. The self-perceived role of the EU in June 2007 was as a 'front-runner', but by the autumn, it was apparent that there was no demand for front-running among UN members. Instead, the co-authors demanded that the role of the EU change in two important ways. The first was that it became 'more normal', with the Portuguese Presidency accorded no special privileges on account of its 26 principals controlling its mandate. This was to give the co-authors real authorship over the resolution. The second was that the EU's profile be lowered and the trans-regional nature of the resolution highlighted. There was no demand from the co-authors for the EU to pose as a human rights champion, despite the fact it is an important element of its self-identity (Manners, 2002). Acquiescing to both demands most likely proved easier under the Portuguese Presidency than it would have been under a French one. Firstly, France's status as a Permanent Member of the Security Council would have made its participation among the co-authors as an equal more difficult. Secondly, it would have made reducing the EU profile harder because of the ammunition it would provide for retentionists keen to paint the resolution as neo-colonialism. While Portugal too has a colonial history, the presence of Brazil, Angola, and Timor-Leste as co-authors reduced this threat. With the benefit of hindsight, the decision to push for a resolution in 2007 proved to be a successful one, despite abolitionist reservations.

By way of conclusion, how can the role of the EU be summarised? Firstly, the role of the EU as an actor adapted from its early incarnation as an abolitionist leader to a team player among many like-minded states. The key strength of the co-authoring group, namely its trans-regional balance, was incompatible with an overtly EU signature on the resolution. For this reason, the role demanded of the EU as an actor was necessarily limited in terms of profile. Having said that, the role of the EU institution of Presidency of the Council – in this case Portugal – was extremely important in mediating a number of potentially combustible elements, not least the clash between abolitionists and pragmatists seeking a moratorium. Portugal worked both in Brussels and in New York to extent the flexibility of its mandate and reduce agent monitoring by the 26 other Member State principals. Portugal, alongside New Zealand, also facilitated informal liaisons with AI and orchestrated the defence of the resolution during the Third Committee. The Presidency's behind-the-scenes contribution was the significant impact made in the name of the EU and demanded by the co-authors. It is no coincidence that the Presidency *qua* sovereign state played this role. To reiterate what has been previously said, the intergovernmental design of the UN makes it easier for a state to carry out such functions, since the EU as an observer cannot. Finally, the role demanded of the other EU Member States was to behave like 'normal' UN members and vote in favour of the resolution.

The numerical weight of the EU and the accession states and candidate countries contributed significantly to the overall majority. However, it should not be forgotten that for these states their support for the resolution came with very few costs. By contrast, many supporting states in the African, Asian, and Caribbean regions risked the wrath of retentionist neighbours by voting in favour of the resolution, and their contribution must not be underestimated or overlooked.

6. Conclusion

What is the EU's position in this case study on the death penalty resolution? In terms of role, it was functionally significant, but not in the way Brussels originally intended it to be. Overall, I would argue that it was the role of the Presidency, as an institution of the EU that can represent it while retaining the legal status of a sovereign state and capitalise on all the rights that accrue there from in the UN system, that was most important. This places it in the southwest quadrant of Table 2.2 (in Chapter 2), as functionally significant but with a low legal status. This position is labelled 'aspiring outsider' and seems more or less appropriate given the disjuncture between the role the EU wanted to play and the role that was carved out for it in the legal and political reality of the UNGA and the Third Committee. Although we have known all along that the EU and the UN share a commitment to universal human rights that makes them appear ideal partners, the successful contribution of the EU in this 'landmark' resolution was not foretold. Three crucial junctures in this story serve to illustrate this point. The first was that the abolitionist movement inside the EU was silenced, and the pragmatists prevailed. Had the EU attempted to take the position outlined in the June 2007 'way ahead' document, the resolution could very easily have failed. Conceding to a moratorium provided enough leeway to attract sufficient support across the whole UN. Secondly, if the Presidency had been held by a different EU state, things could have turned out very different. Relations with the co-authors, and their regional composition would have been altered, and skilful mediation between potentially contradictory forces ensured that the trans-regional (i.e. universal) rejection of capital punishment was undisputable. Thirdly, the orchestration of the resolution's defence, with assistance from Amnesty International, prevented another debacle, as in 1999.

What does this case tell us about UN multilateralism? Most importantly, it speaks to the question of moving beyond the deadlock of North–South entrenchment that has been a characteristic of UN politics for so long. In its place is a new three-fold division between states willing to promote human rights, an axis of sovereignty-protecting states, and swing states that are supportive of human rights in general but will not follow an EU (or Western)-led agenda blindly (Gowan and Brantner, 2008). Building trans-regional coalitions defuses the most powerful arguments of those who

claim human rights promotion is a 'neo-colonial' or 'Western' project. The mechanism introduced by the death penalty – UNGA statement to Third Committee resolution – worries those states anxious to maintain control of the UNGA. Hostility towards the 2008 statement made by 66 states on human rights and sexual orientation demonstrates that it is not just the issue in question but the principle of the procedure that they refute. The death penalty has opened up new opportunities and potential dangers for the UNGA. To advocates of progressive human rights promotion, it promises to unlock the stalemate of the UNGA, while those threatened by such changes see it as undermining the most fundamental normative principles of the UN: non-intervention and international law only binding states that formally accept it through ratifying treaties.

How can the EU capitalise on this opportunity, either by tipping the moratorium on the death penalty towards abolition, or alternatively by promoting other progressive human rights norms? The EU must walk a fine line if it is to maximise its contribution to UN multilateralism. Too high a profile during negotiations or too assertive a stance above and beyond the comfort zone of the majority of UN members, and EU risks doing more harm than good. This is because opponents from the South view the EU with suspicion, for its opaque decision-making and representation structure, and its claims to promote universal (milieu) not national or European (possession) goals (Smith, 2003). These suspicions were summed up by one influential diplomat from the South as 'disagree first and decide why later' (Kissack, 2010, p. 8). Alternatively, if the EU is too timid in promoting human rights, there is, according to Gowan and Brantner, a real risk that universal rights will be rescinded by states from the 'axis of sovereignty' (2008). The EU's current position means that its best strategy is to moderate the policies made in Brussels with the politics played out in New York, using the moratorium on the death penalty resolution as a guide. However, trying to duplicate this model too quickly will jeopardise the fragile balance between promoting human rights and defending the sovereign prerogative of non-intervention.

Notes

1. I would like to thank the 22 diplomats and NGO representatives who talked to me during the weeks 31 March to 4 April 2008, and 16–20 February 2009, New York. Personal interviews were carried out under the Chatham House Rule, and thus to maintain their anonymity, no references to nationalities are made.
2. http://www.un.org/News/Press/docs/2006/ga10562.doc.htm (accessed 8 April 2009) The 84 states were: Albania, Andorra, Angola, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Cambodia, Canada, Cape Verde, Chile, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, France, Georgia, Germany, Greece, Guatemala, Guinea-Bissau,

Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mauritius, Mexico, Federated States of Micronesia, Moldova, Monaco, Montenegro, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Palau, Panama, Paraguay, Philippines, Poland, Portugal, Romania, San Marino, Sao Tome and Principe, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Solomon Islands, Spain, Sweden, Switzerland, former Yugoslav Republic of Macedonia, Timor-Leste, Turkey, Tuvalu, United Kingdom, Ukraine, Uruguay, Vanuatu and Venezuela.

3. Statement by Ambassador Vanu Gopala Menon, Permanent Representative of Singapore to the United Nations, at the Third Committee meeting on agenda item 64(b) to discuss human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, 18 November 2008 (42nd meeting), quoted in Kissack, 2010, p. 51.
4. Albania, Angola, Brazil, Croatia, Gabon, Mexico, New Zealand, Philippines, Timor-Leste, and Portugal.
5. While the principal–agent model was originally designed to be used in rational-choice modelling and game theoretic research, it has recently been adapted in the field of EU studies and international organisation to look more broadly at the delegation of authority (Elsig, 2011).
6. http://www.consilium.europa.eu/uedocs/cmsUpload/10015.en08.pdf (accessed 15 June 2010).
7. States that voluntarily abolish the capital punishment may accede to the Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty.
8. The guidelines were issued by the British Presidency, on 29 June 1988, see EU Bulletin 6-1998, 1.4.30.
9. Cuba (25 June 1999), Trinidad and Tobago (4 June 1999), Uzbekistan (28 January 2000), Lebanon (17 January 2004), India (18 August 2004), Indonesia (11 August 2004), and United States (8 February 2000). Data from http://europa.eu/archives/bulletin/en/bullset.htm (accessed 14 November 2010).
10. Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.
11. Statement issued 16 June 2008. The European Day is the same as the World Day (10 October), which was first declared five years earlier in 2003.
12. This is a depiction of the situation in the past, i.e. before the Union was granted enhanced participation rights in the UNGA in May 2011.
13. 2776th Council Meeting (22–23 January 2007) 5079/07; COHOM (22–23 May 2007) CM1741/07.
14. Doc. 10184/07 (5 June 2007).
15. Political and Security Committee (8 June 2007) CM2076/07; Doc. 10593/1/07 (Rev.1) (15 June 2007); this strategy paper remains unavailable to the public.
16. Doc. 9578/07 (28 August 2007); Doc. 9615/07 (6 November 2007).

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7

The European Union in the 2009 Durban Review Conference

Joëlle Hivonnet[1]

When the Durban Review Conference (DRC) on racism, racial discrimination, xenophobia and related intolerance ended, on 24 April 2009, with an outcome document, which had been adopted consensually by the 183 participating states,[2] there was a great sense of relief as this had proved a long and particularly arduous process whose outcome had seemed uncertain until the last minute. There was also a sense of unease within the European Union (EU) because five EU Member States (Italy, The Netherlands, Germany, Poland and the Czech Republic) had withdrawn from the conference at the last minute, in spite of the fact that the outcome document took all EU concerns into account. As a result, the EU suffered a major and enduring blow to its credibility as a big UN player and supporter of effective multilateralism (European Commission, 2003). Indeed, a few months later, during one of the regular political dialogues between the EU and the African Union (AU), the EU was heavily criticised by AU representatives because, in their own words, there had been *one* major UN event for the African continent in 2009, i.e. the Durban Review Conference, and the EU had failed to deliver. Clearly, expectations on the part of African countries had been particularly high because, in 2001, the European Union, under the strong leadership of the Belgian minister for foreign affairs, Louis Michel, had contributed in a major way to the success of the Durban Conference. This crucial role was acknowledged by Navi Pillay, the current UN High Commissioner for Human Rights, during another regular EU Political Dialogue, when she reported a recent conversation she had had with Nkosazana Dlamini Zuma, the South African minister for foreign affairs in 2001.

So, what had happened between 2001 and 2009, both within the EU and outside, which had made it impossible for the EU to carry its position through? How was it possible that, only months before the entry into force of the Lisbon Treaty, on 1 December 2009, EU foreign policy had hit such a low point? How was it possible that, in spite of the EU's strong commitment to an effective multilateral system, the EU had seemingly undermined a major UN conference? Worse still, how was it possible that the EU, with

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its considerable 'acquis' in the field of combating discrimination, had been unable to engage until the end on the very subject of the conference but had instead become un-redeemingly entangled in geopolitical considerations?

The Durban Review Conference proved to be a complete paradox for the EU, as it was fully engaged in the preparatory process following a clear strategy, fulfilled all its objectives during the conference (although partly disengaged), contributed to a balanced outcome but, ultimately, was seen somewhat as a 'spoiler' rather than as a valuable and constructive player.

This chapter, through applying the interdisciplinary framework, aims to uncover the underlying reasons behind why the EU was not seen as a valuable and constructive actor in the Durban Review Conference. It will moreover assess the Union's overall position in the conference. To this end, the chapter will first go back and evaluate the preparatory process against the international political climate prevailing at the time before looking at the conference itself and at EU competences, its actual participation and contribution to the outcome document. Lastly, an overall assessment of EU foreign policy in the context of the Durban Review Conference will be elaborated upon.

1. Background

In 2006, the UN General Assembly (UNGA) decided to convene the Durban Review Conference and requested the Human Rights Council to prepare the process. The Human Rights Council therefore constituted a Preparatory Committee of the Conference (PrepCom) and the UN High Commissioner for Human Rights was appointed by the UN Secretary-General to serve as Secretary-General of the Conference and her office (Office of the High Commissioner of Human Rights [OHCHR]) to function as its secretariat. The Review Conference was to focus exclusively on the implementation of the texts adopted in 2001, i.e. the Durban Declaration and Programme of Action (DDPA).

Eight years after the original conference, the Durban Review Conference (DRC) was an alternative to a 'Durban + 10 Conference' and its inherent risk of re-opening the DDPA. Just as the 2001 Durban Conference had proved a highly politicised event, remembered not for the balanced text adopted at the end of the conference but for the excesses of the parallel NGO Forum denouncing Israel as a racist state, equating Zionism with racism and for the anti-semitic stance of some NGOs, the Durban Review Conference took place in a very heavy international political climate.

For its part, the EU had to achieve a common position, both on the draft outcome document and on the issue of its participation in the conference. In the beginning, a clear logical link was established between the two. The EU would participate in the Durban Review Conference if it could secure a satisfactory outcome, otherwise it would pull out altogether. In the end, the two were disconnected and some EU Member States further dissociated themselves from the agreed EU position.

2. Global governance mode: the international political climate and its implications

Much had changed since the end of the Durban Conference on 7 September 2001. Only two days after the end of that conference, the world was shattered by 9/11. Subsequently the 'war on terror' and its extrajudiciary arsenal of 'extraordinary rendition', tough interrogation techniques or the extra territoriality of Guantanamo Bay, affected the US human rights record and its high moral ground. It also contributed to the widening gap between the United States, its Western allies and Islamic countries.

In the context of the 'war on terror', several events further contributed to reciprocal suspicion – if not plain animosity – between the West and the Muslim world. The invasion of Iraq (supported by some EU Member States, inter alia Italy, The Netherlands, Poland and the Czech Republic), the bombings in Madrid in 2004 and in London in 2005 (the 7/7 bombings), the assassination in November 2004 of Dutch film director Theo van Gogh by a Muslim radical, the uproar caused in some Islamic countries by the Danish caricatures of Prophet Muhammad in September 2005, the Georgian crisis in 2008 and Russia's determination to reassert itself as a world power, Israeli operation 'cast lead' in the Gaza strip (which led to the holding of a special session of the Human Rights Council in January 2009), the difficult appointment of Anders Fogh Rasmussen as NATO Secretary-General because of Turkey's position on the Danish cartoons as well as the forthcoming presidential elections in Iran in June 2009 were some of the most significant events that had taken place in the intervening period and had influenced more or less directly the political climate surrounding the conference. The presence of President Ahmadinejad as the only head of state at the conference and his hate speech caused further tensions.

In the UN follow-up process to Durban, the animosity was translated into bloc politics between the 'west and the rest' (Petrova, 2010, p. 132). While the Organisation of the Islamic Conference (OIC) prioritised the concept of defamation of religion,[3] a priority that was unacceptable for Western diplomats, the African Group was disappointed by the perceived lack of Western interest for the provision of a remedy for historical injustices like slavery, the slave trade and colonialism.[4] Consequentially, the Western states were isolated at the UN when it came to the combat against racism, the very aim of the Durban process.

3. Global governance mode: the preparatory process

The preparatory process had started badly under the poor leadership of the Libyan chair of the PrepCom, Ambassador Najat Al-Hajjaji who, together with her five facilitators, had only managed to produce an unusable compilation of regional contributions, which was 138 pages long.

In 2007, a questionnaire, prepared by OHCHR, in accordance with a PrepCom decision (PrepCom, 2007), was circulated in order to facilitate the Durban Review Process. The questionnaire consisted of six questions,[5] together with an annex allowing for the description of the policies, programmes and projects, undertaken to implement the Durban Declaration and Programme of Action including constitutional, legislative, administrative, affirmative action measures, development of national action plans, creation of governmental bodies and/or awareness-raising activities.

Separately from the EU reply, the European Commission and the newly created Fundamental Rights Agency prepared a reply to the Questionnaire (UN General Assembly, 2008).

As the PrepCom was clearly going nowhere, the process was put back on track with the appointment, at the end of 2008, of Yury Boychenko, a senior diplomat from the Russian Permanent Mission to the UN in Geneva, as the chair of the drafting committee, assisted by a small team of experts from Belgium (Nathalie Rondeux), Egypt (Ihab Gamaleldin) and Norway (Vebjorn Heines), with the support of the secretariat of the conference (Ibrahim Salama). When it became apparent that the Durban Review Conference was being rescued from a quasi-certain failure under the skillful steerage of the new facilitator, the Russian Permanent Mission in Geneva became more visibly involved in the process, calling for two meetings of ambassadors. It was clear that had Yury Boychenko's mission failed, he would have been dismissed as an independent expert, but as he was successful in bringing the process to a good outcome, the Russian Permanent Mission could (and did) take some credit for his personal achievement. As a result, the image of the Russian Federation as an active player and honest broker was clearly enhanced but not necessarily sustained subsequently.

The preparatory process was also helped by clear signals, first, from the Palestinian representative and Egypt (on behalf of the African Group) that they would not insist on language on the Middle East and, then, by the OIC that it would not be rigid on references to the concept of 'defamation of religion'. For her part, the High Commissioner for Human Rights (HC) had clearly stated that 'while I understand the concerns behind the concept of defamation of religions, I believe that, from a human rights perspective and in light of the Durban Review Conference, it should be addressed as an issue of incitement to religious hatred within the existing framework of international human rights law, with reference to articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR)' (UN HCHR, Report to the Durban Review Conference). Indeed the personal involvement of High Commissioner Pillay and her team was also conducive to finding a compromise.

The EU should also be given credit for the restraint exercised in the final rounds of negotiations, while several African and OIC delegations used tactics not conducive to reaching a speedy consensus. There was even a

sense that agreement would only ever be possible in the final hour, so as to permit all parties to claim they had defended their interests until the bitter end.

3.1. EU red lines regarding the draft outcome document and utilisation of EU instruments

In the second half of 2008, an EU strategy had been agreed by COREU, under the aegis of the French Presidency, with a view to defining red lines, which would trigger disengagement from the EU. The EU was quite transparent about its red lines, stating repeatedly that, if its red lines were not respected, it would withdraw as a bloc.

Such red lines also included sine qua non language to be included in the outcome document (also known as green lines):

- Multiple and aggravated forms of discrimination
- The prevention of genocide, war crimes and crimes against humanity
- Democracy and the rule of law
- The importance of fundamental freedoms, especially freedom of expression, in combating racism
- No hierarchy between victims
- Need to combat all forms of racism, including anti-semitism
- Refusing any denial of the holocaust or weakening of its meaning
- The role of education and training
- Importance of a free and active civil society
- Role of independent national institutions

Other priorities included the 'responsibility to protect' and 'sexual orientation', although those were not considered to be red lines because they were not mentioned in the DDPA. As the EU line was to insist that the Durban Review Conference concentrate on the implementation of the DPA, it could not be too forceful on those two issues but still managed to include at least oblique references. Last but not least, the EU could obviously not accept the concept of 'defamation of religion' nor the singling out of Israel. As is generally the case in such instances, EU demarches were organised in a number of third countries in order to explain the expectations of the EU for the Durban Review Conference. Naturally, EC Delegations were part of EU Troika demarches.

3.2. The EU's participation in the conference: a contentious issue

In the context of heightened tensions between Western democracies and a number of Muslim countries and the highly charged atmosphere surrounding the Durban Review Conference for fear of a repetition of the 2001 excesses of the NGO Forum, the EU had had to agree on a position regarding its participation. Major concerns were the likelihood of

anti-semitic speeches, the branding of Israel as the most racist country in the world and denial of the Holocaust (none of those concerns appearing in the final outcome document). On the other hand, the importance of EU participation was recognised for various reasons as well. It was feared that the boycott of the conference by Western countries would instigate the ideological polarisation between the 'west and the rest'. As High Commissioner Navy Pillay argued, 'the global problem of racism and discrimination needs to be dealt with on a global scale' (Press Release Durban Review Conference, 19 April 2009). Furthermore, it was feared that a European retreat at the Durban Review Conference could have a lasting and negative impact on chances of reaching an international consensus on human rights issues in the future, resulting in a fragmentation of the human rights agenda, which could undermine existing human rights instruments (Bielefeldt, 2009, p. 9).

Several times during the preparatory process, the United Kingdom, Denmark and the Netherlands had suggested that they would disengage if they were not satisfied with the possible outcome. Under pressure from their counterparts, who insisted that the EU should be united and remain involved or disengage as a whole, on the basis of respect for EU red lines, they remained engaged.

Israel and Canada had pulled out of the conference, already in 2008, followed by the United States and Australia. After re-engagement in the preparatory process by the United States and Australia, only for one week and with much prevarication on the US part, the Obama administration finally decided not to re-engage officially because of the reaffirmation of the DDPA that the United States had not endorsed in 2001 and problems with paragraph 13, which limits freedom of speech. Australia and New Zealand pulled out just before the beginning of the conference because of the prevailing political climate.

On 5 March, on the sidelines of a NATO conference in Brussels, Minister Frattini announced that Italy would not participate in the current negotiations on the draft outcome document as it could not 'accept' language that is inspired by anti-semitism, that focuses, with an aggressive and unbalanced view, on a specific regional context (i.e the Israeli and Palestinian issue) and aims at limiting or undermining the freedom of expression (as it is the case for the 'defamation of religion' issue). This pushed the Czech Presidency into a difficult communication exercise, whereby it had to explain that, in spite of the Italian position, the EU, 'as a whole' remained actively engaged in the Durban Review Process.

On 16 March, EU ministers of foreign affairs discussed Durban under 'any other business' (a.o.b) during lunch, upon the Netherlands' request, which also presented an alternative outcome document. Only Italy supported the new Dutch text. There were no formal conclusions to the lunch discussion that only half of the EU ministers attended.

At a later stage, Germany suggested that the General Affairs and External Relations Council (GAERC) should be seized of the matter again, but this avenue was never pursued.

At the same time, the EU (and within the EU some Member States more than others) was also keeping a keen eye on the US position.

4. Global governance mode: US re-engagement[6]

In 2001, the United States had walked out of the Durban Conference because of criticisms against Israel. Eight years later, the new US administration led by the first ever African American President, and its declared intention to re-engage in the multilateral system, gave rise to expectations that the United States would participate in the Durban Review Conference. Indeed, on 20 February, the United States announced that they had sent a delegation to Geneva 'to work with countries that want to achieve a successful review Conference that focuses on combating racism, racial discrimination and other forms of intolerance' (US Department of State Press Statement No. 2009/141). However, the United States recalled that they had not previously participated in the preparations for the Durban Review Conference because of 'strong reservations about the direction of the Conference, as the draft document singles out Israel for criticism, places unacceptable restrictions on freedom of expression under the guise of defaming religion, and calls for payment of reparations for slavery' (US Department of State Press Statement No. 2009/141).

One week later, on 27 February, the United States announced that they would not engage in further negotiations because 'the document being negotiated has gone from bad to worse' and was 'not salvageable'. They added that they would not participate in 'a Conference based on this text', but indicated that they remained 'open to a positive result in Geneva', provided that the draft outcome document (US Department of State Press Statement No. 2009/178):

i. was considerably shortened,
ii. would not reaffirm the flawed 2001 DDPA,
iii. did not single out any one country or conflict,
iv. did not embrace the troubling concept of 'defamation of religion', and
v. did not go further than the DDPA on the issue of reparations for slavery.

In conclusion, the United States declared: 'We will observe developments in Geneva and in capitals to see if such an outcome emerges. We would be prepared to re-engage if a document that meets these criteria becomes the basis for deliberations' (US Department of State Press Statement No. 2009/178). In private, the US delegation indicated that the door was not

completely closed and depending on the evolution of the text, they might want to re-engage. US diplomats stated that their key concern was the Middle East peace process and they would not be involved in an event that might jeopardise their efforts in the region. As Israel was demarching EU Member States in their capitals and in Geneva encouraging withdrawal, Washington would clearly be under pressure to withdraw for geopolitical reasons.

The United States had the additional problem of having to endorse the Durban Declaration and Programme of Action where some paragraphs remained problematic. Speaking to the press on the day before the conference, President Obama said: 'if we have a clean start (...) we are happy to go (...) if you are incorporating a previous Conference that we weren't involved with (and) that raised a whole set of objectionable provisions, then we couldn't participate' (US Mission Geneva Newsletter, 19 April 2009). High Commissioner Pillay dismissed this argument at a press meet on the eve of the conference, saying the United States' difficulty with reaffirming the DDPA could have been overcome by indicating in a footnote that it had not affirmed the original declaration (Press Release Durban Review Conference, 19 April 2009).

To this day, High Commissioner Pillay is still campaigning in favour of the endorsement of the outcome document by all disengaged countries. So far, the United States, the Netherlands and Italy are still resisting. Rather surprisingly, it was the Russian ambassador Loshchinin who, in his concluding statement, announced that Germany would be in a position to endorse the outcome document. Poland and the Czech Republic equally endorsed the outcome of the Durban Review Conference.

5. Global governance mode: the EU in the Durban Review Conference (20–24 April 2009)

In 2006, the United States and Israel had voted against resolution 61/149 that decided to convene the Durban Review Conference. Moreover, Canada had signaled early on its intention not to participate in the process, and the EU Member States predicated their participation on no reopening of the 2001 Durban Declaration and Programme of Action. From the start of the Durban follow-up process, Western support was limited. Moreover, whereas a majority of Southern states was keen to have the conference, they were not supportive of financing or hosting it (Lennox, 2009, pp. 223–224).[7] The organisation of the Durban Review Conference had thus faced difficulties from its very inception.

By the time the conference was opened by the President-designate, Hon. S. Amos Wako, the Attorney General of the Republic of Kenya, on 20 April 2009, three more EU Member States (the Netherlands,[8] Germany, Poland) followed Italy's example and announced their unilateral disengagement.

This prompted some OIC members, particularly Syria, to try and revert to a prior version of the text, arguing that, as some states had not fulfilled their obligations by pulling out of the conference in spite of the fact that all their demands had been fulfilled, other states or groups should not feel compelled to fulfil their own obligations.

Undoubtedly several EU Member States were still smarting from the climate surrounding the 2001 Durban Conference and, like the United States, they feared that what would unfold in the old Assembly Room of the League of Nations would make it impossible to resist the pressure of their national public opinions. Such fears became even more acute when the presence of the Iranian head of state – the only head of state present at the conference – was confirmed and, together with it, the predictability of hate speech against Israel and Jewish people throughout the world.

5.1. President Ahmadinejad's show

President Ahmadinejad's statement had little to do with the conference itself – apart from labeling Israel as a racist state – and would probably have been delivered at the UNGA in New York, were it not for the fact that the Iranian presidential elections were only a few weeks away (12 June 2009) and President Ahmadinejad's position in the electoral race was weak.[9] The opportunity to use the Durban Review Conference to position himself as a world leader was simply too good to be missed.

Indeed, his speech made it obvious that President Ahmadinejad's agenda was to combat Western imperialism and capitalism (rather than racism) and what he regarded as its most blatant manifestation: Israel. However, he was also careful to limit his most ferocious attacks on the United States to the previous administration and his criticism of the UN system to calls for a reform of the Security Council.

On the issue of Holocaust denial, it is worth noting that, when checked against delivery in English, the phrase 'the ambiguous and dubious question of the Holocaust' was not mentioned although it was in the English hard copy of the statement. This was apparently done upon the advice of UN Secretary-General Ban Ki-Moon, who had met with the Iranian President before he addressed the Durban Review Conference.

President Ahmadinejad's attempt to present himself as a constructive reformist animated by the love of people might not have been convincing to any Westerner, but some passages clearly rang true with some delegations and, more importantly for him then, with many of his fellow citizens. Depicting the financial and economic crisis as another Western-made disaster was particularly well received. Nevertheless, Egypt, which was accusing Iran of sponsoring Hamas in its takeover of Gaza and posing a threat to its own national security, was clearly not supportive. Similarly, the Palestinian delegation in Geneva, representing the Palestinian Authority, felt that President Ahmadinejad's speech was a disservice to its cause.

The response of the EU

The reaction of the EU had been well prepared and was well publicised. One week prior to the beginning of the conference, the EU had decided that should President Ahmadinejad use anti-semitic language, deny the existence of the Holocaust, or label Israel as racist, representatives of the EU would walk out en bloc. As predicted, President Ahmadinejad referred to the Zionist regime and all remaining 24 EU delegations (EC included) walked out. The Permanent Representative of France, Ambassador Mattéi, had pre-arranged a press conference in the corridors of the Palais des Nations, in order to explain the EU position. Unfortunately, other EU ambassadors had not been so astute and the co-ordinated communication strategy agreed in the Council Working Group on Human Rights (COHOM) on 14 April never saw the light of day, in spite of the elements provided for by the European Commission.

Despite this co-ordinated EU response, the Czech Republic[10] pulled out of the conference altogether officially because President Ahmadinejad's speech labelled the 'Zionist regime' as racist and denounced Zionist, Western and US domination. In the run-up to the actual conference, some EU Member States had advocated that the EU should walk out of the conference altogether rather than out of the conference room; the Czech Republic had done it.

Not only was the Czech Republic late to move out of sync with the rest of the EU, it also left the EU without representation by its rotating Presidency. However, the Czech Republic could not walk out of the EU Presidency, and it continued to co-ordinate EU positions. Due to not keeping a discrete presence in the conference room – unlike other officially missing delegations – the Czech Republic had to rely on information provided by other delegations to fulfil its role.

Sweden, the incoming Presidency, was asked to deliver statements on behalf of all Member States of the EU, regardless of their participation during the General Segment and the General Debate. This innovative formula had the advantage of mentioning the EU but the disadvantage of not including the EC, as the statement was made on behalf of the EU Member States. After much debate, a third concluding statement was delivered on behalf of the 22 participating Member States, at the end of the conference. The enumeration of a group of countries, which appeared to have little in common, was perturbing to listen to, but Italy could not accept a statement on behalf of the EU, and Germany refused to have a statement on behalf of participating EU Member States so as not to create EU sub-categories of EU Member States participating in the conference and EU Member States not participating.

Twelve EU members also delivered statements in their national capacity, including Belgium, which was the only EU Member State to be represented at the ministerial level, only one day before the end of the conference. With the boycott of other Western countries, there was a definite lack of immediate response to President Ahmadinejad's speech – with the exception of the excellent speech by the Norwegian minister of foreign affairs Jonas

Gahr Støre. His speech was timely and focused on the subject matter of the Durban Review Conference: combating racism, after addressing briefly President Ahmadinejad's hate speech.[11]

6. EU actor capacity

The EU held observer status at the Durban Review Conference. Accordingly, it did not have a right to vote, but could participate in deliberations and was permitted to submit proposals that could be put to a vote on request of any state (A/CONF.211/3, I, rule 1). As only the EU Member States, independently, were full participants with a voting right, EU coordination at the Durban Review Conference was essential in order to ensure an EU position (see EU red lines, above). EU actor capacity was perhaps one of the most telling features of the EU position during the Durban Review Conference, for the EU *debacle* was totally incomprehensible from a legal point of view because the EU had a lot to offer, in terms of acquis and best practices in the field of racism, racial discrimination, xenophobia and related intolerance.

6.1. EU acquis: EU competences and internal decision making

The Treaty of Amsterdam, which came into force in 1999, had introduced new provisions relating to combating discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, in its Article 13. As early as 2000, the EU had already adopted two anti-discrimination directives. The so-called racial equality directive (Directive 2000/43/EC) aims at combating discrimination on the grounds of racial and ethnic origin in the field of employment and training and the provision of and access to services. The so-called employment equality directive (Directive 2000/78/EC) aims at combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in the field of employment and training.

In 2004, the EU adopted a third directive based on Article 13 TEU, in order to implement the principle of equality between women and men in the access to and provision of goods and services. A fourth directive has been proposed by the European Commission, in order to complete the anti-discrimination acquis, and aims at combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in the access to and provision of goods and services. At the time of writing, the Council had been unable to reach the necessary unanimity to adopt this new directive, thus leaving the overall EU anti-discrimination framework incomplete.

Building upon the work of the former European Monitoring Centre on Racism and Xenophobia, the Fundamental Rights Agency was created in Vienna, in 2007, with the objective of assisting the relevant institutions and authorities of the EU and its Member States when they take measures or

formulate courses of action within their respective spheres of competence to fully respect fundamental rights.

Also, prior to the Durban Review Conference in 2008, the EU adopted a Framework Decision (Framework Decision 2008/913/JHA) in order to combat, by means of criminal law, certain forms and expressions and racism and xenophobia directed against a group of persons or a member of a group defined by reference to race, colour, religion, descent or national or ethnic origin.

The Data Protection Directive (Directive 95/46/EC) provides for the prohibition of the processing of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and data concerning health or sex life. In addition, the Schengen Borders Code (Regulation (EC) N°562/2006) and the Visa Code (Regulation (EC) N°810/2009) require border guards and consular staff to perform their tasks with no discrimination against travelers on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Finally, in 2010, the EU adopted the Audiovisual Media Services Directive (Directive 2010/13/EU), formerly known as the 'Television without Frontiers' Directive, which prohibits broadcast and video on demand inciting to hatred on grounds of race, sex, religion or nationality in all audiovisual media services, whatever their means of delivery, including the Internet. This requirement also applies to third country providers, if they use a satellite transmission capacity or an uplink to a satellite appertaining to EU Member States. In addition, Member States are obliged to ensure that audiovisual commercial communications (all forms of advertising) 'shall not include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation' (Directive 2010/13/EU, art. 9.1. (c)(ii)).

6.2. EU actor capacity: the role of the European Commission

The European Commission played a constructive role and provided a valuable contribution to an EU position. Indeed, the Inter Service Group (involving inter alia DG RELEX, DG Freedom, Security and Justice and DG Employment) provided a much appreciated input based on EU acquis, which was taken on board by the Presidency, at various stages of the negotiation process, and the Belgium burden-sharer, who was working with the Russian facilitator. The European Commission also provided elements for a coordinated communication strategy, which never materialised, although it had been agreed upon in COHOM.

However, the European Commission could probably have made fuller use of the possibility given to it to contribute to the conference. Rule 1 of the rules of procedure of the Durban Review Conference specifically refers to 'observer delegations, including the African Union and the European Community' recognising, in a footnote, the right of the EC 'to participate

in its deliberations', as well as its 'right to submit proposals'. In fact, the only direct contribution by the EC to the process was a reply to a questionnaire circulated by the UN in preparation of the conference on the implementation of the DDPA (the EU submitted a separate reply to the same questionnaire).

The European Commission also publicly confirmed its participation as an observer, following the disengagement of five EU Member States, and issued a public press release to that effect, on 20 April. The Commission shared the view that the EU 'red lines' for the negotiations of the outcome document had been totally preserved.[12]

The Delegation of the European Commission to the Conference was led by the Head of EC Delegation in Geneva, Ambassador Eckart Guth, and included the director of the EU Fundamental Rights Agency (FRA), Morten Kjaerum.

An information stand was jointly run by the European Commission and FRA in the corridors of the Palais des Nations, which distributed extensive material on anti-discrimination, diversity and equal opportunities policies in the EU.

Finally, after careful consideration, the EC decided not to make a statement during the conference in view of the difficulty of adding to 'EU statements' whilst avoiding the pitfalls generated by a disunited EU and so as not to add to the political disarray and tensions prevailing within the EU. It is clear that the situation was quite unique and put the EC in a difficult position. OHCHR indicated in private that they would have valued an EC statement, in order to compensate for the 'deficiencies' of some of the Member States but that was exactly what EU Member States did not want. Clearly the political climate within the EU caused a 'kneejerk reaction' by some EU Member States, who were worried that an EC statement would further expose EU divisions and its rather weak position.

7. The EU's recognition as an actor by third countries: consequences for the EU's image and relations

It is clear that the disengagement of some EU Member States has dented the image of the EU as a strong player negotiating in good faith (Lennox, 2009, p. 226, 235; Van Boven, 2009, p. 329; Brown, Croso and Perolini, 2010, p. 183–184). In addition to its potential for damaging EU relations with African countries at the UN, the experience of the review conference may also undermine the credibility of the EU in its human rights dialogues with these and other countries.

As the Durban Review Conference has been so important for the African continent, the high-level segment was heavily dominated by the African Group (nearly half of the 50-odd states that spoke during the High Level Segment were from the African Group). Relatively few (Lesotho, Uganda,

Zimbabwe, Nigeria, Swaziland) expressed regret at the absence of some states. The Zimbabwean justice minister was the most scathing in this regard, saying that 'those of us who have been and continue to be victims of racism cannot but be bewildered at the thought that anyone would boycott this essential Review Conference' (statement delivered during the conference). In another instance, the Nigerian minister of state for foreign affairs deplored the far-right political parties and movements in 'many countries, including those that pride themselves as bastions of civilisation and democracy' (statement delivered during the conference). He added that the absence of some states from the conference was all the more concerning given that many of them had been involved in earlier negotiations and were critical actors in the world.

The EU's positive relationship with the High Commissioner also suffered from the disengagement by some EU Member States, in spite of her repeated pleas. On the eve of the conference, High Commissioner Pillay told the press she was shocked and deeply disappointed by the US decision not to attend, saying its remaining difficulty with reaffirming the DDPA could have been overcome by indicating in a footnote that it had not affirmed the original declaration (Durban Review Conference Press Release, 19 April 2009). Unlike the EU Member States, however (of whose intentions and reasons she learned only through the media), she said the US ambassador had at least 'afforded (her) the courtesy' of informing her in person that his delegation would not be attending. Similarly, in her closing statement, the EU was conspicuously absent from the groups (OIC and African Group) which she singled out for having demonstrated the flexibility vital to reaching consensus.

Finally, several NGOs and think-tanks criticised the disengagement of EU Member States. As the Geneva Advocacy Director of Human Rights Watch stated: 'The sad truth is that countries professing to want to avoid a reprise of the contentious 2001 racism conference are now the ones triggering the collapse of a global consensus on the fight against racism, (...) governments boycotting the Conference have decided to put the concerns of victims last, (...) instead of isolating radical voices, governments have capitulated to them' (Human Rights Watch, 19 April 2009).[13]

8. Implications of EU disengagement: long-lasting effects regarding the outcome document

Furthermore, the disengagement of five EU Member States posed a problem for the implementation of the outcome document by the EU. While expressing her deep regret, High Commissioner Pillay finally adopted a conciliatory stance towards the EU during the conference, focusing on her hope that those having 'chosen to stand aside (...) will not do so for long' (statement delivered during the conference). In her April letter to the 27 EU foreign ministers and Commissioner Ferrero-Waldner, in view of the GAERC

meeting on the same day, she urged EU Member States that had disengaged to 'rejoin the process of implementing the United Nations anti-racism agenda, including the DDPA and the Outcome Document of the Review Conference' (letter addressed by High Commissioner Pillay to EU Member States and the European Commission). Hinting at the wider implications of a failure by the EU as a whole to commit to the anti-racism agenda, she stresses in her letter that such action 'would also be very helpful in the broader context of the human rights work of the United Nations' (letter addressed by High Commissioner Pillay to EU Member States and European Commission). To date, Italy and the Netherlands still have not endorsed the DRC outcome document, causing recurring EU splits.

Already in 2009, during the adoption of a Third Committee decision endorsing the outcome document (UN General Assembly, A /C.3/64/L.55), the EU was split in three ways, normally a recurring situation on Middle East issues, with the Netherlands voting 'no' with Australia, Canada, Israel and the United States, whilst Italy, the Czech Republic, Poland, Germany, and Romania abstained and the rest of the EU Member States (21) voted 'yes'. The decision was adopted with a final vote of 163-5-9.

9. Assessment of the EU's overall position (before, during and after the conference)

When assessing the overall position of the EU during the 2009 Durban Review Conference, three elements are worth considering: first of all, the EU position during the preparatory process; secondly, the participation of the EU at the conference; and thirdly, the EU position regarding the outcome document.

It is fair to say that EU coordination worked very well (up to a point) in spite of clear tensions between EU Member States regarding the strategy but EU unity collapsed with the unexpected Italian unilateral disengagement, which created a precedent and then made it impossible to contain the Netherlands and other EU Member States that had been subjected to intense lobbying by Israel. Also, it is clear that some EU Member States have a tendency to follow a trans-atlantic line rather than adhering strictly to EU positions.

In that context, it is worth noting that there were hardly any references to the Treaty on the European Union, either in Geneva or in Brussels, and the need to uphold common positions in international fora. There were no less than three Articles of the Treaty on the European Union (Articles 16, 19 and 20) which contain unequivocal obligations to seek and uphold EU common positions (see Chapter 3).

It is also worth underlining that throughout the process, there were several lost opportunities to establish or re-establish a common position at the highest level. For example, on 19 January 2009, High Commissioner Pillay

had addressed a letter to the Czech Presidency that she wished to address the GAERC but the Czech Presidency treated this request not as a request to the EU but as some kind of request to one Member State, thus prompting High Commissioner Pillay to send 27 letters to the Member States, on 13 March, but to no avail. Only Sweden and Denmark replied. Finally, on 27 April 2009, Pillay sent a letter to all 27 EU Member States and Commissioner Ferrero-Waldner urging *'all Member States that left the Conference to rejoin the process'* (letter addressed by High Commissioner Pillay to EU Member States and European Commission).

In hindsight, instead of discussing the Durban Review Conference during the GAERC meeting of 16 March (some 10 days after Italy's withdrawal), as an a.o.b. item at lunchtime when half the ministers were absent, a proper discussion on Durban Review Conference as an agenda item would have been more appropriate. Of course, there were many bilateral contacts, at ministerial level, both within the EU and with third countries, especially on the day preceding the opening of the conference, but that was clearly no substitute for a formal GAERC meeting and a formal common position on the matter.

Ultimately, it could be argued that, whilst the EU 'rank and file' fulfilled their duty in agreeing and defending a contribution to the Durban process that was consistent with the EU acquis and values, the higher echelons of EU diplomacy were perhaps not sufficiently engaged for the EU to be seen as a valuable and constructive UN player at the Durban Review Conference and, more generally, in the fight against racism, racial discrimination, xenophobia and related intolerance. This places the EU in the bottom right of the quadrant (marginal) of Table 2.2 (Chapter 2), with a weak legal status and weak role performance.

It is also clear that there was some disconnect between the EU internal policies and its external policy.

According to the European Commission's communication on multilateralism, the EU's commitment to multilateralism is 'a defining principle of its external policy', while the UN is 'the pivot of the multilateral system' (European Commission 2003, p. 3). The EU split at the Durban Review Conference and the unilateral withdrawal of some EU Member States from the multilateral UN Durban Review Conference process, stand in contrast with the EU's goal of effective multilateralism. To uphold the EU's credibility as an effective multilateral actor, it is crucial to prevent similar EU splits at UN multilateral conferences in the future. In that case, the position of the EU during the Durban Review Conference will remain a negative exception in the design of both a coherent and credible EU external policy and a useful contribution to effective multilateralism. In that respect, the Treaty of Lisbon, together with the reinforced role of HR/VP Ashton and the European External Action Service, should help overcome some of the major weaknesses that characterised the EU at the Durban Review Conference.

First of all, as the chair of the External Affairs Council, HR/VP Ashton could put the issue on the agenda and remind EU foreign affairs ministers of their commitment to the UN system and obligation to uphold common EU positions in international fora, bringing back 'straying' delegations.

Secondly, as High Commissioner Pillay's privileged interlocutor, HR/VP Ashton would be in a position to ensure a united response to her requests, thus remedying problems of weak leadership, such as the Czech Presidency, which withdrew unilaterally in the middle of the conference, and a European Commission keeping a low profile in the run-up to the Irish referendum. Under such leadership, the EU should be able to implement its strategy successfully both during negotiations and in representing its position.

Thirdly, the Treaty of Lisbon will hopefully make it easier for the EU to position itself satisfactorily at the UN, amidst very high expectations, notably by ensuring that some EU Member States do not over-react to external stimuli (for example, Iran's posturing or US disengagement). Only then can the EU fulfil its role as a major actor within the UN system and fulfil both its ambitions on the world stage and the expectations of others.

In an ideal world, the EU would have played its full part as a leader and a mediator during the Durban Review Conference, by acting like the Russian facilitator during the preparatory process and by delivering the Norwegian statement during the conference. The Treaty of Lisbon is aiming at that and it is hoped that the political will that is essential to implement the EU's stated commitment to effective multilateralism will not be the missing ingredient.

Notes

1. *Disclaimer*: The views expressed here are entirely my own, do not necessarily reflect the position of the European External Action Service and, in no way, engage the institution. Further, as this work is based on primary sources, such as oral statements, copies of statements handed out before, during and after the conference or legal texts, it contains very few academic references. As the Durban Review Conference was organised recently, only limited secondary resources are available on the topic.
2. Israel, Canada, United States, Australia, New Zealand, Italy, the Netherlands, Germany, Poland and the Czech Republic having withdrawn at various stages of the process.
3. Paragraph 199 of the DDPA recommended that 'the Commission on Human Rights prepare international complementary standards to strengthen and update international instruments against racism, racial discrimination, xenophobia and related intolerance in all their aspects'. In the framework of the Intergovernmental Working Group that was entrusted with the task of the effective implementation of the DDPA, the OIC prioritised the elaboration of a convention on the defamation of religions, see: A/HRC/10/88, §72. This prioritisation is also reflected in several resolutions introduced by the OIC at the UN Human Rights Council (A/HRC/RES/4/9; A/HRC/RES/ 7/19; A/HRC/RES/10/22).

4. §14 of the DDPA recognised that colonialism has led to racism, and must be condemned and prevented, while pointing explicitly at people of African and Asian descent, as well as indigenous people as continuous victims of colonialism. In the framework of the Intergovernmental Working Group that was entrusted with the task of the effective implementation of the DDPA, the African Group prioritised the fight against incitement to racial hatred (A/HRC/13/58, § 26). In this regard, the resolution 7/33 of the Human Rights Council – introduced on behalf of the African Group – 'urges Governments that have not done so to issue formal apologies to the victims of past and historic injustices and to take all necessary measures to achieve the healing and reconciliation of and the restoration of dignity to those victims, as outlined in paragrapfh 101 of the Durban Declaration and Programme of Action'.
5. The questions were the following: 1. Can you assess the implementation of the Durban Declaration and Programme of Action in your country? 2. Can you assess contemporary manifestations of racism, racial discrimination, xenophobia and related intolerance as well as initiatives in this regard with a view to eliminating them in your country? 3. Please identify concrete measures and initiatives for combating and eliminating all manifestations of racism, racial discrimination, xenophobia and related intolerance in order to foster the effective implementation of the Durban Declaration and Programme of Action. 4. How would your Government assess the effectiveness of the existing Durban follow-up mechanism and other relevant United Nations mechanisms dealing with the issue of racism, racial discrimination, xenophobia and related intolerance in order to enhance them? 5. What are the steps taken by your Government to ratify and/or implement the International Convention on the Elimination of All Forms of Racial Discrimination and give proper consideration of the recommendations of the Committee on the Elimination of Racial Discrimination? 6. Please identify and share good practices achieved in the fight against racism, racial discrimination, xenophobia and related intolerance in your country.
6. See, for details, also: Crook (2009) and Gowan and Brantner (2009).
7. At the first substantive session, less than half of the initial projected $7 million budget for the preparatory meetings alone were available, much of this was drawn from the remainders of the voluntary funds to the WCAR and OHCHR's extra-budgetary support. Russia and China topped up the funds with some $220,000, but no other states had responded to requests for voluntary contributions (UN Doc. A/C.5/62/21, 14 December 2007).
8. In a letter to Parliament, the Dutch minister of foreign affairs explained non-participation in the following terms: 'For me it is unacceptable that a few countries misuse this Conference to place religion above human rights, to unnecessarily limit the freedom of expression and opinion, to ignore discrimination on the ground of sexual orientation, and to implicitly single out Israel' (see http://www.minbuza.nl/nl/actueel/brievenparlement,2009/04/Kamerbrief-inzake-deelname-aan-de-Durban-Review-co.html).
9. A poll conducted in late March 2009 indicated that Mir-Hossein Mousavi would take 52% of Iranian workers' votes in the election, defeating Mahmoud Ahmadinejad who were expected to get 36% and Mehdi Karroubi 8%. Interestingly, Mir-Hossein Mousavi once called Ahmadinejad's approach to the issue of Holocaust a wrong one. He said that one should oppose the killing of any number of Jews since 'killing every person, according to Koran, is killing all the human race, whether he's Muslim or Jew', but he also stated that one should

oppose what he calls 'atrocities of Zionist regime'. Against all odds, Ahmadinejad won the election in the end.

10. The Czech Republic was already in a difficult position vis-à-vis the EU since the fall of its government in March and the caretaker leadership of Premier Topolanek.
11. Extract from minister of foreign affairs Store's statement: 'This is the rostrum of the United Nations. By definition it is a rostrum for the freedom of speech – crucial among human rights. The President of Iran has just exercised that human right. He did so – I believe – in a way that threatens the very focus of this Conference. Today we meet on the basis of a declaration that has been carefully negotiated by our representatives. It has managed to build a broad consensus, bringing on board all states and groups of states. By his intervention the President of Iran chose to place his country outside the margins of this declaration. Freedom of speech – yes. But the document that we have agreed is also clear on the need to protect against the incitement of hatred. I heard the messages in the President's speech – and they amount to just that: Incitement of hatred, spreading politics of fear and promoting an indiscriminate message of intolerance. The declaration that we have agreed is not a finger pointing exercise, it is not listing one conflict after another. Today's declaration is principled. We know there are many conflicts – too many conflicts – around the world between countries and within countries. The text aims at protecting people and individuals against the scourge of racism, discrimination and incitement to hatred. The Iranian President's allegations run counter to the very spirit and dignity of this Conference. I will not respond to all the allegations. Through his message the President has made Iran the odd man out. And Norway will not accept that the odd man out hijacks the collective effort of the many. Again – the President of Iran chose to place Iran as the odd man out'.
12. The European Commission issued the following press statement: 'The European Commission has closely followed the preparation for the Durban Review Conference and contributed to the forging of an EU common position on the substance of the review. Several Member States have decided unilaterally to withdraw from the Review Conference. However, a strong majority of EU Member States have decided to remain engaged. The Commission attends the Conference as an observer. In doing so, the Commission takes the view that the EU 'red lines' for the negotiations of the outcome document have been preserved. This text is not ideal and clearly represents a compromise, being the result of complex negotiations. It is essential to emphasize that no language on defamation of religion, of anti-semitic nature or targeting specific countries or regions of the world is included in the draft outcome document that is now before the Review Conference. The European Commission is aware that during the Conference there is a risk of attempts to hijack the attention of the international community to other questions that are absolutely disconnected with human rights law and with the theme of the fight against racism. In this context, we will firmly react to any unacceptable statements during the Conference and condemn any attempt to instrumentalize the Review Conference. Nonetheless, the European Commission believes that this event could provide an important opportunity to illustrate and review many of the concrete and important steps taken at the national level, at the international level, but also at the regional level, to fight against racism and discrimination. Even before the 2001 Durban Conference, the Union had adopted in 2000 legislation (the anti-discrimination directives) banning discrimination on the base

of racial or ethnic origin at work, education and in access to goods and services. It had also banned discrimination on other grounds of discrimination (religion, age, sexual orientation and disabilities) at work (the anti-discrimination directives). The Union is currently discussing a legislative proposal to extend this prohibition to education and access to goods and services. Both direct and indirect discriminations are banned in the EU. The EU remains committed to do all it can to fight all manifestations of racism and xenophobia, and expects its international partners to do the same'.

13. See also Gowan and Brantner, 2009, p. 5: 'The whole affair left the EU, in the words of one participant, looking 'a bit daft'. The fact that the EU was so easily swayed – and split – by American choices, however mixed the signals from Washington, highlighted the lack of a robust European strategy to begin with. The EU's mistake was to allow its opponents to set the terms of debate two to three years ago, rather than working with its allies to set out a more liberal agenda for the Conference in advance'.; Amnesty International, 20 April 2009: 'The withdrawal of Australia, Germany, the Netherlands, New Zealand and Poland and the refusal of Italy and the USA to join the Conference is very disappointing in the light of the long and difficult negotiations and the acceptance of the revised Outcome Document on Friday. True conviction in combating racism requires governments to be there to stand up for what is right and to reject forcefully what is objectionable'.

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Part IV

The EU in UN Environmental Governance

8

Legal Aspects of EU Participation in Global Environmental Governance under the UN Umbrella

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1. Introduction

This chapter traces the legal framework for the participation of the European Union (EU)[2] in the activities of the UN in the field of global environmental governance. The chapter starts with a brief overview of the objectives and commitments of the EU in the field of multilateralism and the environment, where full account is taken of the strengthened language after the Lisbon Treaty. Second, this chapter will look into two key aspects for enabling the EU to participate in international relations: competence and the exercise thereof, in particular as to the external representation of the Union. While both aspects are of course linked, it is important to inquire into them in turn in order to reveal the intricacies of the post-Lisbon framework. It will be argued that precisely the field of global environmental governance offers a prime sample of the major issues that surround the EU's external action. Moreover, a brief overview is given of the limits and possibilities of the UN legal and institutional framework when it comes to enabling a stronger role for the EU. Finally, the attention is turned to the EU's actual participation in global environmental governance under the UN umbrella. On the one hand, the EU's external representation in environmental matters in the UN context is examined, and, on the other hand, some concrete examples are discussed to reveal the challenges and opportunities for coherent and effective future action by the EU in the field of environmental policy through the UN system. The chapter thus offers insights into the day-to-day practice of the Union as it struggles to translate the vagaries of the Lisbon Treaty into practical arrangements for the EU's external environmental policy.

J. Wouters et al. (eds.), *The European Union and Multilateral Governance*

2. Objectives and commitments of the EU

The EU presents itself as committed to environmental protection and as a major actor on the international stage, in particular through multilateral action. If aspirations were the only factor, the EU would appear a model partner for global environmental governance under the UN umbrella.

2.1. EU environmental objectives and commitments

First, the concern for the environment is rooted deeply into the constitutional fabric of the Union. Already in the preamble of the Treaty on European Union (TEU) the economic and social progress the EU strives to bring to its people is qualified by the desire to ensure sustainable development and environmental protection. The same theme returns even stronger in the general objectives of the Union in Article 3 TEU, where the EU indicates that it not merely seeks to protect the environment, but that it is to work toward 'a high level of protection and improvement of the quality of the environment'. The constitutionalization of environmental protection has reached its zenith after the entry into force of the Lisbon Treaty, as Article 6 TEU makes the Charter of Fundamental Rights binding. In a remarkable evolution vis-à-vis a more classic Bill of Rights, the charter also contains a number of principles, including Article 37 entitled 'environmental protection', which reads 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. While the exact legal value of these principles is subject to academic debate (Goldsmith, 2001, pp. 1201–1216; Bacquero Cruz, 2008, pp. 69–70), Article 52(5) of the charter clarifies that 'The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers'. They are to be 'judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. While this excludes an enforceable EU right to a clean environment (Smets, 2001, p. 383-417), it nevertheless implies that the acts of the institutions and the EU Member States implementing EU measures must be interpreted in the light of this principle, and may even be held to be invalid when potentially detrimental environmental consequences are not sufficiently taken into account.

As regards internal policy, this commitment is reflected in a number of references to a high level protection of the environment and sustainable development. Most notable in this respect is Article 11 TFEU, which makes environmental protection a horizontal objective in line with the old Article 6 TEC. A further reminder is given in one of the most powerful legal bases, Article 114(3) TFEU (old Article 95 TEC), which requires that

harmonizing measures for the internal market take inter alia into account 'a high level' of environmental protection. All this further culminates in a separate title on the environment. According to Article 191(1) TFEU, Union policy on the environment is to contribute to the pursuit of the following objectives:

— preserving, protecting and improving the quality of the environment,
— protecting human health,
— prudent and rational utilization of natural resources,
— promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Moreover, in line with Article 191(2) TFEU, 'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at the source and that the polluter should pay'.

But also the external action of the Union is expressly guided by these principles, as is reflected in Article 21(2) TEU, according to which 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to [...] (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty' and '(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'. This is further reflected in the formal framework for the EU's environmental policy, as pursuant to Article 191(4), first paragraph TFEU, '[w]ithin their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organizations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned'.

2.2. A commitment to multilateralism and the UN

This brings us almost seamlessly to the second major EU commitment that is of importance for the EU's role in global environmental governance under the UN umbrella, its commitment to multilateralism and international law. The external environmental policy of the EU is thus embedded in a broader approach to EU external action. In Article 3(5) TEU, the Union affirms its objective to 'the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. This commitment is reiterated in Article 21 TEU and complemented in Article

21(2)(h) TEU by a commitment to 'promote an international system based on stronger multilateral cooperation and good global governance'. The EU recognizes in this respect a particular role for action within the UN framework. Indeed, pursuant to Article 21(1), second paragraph TEU '[t]he Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations'.

3. The possibilities of the UN framework for EU participation

The EU is not a member of the United Nations, nor is it in a position to become one, but its Member States all are. Under those circumstances, EU participation at the United Nations will usually be complicated with EU Member States playing important roles, and the status of the EU as such dependent on the limits of the various rules of procedure as well as the goodwill of other UN Member States. Accordingly, in the UN General Assembly (UNGA), the EU was merely an observer, with the result that it, though allowed to speak, could only do so after all UN Member States have spoken. An EU proposal which sought to upgrade this status to that of a so-called 'enhanced observer' was adopted after arduous negotiations in an UNGA resolution in May 2011 (Wouters, Odermatt and Ramopoulos 2011).[3] In the UN Security Council where the Union has two of its members holding a veto (France, the UK), the rules of procedure do allow for third parties – such as the Union – to be heard, and the Council has made use of this possibility already, but mostly counts on its permanent and non-permanent members to represent EU positions in line with Article 34(2) TFEU. In the specialized agencies and at UN-sponsored conferences the situation is very diverse. While most mimic the practices of the UNGA, the EU has become a full member – next to its Member States – of the FAO, as that organ's basic law contains a so-called REIO clause, allowing for the participation of *R*egional *E*conomic *I*ntegration *O*rganizations. But in most other UN fora, the status of the EU is usually limited to that of observer, the rights of which may, however, vary widely, ranging from a mere observer to one that enjoys almost all the rights of a sovereign Member State (except the right to vote, e.g. in the Commission on Sustainable Development [CSD]). The EU is a party in its own rights to most UN-related multilateral environmental agreements, and will therefore enjoy in principle the same rights as the Member States in the treaty organs, except most notably that it will not be allowed to exercise its right of vote when EU Member States exercise their rights of vote and vice versa (Emerson, Kaczyński, Balfour, Corthaut, Wouters and Renard, 2011, pp. 65–66).

4. Competence and external representation

Good intentions do not suffice, however, to ensure that the EU may effectively contribute to global environmental governance under the UN umbrella. Pursuant to the principle of conferral as laid down in Article 5(2) TEU, the EU may only act to pursue the aforementioned objectives to the extent that the treaties confer upon it the competence to do so. Moreover, even if the Union has been made competent in a particular domain, the concrete exercise of this competence is kept further in check because of the intricate institutional balance that is set up by the treaties, and which after Lisbon gets almost Byzantine qualities when it comes to external action. Accordingly, it is important, first, to clarify which competences the EU has in the field of environmental policy, and, second, to inquire into the exercise of these competences, most notably as to the negotiation of international agreements and the de facto external representation of the Union, in particular in the context of multilateral action under the UN umbrella.

4.1. Competence

Article 4 TFEU lists the environment as an area of shared competence between the EU and its Member States, which means according to Article 2(2) TFEU that 'the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence'. The exact scope of the actual competence of the Union will thus fluctuate over time, as the Union legislates in an increasing number of areas of environmental policy. Yet, in accordance with the Sole Article of the new Protocol (No. 25) on the Exercise of Shared Competences, it is important to bear in mind that there is a presumption against field pre-emption[4] by the Union, because 'when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'. The outer margins for the Union's competences as to environmental matters are primarily described in Title XX of Part III of the TFEU. Using the decision making procedures laid down in Article 192 TFEU, the EU may take action for realizing all of the objectives listed in Article 191 TFEU (see Section 2.1). This gives the EU potentially broad possibilities to act in order to protect the environment; however, until it actually makes use of these possibilities, the Member States remain equally competent.

To complicate matters somewhat, the environmental title is not the sole legal basis under which environmental policy may be developed. Indeed, environmental concerns may often also play a role in the context of standard-setting for the internal market under Article 114 TFEU, the transport policy

of the Union (Title VI of Part III of the TFEU), the common agricultural and fisheries policy (Article 43 TFEU), the policies in respect of research & technology (Title XIX of Part III of the TFEU) and development cooperation (Title III of Part V of the TFEU), energy policy (Article 194 TFEU) and the common commercial policy (Article 207 TFEU). Accordingly, some measures with an impact on the environment may find their legal basis in these titles. This point needs to be stressed as the chosen legal basis has more than token value. It not only determines the extent of Union competence, but also the choice of the legal instrument and the decision making procedure. Since the *titanium dioxide* case,[5] the European Court of Justice (ECJ) has gradually developed its approach as to selecting the dominant legal basis, or allowing for combining one or more legal bases. In light of the sheer variety of competing legal bases it is no wonder that many cases since the aforementioned *titanium dioxide* case have precisely been concerned with the correct legal basis for certain environmental measures.[6]

A major side effect of the variety of legal bases is also the potential that some aspects may no longer be a matter of shared competence. On the one hand, cases such as the *Rotterdam Convention*[7] or the *Cartagena Protocol*[8] demonstrate that the inclusion of trade provisions may bring some aspects of an environmental measure, *in casu* international agreements, in part within the exclusive competence of the Union. On the other hand, the presence of certain aspects relating to development cooperation or research and technology may undercut the natural claim to pre-emption of environmental measures as shared competences due to the reservations in Article 4(3) and 4(4) TFEU.[9] What is more, while there is not necessarily a link between the exclusive or non-exclusive character of a competence and the question of external representation of the Union, it will not come as a surprise that a stronger role for Member States in a particular domain will make the latter inclined to see this reflected in external representation, including in a UN context. Conversely, the European Commission may wish to understate the Member States' role in order to reinforce its own role.

All this becomes even more complicated when the EU seeks to develop an external environmental policy. There is no doubt that the EU may act externally in the field of the environment. This is made explicit in Article 191(4) TFEU for those aspects that fall within the hard core of environmental policy. Also the other legal bases listed above, such as transport or external trade, have inherently external dimensions. The main issue will however be whether the Union can act alone, or whether the Member States can act as well, i.e. whether the competence to develop an international environmental policy is an exclusive competence of the Union or not.[10] As the ECJ has held 'the external competence of the Community in regard to the protection of the environment is not exclusive but rather, in principle, shared between the Community and the Member States'[11], and there is no reason to think otherwise after Lisbon in respect of the Union. Indeed,

the aforementioned Article 191(4) TFEU makes it clear that the EU external environmental competence 'shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements'. While Article 3(2) TFEU sets out three instances when the conclusion of an agreement in a domain that otherwise may be of shared competence must be deemed to be an exclusive competence, namely 'when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope', the most likely scenario for agreements concerning the environment is that they will be mixed agreements.[12] This is particularly so, because even if the Union has set environmental standards, the Member States are entitled to adopt more stringent measures, with the result that any international agreement seeking to do just that will be a mixed agreement.[13] This means that in the negotiation and conclusion of such agreements as well as in their implementation there will be a continued role for the Member States alongside the Union, with returning questions about competence at every stage of the debate, as the examples below illustrate.

4.2. External representation and the negotiation of international agreements

While it has been suggested that 'the mixed agreement is itself a creature of pragmatic forces – a means of resolving the problems posed by the need for international agreements in a multi-layered system',[14] the true difficulties of this pragmatic balance reappear in addressing the question as to who represents the Union externally, particularly in environmental matters.

While the Lisbon Treaty has introduced a number of provisions to strengthen the visibility, coherence and consistency of the Union's external action,[15] the treaty has no straightforward answer to the question who represents it externally, and stays virtually silent on the yet all too common situation of mixity. The argument is further convoluted as representation may take many forms, inter alia depending on the forum and the legal outcome sought. While the procedure for concluding an international agreement, for instance, is more or less adequately spelled out in Article 218 TFEU, other aspects, such as routine contacts with international actors or participation in international organizations, are not fully developed, despite some references to the way the EU takes position in international legal bodies for the adoption of legal acts in Article 218(9) TFEU, and the role of EU delegations in Article 221 TFEU.

When it comes to concluding international agreements[16] in areas concerning environmental law, irrespective of the legal basis, the normal course of action should be for the European Commission to present recommendations to the Council, which then decides on who will represent the Union as a sole negotiator or the head of the negotiating team. In practice,

there is often also a role for the Presidency, if only because in case of mixity, the council decision is (implicitly or explicitly) normally accompanied by a decision of the Member States (usually a decision of the representatives of the governments of the Member States meeting in the Council) as to their position and representation for matters falling under Member States competence during the negotiations. The expectation is that the EU negotiator will be the Commission, which under Article 17(1) TEU is inter alia entrusted with external representation of the Union except in cases provided for otherwise in the treaties, but that is – as such – not spelled out in Article 218 TFEU. Moreover, the Council shall provide the negotiator with Negotiating Directives, the binding force of which is disputed. All of this can in principle be done by qualified majority, at least if there are no areas concerned where unanimity is required internally. The key issue, however, is that the treaty only deals with the representation of the Union. In the case of mixed agreements, the question quickly arises as to who should represent the Member States, an issue that has been left unaddressed by the treaties. It is of course possible for the Member States to entrust the Commission with this task and they have done so on a number of occasions. Yet, they are far from under an obligation to do so. Conversely, the Council, or rather the Member States meeting in the Council, may seek to use – at times, but not necessarily – (minor) issues that still fall under Member State competences to revert (partially) to common agreement and press ahead with a strong role for the Presidency of the Council, which usually (but not always) is entrusted by the Council to negotiate on behalf of the Member States. As will be illustrated below, already at this stage major tensions between the Commission on the one hand and the Council and the Member States on the other hand can arise, for which the duty of sincere cooperation that extends to all actors involved[17] may only be a marginal resolution. If and when the negotiations are nevertheless successful, it will again be the Council that concludes the agreement. However, in the post-Lisbon era, the Council can likely only do so with the consent of the European Parliament as virtually all legal bases in the field of the environment provide for the normal legislative procedure for internal action, and thus, pursuant to Article 218(6)(a)(v) TFEU also for consent of the European Parliament. The Council will normally decide by qualified majority, unless it refers to areas that are internally decided by unanimity, as in the case of environmental taxation for instance. Again, this only describes the Union process. In the case of a mixed agreement, the 27 Member States must also ratify the agreement in accordance with their constitutional requirements.

If an international body is set up in an agreement to which the Union is a party, the positions to be adopted by the Union on a decision having legal effect are to be adopted by the Council on proposal of the Commission pursuant to Article 218(9) TFEU. But here, again, the problem in environmental contexts is often that it may not be fully clear whether a particular

decision falls (entirely) within the Union's competence. Conversely, the possibility that the Union may take certain initiatives within an international body precludes Member States from making potentially interfering separate proposals. Thus, Sweden was recently deemed to be in breach of its duty of sincere cooperation after unilaterally seeking the ban of an additional substance under the Stockholm Convention on Persistent Organic Pollutants (a convention to which both the Union and its Member States are parties), while there was an ongoing process to develop an EU position and the Union did not yet seek to outlaw this substance.[18]

In instances where an international agreement is not open for accession by the Union as such, a more pragmatic solution must be sought. In those circumstances, the Member States (or occasionally a limited number of them) may be authorized to conclude the agreement in the interests of the Union for the parts of the agreement falling under the competence of the latter.[19]

The day-to-day contacts with international organizations, in particular the UN bodies, is the subject of more ad hoc arrangements against the background of, on the one hand, the emergence of new actors on the field, the President of the European Council (Article 15(6) TEU), the revamped High Representative of the Union for Foreign Affairs and Security Policy (Article 18 TEU), the Union delegations (Article 221 TFEU) and the European External Action Service (Article 27(4) TEU), and, on the other hand, the complication that the Union may at times have no or limited participatory rights in quite a number of international fora.

Pursuant to Article 220(1) TFEU, the Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialized agencies, a task which is entrusted by Article 220(2) TFEU to both the High Representative and the Commission – which for environmental matters would suggest that mainly the Commission has to act. However, at the same time the Union has set up a large number of Union delegations in many countries and at a number of international organizations, including at the United Nations in New York, Geneva and Nairobi. Under Article 221 TFEU, these delegations represent the Union, and are placed under the authority of the High Representative and must work closely with Member States' diplomatic and consular missions.[20] In practice, each delegation will be led by a high-ranking official from the newly created European External Action Service, and thus will be under the authority of the High Representative of the Union for Foreign Affairs and Security Policy, while at the same time it will also consist of the necessary civil servants from the Commission to deal with those areas that do not fall within the Common Foreign and Security Policy (CFSP), as is the case for almost all environmental issues.[21] It can only be hoped that the fact that the High Representative is also the Vice-President of the European Commission entrusted with external action (and that he or she, as a member of the college will be aware of all policy initiatives within the Commission, including in the field of the environment) will reduce

the risk that conflicting information and instructions will flow from the Commission and from the European External Action Service towards the EU delegations.

But even when the Union has a delegation, its participation rights may in practice be limited. A fortiori in some instances the rights of the Union may be non-existent. Under those circumstances, the Member States, and in particular the Presidency, may reappear as the mouth of the Union. However, the fact that one or more Member States are tasked with presenting the Union position should not detract from the character of that position, which is that of a genuine common position developed within the Union framework. This implies that the Union position will in any event be prepared within the relevant Council's Working Party and as necessary further elaborated during co-ordination meetings on the spot.

Finally, at major events involving heads of state and government, the Union is to be represented pursuant to Article 15(6) TEU by the President of the European Council. However, as most environmental matters do not fall primarily within the scope of the CFSP, he will likely be accompanied by the President of the European Commission who will address most of the substantive issues.

5. The times they are a-changin': some practical examples

As it may have been observed in the previous sections of this chapter, the EU legal framework for the participation in global environmental governance under the UN umbrella involves rather complex interaction of different rules, procedures and institutions. In the field, the matter was, at the time of writing, in a state of flux, as the different players tried to find a new equilibrium as to the practical implications of the new legal framework since the entry into force of the Lisbon Treaty. In fact, every grey zone, and every potential conflict left in the new legal framework is being tested. New actors (such as the EU delegations, the European External Action Service, the High Representative/Vice-President of the European Comission and the President of the European Council) try to determine their respective role and place in the EU's external representation on the world stage, whereas the traditional actors (Commission, Presidency of the Council, Member States and the Council Secretariat) try to safeguard their (real or perceived) prerogatives. Furthermore, it should not be overlooked that EU representation in global environmental governance takes place in very diverse realities, where the rules of the game have to be agreed on with other parties involved, who may very well be overwhelmed by the EU's ambition as expressed in the Lisbon Treaty and downright puzzled by its institutional complexities. Therefore, the legal framework and its practical implications and solutions need to be pragmatic and flexible enough in order to respond to different political, managerial, institutional, diplomatic and technical concerns. It should ideally

be responsive to political sensitivities of different institutions in particular files; it should make the best use of always scarce human resources; it should make clear that during negotiations the right man/woman is at the right place; it should respond to the legal status of the EU and its Member States in particular UN bodies, institutions, programmes, funds and other entities; it should make use of particular know-how that certain Member States might possess; it should be responsive to particular negotiating techniques used by the EU's negotiating partners; it should make good use of the high level representation that can be made available by the EU and its Member States, and of the special relations certain countries or personalities might have with certain negotiating partners, etc.

This section will attempt to illustrate the practical implications of the EU legal framework at the international stage, and the forces at work behind it, since the entry into force of the Lisbon Treaty. This will be done by evoking some real-life examples of conflicts that took place and solutions that were found on EU external representation in the framework of multilateral environmental negotiations.

The entry into force of the Lisbon Treaty triggered something close to a civil war between the institutions concerned in the field of EU external representation. The Commission felt as if it was eaten up from the inside, as it lost quite a few competences, its representations in capitals and at international organizations (the former Commission delegations), staff and funds in favour of the High Representative and her European External Action Service. Therefore, it reacted by trying to get a hold on as many competences as possible that the Member States had retained pre-Lisbon. It did this in a rather uncharacteristic, dogmatic and aggressive way. This backfired, and caused Member States to stand their ground in a similarly dogmatic way. From their side, they entrenched on the line that apart for CFSP matters, the Lisbon Treaty did not change the external representation of the EU and they dug in their heels behind the 'business as usual' slogan. In this context, the environmental negotiators on both sides had to find pragmatic solutions to avoid that this infighting would affect the effectiveness of the EU during the international environmental negotiations they were responsible for. In some instances, they were more successful than in others.

It goes without saying that the difficult straddle to which the environmental negotiators were forced between their instructions from Brussels/capitals on the one hand, and the necessities of pragmatism and effectiveness in their multilateral negotiations, did not improve the understanding between both, with environmental negotiators accusing Brussels/capitals of a lack of comprehension and understanding of the way multilateral environmental processes function.

The post-Lisbon discussion accentuated and reinforced another division in environmental negotiations, between, on the one hand, negotiations taking place in capitals and at the seats of international organizations (New

York, Geneva, Nairobi), and on the other hand, negotiations at multilateral conferences like in Nagoya (Convention on Biological Diversity (CBD) COP10) and Cancun (United Nations Framework Convention on Climate Change (UNFCCC) COP16). The two sometimes seem to take place in parallel universes with little connection and a lack of common understanding, the former being controlled by diplomats and the latter being dominated by flown-in technical experts and political advisors from capitals.

Hereinafter the practical implications of the EU legal framework post-Lisbon will be illustrated for the subsequent topics: negotiating mandate, coordination and representation.

5.1. Negotiating mandate

The authorization of the Council (the so called 'negotiating mandate') is the core legal instrument for conducting international negotiations on a legally binding international agreement. The Commission makes recommendations to the Council when it judges that the time is ripe to open negotiations on behalf of the EU. When the Council concurs that it is appropriate for the Union to be present and participate in the international negotiations, it grants the mandate. A negotiating mandate is in principle adopted by qualified majority.[22] It is complemented with negotiating directives, and a Special Committee of Member State representatives in consultation with which the negotiations must be conducted.

In the Council, debates will generally take place on whether international talks have reached the stage of 'negotiations'; on what elements of the negotiations touch on EU competences and should therefore be addressed by the mandate; and on what negotiating directives[23] should be given to the negotiator. In an archetypical situation in the inter-institutional power game, whenever the Commission feels that it does not have as much grip on negotiations on behalf of the EU as it should or could have, it will make a recommendation to obtain a negotiating mandate at a rather early stage. In doing so, the Commission will argue that there are broad EU competences at stake or it will try to keep the scope of its mandate vague, and it will suggest to accompany the mandate with only limited negotiating directives (e.g. that the negotiations will be conducted in accordance with relevant EU legislation in force). In this situation, Member States will conversely seek to counter the Commission with the argument that the recommendation is premature, on the ground that the stage of 'negotiations' has not yet been reached, or they will claim that several items addressed in the recommendation concern Member States' competences. Unsurprisingly, Member States will also attempt to limit the mandate to EU competences only and they will argue for more specific and stringent negotiating directives.

The fact that a negotiating mandate is the main legal instrument for negotiating international agreements does not mean that it is the only instrument.[24] For example, if the Commission did not submit recommendations

to obtain a negotiating mandate, a common negotiating strategy of the Member States and the Commission can also be established through Council conclusions, and/or EU/mixed common positions established in Council working parties.

To date, the fiercest battle on EU external representation in multilateral environmental negotiations in the post-Lisbon Treaty era took place over the so-called Mercury mandate. The UNEP Governing Council had convened in 2010 an Intergovernmental Negotiating Committee (INC) and mandated it with the development of a global legally binding instrument on mercury with the goal of completing its task prior to the 27th Governing Council in 2013. The Commission made a recommendation to obtain a mandate for these negotiations. From the outset, this mandate looked pretty straightforward: it could hardly be refuted that 'international negotiations' had started on matters for which extensive EU legislation was in place. The only outstanding issue of debate seemed to be the precise scope of the mandate and the accompanying negotiating directives. However, with the entry into force of the Lisbon Treaty, different EU institutions had raised their stakes. As such, the Commission asked to negotiate on the full range of measures and available options during the Mercury negotiations, arguing that there is EU competence for almost all items to be negotiated. It added that if there were any items left that are subject to exclusive Member States competence, efficiency and coherence in international negotiations should speak in favour of choosing it also as the negotiator for these items. After all, the rationale behind the Lisbon Treaty was to have a more streamlined EU representation on the international stage, and in the Commission's view that aim could best be achieved by not only having one voice (i.e. one message), but also one representation (in the form of one person or one institution) on the international stage.

The Member States reacted in a remarkable way. Of course, they contested the extent of the Commission's claim of how much the negotiations concerned matters of EU competence, but more strikingly, they also took the argument on the rationale behind the Lisbon Treaty to heart and applied it in all its consequences. However, in the view of the Member States these consequences were distinctly different from what the Commission had claimed. Accordingly, they proposed to designate a team of Commission and Presidency negotiators that would be collectively responsible for all matters, whether they fell within EU or Member States competence (more precisely, the Council envisaged the Commission as sole or lead negotiator when EU competences were at stake, the Presidency as lead negotiator for matters of exclusive Member States competence). The Council and its Member States found support for this approach in Article 218(3) TFEU, which refers explicitly to the possibility of having a Union negotiating team.[25] Moreover, they recalled that the treaties are silent on matters that have remained within Member States competence. The proposed solution had the merit of

shifting attention away from the division of competences between the traditional two main players in EU external representation, the Commission and the Council Presidency[26] by requiring rather a focus on the outcome of the negotiations, for which Council Presidency and Commission were made collectively responsible. Moreover, this so-called team approach proposal was pragmatic, as it recognized that the Commission generally does not have the necessary resources and expertise to deal with all items under negotiations. Finally, it was claimed that negotiations generally tend to be less contentious and conflictive within the EU when negotiations are not dominated by one player, but when a fair balance between Commission, Presidency and Member States is maintained. One of the downsides of this team approach was, however, that the adoption of a mandate concerning Member States competences requires *common agreement* of the representatives of the governments of EU Member States, meeting within the Council, whereas the adoption of a traditional negotiating mandate for issues that fall within EU competences in principle only requires *qualified majority (QMV)* in the Council. As the Member States' proposal blurred both types of competences, common agreement would be required for the entire mandate (if such a hybrid act is at all constitutional).

The Commission was horrified: not only did it not get the entire cake (as it had hoped for), but it did not even get the largest part of the cake (for which it might have settled). Instead the Member States' alternative would have reinforced the role of the Commission's traditional mother-in-law during negotiations (the Presidency), and, most problematically, it would have transformed a supranational procedure (requiring QMV) into an intergovernmental one (requiring common agreement). Seen from this perspective, it is admittedly hard to understand how this approach would have embodied the spirit of the Lisbon Treaty.

When after hours of discussions in the Committee of Permanent Representatives of the Council, (better known under the acronym COREPER for 'Comité des représentants permanents') a common agreement was reached by the Member States to submit the 'team approach' for adoption to the Council, the Commission took the unprecedented step to withdraw its recommendation. This approach was dubbed the 'atomic bomb' solution in the Commission's corridors, and as expected it plunged the EU into an inter-institutional crisis.

Although the Council had considered that ignoring the withdrawal and proceeding with adopting the mandate would be a valid legal option, for political reasons, it decided not to do so. It rightfully considered that disregarding the clear political signal of the Commission would risk upsetting the inter-institutional balance. While the Council may have some legal leeway in determining the terms of the negotiating mandate, it must take into account that it will still fall to the Commission actually to carry out (parts of) the negotiations. The chances of a successful outcome appear greatly

jeopardized if the Commission is inclined to reject the entire mandate off-hand.

However, with the unilateral option off the table, a solution still had to be found in time for the upcoming Mercury INC1 negotiations (Stockholm, 6–11 June 2010). Only in this way, the ambition of an effective EU presence at the international negotiation table could be met, and an undermining of its credibility avoided. Without a mandate, it was clear that there would be no full-fledged EU participation, as nobody would have been clearly authorized to negotiate for the EU. However, that would not have meant that the EU necessarily had to stay away from the international negotiating table (this would only be the case if the Council had refused to open negotiations). As in other cases, a common negotiating strategy of the Member States and the Commission can also be established through other instruments. It is, for example, quite common to establish negotiating positions through Council conclusions, and EU positions or mixed common positions in Council working parties, in cases where the Commission did not request a mandate. And that is also the way the Council chose to proceed in respect of the mercury negotiations: it decided to give high-level political orientations and instructions on the substance of the upcoming negotiations through Council conclusions.[27]

In the absence of a negotiating mandate during INC1, intense and lengthy discussions took place between the Member States and the Commission on the issues of who should take the floor, and on whose behalf, and of what kind of interventions could be made. However, not enough time had passed for wounds to heal, and pretty soon both sides came to another stand-off. But this time, the entire world was watching and saw the EU neither speaking with one voice, nor working together in the spirit of sincere cooperation as required by Article 4(3) TEU. The Presidency delivered an opening statement as agreed on during the Council Working Party on International Environmental Issues (WPIEI) on behalf of the Member States, arguing that the Commission did not have a negotiating mandate. The Commission retaliated by making its own opening statement on behalf of the EU, which contained a 'legal disclaimer' regarding the inability of the EU to negotiate in the absence of a mandate and the inability of the Member States to negotiate an instrument which affected internal EU rules. After threats by the Commission that every further intervention by the Presidency would again be followed by a parallel intervention by the Commission, both sides finally agreed to a pragmatic arrangement for the rest of the negotiating session. The agenda items were divided between the Presidency and the Commission. The former would intervene on all horizontal issues 'on behalf of the Member States' (capacity building, technical and financial assistance, and awareness raising and scientific information exchange), the latter all other issues 'on behalf of the EU *and* its Member States' (the ones related to the control measures i.e. supply, demand, contaminated sites,

mercury-containing waste, trade, sound storage and disposal, atmospheric emissions of mercury, final provisions, definitions and essential use).

After the Mercury debacle, a cooling down period set in during which negotiating mandates for other international negotiations were only discussed when absolutely necessary, on a case-by-case basis, if possible limited to technical matters, and in any event handled with the utmost caution and care. First, the recommendation for a negotiating mandate for the Ban Amendment to the Basel Protocol was put on hold, as it was considered premature. At the time, only discussions were taking place between a limited number of parties invited to participate in an informal Country Led Initiative (CLI). It was agreed that the recommendation would be further discussed in the run-up to the Conference of the Parties (COP). Second, an amendment to a negotiating directive for the Gothenburg Protocol to the Convention on Long-Range Transboundary Air Pollution (LRTAP) was adopted, as there was agreement at technical level, and hence it could subsequently be rubberstamped as an A-point[28] at COREPER and Council level.[29] Third, inspired by the latter, an agreement was also brokered at technical level merely to extend the still running negotiating mandate on the negotiations of an Access and Benefit Sharing Protocol to include also negotiations during the tenth Conference of the Parties (COP 10) of the Convention on Biological Diversity (on proposal of the Presidency after the Commission had abandoned its original idea to come forward with a brand new recommendation for a new mandate).[30]

The already ongoing discussions on a negotiating mandate for amendments to the 1998 Heavy Metals Protocol to the LRTAP Convention, however, went a step further. A typical Christmas-tree-compromise was reached: on the one hand, the mandate was narrowed down further towards exclusive EU competence (by limiting it to matters falling within the Union's competence and in respect of which the Union has adopted rules),[31] whereas, on the other hand, a layer of flexibility was added in the negotiating directives. It was clarified that the Commission can conduct negotiations in accordance with relevant EU legislation in force or agreed EU positions established for the purposes of the negotiations.[32] Along the same lines, a negotiating mandate was adopted for negotiations under the Montreal Protocol on Substances that Deplete the Ozone Layer to regulate hydrofluorocarbons (HFC),[33] and the latter precedent eventually paved the way for a new recommendation by the Commission, followed by a negotiation mandate for a legally binding instrument on mercury.[34]

Despite the fact that there is a specific treaty provision dealing with the particular situation of negotiating mandates for the negotiation of binding agreements, the divergence of views and conflicts between the different players was striking. This raises the question whether there would nevertheless be more coherence of views for matters on EU external representation that are not clearly spelled out in the treaties.

5.2. Coordination

Whether EU participation on the multilateral environmental scene concerns the negotiation of international agreements or not,[35] and whether the former takes place on the basis of an already adopted negotiating mandate or not, for the EU and its Member States to act with one voice on the international stage, a common message will need to be established. This usually will be laid down in EU/mixed common positions. Article 218(9) TFEU solely addresses the situation where positions must be adopted by the Council in preparation of a meeting of an international body when that body is called upon to adopt acts having legal effects. For other positions, in particular in the case of all kinds of international conferences, the treaties provide less clarity and practice is diverse.

EU and mixed common positions are decided at EU coordination meetings (in short, EU coordination), that are organized and presided over by the Council Presidency. Whether the Commission is authorized to negotiate on behalf of the EU or not, whether the EU delegation, the Commission, the Presidency or another Member State intervenes on behalf of the EU and/or its 27 Member States, all positions and speaking notes are decided by the Council/Member States in EU coordination. Irrespective of whether this happens in Brussels or on the spot (in eurospeak: '*sur place*'), the process of negotiating and agreeing on positions and speaking notes between the 27 takes place within the Council. In Brussels, Council conclusions, negotiating mandates and their negotiating directives in environmental matters go up the chain from WPIEI over WPE and COREPER to the Council. EU and common positions are generally agreed on in WPIEI, as far as possible in Brussels, but where necessary finalized, fine-tuned, interpreted and amended in coordination *sur place*. These coordinations *sur place* generally are convened and take place in WPIEI setting, but where necessary and available can take the form of a ministerial coordination, with a possible intermediary level of coordination between the heads of delegation.

As these are all Council (working party) meetings, it is the prerogative, but also the duty of the Presidency, to organize and preside over them (Article 16(9) TEU). Only the chair of informal expert groups can be delegated to another Member State or the Commission, but these informal groups have no decision making power. They can at most prepare and pave the way for items that will be brought to and decided at EU coordination. However, some confusion was created after the entry into force of the Lisbon Treaty and the subsequent establishment of the European External Action Service and the EU delegations. Since the entry into force of the Lisbon Treaty, one Council configuration is not chaired by the rotating Presidency, but by the High Representative of the Union for Foreign Affairs and Security Policy: the Foreign Affairs Council (Article 18(3) TEU). By extension, most of the working parties that fall under its remit are chaired by a permanent chairman appointed by the High Representative. However, international

environmental policy does not fall under the remit of the Foreign Affairs Council (which is responsible for common foreign and security policy, foreign trade policy and development cooperation). Despite these clear rules, some discussions and disputes arose as to the role of the Presidency in the coordination processes *sur place*.

First of all, with the entry into force of the Lisbon Treaty, the Commission had instructed its negotiators to physically get seated next to the Presidency so as to position themselves as co-chairs of the EU coordination *sur place*. This was part of the assertive actions the Commission took in claiming a more prominent role in the post-Lisbon EU external representation, yet without reference to any particular legal rule. The Commission just tried to avail itself of the opportunity created by the fact that coordination *sur place* often take place in less formal settings, e.g. rooms put at the disposal by the conference organizers (often shared with other meetings/groups), in hotels, in tents erected for the purpose, or even in the corridors or corners of the conference hall. In these circumstances, seating arrangements and nameplates are often missing. This makes it possible for the Commission to install itself next to the Presidency (instead of opposite the Presidency, as during formal Council (working group) meetings (Degrand-Guillaud, 2009, p. 425)); and confronted with a weaker President, the Commission sometimes managed to take control over the meeting. In order to remedy this, the Council secretariat and Presidency took care of ensuring better adherence to seating arrangements *sur place*.

Second, some confusion was generated by Article 34(1) TEU (which is part of the Chapter 2 'Specific provisions on the Common Foreign and Security Policy') according to which 'The High Representative of the Union for Foreign Affairs and Security Policy shall organise this coordination [of Member States action in international organisations and at international Conferences]'. With the many changes taking place in 2010, incidents were bound to happen, and that is what eventually occurred: the EU delegation in New York took over the chairing of the EU coordination *sur place* for the 18th Commission on Sustainable Development (CSD, 3 till 14 May 2010). The mistake could be understood in the context of the agitation surrounding the cumbersome establishment of the European External Action Service and its EU delegations, the gradual transfer of responsibilities from the Permanent Representations of the country holding the Presidency to the newly established EU delegations, and the fact that the core business of some of the primarily concerned EU delegations are CFSP matters in which the High Representative and its representatives do preside over the Council configurations. The situation was recognized as a mistake and was not repeated. At all other meetings in the field of environment, EU coordination *sur place* was organized and chaired by the Presidency. In a limited number of cases, they were assisted by the Council secretariat sent from Brussels on mission to support the Presidency (e.g. MOP 5 Cartagena, CBD COP10, UNFCCC

COP16), and in some other cases they received assistance from the local EU delegation (e.g. 20th Committee on Forestry (COFO) in Rome, third meeting of the signatories under the Protocol on Strategic Environmental Assessment (SEA) in Geneva).

The question remains, however, how a practical implementation of the treaty reconciling the different treaty provisions may be achieved. The understanding is that the EU delegation is expected to organize the *local* coordination on EU matters between delegations accredited to international organizations as well as mutual exchange of information between Member States on matters falling under their national responsibility, when agreed to by the Member States. Given the fact that the EU delegations may also encompass personnel coming from the Council secretariat and of the former Council liaison offices at multilateral posts, most of such former Council personnel will still have the hang of assisting the Presidency along the same lines as the Council secretariat does in Brussels: i.e. helping the chair in logistical support, supporting in organizing meetings, advising and counselling of the chair during the meeting, drafting minutes, ensuring circulation of documents, etc. In case the Council secretariat cannot ensure these responsibilities, the description of the organization and functioning of the EEAS is wide enough to have the EU delegations step in to assist the Presidency with these tasks during coordinations *sur place*.[36] But what is clearly outside the remit of the EU delegation is the organization and chairing of EU coordinations *sur place* (that lie outside the responsibilities of the Foreign Affairs Council), especially when positions are established, amended, interpreted, etc. as they are part of the political decision-making process and therefore of the operations of the Council.[37] To put it in simple terms: the political decision making process (the EU coordinations *sur place* of Council groups) is organized and chaired by the Presidency, if available, with the assistance of the Council secretariat or the EU delegation, whereas the day-to-day coordination of local diplomats (encompassing a consistency check of the political lines defended in different meetings at the same organization) is organized by the EU delegation.

5.3. Representation

The last topic we intend to tackle is the question of representation during international meetings: who speaks on behalf of whom and how do they present themselves.

The question of who speaks for the EU should be rather straightforward in case the Commission obtained a mandate to negotiate on behalf of the EU (and is to a large extent already covered above under Section 5.1). For matters falling within the mandate, the Commission will intervene and negotiate on behalf of the EU. Of course, that does not mean that no problems and discussions arise. Quite often the question will be whether a certain topic falls within the scope of the mandate. For matters falling outside this scope,

it is up to the Member States to decide who will represent them. This task is usually assigned to the rotating Presidency, but can also be assigned to the Commission, another Member State, or a roster of different lead negotiators and issue leaders for different items.

The fact that the Commission needs a mandate to negotiate an 'agreement' (i.e. in an Article 218 TFEU-setting) should not be interpreted as meaning that the Commission is never entitled to speak in international settings in the absence of a mandate. The Commission represents the Union and has a right to intervene on behalf of the Union in discussions on matters falling within the Union's competence (Article 17(1) TEU). The Commission cannot claim any such right as regards matters falling within Member States competence. In international gatherings where no 'agreements' are being negotiated or for which the Commission did not submit a recommendation to obtain a negotiating mandate, the Commission represents the Union without the need for a negotiating mandate.

In most international environmental negotiations and fora, the EU and its 27 Member States will work on the basis of well-coordinated positions, without a negotiating mandate having been established. The difficulty faced in international environmental meetings or negotiations is that it is almost never possible to divide the subject matters dealt with in clear categories of 'entirely Union competence' or 'entirely Member State competence'. Most of the time, both the Union and its Member States possess competence – albeit to different degrees – on given matters. This situation makes it impossible to draw black and white conclusions as regards who should speak. In order to avoid that two speakers intervene to say exactly the same thing, practical arrangements are made on who speaks and when. Often this is done on the basis of the preponderance argument: where the preponderance of the competence lies with the Union, the Commission speaks, and where the preponderance of the competence lies with the Member States, the Presidency speaks. As then the Commission and the Presidency speak both on behalf of the Union and its Member States, the practical arrangements will require consensus among Member States and the Commission. Practical arrangements differ widely, depending on many factors. During High Level Segments, when politicians are present and cameras are running, interventions and speaking time will often be split in half between the commissioner and the minister from the country holding the Presidency (e.g. high level segments of CBD COP10 and UNFCCC COP16), to guarantee each one his or her time in the spotlight. But also human resources, expertise and experience present within each of the respective negotiating teams will be important factors in shaping and amending practical arrangements (e.g. a team might have a highly experienced expert or negotiator on a particular item). The practical organization and working of the meeting or negotiations might necessitate the need to adopt practical arrangements, e.g. the negotiations might split up in too many informal break-out groups

stretching the capacity of the Commission and/or Presidency team, which might have to rely on experts or negotiators of other Member States to intervene or negotiate in formal or informal settings even when they have a mandate (for example the Access and Benefit Sharing (ABS) negotiations during CBD COP10). Finally, the legal status of the EU and the country holding the Presidency within the international meeting might impose the need for different practical arrangements in order to guarantee an effective EU representation (for example, the EU did not manage to obtain full participant status in time for the UN General Assembly High Level Event on Biodiversity on 22 September 2010, whereas the Belgian Presidency was not a participant at the G20 meeting in South Korea in November 2010). All of these situations may justify alternative practical arrangements as to *who* speaks.

Having discussed *who* will represent the Union and the Member States, the next question to be addressed is *how* they will present themselves to the rest of the world. After the entry into force of the Lisbon Treaty, this gives rise to quite some animosity over (for example) seating arrangements and name plates.

Sometimes the nature of and the setting at the international meeting does not leave much room for discussions, manoeuvre or doubt. For example, no EU/mixed common positions will need to be established for scientific and technical meetings and all Member States and the Commission will be able to intervene on their own behalf (as delegations will merely be giving scientific or technical advice; e.g. CBD's 14th Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA)).[38] In some negotiation settings, however, negotiations are taking place between regional groups, where the EU and their Member States are addressed as 'EU' in the form of a subset of the Western European and Others Group (WEOG) within the UN.[39]

In all international meetings the code-word for agreeing on the practical arrangement for EU external representation was that it was purely a pragmatic arrangement that did not set any precedent for future discussions on external representation or arrangements in other fora. Still, a line of precedents could be discerned starting from the Open Ended Working Group (OEWG) Basel meeting, over CBD's third Working Group on the Review of Implementation (WGRI), which was (with some nuances) rubberstamped by COREPER for UNFCCC COP16 (although disputes persist and divergent practical arrangements have been agreed to for other meetings). What at the outset of the Open Ended Working Group of the Basel Convention (from 10 to 14 June 2010) were irreconcilable instructions, was pretty soon bent through the skilful manoeuvring of the respective negotiators into a new and innovative set of practical arrangement for representing the EU and its Member States on the international scene. Both the Commission and the Spanish Presidency took the floor from behind the EU-flag and as 'European Union' and not as 'European Commission/Presidency of the

European Union on behalf of the EU and its Member States'. These practical arrangements, drafted for a sectoral negotiation session in Geneva, were subsequently copied for the broader and more holistic negotiations of CBD's WGRI 3 in May 2010 in Nairobi. WGRI 3 initially started with a similar stand-off between divergent extreme positions: on the one hand, the Commission's rhetoric that since the Lisbon Treaty it was the only one that could intervene and negotiate, and on the other hand the rhetoric of the Spanish Presidency and other Member States claiming 'business as usual', i.e. that nothing had changed since the entry into force of the Lisbon Treaty. The compromise, forged by Belgium, was that both Presidency and Commission, as well as lead experts from other countries, were allowed to speak, but they all had to do so from behind the EU flag. In general, positions were expressed on behalf of the 'EU', whereas in introductory statements and in the written version of the statements it was specified that 'EU' referred to 'the EU and its 27 Member States'.

Finally, an efficient EU external representation also depends on last-minute practical arrangements on the floor, which needs to be accepted by other parties concerned (in the first place by the chair or the secretariat servicing the meeting/negotiations). For example, the EU did not (yet) manage to convince the UNFCCC secretariat for COP16 to move in plenary the flag of the Presidency next to the EU flag (which on the contrary is generally accepted in the different fora of the CBD and the United Nations Economic Commission for Europa (UNECE)), which can give rise to quite a few practical difficulties (e.g. due to lack of seating place behind the EU flag and subsequent difficulties in sometimes crucial consultations between Commission, Presidency and Member States during negotiations).

6. Conclusion

The Lisbon Treaty underscores the EU's ambitions as an actor on the international stage, also in environmental matters. The treaty, moreover, offers a wide range of tools and actors for strengthening the role of the Union in external affairs. However, the new rules and procedures alone cannot fully encompass the complexities of the day-to-day practice of countless UN multilateral forums. Ensuring that the Union and its Member States speak with one voice in international environmental matters therefore requires constant pragmatism of all actors involved. While there are a number of constitutional red lines in terms of division of competence and institutional balance that should not be crossed, it should be obvious that dogmatism, whether on the side of the Commission or the Member States, will not bring the Union closer to becoming widely recognized as a strong and united international actor. Also after Lisbon, the cure for inter-institutional bickering the treaty appears to offer is the duty of sincere cooperation, laid down in Article 4(3) TEU.

Notes

1. The authors would like to thank Wendy Altobello, Prof. Dr. Geert De Baere, Dr. Frederik Naert, Janek Nowak and Ines Verleye for their valuable comments on an earlier version of this chapter. This chapter was finalized on 31 December 2010 and therefore only refers to examples from the Spanish and Belgian presidencies of the council in 2010. In the meantime, new practices may have evolved. See e.g. General Arrangements for the EU Statements in multilateral organizations endorsed by Council of 22 October 2011, Doc. 15855/11, http://register.consilium.europa.eu/pdf/en/11/st15/st15855.en11.pdf
2. And by necessary extension also the Member States participation in global environmental governance: in principle, as environment is a mixed EU-Member States competence, a clear division of competences will not be easy to establish, but even more importantly, their partners in the UN global fora will not feel concerned by the internal division of competences between the EU and the MS, and will consider them often as one subregional grouping of the Western European and Others Group (WEOG) within the UN. The partners in the UN global fora will colloquially refer to 'EU' irrespective of whether pursuant to the internal division of competences, this should be the 'EU', 'the EU and its 27 Member States' or 'the 27 Member States of the EU'.
3. UNGA, *Participation of the EU in the work of the United Nations*, RES/65/276, 3 May 2011.
4. Field pre-emption is a term borrowed from US constitutional law. It denotes instances where the federal level has legislated to such an extent that the entire subject matter must be deemed to be regulated by federal law. While technically there may still be issues that are not regulated or could still be complemented by national law, additional national laws are nevertheless precluded because they may interfere with the regulatory regime the federal legal order sought to impose. The concept is accepted in EU law as well, in particular in the context of external action, see most notably Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145. On the issue pre-emption, see e.g. Schütze, 2006, pp. 1023–1048.
5. Case C-300/89 *Commission v. Council* [1991] ECR I-2867.
6. See in the international sphere, *inter alia*, Case C-94/03 *Commission v. Council* [2006] ECR I-1; Opinion 2/00 *Cartagena Protocol on Biosafety* [2001] ECR I-9713.
7. Case C-94/03 *Commission v. Council* [2006] ECR I-1.
8. Opinion 2/00 *Cartagena Protocol on Biosafety* [2001] ECR I-9713.
9. Articles 4(3) an 4(4) TFEU nuance the qualification of 'shared competence' in respect of research and technological development and space and development policy, in that it is indicated that contrary to the definition of a shared competence in Article 2(2) TFEU, action by the Union will not preclude the Member States from still exercising their competence. These fields are thus rather fields of parallel competence, a term which is however not as such used in the Treaties. The main consequence is that if in an environmental context also development or research policy is at stake, Member States may always claim that they remain competent, thus triggering mixity.
10. On the concept of exclusive competences in respect of external action, see De Baere, 2008, pp. 33–72.
11. Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635, para. 92.

12. For more on mixity, see De Baere, 2008, pp. 231–250; see also Koutrakos, 2002, pp. 25–52; Karayigit, 2006, pp. 445–469.
13. See by analogy, Opinion 2/91 *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-1061, paras 18–20.
14. Opinion of AG Sharpston of 15 July 2010 in Pending Case C-240/09 *Lesoochranárske zoskupenie*, nyr., 56, citing De Baere, 2008, p. 264.
15. For more on the objectives of the Lisbon Treaty in respect of external relations, see Duke, 2008 pp. 13–18.
16. For a full discussion of the procedure for concluding an international agreement, see De Baere, 2008, pp. 77–93.
17. Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property* [1994] ECR I-5267, paras 106–109. For a broad analysis of the role of the principle of sincere cooperation in external action, see Neframi, 2010, pp. 323–359.
18. Case C-246/07 *Commission v. Sweden* [2010] ECR I-3317. Whether or not there really was a policy for the substance concerned (PFOS), or merely an on-going process to develop an EU position in this respect, was actually subject of disagreement between the Court and Advocate General Poiares Maduro, though both found Sweden to be in breach of Article 10 TEC. For more, see De Baere, 2011.
19. See for instance Opinion 2/91 *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-1061. For a more recent example, see Council Decision 2007/431/EC of 7 June 2007 authorizing Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organisation [2007] OJ L 161/63. For an example involving a limited number of Member States, see Council Decision 2004/294/EC of 8 March 2004 authorizing the Member States which are Contracting Parties to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy to ratify, in the interest of the European Community, the protocol amending that convention, or to accede to it – protocol to amend the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 2960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 [2004] OJ L 97/55.
20. While a definitive answer to this question goes beyond the scope of this contribution, it is worth noting that the question could be posed whether delegations, when performing the functions explicitly provided for in Article 221 TFEU, may qualify as a falling within the situation of 'other cases' in the sense of Article 17(1) TEU, where the Commission is not to ensure the external representation of the Union. A positive answer to this question would imply that the Commission may in principle not displace the EU delegation in a particular forum, especially not outside the period of formal negotiations of an international instrument.
21. See in this respect Article 5(3) of Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, [2010] OJ L 201/30.
22. Unless in areas subject to unanimity internally (then by unanimity) and unless it also covers Member States competence (then by common accord).
23. Negotiating directives provide the framework within which the negotiator should conduct the negotiations.
24. ECJ, 20 April 2010, Commission/Sweden, C-246/07, paragraphs 76, 77 et 79.

25. In any event, this provision makes clear that working with a negotiating team encompassing people from different entities does not in itself contradict the principle that the EU has to act with one voice on the international stage. The Commission's argument that the 'head of the Union's negotiating team' only applies to so-called cross-pillar situations (for mandates covering both CFSP and non-CFSP matters), and that this head of the Union negotiating team can only be the High Representative or the Commission, is not convincing. Everywhere else in the treaties where 'the High Representative or the Commission' are meant, it explicitly says so. Moreover, such an interpretation would not be at odds with reality, as there are fora in which the EU has got no (or no sufficient) standing to act as head of a negotiating team.
26. As the debate traditionally focuses on the question whether a certain item during negotiations falls under EU or Member States competence, and thus whether that item should in principle be negotiated by the Commission or the Presidency on behalf of the EU and/or the Member States.
27. Council conclusions 'Addressing Global Mercury Challenges', 4 June 2010, Doc. 10564/10, http://register.consilium.europa.eu/pdf/en/10/st10/st10564.en10.pdf
28. Agenda items are labeled A-points where the decision can be made without debate.
29. Council Decision of 17 November 2010 amending the Decision of 15 March 2010 on the participation of the European Union in the negotiations on the revision of the Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, Doc. 13719/10.
30. Council Decision of 14 October 2010 amending Council Decision of 26 October 2009 on the participation of the European Community in negotiations on an international regime on access to genetic resources and benefit-sharing in the framework of the Convention on Biological Diversity, Doc. 13610/10.
31. Yet, one should be cautious given that, although environmental matters concerning areas where the Union has adopted rules are generally considered as falling within EU competence, this statement is not entirely accurate. On the one hand, one must also take into consideration the presumption against field pre-emption laid down in Protocol 25 to the Lisbon Treaty and the fact that in the field of environmental policy Member States are entitled to adopt more stringent measures (*supra*, title 3.a). On the other hand, a similar caution should be observed in the other direction: taking into consideration Article 216(1) TFEU, exclusive EU competence could also extend to matters not (entirely) covered by existing EU legislation.
32. Council Decision of 26 July 2010 on the participation of the European Union in negotiations of amendments to the 1998 Protocol on Heavy Metals to the 1979 Convention on Long-range Transboundary Air Pollution, Doc. 11933/10.
33. Council Decision of 14 October 2010 on the participation of the European Union in negotiations under the Montreal Protocol on Substances that Deplete the Ozone Layer, Doc. 13480/10.
34. Council Decision of 10 December 2010 on the participation of the European Union in negotiations on a legally binding instrument on mercury further to Decision 25/5 of the Governing Council of the United Nations Environment Programme (UNEP), 16632/10, 16632/10 ADD 1, 16641/2/10 REV 2, 16641/2/10REV 2 ADD 1.
35. The term 'agreement' should be interpreted 'in a general sense to indicate any undertaking entered into by entities subject to international law, whatever its

formal designation' (ECJ opinion 1/75 *OECD Local Cost Standard*, [1975] ECR 1355, para. 2). Although the undertaking needs to be legally binding for it to be qualified as an 'agreement' pursuant to Article 218 TFEU, the ECJ seems to be prepared to apply Article 218 TFEU by analogy to certain other international commitments (ECJ C-233/02, *France/Commission*, [2004] ECR I-2759, para. 40).

36. Council Decision 2010/427/EU of 26 July 2010 establishing the organization and functioning of the European External Action Service, [2010] OJ L 201/30.
37. It should be noted that pursuant to Article 16(1) TEU, the Council 'shall carry out policy-making and coordinating functions'.
38. While there is no need for formal EU coordination in these situations, in order not to contradict each other on the floor, usually informal EU consultations among Member States and the Commission are organised.
39. An example is offered by the negotiations of the ABS Protocol taking place in the so-called 'Vienna+ setting' from Working Group 9 in Cali, Columbia until CBD COP 10 in Nagoya, Japan.

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9

The European Union in the Commission on Sustainable Development

Karoline Van den Brande

1. Introduction

The Commission on Sustainable Development (CSD) is a functional Commission of the United Nations (UN) Economic and Social Council (ECOSOC) and the main UN body dealing with sustainable development issues. It was established in 1993 and gathers yearly to review the progress in the implementation of Agenda 21. The negotiations in the CSD result in UN soft law (Andresen, 2007, p. 326) such as policy recommendations or decisions that are agreed upon by the UN member states, but cannot be enforced and sanctioned afterwards.

In the EU, decision-making on CSD matters primarily takes place within the institutional context of its external environmental policy, stressing the environmental dimension of sustainable development. Closely related to the early development of its environment policy, the Union has been dealing with sustainable development issues from the late 1980s. Internally, it mentioned sustainable development for the first time in 1988 in the Rhodes Declaration (Pallemaerts, 2006, p. 21), before adopting it as an objective in the Amsterdam Treaty in 1997 and formulating its first sustainable development strategy in 2001. Externally, it attended the large global summits in Rio (1992) and Johannesburg (2002) and the EU has been a full participant at all CSD meetings from 1995 on. Taking into account that the EU has often taken up a leadership role in the field of global environmental governance (Lightfoot and Burchell, 2005; Vogler and Stephan, 2007), this chapter examines how it has attempted to employ its full participant status in the CSD to promote its vision on sustainable development.

Many scholars have already examined the discussions in the CSD (e.g. Mensah, 1996; Wagner, 1999, 2005; Chasek, 2000; Kaasa, 2007) and some authors have analysed the role of the EU at the large global sustainable development summits of Rio (e.g. Vogler and Stephan, 2007) and

J. Wouters et al. (eds.), *The European Union and Multilateral Governance*

Johannesburg (e.g. Lightfoot and Burchell, 2005, see also chapter 12 in this volume). Yet, only few have dealt with the role of the EU in the CSD (e.g. Vogler and Stephan, 2007). Moreover, the research that has previously been conducted on the CSD and on the EU's role in it has remained limited to an analysis of the first ten years of the commission's operation (1992–2002). This chapter aims to fill that gap in the literature by examining the CSD after its 2003 reform. In particular, it analyses the position of the EU in the CSD, looking at the first three cycles of the body's new programme of work, namely CSD-12/13, 14/15 and 16/17 (2004–2009).[1] Following the analytical framework that guides the empirical chapters in this book, it starts with a discussion of the global governance mode, giving an overview of the features of the CSD and looking at the negotiations from CSD-12 up to CSD-17. It continues by investigating the de jure and de facto recognition of the EU as an important negotiating actor in the body. Next, it analyses the EU's actor capacity by focusing on its representation at CSD and on the coordination of a common EU viewpoint for CSD. The chapter ends with some concluding remarks about the Union's position in the CSD.

2. Global governance mode

This section describes the global governance mode by focussing on the formal aspects of the CSD on the one hand and on the informal processes on the other hand. It starts with a discussion of the set-up and formal procedures of the CSD (Section 2.1) and continues with the politics of the CSD by going into detail on the main actors and the key cleavages during the CSD-12 to CSD-17 negotiations (Section 2.2).

2.1. The Commission on Sustainable Development: set-up and procedures

The CSD was set up in 1993 as an answer to a call of Agenda 21, which was one of the main outcome documents of the UN Conference on Environment and Development (UNCED) held in Rio in 1992. The commission was established by UN General Assembly resolution 47/191 as a functional commission of ECOSOC (UN, 1945; UNCED, 1993, chapter 38; UN, 1993; Chasek, 2000, p. 378; UNDESA, 2008a).[2] The CSD meets annually in New York for a period of two to three weeks in April/May. From the outset it has had three main goals: (1) reviewing progress in the implementation of Agenda 21; (2) elaborating policy guidance and options for future activities; and (3) promoting dialogue and building partnerships for sustainable development (Chasek, 2000; UNDESA, 2010). At the World Summit on Sustainable Development (WSSD) in 2002 in Johannesburg, the Johannesburg Plan of Implementation (JPOI) reaffirmed the role of the CSD as the high-level forum for sustainable development within the UN system. In addition, the

commission also has to provide guidance to follow-up the JPOI at all levels of governance (UNDESA, 2008a).

The resolution recommends the CSD to adopt a multi-year thematic programme of its work. The most recent one was adopted in 2003 at the CSD-11 session and launched a considerable reform of the work of the CSD. From then on, the body's agenda has been planned on the basis of two-yearly cycles between 2004 and 2017. Each cycle focuses on a thematic cluster of issues and their inter-linkages and also discusses a cluster of 12 cross-cutting issues, for example sustainable consumption and production (UNDESA, 2008a, 2008d).[3] Such a two-yearly cycle consists of one review session and one policy session. During a review session, the progress that has been made is evaluated, obstacles and constraints are identified and future challenges are discussed. In order to be better prepared for that review session, Regional Implementation Meetings (RIMs) on sustainable development are held beforehand (UNDESA, 2008e).[4] The review session itself consists of parallel panel discussions and a three-day high-level segment. Its outcome is a chair's summary that has the status of an un-negotiated and non-binding text. The actual negotiations take place during the policy session when the CSD aims to develop concrete policy recommendations. The preparations for a policy session start in February with an Intergovernmental Preparatory Meeting (IPM). The outcome of the IPM (i.e. the chair's draft negotiating document) serves as a basis for the final negotiations at the CSD policy session itself (UNDESA, 2008b). During a policy session, most of the time is dedicated to expert-level negotiations on the chair's draft negotiating document, which have to result in CSD decisions. Although a large part of those negotiations takes place in two to three previously defined working groups, an important part happens behind the scenes in informal contact groups, primarily including the main negotiating actors such as the G-77/China, the EU and the United States.

The work of the CSD is organized by a bureau, supported by a secretariat. The bureau consists of a chair and four vice-chairs (UNGA, 1993, p. 5).[5] The commission has 53 members, which all have one vote (UN, 1945; UN, 1992).[6] They are elected by ECOSOC for a three-year term and can be re-elected. The seats in the CSD are allocated on a regional basis. EU member states are elected from two regional groups, namely the Western European and Others and the Eastern European Group. In total, during each CSD session, about 10 EU member states have a seat in the body, which means that one in five members is an EU member state. Only these states can also vote for the EU, as further elaborated on in the following sections. Participation at the CSD sessions is also open to other UN member states[7] and to representatives of UN specialized agencies and accredited intergovernmental organizations (IGOs) (UNDESA, 2010). As an IGO, the European Community (EC) cannot be a CSD member. Accordingly, at the creation of the CSD, the EC requested for the same type of full participant status that it had also obtained for

UNCED.[8] Due to controversies about its request, the EC only received that status in February 1995.[9] The status implies that the EC has the same rights as full members (the right to speak, to reply and to introduce proposals and amendments), but has no right to vote (Mensah, 1996, pp. 31–33).[10] Next to the participation of governmental actors, non-governmental actors, organized in what is referred to in Agenda 21 as *Major Groups*, are also involved in CSD.[11] Broad public participation is of particular importance for the decision-making process in the CSD.

Due to time constraints, the bureau aims to strictly manage the speaking time participants have at the CSD session by promoting statements through negotiating groups.[12] In practice, many UN member states are in any case represented by a negotiating group (Wagner, 1999, pp. 113–115; Kaasa, 2007, pp. 116–119). The largest of these coalitions is the Group of 77 and China (G-77/China), which consists of about 130 developing countries and China (The Group of 77, 2008). Like the EU, they aim to develop a single statement for the whole group, which is represented by a spokesperson thereafter. Examples of other groups at the CSD are AOSIS (the Alliance of Small Island States) and regional groups like the Arab Group, the African Group and the Rio Group. Finally, a coalition of non-European industrialized countries, JUSCANZ (including Japan, United States, Canada, Australia and New Zealand), play an important role in the commission. Although it is the only one of these groups that does not have a spokesperson at the CSD, it represents a key negotiating group and an important partner of the EU.

2.2. The politics of the Commission on Sustainable Development: main actors and key cleavages

Before going into the details of the negotiations during the three most recent cycles, this section shortly elaborates on the viewpoints of three main negotiating actors (EU, United States and G-77/China) at the CSD sessions prior to 2002.

The EU has always been a promoter of global sustainable development. During the first ten years, it actively participated at all CSD sessions with the aim of implementing the Rio agenda (Vogler and Stephan, 2007, p. 402). In the run-up to the WSSD, having committed itself to the establishment of an EU sustainable development strategy, the Union began to focus on the flaws in the functioning of the CSD. At that time, many governmental as well as non-governmental actors described the CSD as a 'talk shop' (e.g. Chasek, 2007, p. 379) that was occupied too much with negotiating contentious political issues, such as trade (Vogler and Stephan, 2007, p. 403). In this context, the EU became an advocate of a considerable CSD reform. Together with some of its key negotiating partners (among which the United States, who led the project), they managed to reform the CSD at its 11th session in the early 2000s (Chasek, 2007, p. 379; Vogler and Stephan, 2007, pp. 402–403).

Table 9.1 CSD sessions and EU presidencies[13] for the cycles 12 to 17

YEAR	Semester	EU presidency	CSD session	Thematic cluster
2003	2	Italy	CSD-12	Human settlements;
2004	1	Ireland		sanitation; water
	2	The Netherlands	CSD-13	
2005	1	Luxembourg		
	2	United Kingdom	CSD-14	Air pollution/
2006	1	Austria		atmosphere;
	2	Finland	CSD-15	climate change;
2007	1	Germany		energy for sustainable development; industrial development
	2	Portugal	CSD-16	Africa; agriculture;
2008	1	Slovenia		drought;
	2	France	CSD-17	desertification;
2009	1	Czech Republic		land; rural development

The United States, too, had constantly been an advocate of reforming the CSD and had frequently stressed that the CSD should not discuss issues that are dealt with in other fora (e.g. climate change) (Andresen, 2007, p. 327; Chasek, 2007, pp. 378–388). In addition, it has long considered the CSD mainly as a forum where countries can exchange best practices on sustainable development issues and where partnerships for sustainable development can be developed. It also repeatedly underlined the importance of education, research and technology.

Finally, the viewpoint of the G-77/China is most noticeable when it comes to financing and the means for the implementation of Agenda 21. More than once, the group has urged the others to increase their development aid and to facilitate technology transfer. For Kaasa (2007, p. 118), those issues are emphasized so much because they represent one of the few shared interests of the very diverse G-77/China, which oftentimes has difficulties agreeing on other issues.

Table 9.1 illustrates the three CSD cycles that will be discussed in detail in the next paragraphs and the EU Presidencies during those cycles.

The CSD-12/13 cycle was the first cycle after the body's reform and its review session was the first CSD meeting that would only include thematic discussions without actual negotiations (ENB, 2004, p. 13). The main topics on the cycle's agenda were human settlements, sanitation and water. Achieving a successful outcome was crucial as it could create a precedent for future sessions (ENB, 2004, p. 13). The EU, represented by the Irish

presidency, stated that the 'new format is an opportunity to revitalise the CSD's role as the specific UN body for sustainable development issues' and that it 'wishes to repeat its commitment to achieving sustainable development goals and targets by moving from words to action' (European Union Presidency, 2004).

Cleavages between the key actors (EU, United States and G-77/China) arose around the following issues of contention: Official Development Aid, good governance, financing, the ecosystem approach and the role of various stakeholders – all of them in the context of the issues under discussion (ENB, 2005, pp. 4–6). Yet, most of the contention during CSD-13 was related to two issues external to the CSD process, namely illegal settlements and occupied territories (ENB, 2005, p. 10), which were put on the agenda by the G-77/China. The latter suggested to quote text from the JPOI on the rights of people under colonial and foreign occupation, but experienced many objections from the other actors. At the end of CSD-13, the Union was rather satisfied with the overall result as the outcome covered 'all of the EU priorities' (European Commission, 2005). Next to stressing good governance, capacity building, technology transfer and finance in the context of the thematic issues under discussion, the EU also emphasized the involvement of all stakeholders and the importance of the cross-cutting issues (European Union Presidency, 2005). Yet, according to the EU, more concrete results and a strong follow-up mechanism would have been desirable (ENB, 2005). Overall, the outcome of this first new cycle can be considered to be double-edged, leaving open the question whether it has been a successful new start or not. Many of the developed countries were satisfied. They recognized the remaining flaws in the work of the CSD, but appreciated the fact that agreement was reached on a set of guidelines for the thematic issues under discussion (ENB, 2005). The United States, for example, was under the impression that CSD-13 served as a good basis for future cycles (ENB, 2005, p. 10). The G-77/China, however, was disappointed because it claimed that on the side of the developed countries there was a lack of willingness to deal with the constraints developing countries were facing with regard to financing and institutional and human resource capacity (The Group of 77, 2005).

The next cycle of CSD-14/15 had some contentious issues on its agenda, mainly concerning energy and climate change. Lacking a global forum to discuss energy, the CSD seemed the perfect place to discuss this topical issue (ENB, 2006, p. 1 and 11). Moreover, in contrast to the agenda of its predecessor, many of the issues on this cycle's agenda were in the interest of developing as well as developed countries, which increased the stakes of all actors (ENB, 2006, p. 12). Because of its reviewing character, CSD-14 already uncovered many of the tensions between the negotiating actors, for example about the future of fossil fuels, nuclear power and the climate regime post-2012 (ENB, 2006, pp. 1–2). Moreover, tensions also arose within negotiating

groups (e.g. among the members of the G-77/China), with group members having differing (energy) concerns (ENB, 2006, p. 12). The outcome of the CSD-14 session stirred mixed feelings among the participants and kept up the pressure for the CSD-15 policy session.

The EU had an ambitious agenda for CSD-15 (ENB, 2007, p. 12). It had been represented at that policy session by Germany, which presided both the Union and the G-8 at the time and was suspected of trying to impose the Union's 'own green agenda on the world' (ENB, 2007, p. 11). Among other things, the EU supported time-bound targets for renewable energy, the integration of energy policies into national planning by 2010, an effective and meaningful review and follow-up arrangement for energy issues within the CSD and an international agreement on energy efficiency (European Union Presidency, 2007). Yet, many of those proposals were rejected by the other negotiating partners, notably Japan, Russia, the United States, Australia and the G-77/China (ENB, 2007). Moreover, only poor results could be achieved with regard to the climate change issue, as many negotiating actors were not prepared to show their cards in view of the upcoming thirteenth conference of the parties in the climate regime (see Chapter 10). In the end, unbridgeable opinions and high stakes made the CSD-15 chair propose a compromise document 'on a "take it or leave it" basis' (ENB, 2007, p. 9). As the text did 'not offer any solution to the pressing challenges' and because they thought 'that by agreeing this text [they] would send the wrong signal to the world', the EU and Switzerland rejected it. Moreover, the EU again emphasized the flaws in the CSD decision-making process, which urgently needed to be improved in order for the commission to remain relevant in the future (ENB, 2007, p. 10; European Union Presidency, 2007). CSD-15 resulted in a chair's summary and not in concrete policy recommendations upon which all states had agreed.

The negative outcome of CSD-15 increased the pressure for the debates during the next cycle. Indeed, also at CSD-16 and 17, some crucial and politicized thematic issues would need to be discussed, namely Africa, agriculture, drought, desertification, land and rural development. Moreover, both sessions took place in the difficult context of global food and financial crises and the challenge of climate change also remained high on the global agenda. At the opening session of CSD-16, the EU clearly stated its belief in the role of the CSD with regard to sustainable development issues (European Union Presidency, 2008). Through such a statement, it wanted to assure its other negotiating partners that it was aiming for the CSD to deliver ambitious results and that it would cooperate in a constructive way in order to achieve an outcome (European Union Presidency, 2008). Within the context of the thematic issues, much attention went to the case of biofuels. Issues that arose concerned its risk and benefits, the tension with food production and the proposal to develop sustainability criteria for biofuels production (ENB, 2008). Some developing countries, led by

Argentina, repeatedly criticized the market distortions resulting from subsidies in developed countries such as the United States and in the EU. In the end, CSD-16 was evaluated relatively successful in its review character (ENB, 2008, p. 15).

At the start of CSD-17, many negotiating blocs stressed the importance of achieving a successful outcome. The negotiations, however, did not proceed very smoothly, including many discussions on agriculture and issues related to climate change and means of implementation. In particular, some delegates questioned whether the CSD needed to talk about sustainable agriculture or not. Cleavages also arose regarding the role of the CSD in the climate discussions, which according to part of the delegations needed to be carried out in the context of the United Nations Framework Convention on Climate Change (UNFCCC). The G-77/China stressed the importance of agriculture and rural development for eradicating poverty and advocated a higher financial support, but encountered strong contrary winds from the developed countries (ENB, 2009, pp. 11–12). Yet, CSD-17 did come to a text upon which all states agreed. According to the Earth Negotiations Bulletin, 'the text was described as being the best text that could be agreed in the current situation' (ENB, 2009, p. 1). Although the EU was not totally convinced of the document, it did accept it because '[i]t is crucial to send a strong signal that CSD can come up with substantial recommendations. It is in this spirit that the EU can go along with the compromise text proposed by the Chair. This does not mean that the text is perfect' (European Union Presidency, 2009). In its closing statement, the EU also again emphasized the need for the CSD to achieve more ambitious results and the urgent requirement to improve its working methods. Overall, the effectiveness of the CSD was not only criticized by the EU, but also by many other negotiating actors. Not surprisingly, many delegates raised the issue behind the scenes when discussing the composition of the agenda of the upcoming Rio+20 Summit in 2012.

To conclude, from its set-up in 1993, the commission has been gathering yearly to deal with a wide range of sustainable development issues. Yet, its effectiveness has been a recurring point of discussion, which led to a reform of the CSD at its eleventh session and which remained high on the agenda even after the reform. Three negotiating actors, namely the EU, the United States and the G-77/China, were central in the discussion of the (informal) politics at CSD. All three have frequently criticized the CSD, but have also often stressed the importance of achieving a successful outcome. Although the EU has presented itself as a promoter of global sustainable development and has arrived at each CSD session with an ambitious agenda, it has never been able to fully convince the other negotiating actors. The cleavages and tensions that arose between the key negotiating parties have at many CSD sessions proven a barrier for a successful outcome.

3. Recognition

This section investigates the de jure and de facto recognition of the EU as a key negotiating actor in the CSD.

Since February 1995, the EC has possessed full participant status in the CSD. According to the rules of procedure of the functional commissions of ECOSOC, this gave the EC the right to speak, though not to vote in the body (Mensah, 1996, p. 33). The CSD is the only functional commission of ECOSOC in which the EC has such a full participant rather than a mere observer status. As mentioned before, the EC's request for the status did not come without a struggle (Mensah, 1996, p. 31). Having acquired the full participant status for UNCED, the community aimed to have the same rights for the CSD. However, many UN member states were not willing to grant that status because they felt that the EC did not possess adequate legal bases and that such a status would go beyond its competence (Mensah, 1996, p. 32). Only after a recommendation of the UN secretary-general, ECOSOC decided to grant the community the status it requested, under the condition that it would not result in a higher representation of EU member states than was already agreed upon (Mensah, 1996, pp. 32–33).

From then on, the European Commission was able to represent the EU in the CSD for matters of EC competence. As such matters are regularly on the CSD's agenda, the European Commission became intensively involved in the discussions and would frequently take the floor, either on behalf of the EU and its member states or on its own behalf, possibly adding to a statement of the EU presidency. For example, at CSD-13 the European Commissioner for Environment, Stavros Dimas, made a statement 'Meeting the Millennium Development Goals related to water, sanitation and human settlement targets'. During the CSD-12/13 cycle, the European Commission had a special focus on water, first and foremost because of its policy on the subject (cf. the EU Water Initiative). Dimas also spoke on behalf of the EU at the ministerial segment of CSD-15. That cycle was especially relevant for the European Commission as the latter had competences concerning all issues on the agenda. Finally, also the CSD-16/17 cycle was of particular importance for the European Commission. With agriculture and rural development on its agenda, the commission claimed a significant role within the EU as those issues are important EC competences (cf. the EU's Common Agricultural Policy). The fact that the EC is formally recognized in the CSD through its full participant status, enabled by internal legal competences for matters that are on the agenda and granting it the right to speak (though not to vote), thus gives the EC a quite extensive legal basis for action in the CSD.

Yet, does this legal status and de jure recognition of the EC also entail a de facto recognition of the EU as an important negotiating actor in the CSD? In order to answer that question it is important to examine the

recognition of the composite EU-27+1 as a whole. As a matter of fact, other negotiating actors do not look at the individual parts which the EU is composed of (namely the member states, the EU Council presidency and the European Commission), but consider it as one entity. The EU is thus perceived as one of the main negotiating actors in the CSD, in similar vein as countries like the United States, Canada, Switzerland, Russia, Australia or negotiating groups like the G-77/China. During the discussions at the CSD, the EU usually has the possibility to take the floor as the second coalition, right after the G-77/China. That order is mainly defined by the order in which a participant indicates its desire to speak and by the size of the negotiating group. Yet, it is also slightly based on the fact that other negotiating actors deem it important to hear the EU's position as one of the first positions brought forward. The de facto recognition of the EU is also linked to the extent to which third parties refer to the EU rather than to its individual member states and to the extent to which the EU is regarded as influential by others. Third parties do seem to recognize the EU as an important negotiating actor at CSD. Indeed, as it is first and foremost the EU (represented by its presidency) that speaks at the CSD, third parties consequently address themselves to the main EU negotiating actors while negotiating in the informal contact groups, conducting informal talks or carrying out outreach activities. All of these factors together make that the EU is regarded as a negotiating actor that cannot be ignored. In sum, they increase the de facto recognition of the EU by other participants in the CSD.

While the EU has a strong legal recognition, in practice it is also highly recognized by its other negotiations partners at CSD. The next section zooms in on the EU's capacity to act at the CSD.

4. Actor capacity

According to the analytical framework followed in this book, the EU's actor capacity at the global level is defined by four interdisciplinary analytical categories (external representation, internal coordination, objectives and instruments) (see Chapter 2). This fourth section primarily focuses on the EU's representation and its decision-making and coordination of a common viewpoint for the CSD. The last category of 'instruments' (material and immaterial) will not be dealt with, as legal and economic tools are not applied with regard to CSD matters. The main immaterial foreign policy instruments are diplomatic in nature, i.e. political dialogue and negotiation, which are illustrated throughout the chapter. Yet, it can be interesting to first shortly discuss the EU's treaty and political objectives with regard to sustainable development.

Sustainable development was adopted as an EU objective in 1997 with the Treaty of Amsterdam (see Chapter 8). That treaty altered the Treaty of

Maastricht (1992), among others, by replacing the existing seventh recital by the following (EC, 1997):

> *DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development (...), and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,*

It also replaced Article B with the following:

> *The Union shall set itself the following objectives:*
> *– to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development.*

In reaction to the Rio+5 Summit and in preparation of the WSSD, the EU decided in 1999 to develop a concrete sustainable development strategy (Tanasescu, 2006, p. 54). That strategy was adopted by the Gothenburg Council in 2001 (Pallemaerts, 2006). In 2006, the European Council endorsed a renewed strategy (Council of the European Union, 2006). In that strategy, the EU emphasized that it is a general objective of the EU to actively promote sustainable development worldwide and ensure that the European Union's internal and external policies are consistent with global sustainable development and its international commitments (Council of the European Union, 2006, p. 20). Moreover, in its communication on 'The European Union and the United Nations: The choice of multilateralism' the European Commission stated that:

> *The EU should adopt a determined 'front-runner' approach to the negotiation and implementation of important UN initiatives in the fields of sustainable development, (...), taking a more proactive approach to the development of international instruments and specific EU implementing actions. Moreover the EU should give renewed impetus to the UN reform'* (European Commission, 2003, p. 9).

4.1. EU representation

The question 'who speaks for Europe?' often seems to be a hard one to answer because of the complexity that comes with the issues that are on the international agenda (Farrell, 2006, p. 30). Especially in the case of the CSD, the answer is not self-evident. The CSD agenda is loaded with a variety of issues that can be EC competences and/or member state competences. In fact, many of the thematic issues under discussion are shared competences in which both the member states and the European Commission can act.

The EU's external representation at CSD is closely related to its internal decision-making and coordination (cf. infra), in which the Union uses a so-called 'lead country system' to prepare its speaking points for CSD. The lead country system implies an informal division of labour in which the EU presidency assigns the member states, or even the commission, a particular task during the preparatory process. In particular, that means that they take the lead in preparing the common EU viewpoint for a particular thematic issue on the CSD agenda (Delreux and Van den Brande, 2010, p. 8). The appointment of lead countries is highly related to the division of competences between the member states and the EU. Thematic issues representing important EC competences are almost automatically assigned to the European Commission (e.g. agriculture in the CSD-16/17 cycle), whereas other issues are divided among the member states. While the European Commission is also responsible for taking the floor at the CSD for those issues for which it has taken the lead internally, other lead countries cannot externally represent their speaking points, as that task is carried out by the EU presidency. In practice, EU representation at CSD is thus divided between the European Commission and the EU presidency.

In first instance, the EU is represented at CSD by its presidency, which has the legal competence to represent the EU in many of its external affairs (Farrell, 2006, p. 31). As mentioned before, the EU presidency does not stand alone in the preparatory process or in the representation on the spot. It is assisted by the lead country and a small subgroup of other closely involved member states. 'Sitting next to the Presidency, they intensively follow the discussions and coordinate on the spot' (Delreux and Van den Brande, 2010, p. 13). The EU presidency does thus not at all act independently from the other member states. In very exceptional cases, the lead country system even makes it possible for an experienced member state representative to take the floor instead of an EU presidency representative (which is of course not noticeable to an outsider, as the EU spokesperson always occupies the seat of the country holding the EU presidency). The latter, however, is most probable during a policy session where negotiations are primarily conducted within the format of working groups or informal contact groups.

When important EC competences are discussed, the European Commission will function as a so-called 'lead country'. It is assisted by a small subgroup of closely involved member states and an EU presidency representative. As it has already been discussed, the issues on which the European Commission claimed a (important) role during the three cycles were water at CSD-12/13, air pollution/atmosphere, climate change, energy for sustainable development and industrial development at CSD-14/15 and agriculture and rural development at CSD-16/17. In practice, the European Commission also made statements with regard to all of those issues during the CSD sessions. Yet, it was during the last cycle that its role was the most significant. Being

largely competent for agriculture and rural development, the commission took the lead within the EU on those issues.

More than once, competence struggles between the commission and the member states emerged. In the beginning of the preparatory process for CSD-16, for example, much discussion arose around the issue of biofuels which the member states considered to be primarily a member state policy, while the European Commission claimed it to be also part of the EC's agricultural policy.

In contrast to the actual negotiations during a policy session where the floor is only taken by EU representatives (the EU presidency or the European Commission), member states sometimes take the floor during the thematic discussions at a review or policy session. Yet, that is mostly the case when they want to add specific national experiences to the EU statement and is in other cases strongly discouraged by both the EU presidency and the European Commission.

In sum, the EU's representation at CSD follows from the thematic issues that are on the CSD's agenda. Depending on the issues under discussion, either the EU Council presidency or the European Commission speaks for 'Europe'. Yet, both the commission and the presidency do not stand alone in the EU's representation, as they are assisted by a lead country or by closely involved member states. The next section goes deeper into the EU's internal decision-making with regard to CSD matters.

4.2. EU decision-making and coordination

The internal EU decision-making process takes place in the Council Working Party on International Environmental Issues (WPIEI), in particular the WPIEI dealing with global environmental aspects of sustainable development (WPIEI Global). The WPIEI Global gathers monthly and the yearly session of the CSD is a recurring point on its agenda. It is the highest decision-making body that is involved in the preparatory decision-making process for CSD. Indeed, in contrast to other global negotiations, such as those on the UNFCCC (see Chapter 10), the WPIEI Global does not prepare Environment Council conclusions for the CSD. Once the WPIEI Global has adopted an EU viewpoint, that viewpoint is no longer discussed at higher levels by Coreper, the Environment Council or the European Council (Van den Brande, 2009, p. 12). The role of the Environment Council (and of other Council configurations) with regard to CSD is very limited. In practice, it is only used for debriefing about the CSD negotiations by the presidency.

On the spot, the EU coordination meetings are organized in a setting similar to that of the WPIEI Global. Those meetings take place daily before the CSD meeting itself or during the meeting, if deemed necessary. At those coordination meetings, the EU's speaking points are finalized and practical arrangements for the negotiations of that day are made. The presidency also

uses those meetings for debriefing about the CSD discussions of the previous day and about its outreach activities.

The formal responsibility for the preparation and coordination for the CSD (and its preparatory meetings) lies with the EU Council presidency. In order to prepare a common EU viewpoint for CSD, many presidencies use the lead country system (cf. supra). Delreux and Van den Brande (2010) identify four reasons that explain the rationale behind that kind of informal division of labour. The first reason is burden-sharing. Because of the complexity and number of issues on the CSD agenda and because of sometimes limited capabilities of the presidency, the latter shares the work with the member states and the European Commission and aims to better manage the preparatory process (Delreux and Van den Brande, 2010, p. 6). The other three reasons concern the pooling of member state and commission expertise, involving the other member states during the process and improving the continuity in the EU decision-making and coordination process, taking into accounting the rotating EU presidency (Delreux and Van den Brande, 2010, pp. 6–8).

Lead countries always operate under the authority of the presidency and it is the latter who appoints them at the start of the preparatory process for each CSD session. In practice, the lead country task is carried out by representatives of member states or the European Commission. As the lead country system is used to improve the continuity across the four presidencies that are responsible for the preparatory process of a whole CSD cycle, a lead country is often appointed for the whole CSD cycle. Belgium, for example, was lead country for a sub-cluster of issues, including the cross-cutting issues and interlinkages, during the whole CSD-16/17 cycle. Sometimes, when no member state can be found to be a lead country, it can be the case that the presidency itself takes on the task. Table 9.2 illustrates the lead country system for the CSD-16/17 cycle.

In sum, the EU's decision-making and coordination for CSD issues are largely determined by the use of the lead country system, which seems to enhance the EU's role in the CSD negotiations. Yet, an important role is still reserved for the EU presidency, which has to steer the internal EU decision-making process in the right direction.

5. Conclusion

Linking up the EU's actor capacity, its de facto recognition and its interaction with the other negotiating actors at CSD (as part of the global governance mode) during the studied period 2004–2009 (cycles CSD-12/13, CSD-15/15 and CSD-16/17), the EU played a functionally significant role on the continuum 'functionally significant – dysfunctional'. It has actively attempted to contribute to problem-solving and promoted multilateralism at the CSD. This behaviour is in line with the European Commission's

Table 9.2 Lead countries for CSD-16 and CSD-17

Thematic issue	Lead country CSD-16 (2008)	Lead country CSD-17 (2009)
Agriculture	Commission	Commission
Rural development	Commission	Commission
Land	The Netherlands	France, Czech Republic (both as Presidency)
Drought	Czech Republic and Italy	Spain
Desertification	Czech Republic and Italy	Spain
Africa	The Netherlands	France (initially as Presidency)
Cross-cutting issues & interlinkages[14]	Belgium	Belgium
Water	France	France

Source: Adapted from Delreux and Van den Brande, 2010, p. 11.

communication on the choice of multilateralism, which sees the EU in a 'front-runner' role in the field of sustainable development.

Moreover, it is also in line with the EU's general objective in its sustainable development strategy to actively promote sustainable development worldwide. First of all, throughout the three CSD cycles the EU has frequently promoted the CSD as the specific UN body for sustainable development issues. Second, advocating the work of the CSD, the EU has often aimed for more concrete results and strong follow-up mechanisms. Third, observing the flaws in the functioning of the CSD, the EU has more than once emphasized the need for a CSD reform, which corresponds to the European Commission's recommendation that it should give renewed impetus to the UN reform.

The EU's promotion of multilateralism has been the most obvious at the end of the CSD-15 session. At that time, the EU had an ambitious agenda, but could not convince its other negotiating partners. That resulted in a weak CSD outcome, although crucial issues were on its agenda. Through its refusal to agree with the outcome, the EU wanted to give a strong signal. Another signal of its support for multilateralism came at the end of the CSD-17 session, when – although it did not totally agree on it – the EU accepted the text in order to avoid another CSD failure.

Playing a functionally significant role at CSD and having acquired quite a developed legal status, the typology indicates that the EU occupies something close to the ideal-type of a central position in the CSD. Indeed, it is one of the main negotiating actors at CSD and to a certain extent its viewpoints have been decisive for the final outcomes during the period 2004–2009.

Yet, the EU's support for multilateralism has not yet resulted in the best possible outcome of the negotiations in the CSD. Despite its reform in 2003, the body still remains a forum of which the usefulness is often questioned. At each CSD session, many participants, among whom the EU, have emphasized the flaws in the CSD's functioning and have promoted a reconsideration of its work. Not surprisingly, the global institutional framework for sustainable development will be one of the main topics of the upcoming UN Conference on Sustainable Development, to be held in 2012 in Rio.

One could question why the EU's attempt to lead the way at the CSD has not been more successful over the years. The internal EU decision-making and coordination on CSD work quite effectively. The lead country system has its caveats, but the successive EU presidencies know how to deal with them. Moreover, in spite of some internal competence struggles between the European Commission and the member states, the EU's external representation also works quite smoothly. The problem thus seems to be situated at the global level, where an often ambitious EU comes up against other negotiating partners. The complexity and the multitude of issues that have to be dealt with create a global dynamic in which flexibility in the viewpoints of negotiating partners is needed. Yet, since the EU regularly arrives at the CSD with a set of positions extensively negotiated between the Member States and the European Commission, its own approach is rather rigid and too inflexible to deal with the evolving context at the CSD. In order to be a leader in the promotion of multilateralism at the CSD and to bolster its central position at the CSD, the EU would need to assure an even greater internal coherence and take the specific features of the CSD to a larger extent into account when designing its positions.

Notes

1. The empirical research for the chapter is based on literature study, document analysis, interviews conducted with officials and non-governmental actors at the national, EU and UN levels between January 2008 and December 2009, and a non-participatory observation of the CSD-16/17 cycle. As a member of the Belgian national delegation, the author observed the entire decision-making process from the inside at every single level. The research has been carried out within the framework of a doctoral research project on the Flemish subnational government in multilateral decision-making on sustainable development and was financed by the Flemish Policy Research Centre on Sustainable Development (Van den Brande, 2012).
2. In accordance with Article 68 of the UN Charter.
3. The cross-cutting issues are: poverty eradication; changing unsustainable patterns of consumption and production; protecting and managing the natural resource base of economic and social development; sustainable development in a globalizing world; health and sustainable development; sustainable development of Small Island Developing States (SIDS); sustainable development for Africa; other regional initiatives; means of implementation; institutional framework for sustainable development; gender equality; and education.

4. The regions are clustered according to the regional classification of the UN Economic Commissions. There are five regional Commissions (subsidiary bodies) of ECOSOC (ECOSOC 2007): UN Economic Commission for Africa (UNECA), UN Economic and Social Commission for Asia and the Pacific (UNESCAP), UN Economic Commission for Europe (UNECE), UN Economic Commission for Latin America and the Caribbean (UNECLAC), UN Economic and Social Commission for Western Asia (UNESCWA).
5. At the end of the CSD-15 session, the appointment of the next bureau produced some commotion. The EU and some other states, such as Canada, Australia and New Zealand, expressed concerns about the candidacy of Zimbabwe for CSD-16 chair. They doubted whether Zimbabwe – a country marked by poor government policies – would be able to promote good governance, one of the core principles of the CSD, and they emphasized that appointing Zimbabwe as chair could negatively impact the CSD's work (ENB, 2007).
6. In accordance with the UN Charter (Article 67, Chapter X) and the Rules of Procedure of ECOSOC (rule 58).
7. A CSD session is also largely attended by UN members that are not a CSD member. In practice, no large differences are visible between the number of interventions by CSD members and those by UN members that are no CSD member. The only noticeable difference concerns the attendance of the CSD meetings, which is slightly higher for CSD members.
8. At UNCED, the EC for the first time received a full participant status to a UN conference (Mensah, 1996, p. 32; Vogler and Stephan, 2007, p. 396). That status has been affirmed in Agenda 21, by stating in a footnote of its preamble that 'When the term "Governments" is used, it will be deemed to include the European Economic Community within its areas of competence' (UNCED, 1993, p. 15).
9. By ECOSOC decision 1995/201 on 'Full participation of the European Community in the Commission on Sustainable Development'.
10. An important difference between a full participant status and an observer status is the possibility to attend informal meetings. The latter is usually not possible for participants with an observer status, for example IGOs.
11. There are nine major groups, i.e. women; children and youth; indigenous people; non-governmental organizations; local authorities; workers and trade unions; business and industry; scientific and technological communities; and farmers (UNCED, 1993). Their main purpose is to inform the decision-making process of the CSD (UNDESA, 2008c).
12. During a CSD session, strict time constraints are applied to all speakers: negotiating groups are usually granted five minutes, individual states and observers three minutes and major groups only one minute.
13. The research shows that an EU presidency that speaks for the EU at the CSD does not have to be a CSD member at the same time. That was the case for Ireland at CSD-12 and Slovenia at CSD-16.
14. In the final months of the negotiations, 'means of implementation' was added to the thematic issue 'cross-cutting issues and interlinkages' and was led by Belgium, together with the UK and the presidency.

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10

The EU in the United Nations Climate Change Regime

Simon Schunz

1. Introduction[1]

After almost two decades of active implication in the United Nations (UN) climate change regime, the European Union's (EU) engagement in this domain of global environmental politics has become widely considered as emblematic of its participation in global multilateral governance generally.[2] In this time span, the internal and external parameters for EU activities in this domain have considerably evolved. The science of climate change, reflected in successive reports of the Intergovernmental Panel on Climate Change (IPCC), has become ever more compelling, transforming the issue into a priority foreign policy topic (IPCC, 2007). At the same time, the global politics of climate change as well as the governance structures within and beyond the UN climate regime have undergone significant transformations. Not in the least, the EU itself has become a foreign policy actor in its own right, not only driven by several internal treaty reforms, but also by recurring attempts at finding its place in the evolving regime context. One parameter that has remained a constant throughout all this time, however, is the Union's desire to 'play a leading role in promoting concerted and effective action at global level', formulated by the European Council in Dublin in June 1990 (European Council 1990: Annex II – 'The environmental imperative'). This leadership aspiration, paired with a commitment to searching for multilateral solutions to the problem of climate change, has been reinvigorated at different moments in the evolution of the climate regime on the basis of both norms and interests shared among EU Member States (van Schaik and Schunz, 2012).

This chapter builds on the analytical framework explicated in Chapter 2 to assess the historical evolution of the EU's *position* in the regime from the talks that resulted in the UN Framework Convention on Climate Change (UNFCCC) in 1992 until the conclusion of the Copenhagen Accord in 2009. To conduct this analysis, the chapter first looks into the global governance mode of the UN climate regime, differentiating between

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four periods this regime has gone through since 1991. Subsequently, it assesses the cross-time development of the de jure and de facto recognition of the EU as an actor, before analysing its evolving actor capacity. In a concluding section, the various components of the analytical framework are then re-confronted to evaluate whether the EU was capable of effectively contributing to solutions to the problem of climate change via the multilateral regime. It is argued that while the EU's actor capacity has in many respects developed almost in a linear fashion, its effectiveness as a player in the multilateral regime has, for a number of reasons, not paralleled this evolution.

2. The context: the evolving global governance mode of international climate politics

To understand the EU's external climate policy activities, these latter have to be analysed in their context, depicted here as 'global governance mode'. In the area of global climate politics, formal, legal-institutional factors such as the bodies and procedures of global climate policy-making therefore need to be examined just as much as the informal processes and interrelations between key actors that shape the dynamics of global governance in this field. The specificities of the EU's participation in the global climate regime are then considered in the subsequent sections of the chapter.

To account for the evolution of global climate governance over time, the study proceeds in a chronological fashion. It traces the development of the regime through four time periods: a regime creation phase, during which the Framework Convention was negotiated (1991–1992), a consolidation period that witnessed the adoption of the Kyoto Protocol (KP) (1993–1997), a phase during which regime maintenance became the prime concern, as parties had to operationalize and ratify the protocol (1998–2004), and a regime reform period that is ongoing, but had its first showdown at the 2009 Copenhagen summit (2005–2009) (for an overview of the international negotiation sessions during this period, see Table 10.1).

2.1. Regime creation (1991–1992)

Following a series of scientific and semi-political conferences on climate change in the late 1980s, a December 1990 resolution of the UN General Assembly created an 'Intergovernmental Negotiating Committee' (INC), charged with the task of negotiating a framework convention on climate change (Bodansky, 1993; UNGA, 1990). Between February 1991 and May 1992, the body would meet five times to deliver on its mandate.

Formally, the INC was placed under the authority of the UN Secretary-General and adopted 'Rules of Procedures (...) reflecting a balance between the requirements of consensus and majority voting' (Dasgupta, 1994, p. 132). In practice, consensus was regularly sought, and parties only used the 'possibility of recourse to the voting procedure (...) as a restraint on

Table 10.1 Key UN climate regime negotiation sessions between 1991 and 2009

Period	Meeting	Dates	Places
1991–1992	INC 1 - 5.2	February, June, Sept., Dec. 1991; February, May 1992	Chantilly (USA), Geneva, Nairobi, New York
1993–1997	INC 6-11	Dec. 1992, March, August 1993; Feb., Sept. 1994; February 1995	Geneva New York
	COP 1	28 March–7 April 1995	Berlin
	AGBM 1-3	August, Nov. 1995; March 1996	Geneva
	COP 2/AGBM 4	8–19 July 1996	Geneva
	AGBM 5-8	December 1996; March, July/August, October 1997	Geneva Bonn
	COP 3	1–11 Dec. 1997	Kyoto
1998–2004	COP 4	2–13 Nov. 1998	Buenos Aires
	COP 5	25 Oct.–5 Nov. 1999	Bonn
	COP 6	13–25 Nov. 2000	The Hague
	COP 6bis	16–27 July 2001	Bonn
	COP 7	29 Oct.–10 Nov. 2001	Marrakech
	COP 8	23 Oct.–1 Nov. 2002	New Delhi
	COP 9	1–12 Dec. 2003	Milan
	COP 10	6–18 Dec. 2004	Buenos Aires
2005–2009	COP 11/MOP 1	28 Nov.–10 Dec. 2005	Montreal
	AWG-KP 1/ Dialogue 1	May 2006	Bonn
	COP 12/MOP 2	5–17 Nov. 2006	Nairobi
	AWG-KP 3-4.1/ Dialogue 3-4	May, August 2007	Bonn, Vienna
	COP 13/MOP 3	3–15 Dec. 2007	Bali
	AWG-KP 5.1-6.1/ AWG-LCA 1-3	March/April, June, August 2008	Bangkok, Bonn, Accra
	COP 14/MOP 4	2–13 Dec. 2008	Poznan
	AWG-KP 7-9.2/ AWG-LCA 5-7.2	March/April, June, August, September/ October, November 2009	Bonn Bangkok Barcelona
	COP 15/MOP 5	7–19 Dec. 2009	Copenhagen

influential parties' (Dasgupta, 1994, p. 132). Only states could be parties to the INC, enjoying the rights to speak, vote and table proposals (UNFCCC, 1991). In the actual proceedings, up to 150 parties would become involved (Bodansky, 1993, p. 477).

These parties would not so much interact on an individual basis, but mostly via two major negotiating coalitions: the Organisation for Economic Cooperation and Development (OECD), regrouping countries of the industrialized world, and the G-77 and China, a coalition of almost 140 developing countries. Within each of these blocs, smaller groupings would also come to play a role. In the OECD, the European Community (EC) would gain profile as a coalition, while the G-77/China had to find compromises between the strongly divergent views of the newly created Alliance of Small-Island States (AOSIS), consisting of about 40 island states that were directly threatened by climate-induced sea-level rise, and the oil-producing countries (OPEC) (Dasgupta, 1994, p. 132; Paterson and Grubb, 1992, pp. 299–300).

After the first INC sessions had only witnessed procedural advances, debates would mostly centre on two issues: the magnitude and format of the emission reduction efforts the convention should embody and the question of 'who should do what?' in the future climate regime (for an overview: Mintzer and Leonard, 1994; Bodansky, 1993).

On the latter issue, the developing countries held a quite defensive position. For them, it was up to the developed world to undertake emission reduction efforts and support the poor in their efforts to combat the negative effects of climate change. The OECD countries, including the EC, disagreed with this view in the beginning, but would later come to accept the argument embodied in the 'principle of common, but differentiated responsibilities' of Article 3 UNFCCC, namely that all countries had a *common* responsibility for the protection of the environment, but that *differences* in both past and present contributions to environmental degradation and in the capacities to combat environmental problems needed to be accounted for (Rajamani, 2000; Steffek, 2005). In line with this principle, only parties placed into Annex I of the convention, i.e. industrialized countries, 'shall adopt national policies and take corresponding measures on the mitigation of climate change (...) These (...) will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions' (Article 4.2(a) UNFCCC).

The second issue proved much more divisive: within the OECD, many countries – including the EC members as a bloc – had declared that they were prepared to stabilize their emissions at 1988 or 1990 levels by the year 2000 (Paterson and Grubb, 1992, p. 301; Dasgupta, 1994, pp. 134–135). This 'target and timetables' approach was 'vigorously opposed' by the United States (Bodansky, 1993, p. 478). It took intense bargaining between OECD members and the Americans, involving a decisive bilateral exchange with the United Kingdom, to find a compromise solution (Borione and Ripert, 1994, p. 83). In the end, the Framework Convention contained only a vaguely formulated objective: 'to achieve (...) stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous

anthropogenic interference with the climate system' (Article 2 UNFCCC). To attain this objective, each Annex I party 'shall communicate (...) detailed information on its policies and measures (...) as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases (...), with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases' (Article 4.2(b) UNFCCC). This soft, non-binding provision represented a compromise between the EC and the United States, which paved the way for all parties to solemnly approve the convention (Bodansky, 1993, p. 491). The treaty was opened for signature at the Rio Earth Summit in June 1992.

2.2. Regime consolidation (1993–1997)

Between mid-1992 and early 1995, the INC met another six times to prepare the first conference of the parties (COP) to the UNFCCC, whose organization required the prior ratification of the treaty. During this period, many parties had come to realize that the soft approach inherent in the convention would not bring about the emissions reductions considered necessary in light of the latest scientific findings on climate change (Oberthür, 1994). By consequence, COP 1, held in March/April 1995 in Berlin, would serve to kick off a new negotiation process. Based on the 'Berlin Mandate', an Ad Hoc Working Group (AGBM) was charged with talks on a legal instrument to supplement the UNFCCC (UNFCCC, 1995b). Negotiations resulting in the Kyoto Protocol would involve the quasi-totality of UN members and were conducted over eight sessions.

Formally, the conference of the parties and the AGBM functioned according to the draft Rules of Procedure of the COP (Article 7 UNFCCC), which implied that each party had the right to speak, table proposals and vote (Yamin and Depledge, 2004, pp. 432–434, 438–443). A special provision applied to Regional Economic Integration Organizations (REIOs) such as the EU (Article 22 UNFCCC), as further discussed in Section 3. In the absence of a decision on formal voting rules,[3] decisions in these bodies had to be taken by consensus (Yamin and Depledge, 2004, p. 442).

The negotiations would again be conducted by major negotiating blocs. The industrialized country group had split into the EU(-15) on the one hand and the non-European industrialized countries, regrouped in the so-called JUS(S)CA(N)NZ coalition (Japan, United States, Canada, Australia, New Zealand, later with Switzerland, Norway, Iceland), on the other hand. The G-77/China remained as one heterogeneous negotiating coalition, with growing difficulties to forge common positions.

In the course of the talks (for an overview: Oberthür and Ott, 1999; Grubb, Vrolijk and Brack, 2001), three issues would become central stepping stones: the format and magnitude of the emissions reduction targets for industrialized countries, the regulatory approach of the future regime

and the question whether (and to what extent) major developing countries should engage in emission reduction efforts alongside Annex I parties.

On the latter issue, a decision was locked in early in the negotiation process. At the first COP, a temporary split of the G-77/China led to the emergence of a small coalition of developing countries, referred to as the 'green group', who – together with environmental NGOs – drafted a proposal for a mandate for negotiations on a new legal instrument (Oberthür and Ott 1999: 46). In this document, they demanded that 'the consultations will not introduce any new commitments whatsoever for developing country Parties' (UNFCCC, 1995a: point 4). This request, justified with reference to the principle of common but differentiated responsibilities, was quickly supported by the EU and found its way into the Berlin Mandate (Oberthür and Ott, 1999, p. 46). Although the United States and other JUSSCANNZ members would try to alter this provision in the further course of the debates, the Kyoto Protocol does not assign any new duties to non-Annex I countries.

Its Annex B does, however, foresee novel, concrete and legally binding emissions reduction targets for industrialized countries. These were the result of a last-minute bargain involving the three big OECD emitters: the United States, the EU and Japan (Schröder, 2001). On this item, the EU had successfully set the agenda with its April 1997 proposal that industrialized countries should reduce their emissions by 15% from 1990 levels until 2010. Right before the decisive COP 3 in Kyoto, this proposition received the support of the G-77/China, but stood in stark contrast to the offers made by COP host Japan (5% reductions by 2010) and by the United States (stabilization over the period 2008–2012). The final deal comprised reduction pledges of 8%, 7% and 6%, respectively, by the EU, the United States and Japan and represented thus a non-negligible success for the Union (Yamin, 2000, p. 55, see Section 4.2).

This achievement came, however, at a high cost regarding the third central item under negotiation. In exchange for the acceptance of the relatively high targets by the big JUSSCANNZ members, the Union's preferred regulatory command-and-control approach for the climate regime, based on a combination of (binding) policies and measures, had to be sacrificed. By consequence, the Kyoto Protocol contained a set of flexible, market-based mechanisms (emissions trading, joint implementation and the clean development mechanism, Articles 17, 6, 12 KP), favoured essentially by the United States (Grubb, Vrolijk and Brack, 2001).

2.3. Regime maintenance (1998–2004)

Before engaging in its ratification, the Kyoto Protocol needed thorough operationalization, notably regarding the newly introduced flexible mechanisms. The relevant provisions were negotiated between 1998 and 2001. Thereafter, ratification was not imminent, however, as the context for

global climate governance had considerably altered when the world's largest emitter, the United States, withdrew from the multilateral process in 2001.

Formally, talks during this period were conducted at the COPs, following the draft Rules of Procedure. Meetings of the parties (MOPs) to the protocol could not be held until the latter had been ratified. In 1998, parties adopted the Buenos Aires Plan of Action to map out the steps towards the operationalization of the treaty (for an overview: Dessai, Lacasta and Vincent, 2003). Talks entered into a hot phase at COP 6 in late 2000 in The Hague. Essentially, they opposed the EU, whose primary aim was to protect the environmental integrity of the protocol by imposing a certain rigour in the fulfilment of target obligations, to members of the Umbrella Group, a newly formed coalition of the old JUSSCANNZ members plus Russia and the Ukraine (minus Switzerland), who sought maximum flexibility (Torvanger, 2001). Talks in the Dutch capital would then also break down over transatlantic (and EU internal) differences on the details of flexibility provisions (Grubb and Yamin, 2001).

Only months later, the new US administration under George W. Bush would completely withdraw from the protocol ratification process. A series of diplomatic exchanges between major parties and coalitions outside the UN regime followed, prominently involving the EU (Grubb, 2001). They resulted in a joint commitment to continue with the ratification process.

The US absence from this process would, however, give the remaining members of the Umbrella Group a veto power of sorts, as each one of them was now needed to obtain the ratification of the protocol.[4] This new power distribution in the UN climate talks would have consequences for the further operationalization process of the protocol, which was concluded at COP 6bis in mid-2001 and then formalized with the 'Marrakech Accords' at COP 7 (Dessai, Lacasta and Vincent, 2003). In this process, countries like Japan or Russia exploited their new bargaining power to obtain numerous concessions from the EU, mostly with regard to the use of flexibility provisions.

It took another three years to convince Russia of ratifying the treaty, an effort that was mainly assured by the EU (Douma, 2006, see Section 4). With the entry into force of the protocol on 16 February 2005, the path was cleared for further regime development.

2.4. Regime reform (2005–2009)

In the fourth and latest period of the development of global climate governance, new political dynamics unfolded within and beyond the UN arena. While parties had been discussing the fate of the Kyoto Protocol, the parameters for global climate policy-making had already begun to evolve. Following a transition period between 2005 and 2007, this would become patently obvious after the formal kick-off of post-2012 talks at the Bali COP in December 2007.

Formally, negotiations on the future of the climate regime were conducted in the COP and the MOP as well as in temporary subsidiary bodies set up under both the convention and the protocol. In these bodies, parties, including REIOs (Article 24 KP), would proceed in line with the provisional Rules of Procedure of the convention.[5] Reform decisions in bodies created under both treaties had thus to be taken by consensus (Yamin and Depledge, 2004, p. 442).

In a broader governance perspective, talks on the future of global climate politics would also increasingly be conducted outside the UN regime during this period. From the mid-2000s, the United States tried to promote the creation of smaller governance arrangements outside the multilateral framework, such as the 2007 Major Economies Meeting (since 2009 called Major Economies Forum) of the 17 largest global emitters. At the same time, efforts were made notably by key EU Member States to re-engage the United States in the multilateral climate talks, particularly via the G-8(+5) (Afionis 2008).

Within the – still central – UN regime, parties decided to engage in first talks on a post-2012 reform at the eleventh COP and first MOP in Montreal in late 2005.

Under the MOP, in which the largest emitter United States held only observer status, such talks were imposed by the protocol itself, whose Article 3.9 foresaw a review of the adequacy of commitments of Annex I parties seven years before the end of the first commitment period in 2012. An open-ended Ad Hoc Working Group (AWG-KP) on further commitments for Annex I parties was created to that effect (Wittneben, Sterk, Ott and Bround, 2006, pp. 16–17).

Under the COP, including the United States as a full party, the start of regime reform discussions was much more controversial. Over the course of the years, the emission profiles of the major emerging economies such as China and India had considerably evolved. Studies suggested that the proportions between developed and developing countries were continuing to change dramatically not only in terms of annual absolute emissions, but also regarding cumulative contributions to the problem of climate change (Botzen, Gowdy and Van den Bergh, 2008, p. 571). For that reason, the United States and other Umbrella Group members were now joined by the EU in their demands for the meaningful participation of emerging countries in the emission reduction efforts under the future regime. Yet, via the G-77, the major emerging countries refused to take on own obligations as long as the developed nations had not delivered on their financial and emission reduction commitments. In this intricate context, COP 11 could only decide to start a 'loose dialogue' on a regime reform (Wittneben, Sterk, Ott and Bround, 2006).

It was under the impression of the scientific findings presented in the Fourth Assessment Report of the IPCC, released over the course of the year 2007, that things evolved more quickly at COP 13/MOP 3 in Bali, then. The report indicated, inter alia, that there was now a '*very high confidence* that the global average net effect of human activities since 1750 has been one of warming', with numerous effects on the living conditions on the

planet (IPCC, 2007, p. 5). Projecting into the future, these consequences were bound to intensify and become possibly 'abrupt or irreversible' (IPCC, 2007, p. 13). Different scenarios were advanced in the report, many of which were interpreted as imposing fairly urgent action to forego the most devastating effects of climatic changes (Stern, 2007).

After the United States had signalled to re-engage in global talks and the emerging countries had shown preparedness to consider 'nationally appropriate mitigation actions' (NAMAs), the 'Bali Roadmap' cleared the way for concrete negotiations under the AWG-KP and a newly created Working Group on long-term cooperative action under the COP (AWG-LCA) (UNFCCC 2007). The self-set deadline for the process to deliver an 'agreed outcome' was COP 15/MOP 5 in Copenhagen.

Despite an unprecedented number of negotiation sessions and the proactive activities of the EU, which had presented detailed positions as early as 2007 (see Section 4), this deadline could not be met. The gaps between, essentially, the United States and the major emerging powers proved too wide. By consequence, key parties from the industrialized and developing world remained unprepared to engage in real negotiations for the most of two years. Positions around key issues such as the magnitude of emission reduction targets of industrialized countries therefore clashed only at the very final day of the Copenhagen Summit. Last-minute talks among the heads of state and government of 25 parties representing major emitters and key negotiation coalitions resulted in the 'Copenhagen Accord' (CA), a political declaration of a little over two pages (UNFCCC 2009).[6] In this accord, parties agreed to pledge – by 31 January 2010 – target proposals (for Annex I parties) or NAMAs (for non-Annex I parties) for 2020 and to hold each other accountable for them, following a set of loosely stipulated rules (Articles 4, 5 CA).[7] Moreover, to enable this bargain, industrialized countries promised fast-start financial support to developing countries in the magnitude of $10 billion per year between 2010 and 2012 and long-term support of up to $100 billion per year by 2020 (Articles 8, 10, 11 CA). Due to the, in their view, non-transparent negotiation process, a small minority of parties did not accept the accord, however, which was therefore only 'taken note of' by the COP (Müller, 2010). Negotiations on a more wide-reaching reform of the post-2012 regime were pursued under both tracks into the year 2010. At COP 16, held in the Mexican city of Cancun, key provisions of the Copenhagen Accord were integrated into the negotiations under the AWG-LCA (Bodansky, 2011). COP 17 in South Africa then agreed on the 'Durban platform', i.e. a roadmap for negotiating a legal outcome until 2015, which is to take effect in 2020. It also agreed on a second commitment period for the Kyoto Protocol, the details of which were to be specified in the course of 2012.

In synthesis, the global governance mode regarding climate change has evolved considerably since the beginning of the 1990s. In terms of formal institutions, the UN regime has affirmed itself as the key site of global climate governance, even if other governance fora emerged in the more

recent past. Negotiations in the COPs and MOPs follow a set of standardized rules and procedures, of which the most significant one is arguably the consensus requirement for major decisions. This has proven to be a very high hurdle notably during the (intermediary) final round of post-2012 talks in late 2009. Informally, the global politics of climate change have equally transformed over time: where the United States, the EU and Japan were the key protagonists in the 1990s, the changing emissions profiles and the latest climate science have brought up the issue of emission reduction efforts by major developing countries. The resultant reinforced antagonism US-BASIC (Brazil, South Africa, India, China) has rendered global climate governance within and outside the UN regime more complex, further jeopardizing the effectiveness of the latter. All these changes have also affected the EU's performance in this arena in multiple ways.

3. The EU's recognition as an actor: an asymmetrical evolution over time

As a second major analytical unit, the framework guiding the analyses in the different empirical chapters of this book identifies the Union's de jure and de facto recognition, i.e. whether third parties perceive the EU as a uniform actor in the talks, as a key component of its participation in global multilateral governance arrangements.

De jure, the Union has been fully recognized as an actor in UN climate negotiations ever since the post-Earth Summit phase. During the negotiations on the Framework Convention, the EC did not possess a legal status in the Intergovernmental Negotiating Committee (Brambilla, 2004, p. 165). But already for the Earth Summit, it was then given full participant status. In the period 1993 to 1995, even though the convention had not yet entered into force, the Union was considered a full member in the additional INC sessions, granting it the rights to table proposals, speak and vote on behalf of its Member States (Lescher, 2000, p. 73). Finally, the joint ratification by the EC and its Member States enabled the formal endorsement of this arrangement via the REIO clause inserted into Article 22 of the UNFCCC evoked above. This meant that the Union became, from 1995 on, legally recognized as a fully fledged party to the proceedings of the COPs. A similar REIO clause in the Kyoto Protocol (Article 24 KP) later also provided the ouverture in international law for the EU to participate as full member in the meetings of the parties under the protocol (cf. Pallemaerts and Williams, 2006, p. 39).

If the Union's de jure recognition in the UN climate regime has thus been unambiguously achieved since at least the mid-1990s, the de facto recognition as an actor could always be taken for granted. In the INC negotiations, the EC was considered as a key coalition, but not always as fully coherent, single player: 'the EC (as opposed to its Member States) in fact only played a limited role in the negotiations leading to the Climate Change

Convention' (Haigh, 1996, p. 181; Lescher, 2000, p. 61). It was only during the periods that followed then that third country representatives would gradually perceive the EU as a uniform actor. In the course of the talks on the Kyoto Protocol, it defended a widely recognized common position, which gained the support from the G-77/China and came to play a central role in the bargain with the United States and Japan. During the immediate post-COP 3 period, it acted coherently to protect its Kyoto achievement by 'saving' the multilateral process. Finally, it entered the post-2012 negotiations with a wide-reaching common position, based on the harmonization of its internal climate policies.

Interviewed about the perceptions third countries might have of the Union as of the 2000s, EU representatives tended to think that it was recognized as a largely uniform and significant actor (Interviews, EU representatives, January and May 2009). External observers agree: the EU is one of the key actors in the regime, and in recent years it does present itself most of the time as a largely uniform player (Interviews third country representatives February and April 2009). But they also indicate that several qualifications to this general impression need to be made. At key moments, conflicts among EU Member States on central political issues could not be concealed. At the 2000 summit in The Hague, for instance, the UK and the French Council Presidency clashed in their approach vis-à-vis the United States (Grubb and Yamin, 2001). During the 2008 COP in Poznan, the EU gave the impression of disunity when it was frantically engaged in parallel internal negotiations about its legislative climate and energy package. During the endgame at the Copenhagen summit a year later, EU members overtly disagreed about the foreign policy strategy to pursue (e.g. whether to step up EU proposals by moving to 30% reductions unilaterally or not). Moreover, as a generalized pattern during such final bargains at major COPs, larger EU members like Germany or the UK become increasingly implicated in bilateral talks with third countries, which also hampers the perception of the EU as a single, influential actor. Finally, also on more technical issues, dissonant voices in the Union can hardly be hidden from negotiation partners.

In sum, just like the discussion of the global governance mode for the analysed regime testified to a considerable evolution of the legal-institutional and politics dimensions of global climate policy-making, the recognition of the EU as an actor in global climate politics developed remarkably over time. While its de jure recognition has been uncontested ever since the mid-1990s, its de facto recognition as a single and influential actor has come a long way towards a – still incomplete – consolidation. Even if the EU is generally perceived as a single player today, third country representatives tend to be aware of eventual internal differences among Member States. This makes it, at times, still difficult to refer to the EU as 'it' in global climate governance.

4. The EU's actor capacity: consolidation with limitations

Actor capacity as an analytical concept depends on an actor's competence to act, the legal and practical provisions and arrangements it has in place for internal decision-making, coordination and representation, the guiding treaty objectives and principles as well as their translation into policy objectives and, last but not least, the availability of and capacity to use foreign policy instruments in the studied policy field. The analysis covers these components of the concept in a historical perspective, linking them also to the discussions of the global governance mode.

4.1. EU competences, treaty objectives and decision-making

The EU's legal competence to act internationally on climate change has undergone the most significant change with the Maastricht Treaty.

Without repeating the general legal framework for the Union's implication in global environmental governance (see Chapter 8), it can be said that EC external activity on climate change found its substantial treaty basis essentially in Article 130r TEC of the Maastricht Treaty (this would later become Article 174 TEC-Nice): 'Community policy on the environment shall contribute to the pursuit of the following objectives: (...) promoting measures at international level to deal with regional or world-wide environmental problems.' Paragraph 4 of this article underscored the fact that environmental protection was a shared, not an exclusive EC competence.

In terms of procedures to follow regarding EU external representation, Article 130s TEC-Maastricht generally granted the EC Member States the right to negotiate international environmental agreements, but it also left them the opportunity to authorize the Commission to conduct these negotiations following the provisions of Article 228 TEC-Maastricht, which represented a codification of pre-1993 practice (Art. 300 TEC-Nice; Brambilla, 2004, p. 160). Its first paragraph stated that, where EC competence existed, 'the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special Committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it'. The decision-making rule that was to be applied depended on the decision-making mode used for internal legislation (Art 228.1 and 2 TEC-Maastricht). Until late 2009, these substantive and procedural bases for EU external activity in primary law remained unaltered.

Only recently, the Lisbon Treaty reinforced EU external competences to act on climate change explicitly in Article 191 TFEU (ex-Article 174 TEC-Nice): 'Union policy on the environment shall contribute to the pursuit of the following objectives: (...) promoting measures at international level to deal with regional or worldwide environmental problems, and in

particular combating climate change'. Also in terms of representation rules, the Lisbon Treaty provides novel formulas (Article 218 TFEU, revised version of ex-Article 300 TEC-Nice) that may alter the balance between the Member States and the Commission (see Chapter 8 in this volume).

Based on these competences, internal decision-making on EU external climate policy has in practice been the domain of the environment ministers of the Member States, with a preparatory role for the Commission. Joint positions were adopted by consensus. Where the conclusions of an Environment Council session held in the autumn of a given year regularly provided the negotiation directives for a COP, the increasing politicization of the topic of climate change and its explicit link to the topics of energy supply and security have gradually led to the implication of the European Council in this process. Since the 2000s, the heads of state and government have therefore provided additional steering on the central political choices in this field.

The decisions taken at these levels represented, however, only the tip of the iceberg. Their preparation has been, ever since its creation in 1994, the task of a working group under the Environment Council and Coreper (Oberthür and Ott 1999, pp. 65–66). This group of climate experts from the Member States and the European Commission has developed into the Working Party on International Environmental Issues-Climate Change (WPIEI-CC), which relies today on a whole set of thematically organized expert groups (e.g. on legal issues, on mechanisms, on budgetary questions). It is in these groups, and with growing input from the Commission, that the delicate bottom-up process of EU (external) climate policy-making begins (Costa, 2009).

The positions adopted in the EU's climate policy making machinery have regularly been political choices that were strongly influenced by the Union's overarching treaty objectives and guiding decisions by its institutions, notably regarding the principles of precaution, sustainable development and multilateralism (van Schaik and Schunz, 2012). Implicit reference to the precautionary principle can already be found prior to the Maastricht Treaty, for instance in the conclusions of the Dublin European Council of June 1990, which stated that a need for further scientific 'research must not be used to justify procrastination' and that the EC should accept 'a wider responsibility (...) to play a leading role in promoting concerted and effective action at global level' in the domain of environmental politics (European Council, 1990, p. 7, Annex II). After the entry into force of the Maastricht Treaty, the EC would employ this principle as a key driving force behind its policies in domains that represented risks, but where the science was still uncertain (Article 130r TEC-Maastricht; Baker, 2006). In the Amsterdam Treaty, the principle of sustainable development was then also given a prominent place, providing further justification for EU activity on climate change (Article 2 TEC, see Chapter 9). Finally, the Union has, throughout its history, displayed a strong public commitment to seeking solutions based

on the principle of multilateralism, calling for 'effective multilateralism' and the promotion of international law, especially also in the domain of climate change (European Commission, 2003; see Chapters 1 and 8). With the Lisbon Treaty, this commitment has consequently been promoted to the ranks of a principle guiding EU foreign policy ('It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations') (Article 21(1) TFEU, see Chapter 1).

In actual practice, although the internal and external (global governance mode) contexts varied across time, the Union's concrete policy choices were strongly inspired by these overarching internal norms. As seen from the discussion of the global governance mode, its positions could seldom be successfully defended in the global arena, however.

In the early 1990s, the EU represented, after some internal quarrels, commonly the approach that precaution had to prevail, suggesting a targets and timetables approach which foresaw the stabilization of emissions at their 1990 levels by the year 2000, with the limited success discussed in Section 2.1 (Jordan and Rayner, 2010, pp. 55–58).

The EU's leadership aspiration expressed by the Dublin European Council was then especially observable in the mid-1990s when it started to formulate proactively a whole set of ambitious policy proposals for the future shape of the climate regime so as to 'show the way'. In 1995, it had begun by suggesting a regime based on a legally binding protocol to the convention, incorporating a command-and-control type of regulatory approach with policies and measures. In the course of 1996, it then introduced as its major narrative that global emissions limitation efforts should be guided by the objective of keeping temperature rise within 2 degrees above pre-industrial levels (Council of the EU, 1996, paras. 3, 6). Based on this overarching aim, its key proposal would then be the 15% emission reduction objective evoked above, introduced in the spring of 1997, half a year before other major emitters revealed their positions (Yamin, 2000). The target was based on an internal burden-sharing agreement of 9.2%, the best compromise the EU could achieve among its members at the time. The difference between the official proposal and the internally agreed number earned it, however, considerable criticism in the international arena (Oberthür and Ott 1999, p. 67). While the Union succeeded nonetheless in partially imposing its view of the magnitude of emission reduction efforts on other major emitters in the international talks, the discussions of the global governance mode demonstrated that it failed to upload its regulatory preferences to the global level (see Section 2.2).

In similar vein, the EU's approach to the operationalization of the protocol and to the multilateral process thereafter was inspired by its overarching values. In the negotiations up to the Marrakech Accords, it was above all concerned with the environmental integrity of the new treaty and favoured a sound enactment of the flexible mechanisms (including

a demand for 'supplementarity', i.e. the setting of a cap on non-domestic measures counting towards the fulfilment of a party's Kyoto target) and a strong compliance system (cf. Torvanger, 2001, pp. 2–3). Subsequently, its diplomatic actions to safeguard the multilateral process after the 2001 US withdrawal from the ratification procedure were also strongly guided by its commitment to the multilateral system. They resulted in a 'meta-success': the Union contributed to the continuity of the regime as such, but lost out when it came to the details of the operationalization of the protocol.

Finally, in the latest round of talks on a regime reform, the EU adopted again an approach that was based on the notion of 'showing the way'. Very early in the global talks, it presented a detailed vision of the future regime, which centred on an ambitious target proposal of 20% unilateral emission reductions from 1990 levels by 2020 and of 30%, if other developed countries adopted comparable reductions (European Council, 2007, p. 12; Schunz, 2009). Moreover, the Union asked that major developing countries undertake efforts to allow for a deviation from their business-as-usual emissions of 15–30% by 2020 (Council of the EU, 2008). This, it was argued on the basis of the fourth IPCC report, would keep global temperature rise within the 2 degrees Celsius that the EU considered as tolerable (European Commission, 2007). As indicated earlier (see Section 2.4), these positions were not reflected in the 2009 Copenhagen Accord.

Altogether, the Union's solid competences for policy-making in the area of environmental politics and its ever more institutionalized internal decision-making processes made it possible for it to forge ambitious positions, based, across time, on a leading-by-example aspiration. The downsides of these positions were their rather obvious inflexibility: front-running implied little evolution of the Union's stances with the changing global context. The position had thus not only implications for the instruments employed by the EU, but also for its coordination and representation in the UN regime.

4.2. EU coordination, representation and instrument use

Once the described positions had been adopted, their representation on the basis of the discussed competences would, for a long time, essentially be assured by the rotating Presidency, which was also responsible for internal coordination processes. Coordination in this context referred to a sort of prolongation of decision-making in situ, i.e. during international talks, as the positions adopted by the Environment Council did not come with fall-back positions and could thus not simply be adjusted without further debate among Member States. In the practical defence of its positions, the Union's representatives had theoretically a wide range of instruments at their disposal, only some of which would, however, regularly be employed.

In the negotiations on the UNFCCC, coordination and representation functions were fulfilled by the Council Presidency and – as far as coordination goes – also the Commission, arguably achieving a certain degree

of coherence of an otherwise not fully uniform foreign policy player EC (Jachtenfuchs, 1996, pp. 114–116; Section 3).

In the period thereafter then, coordination and representation functions were also assumed by the Presidency, now assisted, however, by the former and future Presidencies, together commonly referred to as 'the Troika' (Brambilla, 2004). This arrangement was further reformed in 2000, when the Commission replaced the former Presidency in the Troika, assuring greater continuity of the Union's external climate policies within the UN climate regime (Grubb, 2001, p. 10).

Finally, in 2004, due to recurring problems of continuity arising from the rotation principle, a more sophisticated coordination and representation arrangement was put into place. It involved the designation of lead negotiators from any Member State or the Commission and of issue leaders, essentially from within the WPIEI-CC, who formed small groups that would join the lead negotiators in designing and promoting EU positions in cooperation with the expert groups (Interviews, EU representatives, January and February 2009; Oberthür and Roche-Kelly, 2008, p. 38).

The trend towards a greater diversification of climate governance arrangements in the late 2000s was reflected in the fact that the EU was also being represented in other fora, such as the Major Economies Forum and a growing number of bilateral summits. In these governance arrangements, diplomats from the Member States and the Commission would become involved, who were often less familiar with the climate change dossier per se. This placed the Union before the novel, not fully mastered coordination challenge of promoting synergies between these representatives and the traditional environmental community. Especially during the run-up to and at the Copenhagen summit, this impaired the performance of its otherwise steadily improved climate-specific coordination and representation arrangements (Interviews, EU representatives, February and March 2010).

This evolution of the institutional set-up for EU external climate policy was not paralleled by a more sophisticated use of foreign policy instruments. In theory, the Union has a wide range of foreign policy tools at its disposal, also for usage in a climate policy context, which find their legal bases in what used to be the first and second pillars of its treaty construction before the latest reform. These instruments range from diplomatic over economic to coercive tools (Smith, 2003, pp. 52–68). Diplomatic instruments include issuing demarches or declarations, visiting other countries, opening dialogues on climate change, etc. In the economic sphere, the EU can act positively by, inter alia, concluding trade, cooperation or association agreements, reducing tariffs or providing aid. Negatively, the EU can, for instance, impose boycotts, delay or suspend agreements, increase tariffs or reduce aid. All of these instruments could incorporate or be linked to climate change provisions. Genuine coercive instruments seem less likely in the sphere of climate policy, but they are conceivable in the form of

economic measures such as border adjustment taxes that impose burdens on third countries.

Out of this set of measures, the Union practically regularly relied on only a small number of instruments, dictated by the leading-by-example approach it recurrently adopted since the 1990s. This approach was essentially based on the explanation of the Union's model vis-à-vis as many external players as possible. Not surprisingly, its activities throughout all time periods were thus above all based on the tools of multilateral conference diplomacy. After the US withdrawal from the Kyoto Protocol ratification process, the Union temporarily stepped up its diplomatic activities beyond the UN arena to protect the multilateral process (Grubb, 2001). Notably during the period when Russia had to be convinced of ratifying the Kyoto Protocol, it also used issue linkages based on economic incentives (Douma, 2006). Later, it attempted to forge stronger bilateral ties and further the global negotiation process with key countries such as China and India via strategic climate and energy partnerships (Schunz, 2009). All by all, however, the Union relied essentially on the quality and appeal of its proposals, promulgated through an ever wider range of diplomatic channels, including Member State embassies and Commission delegations in the second half of the 2000s (Schunz, 2009). Other components of its tool box, such as border adjustment mechanisms or generalized issue linkages were discussed and – in the form of economic incentives for developing countries – also employed on a small scale, but hardly ever systematically used to further the EU's objectives in the context of the UN climate negotiations.

Where EU coordination and representation have thus evolved considerably over time, with the Union's set-up as a foreign climate policy actor becoming institutionally more sophisticated, its positions were defended most of the time through the same, limited set of foreign policy instruments. This underscores the non-negligible limitations of the EU's actor capacity on the whole. An almost linear expansion regarding the legal and formal institutional aspects (competences, treaty objectives, decision-making machinery, coordination and representation arrangements) has transformed the Union from a simple negotiation participant in the early 1990s into an almost fully fledged diplomatic actor in the late 2000s. At the same time, several restraints continue to exist, most notably regarding the Union's strategic capacity (inflexibility of the positions, limited instrument use). They have to do with both the evolving global climate governance mode and internal constraints related to the type of entity the Union is, as further discussed in the concluding section.

5. Conclusion: the EU's position in the global climate regime across time

On the basis of the discussion of the various components of the analytical framework, a clear picture of the EU's position in the UN climate regime has

emerged. For a long time, the EU has been a central player in this regime. This position has, however, come under serious pressure in the most recent past and the Union's involvement in the final talks at the Copenhagen summit demonstrated that the EU risks becoming a 'sidelined insider' in this regime.

The first major component of the EU's position, its legal status in the UN climate regime, has been of high quality and uncontested since the mid-1990s. The Union is a full member and party to both treaties that the regime relies on. Moreover, it is centrally implicated in the recently emerged climate governance fora beyond the UN.

Secondly, throughout its entire history, the EU has played a functionally significant role in the global climate regime. In the 1990s, notably during the Kyoto Protocol negotiations, it was the most ambitious actor among industrialized countries, with the highest level of activity in its combat for effectively mitigating climate change through global collective action. In the early 2000s, the Union successfully played the role of a guardian of sorts of the multilateral climate regime. Finally, during the post-2012 negotiations, its leading-by-example approach arguably contributed to setting the agenda for global talks, especially with regard to the urgency with which the topic of climate change had to be treated. One can conclude therefore that the EU has constantly been a genuinely multilateral player within the global climate regime, with a key role when it comes to striving for the fulfilment of the ultimate objective of this regime: 'to achieve (...) stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' (Article 2 UNFCCC).

When attributing the Union such a central position in the UN climate regime across time, an important qualification imposes itself, however. While it has been functionally central to the overall objective and the multilateral quality of the UN climate regime, this is not to suggest that it has been very effective in leading and attaining its concrete policy objectives. Quite on the contrary: the only real substantive success the EU booked in this regard concerned the reduction objectives for industrialized countries in the Kyoto Protocol. Since then, its actual achievements within the UN regime have been rather meagre, with an absolute low point reached at the Copenhagen summit, when the EU's positions were de facto discarded during the final talks. Almost consistently, the Union's leadership aspiration has thus been unsuccessful below the meta-level: beyond obtaining the general commitment of other players to solving the problems associated with climate change through the multilateral regime, the Union has failed in mobilizing followers for its concrete policy proposals.

While it cannot be expected that one actor alone decisively determines global climate policies, the EU's ascent towards becoming an ever

more uniform diplomatic actor coincided thus with a downward trend of decreasing significance regarding the substantive discussions within the global regime. This trend continued well into 2010 and 2011. At both the Cancun and the Durban summits, the EU presented a united front, led by the new Commissioner for Climate Action and the Council presidencies (Belgium, Poland). While it kept a low profile in Cancun, the Union was arguably again fairly successful at the meta-level of governance, most notably with its call for a new 'roadmap' to negotiate a legal outcome by 2015, embodied in the 'Durban platform'. The contents of this outcome remain to be negotiated, however, and it will have to be seen whether the EU is able to leave its mark on this outcome, six years after its failed attempt at doing so during the Copenhagen summit. This paradoxical situation of increased EU actor capacity coinciding with low impact begs explanation, and the other components of the analytical framework can provide first indications as to where the restraints may lie.

The Union's legal status does not seem to have had an effect on its role performance. Via some of its active Member States, the EC already had some impact on the UNFCCC negotiations in the early 1990s, even before it was granted the status of a full member. By contrast, it had virtually no impact at certain points in time despite having obtained this high legal status (and considerable de facto recognition). Major factors for explaining its declining clout concern rather the evolving informal global governance mode and its own incapacity to fully adapt to this institutionally and politico-strategically. As consensus is required for important decisions in the global climate governance arena, strategic behaviour is primordial to reaching one's objectives.

If the EU wants to preserve the centrally functional position it has occupied in the regime up until the Copenhagen summit, it will have to be more than just the facilitator of global talks. There is no use in (being successful in) promoting a global multilateral solution to climate change per se, if it cannot also leave its mark on the contents of that solution and/or if multilateralism produces results that remain as vague and insufficient as the Copenhagen Accord, the Cancun Agreements and the Durban platform. To improve the effectiveness of its participation in the UN climate regime in spite of its decreasing proportion of global emissions, it will need to develop further as a foreign policy actor. This necessitates stronger institutional integration. The Union has to stimulate further cooperation between its foreign policy and environmental communities and assure that it uses the provisions of the Lisbon Treaty and the creation of a European External Action Service, to its advantage (see, however, Chapters 8 and 13). More importantly, however, the EU will need to empower itself to act more strategically by forging more flexible positions and employing a wider set of foreign policy instruments, taking account of the evolving power politics constellations in global climate governance.

Notes

1. The empirical data presented in this chapter are partially based on semi-structured interviews with Commission, EU Member State and Council secretariat officials involved in EU climate policy decision-making and international climate negotiations as well as with third country representatives. Where insights based on interviews were used, it is indicated in the text.
2. During early talks on the set-up of a climate regime, the European Union did not exist as an entity yet. Until the entry into force of the Maastricht Treaty in 1993, its official denotation was 'European Community' (EC). In this chapter, reference will be made to the EC whenever the pre-1993 period is referred to or legal accuracy demands it. Otherwise, general custom is followed by referring to the community as 'European Union'.
3. Due to a conflict over voting rules, the COP never formally adopted its Rules of Procedure, but only 'applies' them. In practice, this means that decisions need to be taken by consensus (Yamin and Depledge, 2004, pp. 432–433).
4. The approval of the treaty required the ratification of 55 parties to the UNFCCC, covering 55% of the emissions of Annex I parties (Article 25.1 KP).
5. According to Article 13.5 KP, the MOP is to apply the Rules of Procedure of the Convention *mutatis mutandis* (Yamin and Depledge, 2004, p. 434).
6. These parties were: Australia, Brazil, China, France, Germany, India, Japan, Mexico, Russia, South Africa, South Korea, Spain, Sweden and the European Commission (these three as EU Troika), the UK, the United States and the Danish COP hosts. Additionally, several parties represented coalitions: Ethiopia and Algeria (African Group); Bangladesh and Lesotho (Least Developed Countries); the Maldives and Grenada (AOSIS), Saudi Arabia (OPEC), Sudan (G-77/China), Colombia and Norway.
7. By 31 January 2010, ten Annex I and 20 non-Annex I parties had formally communicated their commitment/action pledges to the UNFCCC secretariat (UNFCCC, 2010).

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11

The EU in Negotiations on the Cartagena Protocol on Biosafety

Tom Delreux

1. Introduction

This chapter analyses the European Union's (EU) position in the international negotiations leading to the Cartagena Protocol on Biosafety, the first international legally binding agreement on the transboundary movements of genetically modified organisms (GMOs). Unlike most of the contributions in this volume, the present chapter does not look at the EU and its position in a particular regime, but only at a specific negotiation process that was conducted during a delimited time period (July 1997 to January 2000) and led to an environmental treaty. In this negotiation process, the EU was able to defend its positions successfully, as it succeeded in reaching a protocol that strictly regulated the transboundary movements of GMOs, including a rigorous application of the precautionary principle. Hence, in terms of impacting on the negotiation outcome, the Cartagena Protocol negotiations can be seen as a success story for the EU.

To explain why and how the EU managed to influence the multilateral negotiations, the chapter examines the EU's position, unpacking it into the three analytical categories presented in the conceptual framework guiding the case studies in this volume (see Chapter 2). Section 2 unravels the global governance mode of these negotiations. Section 3 examines the recognition question, arguing that the EU enjoyed a high degree of de jure and de facto recognition. Then, in line with the general framework of the book, Section 4 discusses the EU's actor capacity, first, by analysing how the EU was represented around the international negotiation table and, second, by explaining how it reached a common position internally. Finally, Section 5 concludes that the EU occupied a central position in the Cartagena Protocol negotiations, resulting in a strong impact on the outcome. The empirical data presented in this chapter are based on primary – and often semi-confidential – document research, and on eight semi-structured interviews with Commission officials, EU Member States (including Presidency) representatives and Council Secretariat officials

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who participated in the EU decision-making process and the international negotiations.[1]

2. Global governance mode: negotiating a Protocol on Biosafety under the Convention on Biological Diversity

Before Sections 3 and 4 examine in detail the EU as a negotiating partner in the Cartagena Protocol negotiations, this section discusses the basic content of the protocol, its origins and the various stages of the negotiation process as well as the positions of the main players, emphasizing the positions defended by the EU.

The Cartagena Protocol on Biosafety was concluded under the 1992 Convention on Biological Diversity (CBD), one of the so-called Rio conventions, inter alia setting principles for the conservation and sustainable use of biological diversity (Gupta, 2000; Glass, 2001). The protocol aims to protect biodiversity by regulating the safe transfer, handling and use of GMOs that may have adverse effects on the conservation and sustainable use of biodiversity (Thieme, 2001; Kirsop, 2002). More specifically, it establishes an internationally legally binding framework for the transboundary movement of GMOs (including their international trade).[2] The terminology used in the Cartagena Protocol is not 'GMOs', but 'LMOs' (living modified organisms). In the protocol, LMOs/GMOs are defined as 'living organisms that possess a novel combination of genetic material obtained through the use of modern biotechnology' (Article 3).

The protocol stipulates a procedure by which GMO exporters have to obtain an Advance Informed Agreement (AIA) (an explicit consent based on a risk assessment) from the importer before certain GMOs can be exported (Falkner, 2000; Andrée, 2005).[3] Moreover, it permits the restriction of GMO import (i.e. by not granting a consent) on the basis of precaution, as the precautionary principle is one of the guiding principles for risk assessments (Kirsop, 2002; Bevilacqua, 2007).[4] Once an importer has decided to accept the GMOs, the exporter has to provide the exported GMOs with appropriate labelling and documentation requirements.

The origin of the Cartagena Protocol lies in Article 19, paragraph 3 of the Convention on Biological Diversity, which asks its parties to consider the need and modalities of a protocol regulating biodiversity-related GMO issues. Due to several incidents in the late 1980s, there was an increasing concern that developing countries would become a test area for new and potentially hazardous GMOs. The second Conference of the Parties (COP 2) of the CBD in Jakarta (1995) established an Open-ended Ad Hoc Working Group on Biosafety (the so-called BSWG, or Biosafety Working Group) to negotiate a protocol. The BSWG held six negotiation sessions between July 1997 and February 1999. The sixth BSWG was organized in Cartagena and was meant as final preparation for the Extraordinary COP (ExCOP) of the

CBD that would take place immediately afterwards in order to conclude an agreement of the protocol. The draft rules of procedure of the CBD[5] stipulate that the voting rule in the (Ex)COPs for substantive (non-procedural) issues is consensus, but that decisions can also be taken by a two-thirds majority if all efforts to reach consensus have been exhausted and no agreement could be reached (Rule 40 CBD/COP/1/2). The draft rules of procedure also mention that all parties and observers are able to speak during the (Ex) COPs, and that the formal right to table proposals is limited to the parties (Rule 35 CBD/COP/1/2).

The ExCOP in Cartagena collapsed, however, mainly because the United States could accept neither the chair's compromise text nor a final compromise proposed by the EU (Bail, Decaestecker and Jørgensen, 2002; Falkner, 2002; Graff, 2002; Rhinard and Kaeding, 2006). To get the United States on board, this EU compromise did not include an explicit reference to the precautionary principle, although this was considered as very important by the EU. Despite this move, which demonstrated that the EU really wanted to go for an agreement in Cartagena, the United States maintained its opposition against any proposal referring to the precautionary principle.[6] On 24 January 1999, the chair of the ExCOP could only conclude that the major negotiation partners were not able to find an agreement. As a result, the ExCOP was suspended.

After a six-month cooling-down period, informal consultative meetings were held in Vienna, where the main players confirmed their political will to reach an international agreement on biosafety. In that period, GMOs and biosafety were at the top of the international political agenda (Bail, Decaestecker and Jørgensen, 2002). In January 2000, negotiation parties met again in Montreal to continue the ExCOP (ExCOP-bis). After some days of tough negotiations, all parties, except for the United States, finally accepted a compromise text, proposed by the ExCOP's chair (Winfield, 2000). The United States had difficulties with the documentation and labelling provision for commodities. After a couple of bilateral EU-US meetings, a compromise on this provision was found and the United States endorsed the text as well. It is important to note that the United States is not a party to the CBD. As the Cartagena Protocol is a protocol under the CBD, the United States could not sign the protocol. However, parties considered it very important that the United States, being a major producer and exporter of genetically modified commodities, would also take part in this GMO regime. It is for that reason that a country that was never going to become a formal party to the negotiated agreement could jeopardize the success of the negotiations (in Cartagena, ExCOP) and remain the last obstructing country until their very end (in Montreal, ExCOP-bis).

In the negotiations, the EU had taken an intermediate position between the majority of developing countries on the maximalist side and the GMO exporting countries (led by the United States) on the minimalist side

(Bretherton and Vogler, 2000). From BSWG 6 in Cartagena to the ExCOP in Montreal, which was the period of the most intense negotiations, the latter were conducted by five groups of countries with similar interests (Gupta, 2000; Burgiel, 2002; Falkner, 2002). The Miami Group, composed of countries exporting agricultural products and concerned about the trade implications of a biosafety agreement (Argentina, Australia, Canada, Chile, Uruguay, the United States), had the most minimalist positions, basically arguing that such a protocol was unnecessary and in possible conflict with global trade rules (Rhinard and Kaeding, 2006). Except for Uruguay, none of these countries has ratified the Cartagena Protocol. At the time of writing, Australia and the United States[7] had not even signed it. The Like-Minded Group (i.e. the G-77 without the agricultural exporters Argentina, Chile and Uruguay) was positioned at the other end of the preference spectrum. The EU occupied a position in the middle, as was the case for the Central and Eastern European Group (including Russia) and the Compromise Group, which assembled the non-EU and non-agricultural exporting OECD (Organisation for Economic Cooperation and Development) countries (Japan, Norway, South Korea, Mexico, Switzerland, Singapore and New Zealand).

Although the EU occupied an intermediate position at the international level, it had some clear preferences about the protocol[8]: opposing a 'savings clause', which would subordinate the protocol to WTO agreements, striving for a broad scope so that many GMO categories would be regulated, attempting to include an AIA procedure, labelling and documentation requirements and a detailed methodology for risk assessment (Bail, Decaestecker and Jørgensen, 2002). Moreover, the EU became a strong advocate of the inclusion of the precautionary principle in the protocol in the course of 1999 (Falkner, 2007). While the EU would have accepted a compromise that did not explicitly mention precaution in Cartagena, it did not do so in Montreal a year later.

3. Recognition: the EU as a fully recognized negotiation party

The EU was a fully recognized negotiation partner during the negotiations leading to the Cartagena Protocol, both in its political and in its legal dimension.

As for the de jure dimension of the EU's recognition, it is important to note that the Cartagena Protocol was not negotiated in an international organization *stricto sensu*, but under the auspices of the Convention on Biological Diversity. The negotiation process was initiated by COP 2 of this convention and ended in two sessions of an Extraordinatory COP, the first one resulting in a failure of the negotiations and the second one in the adoption of the protocol. In between COP 2 and the final ExCOP, negotiations were conducted in the BSWG, which was created by the COP and formally fell under the COP. Hence, during the whole negotiation process, the institutional context

of CBD's COP and the question whether the negotiation parties had ratified CBD determined their legal status. Since both the European Community (EC) and the Member States had ratified the CBD between 1993 and 1996, and since they were, as a consequence, contracting parties to the convention, they were fully recognized negotiation partners in the BSWGs and the ExCOPs. This means that the EU – by means of representatives of the EC or the Member States (collectively) – had the formal right to speak and to vote in the Cartagena Protocol negotiations.[9] In CBD's COP and ExCOP, the EC – and nowadays, after the entry into force of the Lisbon Treaty, the EU – can vote on all matters within its competence. The number of votes that the EC has at its disposal in such a case equals the number of EU Member States that have ratified CBD (Article 31 CBD). Moreover, the EC is not allowed to vote if the Member States vote separately, and vice-versa.

The fact that the EC and the Member States are contracting parties to CBD also demonstrates that the competences on biodiversity and biosafety were shared between the European and the national level. From a legal perspective, such a situation of shared competences means that both the EC and the Member States have the right to participate in the negotiations, each speaking for the issues covered by their own competences (Delreux, 2006). Following the Treaty Establishing the European Community (TEC), which was in force during the Cartagena Protocol negotiations, the Commission represents the EC in multilateral (environmental) negotiations, whereas it is usually common practice that the Member States are collectively represented by the rotating Presidency for their competences. However, as it will become clear in the next section, the representation of the EU – here understood as the EC plus the Member States – in practice did not always strictly follow this rule.

Whereas de jure, the EC and the Member States were separately recognized as negotiation partner, the de facto situation was a bit different, since the EU as a whole was recognized as one of the main negotiation blocs. Both in press reporting on the negotiations (e.g. IISD, 2000) and in analyses of the negotiations (e.g. Gupta, 2000; Burgiel, 2002), the EU is considered as one of the five main negotiation groups, next to the Miami Group, the Like-Minded Group, the Compromise Group, and Central and Eastern Europe. Third countries perceived the EU clearly as a unitary actor, particularly in the second half of the negotiation process. Hence, also from a more political perspective, the EU enjoyed a full degree of recognition from its negotiation partners.

4. Actor capacity: developing and representing the EU position in the Cartagena Protocol negotiations

In order to assess the EU's actor capacity, both the way in which the EU was represented and behaved in the international negotiations (Section 4.1) and the way the European position was established (Section 4.2) are discussed.

4.1. EU representation: from a formulaic to a pragmatic way of cooperation

The EU negotiation arrangement evolved during the course of the negotiations. In the context of the CBD, it is normally the Presidency negotiating on behalf of the EU. However, at COP 2, which resulted in the Jakarta Mandate establishing the negotiations leading to the Cartagena Protocol, the Commission challenged the Presidency's role because the Jakarta Mandate included trade issues on which the EC was competent (Thieme, 2001). Also during BSWG 1, the Commission and the Presidency disagreed about who should speak on behalf of the EU. The Commission had convinced the Irish Presidency that it had to be the sole EU negotiator, arguing that all issues under consideration were falling under Community competences. By contrast, the Member States wanted the Presidency to continue to do its job. They were concerned that the Commission did not have enough expertise on the technical aspects of biotechnology to negotiate the whole range of issues under consideration. However, the Irish Presidency was apparently not able to prevent the Commission of negotiating all the issues, which is why the latter was de facto the only EU negotiator in BSWG 1.

As a reaction to this tension between the Commission and the Member States, the Netherlands – holding the Presidency during BSWG 2 and, according to a Commission official, being 'very much behind the Irish Presidency in trying to prevent the Commission of negotiating alone' – challenged the EU negotiating arrangement of BSWG 1, arguing that biosafety is a matter of shared competence. To solve this problem, the Commission and the Presidency negotiated a detailed list covering the main topics of the future Protocol and indicated who would speak on what topic. This gentlemen's agreement between the Commission and the Presidency established the division of labour used during BSWG 2-6. From then on, for every item that popped up at the international negotiation table, it was clear whether the Commission or the Presidency would be the EU negotiator. All trade-related issues and issues with a connection to the already existing GMO legislation in the EC[10] (including AIA, definitions, etc.) were handled by the Commission, while the Presidency was the EU negotiator for more technical issues (exchange of information, liability, capacity building, etc.).[11] Moreover, it was agreed that the Presidency would deliver the EU opening and closing statements at each BSWG.

During the BSWGs, negotiations were held in plenary, working group and contact group settings,[12] all of which could be attended by all Member States. However, at the ExCOP in Cartagena, this negotiation setting was modified for two reasons. First, interest-based negotiation groups, such as the Miami Group or the Like-Minded Group, were established (see above). Second, the ExCOP chair organized a kind of Friends of the Chair meetings, which were restricted in nature and composed of representatives of

these interest groups, complemented with the co-chairs of some of the working and contact groups. In Cartagena, this negotiation setting was called the 'Group of Ten'. The Group of Ten was composed of the chair of the ExCOP, five representatives of the Like-Minded Group, two representatives of the Miami Group and one representative of the EU, the Central and Eastern Europe Group and the Compromise Group (Bail, Decaestecker and Jørgensen, 2002; Falkner, 2002). There were only ten representatives (plus one assistant each) who could participate in these meetings. A Member State representative described the situation as follows: 'There was an enormous barrier drawn between the people in that room and everybody else. There were guards on the door so that you could not have anybody going in. We were completely separated. It did not work.'

The Commission occupied the only EU seat at the table and was the official EU negotiator in the Group of Ten. One representative of the Presidency could assist the Commission in this setting. However, as a government change in Germany had just taken place before the Cartagena meeting, the German Presidency team was internally divided and was unable to take a strong role. The main Commission negotiator stated that 'the Germans practically left the negotiations to the Commission'. As a consequence, the Commission de facto became the only EU negotiator in Cartagena (Bail, Decaestecker and Jørgensen, 2002).

After the negotiations had collapsed in Cartagena, the process continued with informal consultation meetings, which started in the summer of 1999, mainly in Vienna. These informal talks took place in a new negotiation setting: the Vienna Setting. Based on the Group of Ten setting, representatives of each group conducted the negotiations. Each group had two seats at the negotiation table. Other countries could attend the meetings as well by sitting behind their representatives, but they could not intervene. By organizing the negotiations in such a transparent manner, parties demonstrated that they had learned lessons from the failure in Cartagena (Gupta, 2000; Falkner, 2002). The Vienna Setting was not only used in the consultation meetings in the second half of 1999, but also in the final negotiation session in Montreal (ExCOP-bis). The Commission and the Presidency were the two EU representatives in this setting. As a result, the EU negotiator on each topic was present, and Commission and Presidency representatives could consult with each other during these very intense meetings. They were assisted and supported by Member State experts sitting behind them (Bail, Decaestecker and Jørgensen, 2002). Not all the Member State representatives were always present. Depending on the issue under discussion, 'there was an understanding of where the strengths were in the EU and who should go where' (Member State official).

In Montreal, another dimension was added to the EU's representation, as ten environment ministers from the Member States and Environment Commissioner Wallström attended the ExCOP-bis. The ministers did not take over the negotiating role from the civil servants, but 'they played a decisive

Table 11.1 Negotiation settings and EU negotiation arrangement during the Cartagena Protocol negotiations

Negotiation session	Location	Negotiation setting	EU negotiator	Role Member States
BSWG 1 (07/1996)	Aarhus		Commission	Could attend
BSWG 2 (05/1997)	Montreal		Commission + Presidency	Could attend
BSWG 3 (10/1997)	Montreal		Commission + Presidency	Could attend
BSWG 4 (02/1998)	Montreal		Commission + Presidency	Could attend
BSWG 5 (08/1998)	Montreal		Commission + Presidency	Could attend
BSWG 6 (02/1999)	Cartagena		Commission + Presidency	Could attend
ExCOP (02/1999)	Cartagena	Group of Ten	Commission	Could not attend
informal consultations	Vienna	Vienna Setting	Commission + Presidency	Could attend
ExCOP-bis (01/2000)	Montreal	Vienna Setting	Commission + Presidency	Could attend

role for the final agreement while staying away from the formal process' (Bail, Decaestecker and Jørgensen, 2002, p. 182). This was mainly because not every external negotiation partner was represented at the ministerial level, and the EU wanted to avoid creating an imbalance in the negotiations. Ministers held bilateral meetings with the Miami Group, they organized press conferences, etc. In sum, 'they did a lot at the political level to save the Protocol and to back the negotiators and the officials' (Commission representative). A Member State representative declared: 'We needed the ministers because we needed the political responsibility to agree on the final text' (Member State representative). Their task was mainly to 'make the final deals in line with the EU mandate' (Wallström, 2002, p. 247).

Table 11.1 summarizes the different settings in which the Cartagena Protocol was negotiated, as well as the EU negotiator in that setting and the ability of the Member States to attend these meetings.

Hence, it has become clear that the Commission and/or the Presidency represented the EU during the whole negotiation process. However, also Member State representatives occasionally took the floor on behalf of the EU. On the one hand, the Commission or Presidency negotiator sometimes invited an expert from a Member State to explain a technical issue. Those national experts always represented the EU line. This also holds for the national officials who now and then replaced the Commission or Presidency negotiators (because of practical reasons) in the contact or working groups to represent the EU.

Probably the most important observation about the EU negotiation arrangement during the Cartagena Protocol negotiations is the evolution from a rather

conflictual situation in Jakarta and at BSWG 1 to a well-functioning team at the end of the negotiations. The EU evolved from a formulaic to a pragmatic way of cooperation.[13] According to a Member State official, 'it was not a set of arrangements as you read in the Treaty. The point was that we had people. Over the years, there was a great deal of trust and respect between individuals. The EU became a homogeneous body, where individuals took on various tasks. There was a real growing together, which was the real strength of the EU. It was a sense of joint ownership and joint purpose where everybody wanted to play a role in'. A result of this growing team spirit in the EU was that the gentlemen agreement, stipulating the division of labour between Commission and Presidency, was no longer strictly used in the final stages of the negotiations. A Member State representative stated it as follows: 'The formal division of labour was quietly put aside in favour of getting the best people in there'.

As a result of this increased team spirit among Member State, Commission and Presidency officials in the second half of the negotiations, the EU decision-making process took place in a very cooperative atmosphere. A Commission official described this spirit in a rather lyric way: 'The EU process developed in a beautiful friendship'. It is even regarded as a model of how the EU can maximize its international impact by operating as a team (Cameron, 2004). Hence, in particular in Cartagena, Montreal and the consultation processes in Vienna, the EU performed as a group. This also became possible because the preferences of the Member States increasingly converged as the negotiations evolved. That was not so much the case during the first BSWGs.

Member State officials admit that 'the Ad Hoc Group on Biosafety was made up with people who knew each other very well and who relied on each other during the negotiations'. The cooperative decision-making atmosphere in the EU can be illustrated by three other observations. First, the Member States had a good insight into the rationale behind each other's positions. A Member State official expressed this as follows: 'We knew a lot about the other people and the positions in their capitals'. It is even acknowledged that some Member States changed their positions to some extent because of discussions and interactions with other Member States in the EU meetings. Second, consensus and compromise striving always took a central place in the institutional environment of the EU coordination meetings. There was never a vote, or a threat to vote. It was even said that 'striving for a consensus was really the main objective of the EU coordinations' (Member State representative). Finally, a large extent of trust between the representatives from the Member States and the Commission grew as the decision-making process evolved.

4.2. EU decision-making: internal coordination and converging preferences among the Member States

The EU was usually able to present a common position during the negotiations on the Cartagena Protocol. Corresponding to Article 300 TEC, the

Commission negotiated under a formal mandate, granted by the Council. The mandate was rather standard and did not include strict substantive instructions. It stated that the Commission would negotiate for the issues falling under EC competence in close cooperation with the Member States, that the EC should become a party to the protocol, and that the protocol had to be in line with existing Community legislation (e.g. the GMO definition in the protocol had to be similar to the definitions in Directives 90/219/EEC and 90/220/EEC).

However, the mandate was complemented by Council conclusions, which elaborated in a more detailed way the common Member State positions. During the negotiation process, there were three versions of the Council conclusions. First, the Council conclusions of October 1995 (Council of Ministers, 1995) were considered as 'vague, in the sense of "wait and see"' (Rhinard and Kaeding, 2006, p. 1035). They were issued at the time of the COP 2 in Jakarta, when the EU position could still be considered as a two-track approach, as a legally binding protocol was only seen as one option to deal with the biosafety issue (Falkner, 2007). Second, the Council conclusions of June 1996 (Council of Ministers, 1996) were adopted to make the negotiation mandate appropriate to the Jakarta Mandate, which was the outcome of COP 2 and which set the general framework for the Cartagena Protocol negotiations. Third, the December 1999 Council conclusions (Council of Ministers, 1999), adopted just before the final Montreal meeting, stressed the importance of reaching an agreement on the protocol and allowed more leeway for the EU negotiator, although it was strict on what the latter could accept with regard to the precautionary principle and to the protocol's relation to WTO agreements (Bail, Decaestecker and Jørgensen, 2002; Rhinard and Kaeding, 2006).

The Council conclusions served as the basis for the EU position papers that were prepared in Brussels before each international negotiation session[14] and were specified during frequent coordination meetings on the spot. For every negotiation session – probably with the exception of the Cartagena and Montreal meetings – the Presidency and the Commission, in close cooperation with the Member States, elaborated detailed and outlined position papers, mostly including fallback positions and possible room for manoeuvre.

Developing such a common EU position became easier as the negotiations evolved, since the preferences of the Member States converged during the negotiation process. During the first two years of the negotiations, these preferences were relatively heterogeneous. Germany and France – and to a lesser extent also the UK and the Netherlands – had minimalist preferences (Rhinard and Kaeding, 2006). As the main German concern was the pharmaceutical industry, Germany wanted pharmaceutical GMOs to be excluded from the protocol's scope. France was the largest agricultural exporter in the EU and was a potential exporter of GMOs. That explains why France was

hesitant in the beginning and why its preference was more on the side of the preference spectrum that went into the direction of the Miami Group (the main agricultural exporters). Germany and France initially questioned the need for a protocol as such. Once the decision to establish a legally binding agreement was taken, these minimalist Member States were sceptical of the inclusion of heavy procedures in the protocol (e.g. a strong AIA procedure). Clearly, these Member States were in favour of biotechnology and opposing a strong biotechnology-restricting protocol. On the other side, Sweden, Denmark and Austria took maximalist preferences, striving for a strong, GMO trade-restricting protocol (Bail, Decaestecker and Jørgensen, 2002).

As the negotiations evolved, the degree of preference homogeneity among the Member States increased. The switch from heterogeneous to homogeneous preferences took place in the period of BSWG 5 in 1998 and was caused by a U-turn of the initially minimalist Member States (mainly France and Germany). This can be explained by two reasons.

First, the debate on biosafety, in which the general public opinion went in the direction of anti-biotechnology, had increased the sensitivity of the issue (Falkner, 2007). Indeed, the biosafety issue became more and more politically sensitive in Europe by the end of the 1990s. In the beginning of the negotiations, by contrast, the issue was not characterized by a high level of politicization (Bail, Decaestecker and Jørgensen, 2002). A Member State official described the first BSWG as follows: 'These negotiations were led by a sort of scientific ambiance, more than a political one'. In the run-up to the Cartagena meeting, the negotiations became more and more politically driven and politically sensitive in the EU Member States. The growing public opinion resistance against GMOs – prompted by the first GMO on the European market without labelling requirements – and an increasing NGO activity on the biosafety issue made the biotechnology debate in Europe extremely controversial (Bretherton and Vogler, 2000; Bail, Decaestecker and Jørgensen, 2002; Graff, 2002). The high level of politicization was even more triggered by various food safety crises across Europe – such as BSE (or the mad cow disease) or dioxins – and by simultaneous discussions about a de facto moratorium on GMOs in the EU.[15] The precautionary principle and the increasing EU aim of getting a strong provision on precaution included in the protocol became politically sensitive. Indeed, the precautionary principle was considered the necessary justification for the existing EC legislation in the field of biosafety, since the EU feared that that the United States would impose a WTO case against it (Falkner, 2007). In other words, the necessity of having included the precautionary principle in the Cartagena Protocol in order to justify its legislation made this a very sensitive topic in the EU during the final negotiation session in Montreal.

Second, significant government changes took place in Germany (where a red-green coalition had replaced a conservative one), France (with a green

environment minister in the new government) and the UK (where the Labour government took over from the Conservatives). Also in Belgium and Italy, green parties had entered into government. Hence, parties that are traditionally more opposed to biotechnology came into power and the Member States' preferences converged in a more maximalist direction. This strengthened the internal EU cohesion and led to a 'more unified and a more harmonized approach of the EU as a whole' (Commission official).

Both in Cartagena and in Montreal, there was a strong will by the Member States to have a protocol adopted. Particularly in Montreal, one year after the failed Cartagena meeting, the idea that a second collapse would mean the end of the protocol played a large role in the EU. 'Coming home with an agreement was objective number one' (Member State official). Environment Commissioner Wallström expressed the pressure on the EU and the Member States to reach an agreement and to avoid jeopardizing the negotiation process as follows: 'We had come so far by this stage that the political cost of being the one who prevented the Biosafety Protocol from becoming reality would be enormous' (Wallström, 2002, p. 248). Moreover, in its Conclusions of December 1999, the Environment Council 'recognise[d] the need for all participants to the negotiations to show the necessary flexibility in order to ensure a successful outcome in Montreal', 'emphasise[d] that every effort should be made to finalise the Protocol' and 'invite[d] the Commission and the Member States to continue to make every effort to bring the negotiations to a successful conclusion' (Council of Ministers, 1999).

The main reason why the political cost of no agreement was extremely high in the Member States was that a failure of the negotiations and the lack of an international instrument to deal with a highly controversial issue, 'would return to be debated in the media or the streets' (Gupta, 2000, p. 27). Indeed, the protests at the WTO Ministerial Conference in Seattle (November/December 1999), were considered as an indicator of the sensitivity of the issue and generated concerns about the interplay between trade and environment (Falkner, 2000; Burgiel, 2002). Moreover, the Member States feared that in case of a second collapse, the GMO dossier would be taken over by the WTO, and that in this framework the environmental protection would receive less attention. During the Seattle Conference, members of the Miami Group had launched the idea to create a working group on biotechnology in the WTO, where the issues that were under discussion in the Cartagena negotiations could be dealt with (Bretherton and Vogler, 2000; Bail, Decaestecker and Jørgensen, 2002). The fact that the Member States really wanted an agreement also influenced their behaviour. This is, for example, illustrated by the final agreement on the labelling issue, for which the EU had done a major concession to the Miami Group in order to get their approval of the compromise text. For the most maximalist Member States (mainly Sweden, Austria and Denmark), 'the labelling provisions were

really under our bottom line' (official from a maximalist Member State). However, they agreed on the whole package to save the negotiations and the agreement.[16]

As mentioned, the Commission and the Presidency acted as EU negotiators. In their representation task, they did not go significantly beyond the Member States' instructions, thus acting loyally. Although, at the end of the Cartagena and Montreal meetings, the EU negotiators could not come back to the coordination meeting every time before they agreed on an issue, Member State officials confirm that 'our negotiators, from the Commission or from the Presidencies, always dealt very correctly with the issue'. This can be explained by the fact that neither the Commission's nor the various Presidencies' preferences were diverging from the common preference of the Member States.

The fact that the Commission had to take different sectorial interests (defended by different DGs: mainly trade and environment[17]) into account made the Commission position moderate by nature. Although the negotiation team of the Commission was mainly composed of officials from DG Environment[18], various EU decision-makers acknowledge that 'it was a key concern of the Commission not to get in trouble on the trade side and to keep the US and Japan on board in other trade negotiations'. Although the Commission was initially seen as rather minimalist by the maximalist Member States like Austria and Sweden, this was mainly because the Commission insisted that nothing in the protocol should contradict existing EC legislation on GMOs.

After the Cartagena Protocol was signed by the EC, it still had to be ratified before it became legally binding in the EU and before the EC was internationally bound by its provisions. The EC ratification was considered as a formality: 'There were no political difficulties' (Member State official). However, there were some discussions on the EC legislation to implement the protocol (European Community, 2003/1946/EC). The most difficult point was the question on what would happen if a possible importing country did not answer the notification of the exporting country.

The EC ratification (or 'conclusion') of international agreements is a prerogative of the Council, but the latter can only act on the basis of a proposal by the Commission. Before the Commission initiated the ratification decision in 2002, the Commission and the Council had a different opinion about the appropriate legal basis for the ratification decision (van Calster and Lee, 2002). The discussion basically was concerned with the question whether the EC ratification should be based on an environmental article of the Treaty establishing the European Community (TEC) or on a TEC article covering the EU's external trade policy.

International agreements are always concluded by the EC on the basis of a dual legal basis: the article stipulating the procedures for the EC's participation in international negotiations and its conclusion of international

agreement (Article 300 TEC) and a substantive article, referring to the policy area covered by the international agreement (Delreux, 2006). While the Commission opted for Articles 133 and 174§4 TEC *juncto* article 300 TEC as the legal basis for the ratification of the Cartagena Protocol, the Council's position was to base the decision on Article 175, paragraph 1 TEC *juncto* article 300 TEC. On the one hand, the Commission reasoned that the Cartagena Protocol has a trade-based content and that therefore Article 133 TEC (common commercial policy) should be the substantial legal basis. However, it accepted that the protocol deals with environmental protection and opted for Article 174, paragraph 4 TEC as a second legal basis. Consequently, the Commission argued that the Member States only retained concurrent powers for the issues that do not affect trade in GMOs. On the other hand, the Council's position was that the Cartagena Protocol is essentially an environmental agreement, regulating biodiversity. Therefore, the Council did not want a trade article as legal basis, but only an environmental article.

It was the European Court of Justice (ECJ) that solved this disagreement on the legal basis between the Council and the Commission. In its Opinion 2/00, the ECJ stated that the substantial legal basis should be dependent on the aim and content of the protocol, *in casu* 'the protection of biological diversity against the harmful effects, which could result from activities that involve dealing with GMOs, in particular from their transboundary movement' (European Court of Justice, Opinion 2/00, paragraph 34). As the Cartagena Protocol is 'an instrument intended essentially to improve biosafety and not to promote, facilitate or govern trade' (European Court of Justice, Opinion 2/00, paragraph 36), the ECJ ruled that Article 175§1 TEC *juncto* article 300 TEC is the appropriate legal basis.[19] Following this opinion, the Commission based its ratification proposal on Article 175§1 TEC *juncto* article 300 TEC (European Commission, COM(2002) 62). The Cartagena Protocol was finally ratified by the Council in 2002 (European Community, 2002/628/EC). Between 2002 and 2004, every EU Member State ratified the protocol at its domestic level.

5. Conclusion

The analysis of the EU's participation in the negotiations on the Cartagena Protocol revealed that the EU fulfilled the two conditions to occupy a central position in the ad hoc UN arrangement in which the Cartagena Protocol was negotiated. On the one hand, the EC and the Member States fully participated in the negotiations and thus had a high-grade legal status. On the other hand, the EU promoted the purpose of the multilateral negotiations – i.e. the creation of a legally binding treaty regulating the transboundary movement of GMOs – and thus played a functionally significant role in this negotiation process.

Next to the EU's central position in the Cartagena Protocol negotiations, two other conclusions can be drawn from the present analysis.

First, the EU underwent an internal development from a relatively weak and divided negotiation partner in the beginning of the negotiations towards a strong and unified negotiator in the final stages. The increasing degree of politicization connected to the GMO issue, the converging preferences among the Member States and the fear that a definitive failure of the Cartagena Protocol negotiations would move the issue away from the UN forum towards the WTO explain this evolution.

Second, the fact that the EU performed cohesively in the second half of the negotiations enabled it to strongly impact on the content of the protocol. It made the Cartagena Protocol 'very much in line with the EU's policy preferences and [a] victory for the EU's activist policy intentions' (Rhinard and Kaeding, 2006, p. 1033). Indeed, the protocol includes all major points the EU had put forward in the endgame of the negotiations, including a broad scope of GMOs and a strong and operational reference to the precautionary principle.

The case study of the Cartagena Protocol negotiations thus demonstrates that the EU can be an effective player occupying a central place in the UN system, if the conditions mentioned above are fulfilled.

Notes

1. The interviews were conducted between September 2006 and January 2007. All interviewees were guaranteed anonymity.
2. The scope of the protocol does not include GMOs for pharmaceutical use.
3. This AIA procedure holds for GMOs that will be introduced in the environment, whereas an information procedure is established for GMOs that are meant for food, feed or processing (the so-called 'commodities') (Burgiel, 2002).
4. The precautionary principle is often defined as follows: 'When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not established scientifically' (Raffensperger and Tickner, 1999, p. 8).
5. CBD's rules of procedure have not been formally adopted, because no agreement could be found on a number of rules. Practice shows, however, that the draft rules of procedure are applied in the COPs.
6. Ironically, the final agreement on the Cartagena Protocol, which was ultimately accepted (but not signed) by the United States, contains four explicit provisions on precaution.
7. The US position at the beginning of the Cartagena ExCOP even was that the scope of the protocol should be limited to non-agricultural GMOs. This would mean that the protocol would only be applicable to a very small number of GMOs.
8. In 1995, i.e. before the BSWGs started, the development of a legally binding agreement on biosafety was only considered one option among others (like capacity-building and technical guidelines) by the EU to deal with the issue. However, when the negotiations started, the EU was already in favour of the establishment of a legally binding protocol (Bail, Decaestecker and Jørgensen, 2002).

9. However, voting did not happen in this negotiation process, since there was no explicit vote on the adoption of the protocol (at the ExCOP-bis) or the rejection of the compromise text (at the ExCOP).
10. EC competences on GMOs originate from the directive on the contained use of genetically modified micro-organisms (Directive 90/219/EEC) on the one hand and the directive on the deliberate release into the environment of GMOs (Directive 90/220/EEC) on the other hand.
11. The complete division of labour between Commission and Presidency can be found in Thieme (2001, p. 263).
12. There were mostly two working groups running in parallel. Contact groups were established on an ad hoc basis to discuss a particular issue.
13. Bail, Decaestecker and Jørgensen (2002, pp. 174–175) describe this as follows: 'All Member States knew that there were crucial decisions to be made at Cartagena and that this would not be the time for internal EU wrangling over formalities'.
14. The coordination meetings in Brussels took place in the so-called Ad Hoc Group on Biosafety, a subgroup of the Environment Council Working Group.
15. In 1999, the EU decided not to approve any GMO product on its food or agriculture market: the so-called de facto moratorium.
16. Another example is that some Member States had difficulties with the flexibility in the protocol on the labelling requirement for GMO transports. That was the last compromise made by the EU to get the agreement accepted by the United States in Montreal (Bail, Decaestecker and Jørgensen, 2002; Falkner, 2002).
17. DG Agriculture was less interested in the negotiations, although the Commission negotiating team wanted to get this DG involved as well.
18. However, the main Commission negotiator had worked in DG Trade for a long time and was very experienced in trade negotiations.
19. On the discussion whether the environment article should be 174 (4) or 175 (1) TEC, the ECJ stated that Article 174 TEC does not create competences as such. It only stipulates the objectives and principles of environmental policy. Following this opinion by the ECJ, Article 175 TEC creates EC competences in the field of the environment.

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12

The EU in the World Summit on Sustainable Development

Simon Lightfoot

1. Introduction

The three major global environmental conferences that have taken place under the auspices of the United Nations (UN) since 1972 have embedded the concept of sustainable development into policy debates (Bruyninckx, 2005). To an important extent, we have seen the EU[1] develop as a global environmental actor and then try to shape the global debates about sustainable development. At previous summits, notably the Earth Summit in Rio in 1992, the EU was identified as a leading protagonist in the development and support for the Kyoto Protocol on climate change and acknowledging a broader environmental commitment to prevent major damage to the environment and ensure sustainable development (CEC, 2001). Such significant progress has resulted in suggestions that the EU is fast becoming 'a surprisingly effective international environmental actor, even aspiring to leadership' (Vogler, 1999, p. 24).

The aim of this chapter is to assess the position of the EU at a major environmental conference organized under UN auspices, namely the World Summit on Sustainable Development (WSSD), through the legal status it enjoyed and whether its role was functionally significant. To that end, the analysis follows the conceptual framework developed in Chapter 2 in order to examine the broad context of the EU's actions at the WSSD. Thus, it first places the EU in the broader context of the UN system regarding sustainable development issues. It then outlines the key actors and cleavages at the WSSD, before briefly summarizing the main outcomes of the summit. The chapter then analyses the EU's recognition at the WSSD in more depth, before examining its actor capacity. By examining inter alia the instruments at the EU's disposal and how they line up with its external representation, the chapter is able to show the extent to which the EU defended its strategic objectives. The chapter concludes that despite problems arising from the cross-cutting nature of sustainable development and issues of policy coherence, overall the EU occupied a central position at

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the WSSD with a high degree of formal recognition and a functionally important role.

2. EU competence and sustainable development

The promotion of sustainable development has been an objective for the EU since the 1988 Rhodes Council, despite some definitional problems (Collier, 1997, p. 4). In 1997, the Amsterdam Treaty enshrined sustainable development as a fundamental objective of the Union. At the heart of this definitional process has been the much-utilized formula outlined in the Brundtland Report (WCED, 1987), which defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' (WCED, 1987, p. 43). The Amsterdam Treaty commitment also mainstreamed sustainable development into all the Union policies, including external commitments (see Geyer and Lightfoot, 2010). This commitment was later confirmed by the EU Sustainable Development Strategy (SDS), adopted in Gothenburg in 2001 in preparation for the WSSD in 2002. This strategy linked the promotion of sustainable development and ethical issues of justice, equity and democracy, although with a 'sturdy dedication to economic growth' (Baker, 2007). The external recognition of the EU stems from the 1971 ECJ ruling in the ERTA case, which permitted external authority in areas of internal competence, which has now been consolidated as part of the treaties (Hession, 1995, see Chapter 8). Over time, the EU has gained the power to act on behalf of its Member States in international environmental negotiations, making it possible for the Union to play a global role, despite the sharing of competencies between the Member States and the Commission (Hession, 1995; Delreux, 2006).

3. The global governance mode: framework, proceedings and outcomes of the WSSD

This section looks at the background to the WSSD and the legal framework within which it operated. It first briefly outlines the formal legal framework of the WSSD and its rules of procedure. It then goes on to examine the politics of the WSSD to situate the EU in its international context: who were the key actors, what were the main topics and central cleavages. Finally, it briefly summarizes the key outcomes of the summit.

3.1. The WSSD in the UN context: background and legal framework

Haas (2002) argues that United Nations environmental conferences are 'oft used policy instruments, thus deserving careful evaluation and assessment' (see also Death, 2010). Between 1972 and 2002, the UN sponsored three major international summits on environment and development: the 1972

UN Conference on the Human Environment (UNCHE), held in Stockholm, the 1992 UN Conference on Environment and Development (UNCED), held in Rio de Janeiro, and the 2002 World Summit on Sustainable Development, held in Johannesburg (Rajamani, 2003). The WSSD was the last 'mega-Conference' to discuss global environmental issues organized by the UN (Seyfang, 2003). The crucial aspect of these conferences is that they differ from other conferences on individual environmental issues in a number of ways. Firstly, they address the overall trajectory of human development and its relationship to the environment as a whole. Secondly, they take a broader overview of complex environment and development issues over a longer time frame.

The WSSD was designed to review progress made towards sustainable development since Rio. Resolution 55/199 decided that the review should focus on accomplishments and areas requiring further efforts to implement Agenda 21 and other UNCED outcomes, leading to action-oriented decisions. It also called for renewed political commitment to achieve sustainable development (Seyfang, 2003). The WSSD has therefore been used as a benchmark for gauging the character of contemporary global environmental politics (Wapner, 2003) and provides a good case study to judge the position of the EU in UN fora.

The rules of procedure for the WSSD were set down by the Commission for Sustainable Development (CSD), which acted as the preparatory committee for the summit. The draft rules were adopted by the UN General Assembly in its resolution 56/226 in 2001. One interesting element of the WSSD was that preparations were divided up in three ways. First there were national preparations where states were asked to review Agenda 21 plans and prepare national sustainability strategies. At regional level, high-level ministerial meetings were organized that then fed into a series of four preparatory meetings known as prep coms, organized by the CSD.

The EU has a complicated legal status within UN environmental bodies, including the CSD (Maillet, 2006; Damro, 2006, see Chapter 9). Whilst it is not a member of the CSD, it has been given full participant rights, which allows it to exercise a significant presence in CSD meetings (Damro, 2006, p. 183, see Chapter 9). This is crucial, as the WSSD was preceded by a number of prep coms organized by the CSD (Seyfang, 2003, p. 224). These prep coms clearly shaped the rules of procedure and the agenda for the summit, so EU presence was primordial. The third and fourth prep coms were the most important ones, as they focused on negotiating the final text. These 'informal' prep coms were intended to break deadlocks and move negotiations along (Death, 2009). The EU's position as a 'Friend of the Chair'[2] was seen a crucial one in brokering some deals at this stage in the process. However, the Draft Plan of Implementation for the WSSD still contained a large number of bracketed phrases associated with trade, finance and globalization that would have to be negotiated at the summit itself (Buenker, 2002; Death 2009).

3.2. The proceedings at the WSSD: negotiating sustainable development – key actors and cleavages

The WSSD was always likely to be a more difficult summit than the one in Rio. It had become clear that implementing the agreements from Rio required more political will than was realized due to the multifaceted nature of sustainable development (Bruyninckx, 2005, p. 269). In the run-up to the 2002 WSSD, we can identify two broad groupings with very different political attitudes to the summit. The first camp was led by the United States, with support on many issues from the JUSCANZ[3] group plus OPEC states. In the other camp was the EU with the G-77/China group of developing countries led by Venezuela. Their positions were summarized as follows: 'the USA is powerful but is often perceived to be a laggard, while the EU clearly has leadership ambitions' (Andersen, 2007, p. 319). As a matter of fact, both the positions adopted by the EU and the United States turned out to be crucial to the outcome of the summit. Clearly, as the focus of this chapter is the position adopted by the EU, the cleavages between actors cannot be covered in depth here. However, it is worth briefly outlining the US position and that of the G-77/China group.

It was argued that the United States 'systematically obstructed' negotiations both in the prep coms and the summit itself, particularly over the issue of time-bound targets (Burg, 2003, p. 116; von Frantzius, 2004, pp. 470–1). There was also a clear sense that the Americans were intent on pulling out of previously negotiated commitments (Wapner, 2003, p. 7; Burg, 2003). In part, this reflects the Bush administration's attitude to multilateral environmental negotiations, which echoes their general mistrust of multilateralism (Rajamani, 2003; Falkner, 2005). The biggest concern for the United States was that the outcomes of the summit would be detrimental to economic growth. This also helps to explain the resistance of the Bush administration to the Kyoto Protocol, which was felt by its exclusion of rapidly expanding developing countries such as China and India to threaten the global competitiveness of US firms. These concerns were shared, for instance, by the Howard government in Australia (Lightfoot, 2006). Perhaps the best symbolism of the attitude of the United States was the fact that President Bush failed to attend the summit – a behaviour Wapner characterized as 'hegemonic disengagement' (Wapner, 2003, p. 8).

The G-77/China grouping wanted to ensure that the summit had more than just an environmental focus. As befits a summit on sustainable development, they wished to stress the development aspect of the summit (Bruyninckx, 2005, p. 270). In particular, they were keen to ensure the developing world had a voice in the summit. The two main issues for them were trade and aid. Previous promises on finance had not been honoured so developing countries desired to see new financial commitment at the development talks in Monterey reinforced, along with further debt cancellation

(Seyfang, 2003, p. 225; von Frantzius, 2003, p. 470). They were also interested in greater market access in the developed world, especially for agricultural products.

To a large extent, these divisions were evident throughout the prep com process as well as during the summit itself (Buenker, 2002). It was clear that, unlike in 1992 for the Rio Summit, the key debates were becoming 'more political and difficult or even conflictual' (Bruyninckx, 2005, p. 270). As this chapter will show, these conflicts hampered EU efforts to lead at the summit and were evident in the perceived weakness of the main summit outcomes (see Wapner, 2003; von Frantzius, 2004). The key result of the WSSD was the Plan of Implementation. This reiterated Millennium Development Goals on poverty and access to clean water and sanitation: to halve, by the year 2015, the proportion of the world's people whose income is less than $1 a day as well as the proportion of people who suffer from hunger and, by the same date, to halve the proportion of people without access to safe drinking water. There was also a commitment to substantially increase the global share of renewable energy, although without a time-bound target. On biodiversity, there was agreement to 'cut significantly by 2010 the rate at which rare animals and plants are becoming extinct'. On health, it was agreed 'to install sound management of chemicals throughout their life cycle and of hazardous wastes [...], achieve by 2020 that chemicals are used in ways that lead to the minimization of significant adverse effects on human health and the environment' (van Frietzen, 2004, p. 468). The final declaration also called for the 'implementation of the Montreal Protocol on Substances that deplete the Ozone Layer by ensuring adequate replenishment of its fund by 2003/2005' and to 'improve access by developing countries to affordable, accessible, cost-effective, safe and environmentally sound alternatives to ozone-depleting substances by 2010' (Van Frietzen, 2004, p. 468). Lastly, the final text repeated the importance of concluding the Doha round of the WTO.

The extent to which these outcomes reflected the negotiating position of the EU is something this chapter will return to later. Before turning to this issue, it is crucial to understand the de jure and de facto recognition of the EU at the WSSD.

4. The EU's recognition at the WSSD

This section outlines the EU's de jure and de facto recognition at the WSSD. It highlights that granting the EU participant status was a controversial decision made during the Rio summit in 1992 and reflects broader discussions concerning the status of the EU in UN environmental institutions (Vogler, 1999; Damro, 2006). Alongside examining this de jure dimension, the section examines whether the EU was politically recognized as an actor by other participants at the summit.

The position of the EU as neither a state nor a traditional international organization complicates its position in any UN forum (Damro, 2006, p. 175). Historically, the specific legal status of the EU in many of these agreements was negotiated on a case-by-case basis (Bretherton and Vogler, 2006, p. 96). As Vogler (2005, p. 844) argues, EU's attempts to lead the Rio process have 'been hampered by the inadequate status of the Community at Conferences sponsored by the UN General Assembly and at the CSD'. Indeed, the whole issue of EU participation in UN environmental conferences is linked to debates about the general status of the EU in the UN, with some EU Member States reluctant to see the EU enjoy full rights in New York lest this sets too much of a precedent (Vogler, 2005). However, over time and despite opposition from the United States in particular, the EU has been able to negotiate de jure recognition in a variety of global environmental bodies (Oberthür, 2009, p. 193). This in turn has resulted in de facto acceptance as an actor by both civil society and more crucially other states, even when it lacks formal membership such as in the CSD and in the UN Environmental Programme (UNEP) (Oberthür, 2009, p. 196).

For the WSSD, the EU's status was defined by discussions that had taken place ten years earlier. A precedent was created in March 1992 when the Member States agreed to grant the EU full participant status for the UNCED in Rio, and this despite the fact that the EU only had observer status at the UN itself (see Jupille and Caporaso, 1998). To achieve this status, however, the EU needed approval from other UNCED participants. After a large disagreement between the United States and the EC over its status, Rule 63 of the conference procedures was finally amended to grant the EC, unlike other intergovernmental organizations, full participant status for the UNCED only (Jupille and Caporaso, 1998).[4]

At the WSSD, there was little debate about the EU as a de facto participant. By 2002, it had been a global actor long enough for non-Member States to be used to its presence. The perception of the EU as a complicated actor to negotiate with however still remained. It was also seen to be an inflexible actor, due to the fact that its negotiating position is often the result of a fragile consensus within the EU delegation. The most interesting issue about external perceptions given the issues outlined above was the fact that the EU was seen to be the only hope for achieving a sustainable outcome to the summit amongst NGOs and the media. Admittedly, the EU's role was talked up by the EU officials in the run-up to and during the summit itself, but statements like 'the EU must save the summit' were not unusual (Burchell and Lightfoot, 2004b). This type of language from the EU in the run-up to major environmental events was seen as 'posturing' by some states, notably the United States (see Vogler and Bretherton, 2005) and Australia (Lightfoot, 2006). Despite similarities in positions between the EU and the G-77/China, many developing countries believed that the EU was good on rhetoric but

did not always deliver the goods, be it on finance or opening access to agricultural markets (Seyfang, 2003).

5. EU actor capacity at the WSSD

The previous section outlined the views of the EU held by different participants at the summit. This section outlines the rights of the EU during the WSSD, how EU policy positions were arrived at and the extent to which attempts by the EU to shape the WSSD agenda were hampered.

5.1. EU competence, decision-making and internal coordination

As outlined in the previous section, the EU was granted full participant rights for the WSSD after some discussion (United Nations, 2002, p. 150). The de facto recognition can be seen in the fact that EU recognition was granted by the Credentials Committee without a vote. What this means in practice for the EU was that it enjoyed full voting, speaking and reply rights (United Nations, 2001). However, the then 15 Member States also enjoyed full participant status, even if Member States have an obligation to try and coordinate their positions (Vogler, 2005). For the WSSD, a major complicating factor was that on many issues under discussion, such as trade, the EU has exclusive competence. In other, mixed areas, however, it would be left up to the EU and the Member States to decide which of them would represent the position of the EU and the Member States (Jupille and Caporaso, 1998). This was because in reality it is almost impossible to strictly delineate responsibilities. There was also no assistance from the primary law of the EU, which is silent on the issue of participation under mixed agreements, except to say that Member States have a duty of cooperation under Article 10 TEC to uphold the treaties (Delreux, 2006).

The Commission has two roles in the run-up to a major international environmental summit. The first is to provide background and agenda to a summit (Delreux, 2006). For the WSSD, this was 'Ten Years after Rio: preparing for the WSSD in 2002' (CEC, 2001). Its other job is to create a Draft Council Decision, mentioning the substantial legal basis and a proposal for authorization (Delreux, 2006). For the WSSD, this initially focused on 'Towards a Global Partnership for Sustainable Development' (CEC, 2002a). The latter was resisted in parts of the Commission for well over a year leading up to the Gothenburg summit in June 2001, which launched the EU's strategy for sustainable development (CEC, 2002b). The main problem was that unlike the EU's position for the trade talks in Doha or the development talks in Monterey (part of a post-millennium continuum that included the WSSD), Johannesburg's agenda encompassed a mixture of foreign, development and environmental issues, reflecting the multi-dimensional nature of sustainable development as a concept within the EU (Pallemaerts, 2006). All this created issues for EU internal coordination.

To offer leadership, the EU needed a clear negotiating position. Its hybrid nature meant that it was unable to clearly demarcate lines of authority between the Commission and the Member States, via the EU Presidency. The specific nature of the EU set-up and the division of labour between the EU and the Member States influenced its strength (Maillet, 2006). In some situations, the lead was taken by the European Commission, in others it was a group of sovereign Member States represented by a presidential 'troika'. As Vogler notes, 'it can adopt both of these forms simultaneously, on occasions changing its shape virtually by the hour' (Vogler, 1999, p. 24). However, Vogler and Stephan also remark that the 'problem of consistency between Member States themselves and the Commission ought not to be exaggerated' (Vogler and Stephan, 2007, p. 408). They argue that the internal EU rules and the presence of institutions like the Commission and the Council secretariat give the EU position greater coherence than the G77 or JUSCANZ, although problems of co-ordination are still sometimes 'horrendous' (Vogler and Stephan, 2007, p. 408).

A crucial coordination role is played by the EU Council Presidency. As we have seen, Sweden was proactive in pushing for the SDS in 2001. However, much of the pre-negotiation for the WSSD was conducted under the Belgian and Spanish Presidencies, neither of whom are states that are said to be environmental leaders. There was clear evidence that the political momentum built up by the Commission and the Swedish Presidency was 'no longer there' by the time of the Barcelona and Seville Council meetings in the first half of 2002 (Tanasescu, 2006, p. 76). The nature of the internal compromises made to achieve a common position for a meeting like the WSSD will have been carefully constructed over a long period within the EU. Adding to the internal problems was the fact that different Member States had put forward rather divergent visions of the overall negotiating objectives and the content of a 'global deal'. Vogler notes that some states are prepared to take the lead on specific issues. This can be seen in the run-up to the WSSD. Vogler and Stephan highlight the different emphases chosen by Sweden[5] and the UK, with 'Sweden pressing for institution-building and action while Britain presented a toned-down version of the pragmatic and problem-solving approach that was also proffered by the USA' (Vogler and Stephan, 2007). In the end, they argue that a Europeanized version of the UK approach won the day.

The complexity of achieving this position can make the EU an inflexible negotiator as it is not able to respond quickly to evolving negotiating positions. The position can be often ascertained via the conclusions of the Council of Ministers (Bretherton and Vogler, 2006). For the WSSD, the EU's official objectives and priorities evolved during the build up to the summit. In 2001, the Commission produced a communication that set out the priorities for the Union and the action which it should take to help to make a success of the 10th anniversary of the first Earth Summit (CEC, 2001). These

focused on protecting the natural resource base of economic development by promoting eco-efficiency and sustainable use of water, land and energy; integrating environmental protection and eradication of poverty; and enhancing good governance and participation by everyone in sustainable development by strengthening the institutional and legal frameworks and civil society's role. These goals were approved by the Council in March 2001 (Pallemaerts, 2006, p. 31). The conclusions of the Development Council listed in detail the EU's priorities for the summit (CoM, 2002). In particular, it identified the need for a focused and action-oriented plan of implementation with targets and timeframes, a political declaration framing the renewed commitment by world leaders to achieving sustainable development and complementary voluntary partnership activities. As early as February 2001, the communication '10 Years after Rio: Preparation for the World Summit for Sustainable Development' was adopted outlining the strategic aims of the EU for the summit. These included greater global equity and an effective partnership for sustainable development; stronger integration and coherence of environment and development on an international level; a clear agreement on environment and development goals to revive and enhance the Rio 1992 process; and effective measures on a national level with strict international supervision. Finally, the EU supported the proposals of the UN Secretary-General that the WSSD should make progress in five key areas: water, energy, health, agriculture and biodiversity (CEC, 2001).

5.2. EU representation and defence of its strategic objectives

The Seville European Council in June 2002 endorsed the EU's position for the WSSD as well as discussing the more internal SDS. The link between the preparations for the WSSD and the creation of the SDS did have the effect of rallying the Member States around the EU's position for Johannesburg (Tanasescu, 2006). As such, it allowed the EU to enter the WSSD with a 'coherent, unitary image' (Tanasescu, 2006, p. 75). The responsibility for ensuring the unitary image lasted during the WSSD fell to the negotiators. Within the Commission, *chef de file* responsibilities were shared between Commissioners Nielson (Development) and Wallström (Environment), although for much of the summit the lead was taken by the Development Commissioner. The Council Presidency was chaired by the prime minister of Denmark, Rassmussen, who often shared a platform with Commission President Prodi.

Whilst the formal legal external recognition of the EU as an actor in the WSSD was not seriously questioned by non-Member States, a number of different parties opposed its negotiating position (see Section 3). As we have seen, there were two basic camps: the EU and the G-77/China and the United States and her allies. This group was opposed to the EU's plan for financial assistance and detailed timetables, whilst even the G-77/China group opposed the EU position on specific issues. At the previous summit in Rio,

the EU saw itself as able to play a mediating role, bridging the gap between developing countries on the one hand and the United States (and Japan) on the other. For the EU to be effective required the ability to influence the negotiating positions of the developing world as well as fellow developed countries. By examining the debates concerning the key areas the summit focused on, we can identify the extent to which these problems affected the EU achieving its strategic objective(s).

The main outcome of the WSSD was the 'Plan of Implementation'. It is important therefore to consider the influence of the EU's position over the plan's key commitments, targets and timetables. The reluctance of states like the United States to agree to time-bound targets in this area highlighted a major problem for the EU: to achieve its targets it needed to gain the support of other states who may not share these environmental priorities. Therefore, whilst the EU called for a Plan of Action which included targets and timetables 'as they alone will make the international community accountable for delivering on its promises' (CEC, 2002a), it was reliant upon other states to make this happen. If we look, for example, at energy, the EU's summit commitment was to reach agreement on affordable and clean energy to eradicate poverty, improve energy efficiency and increase the share of renewable energy sources (CEC, 2001). The EU target was that renewable energy should make up 15 per cent of the total energy source by 2010. There were multiple proposals for targets alongside that of the EU with, for example, Brazil proposing a target of 10 per cent by 2010. However, there was also widespread opposition to targets. The United States, Australia, Canada, and Japan were concerned that the EU's approach was not flexible enough, whilst the G-77/China, with OPEC member Venezuela as its head, 'opposed the proposal, saying it detracted attention from ensuring energy access for the poor' (La Vina, Hoff and de Rose, 2003, p. 8). In relation to the United States, it was clear that its negotiating position was immovable on this issue (Falkner, 2005). However, the global South could have arguably been courted more effectively rather than slipping into a defensive posture as the EU did (Vogler and Stephan, 2007). The EU also struggled in terms of a target of halting and reversing the current loss of natural resources and biodiversity by 2015. The summit outcome to achieve by 2010 a significant reduction in the current rate of loss of biological diversity does not even reverse the current loss per se.

The biggest problem faced by the EU was, however, associated with the trade dimension of sustainable development. Neither the United States nor DG Trade wanted the WSSD to address the issue of trade beyond re-affirming what was agreed at the Doha Development Round (Vogler, 2005, p. 845; Death, 2010). Here we obviously need to consider the fact that in the field of trade, the European Commission has the exclusive competence to act on behalf of the Member States, although Member States tried to keep a watching brief via the then Article 133 Committee (Meunier and Nicolaidis,

1999). In terms of its negotiating position, it is clear that trade commitments and sustainable development can come into conflict (see Bretherton and Vogler, 2006). On this issue, we see clear evidence of DG Trade and the United States working together to agree to open up agricultural and textile markets to competitors from the developing world, on the condition that the very same countries liberalized access to banking and insurance markets.

After the summit, Green MEPs tabled a parliamentary question asking why the responsibility was split between two commissioners and DGs, as they felt that this decision signalled a splintered approach to the WSSD. They highlighted 'considerable differences of priorities in their negotiating stance', between Development and Environment officials, which they argued allowed trade concerns to take a higher priority than environmental ones (in Burchell and Lightfoot, 2004b). According to Monica Frassoni, MEPs 'have always supported the idea that the Commission has to represent the EU in these [international summits] but we had the impression of a serious lack of unity and coherence in the EU delegation, which led to a diminished efficiency in the negotiating process' (cited in Burchell and Lightfoot, 2004b). Such internal diversity of aims was a major drawback in the negotiations (Vogler and Stephan, 2007), especially when combined with problems over the salience of the EU's aims amongst the wider participants at the WSSD. This now clearly leads into a discussion of the instruments at the disposal of the EU in its attempts to influence other states.

5.3. EU instruments

The three big instruments available to the EU in the context of the WSSD were financial, political and trade-related. The EU is the world's largest development donor and pledged before the summit 'to increase and deliver these resources over the following years within the context of countries' efforts to reduce poverty in the framework of sustainable development' (CEC, 2002). The EU is also a major trading bloc and has in its power the option of granting nations more favourable trade terms if they comply with the EU's wishes.

The EU was therefore able to record some influence over the process as a result of its power. Probably the most important aspect was the fact that EU pressure ensured the Rio discourse was not rolled back. There was a fear that US antipathy towards multilateralism could have resulted in one of the main global players opting out of a variety of global environmental agreements (Moens, 2004). The EU kept time-bound targets, such as those on water and sanitation agreed as part of the MDGs, on track by putting pressure on the United States. The biodiversity target, despite its weakness, was also seen to be an important step in maintaining the multilateral focus on this issue. Alongside Kyoto, the Bush administration had major issues with the Biodiversity Convention and opted to remain a non-participant (Falkner, 2005).

There is also the impact of concerted diplomatic pressure, which played a major role in getting Russia to pledge to sign the Kyoto Protocol (Damro, 2006, pp. 189–90). Russia was a key signatory in part because the United States refused to ratify. This was because, for the Kyoto Protocol to come into force, it had to be signed by 'not less than 55 parties to the UNFCCC, incorporating Annex I parties accounting for at least 55% of the CO2 emissions for 1990 of these Annex I parties' (Douma, Kozeltsev and Dobrolyubova, 2010, p. 301). Given Russia's CO_2 emissions, it became the focus of intense EU pressure. As Russia had initially been sceptical of the protocol, the EU used the carrot of WTO membership to bring the Russians on board. Although never explicitly linked in public, it is clear that the Russians gave the EU what they wanted in return for something they wanted – classic international bargaining rather than an ecological conversion of behalf of Russia (Damro, 2006; Douma, Kozeltsev and Dobrolyubova, 2010, see also Chapter 10). It shows that the political weight that the EU can exercise allows it to shape the behaviour of other states. The EU's intense diplomatic effort to keep other industrialized countries on its side therefore paid off with Russia publically supporting the Kyoto Protocol,[6] in addition to China and Canada (despite Canada's general agreement with the United States around many summit issues).

The general mood of the WSSD on the Kyoto Protocol and renewable energy can in part explain the WSSD outcome, to 'substantially increase the global share of renewable energy'. Whilst this target fell a long way short of what the EU had hoped for, it was seen by Commission President Prodi as a 'compromise in the right direction' (Burchell and Lightfoot, 2005b). Given the US and Australian refusal to agree to restrictive time bound targets, this compromise was indeed a major achievement. After this compromise, the EU launched a coalition of like-minded states committed to increasing their use of renewable energies through quantified, time-bound targets. This 'coalition of the willing' or 'the OPEC of renewables'[7] aimed to continue to put pressure upon the 'unwilling' and will push for a renewable energy target that represents a floor not a ceiling (Wallström, 2002b).

In contrast to this claimed success, it was also clear that despite the pledged increases in Overseas Development Assistance, the EU was unable to rely on developing world support for some of its main proposals, especially concerning energy. Alliances were built between the G-77 and the United States around a number of issues and in part this was due to the policy incoherence outlined above. Probably the biggest issue was the high tariffs imposed by the EU on agricultural products and textiles from certain developing countries, something that continues despite initiatives such as 'Everything but Arms'. After the summit, Commissioner Wallström argued that the EU needed to integrate sustainable development more closely with its development and trade agenda and that it had to convince its partners in the developing world of a shared interest in sustainable development

(Wallström, 2002c, p. 6). She also called for greater policy coherence between its external commitments and its internal policies. Wallström believed that the EU's 'credibility will suffer if unsustainable trends persist or if our policies have detrimental impacts outside the EU, in particular on the development opportunities of the poorest countries' (Wallström, 2003, p. 4). However, it was clear that during the summit the existence of this policy incoherence fatally weakened the ability of the EU to bring key players from the developing world on board regarding specific issues.

6. Conclusion: The EU's position in the WSSD

The WSSD has been criticized for the fact that most of the goals were re-circulated versions of the broader UN Millennium Development Goals (MDGs). The MDGs have become the most important goals against which to measure progress, not the Johannesburg Declaration (Andersen, 2007). Utilizing the framework of the book, we can identify that overall the EU occupied a central position at the WSSD with a high degree of formal recognition, expressed in its legal status, and a rather functionally significant role. It ensured substantive environmental outcomes. Without the EU, there would have been no progress in global environmental policy at this summit. EU Council President, former prime minister Rasmussen of Denmark, was therefore right in part in his claim that the EU was 'driving issues in Johannesburg' (Burchell and Lightfoot, 2005b). In the face of an assault on multilateralism by a number of states, notably the United States and Australia, the EU was the largest actor at the WSSD pushing for multilateral solutions to the issue of sustainable development. However, the fact that the biggest success for the EU was that it prevented a rolling back of progress made in the field of global environmental governance rather than pushing the agenda forward, shows the difficulty for the EU in the face of hostility to the multilateral agenda by the US and Australian governments. Two excellent examples are the precautionary principle and the principle of common but differentiated responsibility (Perrez, 2003). The United States, Japan and Australia wanted the former principle removed from the text (Lightfoot, 2006). The compromise was the use of the term 'Precautionary Approach' in the final text rather than principle, which was felt to have strong legal implications (Perrez, 2003). The EU struggled to maintain the link between precaution and common but differentiated responsibility in the face of pressure from the United States and the G-77/China. This compromise might for many be a step too far, but the fact the EU was able to keep the Rio sentiments alive was no mean feat given the concerted opposition it faced (La Vina, Hoff and De Rose, 2003). As Vogler and Stephan (2007, p. 400) argue, 'defending the ideal of sustainable development against powerful contenders has been no small matter (...) especially at a time when the global agenda revolves around the Millennium Development Goals'.

The major weakness for the EU when negotiating in summits like the WSSD is that the topics under discussion tend to cross cut not only bureaucratic competences within the Commission (three DGs were central at the WSSD: development, environment and trade), but also Commission/Member State competences. If there was a strong commitment to a field and Member State acceptance of the leadership role for the EU, then the Union tended to have more influence (climate change, renewable energy, and water and sanitation). In other areas, notably trade, where the sustainable development discourse is weaker or the Member States are reluctant to see EU activity (CSR), the influence of the EU is reduced (Burchell and Lightfoot, 2004c; Vogler and Stephan, 2007). This is where the EU faces a substantial challenge if it is to effectively promote the global norm of sustainable development. Catherine Day, director-general, Environment, argued that the EU 'must make sure we develop and implement sound policies at home and make them compatible with those we advocate internationally' (Day, 2003, p. 3). This 'coherence' is essential if the EU's pursuit of norms is to avoid being weakened by its support of policies detrimental to other countries. This position is clearly reflected in Coates's summary of the EU's role at the WSSD:

> The EU influence was crippled by its deeply unsustainable trade, agriculture and fisheries policies, its unwillingness to meet developing countries halfway on aid and debt cancellation, its internal coherence, and its lack of leadership. (Coates, 2002, p. 9)

Coates's damning critique appears to question the claim made above that the EU played a functionally significant role in promoting the advancement of global environmental governance in the multilateral arena via its actions at the WSSD. Yet, what is clear is that the issues outlined by Coates are exactly those issues that reflect the broader definition of sustainable development. When the EU was on the relatively safe ground of environmental and climate governance (Oberthür, 2009), it was able to influence the agenda. When it got onto the rocky ground of sustainable development, it became harder for the EU to find internal coherence and therefore its voice was quieter on these issues.

However, the issue for the EU seems to be that the world has evolved since 2002. This was evident at the Copenhagen climate change summit in 2009.[8] Despite EU rhetoric in the run-up to the summit, the final Copenhagen Accord had no real input from the EU either 'conceptually' or in terms of its substance, with the outcome the EU was forced to accept being driven by the 'BASIC' block of Brazil, South Africa, India and China, along with the United States (Curtin, 2010, see Chapter 10). The outcome from Copenhagen seemed to signal a major setback for the UN multilateral process in this field. However, the reaction to Copenhagen was such

that there are some grounds for optimism that the UN multilateral process may not be dead. The Cancun Climate Change Conference in late 2010 saw a markedly different atmosphere than the one seen in Copenhagen and whilst the outcome was not a new protocol to replace Kyoto, the attitude of the different participants was more open to compromise than in Copenhagen.[9]

Whether this spirit of compromise extends to either the climate change talks in 2011 or the planned Rio plus 20 meeting in 2012 to review progress on sustainable development is obviously too early to tell. However, what is clear is that the EU needs to overcome the view held by many states at Copenhagen that it is as an increasingly incoherent and internally divided actor, whose pledges, especially financial ones, are not seen as credible (Kilian and Elgström, 2010). EU reforms such as the creation of the External Action Service and the High Representative post may help 'resolve the institutional wrangling and competition that have characterised the making and implementation of European foreign policy since its inception' (Whitman, 2010, p. 30). There is also evidence that the EU's political engagement with China over climate change could be paying dividends that may allow both parties to shape the post-Kyoto framework and global environmental governance more widely (Dai and Diao, 2010, p. 266). However, the main stumbling block will always be that the sustainable development agenda takes the EU away from the safer haven of environmental policy. The multifaceted nature of sustainable development forces the EU to tackle hard topics such as aid commitments to the developing world and policy incoherence head on. Unless the EU starts to live up to its rhetoric with actions, there is a big risk that its credibility as an environmental actor will be damaged beyond repair.

Notes

1. As per the rest of the book I use the term EU throughout for ease of reading, even if it might be more accurate to refer to the EEC or the EC than the EU.
2. In the run-up to the WSSD, 25 countries were invited to serve as 'Friends of the Chair' in an effort to find an approach that will help resolve the remaining differences and achieve a global consensus at the summit. The 25 countries were selected based on geographical representation as well as their common interest in the pending issues, and their overall commitment to the success of the Johannesburg Summit. The main aim was to try and speed negotiations. See http://www.un.org/jsummit/html/whats_new/otherstories_ friends_of_the_chair.html, last accessed 20 December 2010.
3. Japan, Canada, Australia and New Zealand.
4. Interestingly, when Agenda 21 refers to governments, 'it will be deemed to include the EU within its areas of competence' (Bretherton and Vogler, 2006, p. 97).
5. Sweden was in a strong position to shape the EU's agenda for the WSSD as it held the EU Presidency at the end of 2001.

6. The deal with Russia was not fully completed at the WSSD as it took until late 2004 to get the Duma to ratify the Kyoto Protocol. However, the majority of the negotiations were done at the WSSD and given the high-profile nature of the WSSD it would have been more difficult for the Russian government to back track on this commitment than a commitment given in another forum (Mehta, 2003).
7. The 'coalition of the willing' was made up of over 30 states, including EU states, Brazil and a number of developing countries who were willing to set themselves targets and timeframes for the increase of renewables in the energy mix. The group was basically the same that lobbied for these types of targets in the WSSD, but came up against resistance from the United States and other states (La Vina, Hoff and De Rose, 2003).
8. Formally known as the Conference of the Parties 15.
9. See 'UN climate change talks in Cancun agree a deal', http://www.bbc.co.uk/news/science-environment-11975470, last accessed 20 December 2010.

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Part V
Implications and Conclusion

13

The Position(s) of the EU in the UN System: The Examples of Human Rights and Environmental Governance

Hans Bruyninckx, Jan Wouters, Sudeshna Basu and Simon Schunz

This edited volume set out to explore the position(s) of the European Union (EU or Union) in multilateral global governance arrangements under the UN umbrella in two central domains of EU foreign policy activity: human rights and the environment. In so doing, it parted from several assumptions about (i) the EU's participation in governance fora in these domains and (ii) its reflection in the academic literature.

First, it was observed that the EU regularly presents itself as a multilateral player, whose value base compels external action in line with the principles of multilateralism. It claims to be promoting the cause of multilateralism notably in global fora dealing with issues such as human rights and the environment, which are reflective of its ideals regarding the dignity of human life and precautionary action for protecting human living conditions on planet Earth. Second, it was assumed that the EU not only promotes multilateralism in general, but even more so intends to play a front-running role in these two domains. Third, it was argued that the Union's participation in such fora raises a set of intricate legal questions, which add to – but are often insufficiently taken into account by – studies of political scientists investigating into these issues. At the same time, political science experts of the EU themselves have generally tended to give comparatively little attention to the Union's performance in the two issue areas. While the resulting lack of empirical knowledge about the EU's actions represented a motivation for developing the volume around a set of in-depth case studies, the legal/political science divide provided the impetus for designing an interdisciplinary analytical framework for studying the EU's position, legal status and role in the two domains of UN governance. Combining these rationales, the book parted from the overall assumption that a systematic analysis of several cases will not only accrue the empirical knowledge on EU

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multilateral external action, but can also serve as the basis for generating more general insights on its participation in multilateral governance.

To verify the rationale of these assumptions and gradually provide answers to each of the research questions posed in the introductory chapter, this concluding section of the volume initially synthesizes the findings of the various case studies so as to demonstrate the added value of interdisciplinary approach in terms of *understanding* the EU's participation in UN human rights and environmental governance. This is done for each of the two domains separately, and combined with an extraction of patterns and tentative attempts at *explaining* the EU's position, whilst respecting the concept's dissected form (global governance mode, recognition, actor capacity), *within* each of the domains. Subsequently, the chapter engages in extracting patterns of EU positions, roles and legal statuses across the two policy domains. This will serve as a starting point for undertaking a broader, yet clearly demarcated effort at *generalizing* the research results of the various studies presented in this volume beyond the studied cases. Finally, the chapter draws key methodological implications from the findings, highlighting the virtues and limits of the interdisciplinary analytical framework, before concluding with a set of political-practical considerations on the EU's future participation in multilateral governance.

1. Synthesizing key findings: understanding and explaining the EU's participation in UN human rights and environmental governance

Before engaging in a discussion of the volume's overall findings across domains, its insights for each of the analysed policy areas need to be synthesized and assessed. To begin with, the analysis in this section will therefore highlight the Union's positions across fora in each of the domains. It will then try to explain the emergence of these positions by recapitulating the internal and external legal-institutional and political preconditions for EU participation in UN governance fora in each of the policy fields, before turning to the particularities and repercussions of the Union's legal status as well as its actual role performance. Such an approach enables a concise understanding of the relative relevance of the legal and political components of the EU's participation in UN governance fora, at different levels of analysis, for accounting for its position.

1.1. The EU's participation and position(s) in UN human rights governance fora

In European and international policy circles, the EU and the UN are regularly considered as having a reinforcing relationship in the area of human rights: the EU needs UN fora to export its human rights values and norms and the UN needs the EU in its human rights bodies to help uphold and attain international human rights standards and objectives. From an analytical

perspective, it is therefore interesting to understand (i) how the Union really fares in the UN system and (ii) what the EU's position is in each individual body representing different facets of the UN human rights architecture.

In examining the EU's position in the UN human rights system, it could be observed that there were many more similarities than differences in not only the formation the EU takes in its participation in the examined bodies but also in third country perceptions of the Union as an international human rights actor. Moreover, by applying the interdisciplinary framework of analysis, many insights were yielded into why the EU's position is what it is in each forum.

In Chapter 4, Giaufret asserts that the EU holds an *aspiring outsider* position in the Third Committee of the UN General Assembly (UNGA) mainly on the basis of its observer status paralleled with its ability to shape the human rights agenda in New York and present new and innovative initiatives. The EU's limited rights resulting from its observer status, such as not having the right to vote, has not posed insurmountable obstacles for it to be a functionally significant player in the committee. As Giaufret justifiably points out, atleast for the pre-Lisbon period, with the country holding the EU Presidency also being a full member to the UN, the EU could *almost* be viewed as being – in formal terms – on equal footing to that of other UN Member States holding full membership rights. Against the backdrop of the EU participating as a cohesive actor in the body, Giaufret contends that it is recognized as a unitary actor and indeed a functionally significant one for this UN body by third countries, although it is not always perceived as an influential player.

In Chapter 5, Basu concludes that the EU holds an *aspiring outsider-marginal* position in the Human Rights Council, arguing that its efforts to play a functionally significant role in the Council are overshadowed by its consensus-based approach, leading it to perform a rather dysfunctional role in practice in many areas of the Council's work. Similar to the Third Committee, the Council is highly politicized, markedly on resolutions that address the Occupied Palestinian Territories, the only issue area where EU Member States split their votes. Regional bloc politics also pose obstacles to the EU's position, notwithstanding its high de facto recognition by third countries in the body. Visibly, this recognition is not reflected in its outreaching efforts, and as such, the EU tends to struggle to receive the necessary endorsement for various initiatives, such as those explored by Basu in renewing the Special Procedure mandates for the Democratic Republic of Congo and Belarus. As an observer in the Council, the EU is limited to the constrictions that come with this status, but has nevertheless – through the EU Presidency in the pre-Lisbon era – been able to act successfully in some areas of the Council's work, for example, through its five Special Session initiatives.

Kissack in Chapter 6 maintains that the EU in the negotiations of a Moratorium on the Death Penalty held an *aspiring outsider* position. His contention is based upon the EU's legal status as an observer vis-à-vis the fact that it played a functionally significant role with the Portuguese Presidency

at the forefront of the negotiations. Whilst the EU was seen as a unitary and cohesive player, strikingly, it chose to portray itself as a weaker actor, taking a lower profile ranking. This was observed by Kissack as one of the key elements that contributed to its success in the negotiations and ultimate adoption of the landmark resolution. Moreover, the Union managed to manoeuvre through the entrenchment of the North–South divide that is clearly embedded into the workings of the UNGA, thereby demonstrating that cross-regional coalition-building is possible on human rights issues in UN fora. This was most aptly observed in the Portuguese Presidency's cross-regional coalition-building exercises with Chile. The negotiations of this resolution furthermore established that the Union can adapt to political climates of governance arenas, whereby it not only lowered its profile and reinforced coordination exercises but also empowered Portugal with more confidence and authority than normally given to Member States holding the Presidency. Lastly, Kissack's assessment furthered insights into the application of the concept of position, demonstrating that the EU's role in the body does not solely depend on its legal status.

In Chapter 7, Hivonnet asserts the EU's position to be *marginal* in the Durban Review Conference for a number of reasons, which interestingly do not generate from its legal status as a full participant. The EU was very much itself responsible for its weak role performance, which resulted from its unilateral disengagement from the conference as a whole. This disengagement cast a shadow on the Union's de facto recognition and thus led much of the international community to criticize its dedication to multilateralism and its human rights values surrounding discrimination, racial equality and other human rights issue areas addressed in the context of the conference. Whilst regional bloc politics did have a large influence on the political climate of the conference, especially with the high-level segment being dominated by the African Group, observably this had little to do with the EU's approach to the conference. Its split and disengagement at the conference stood in stark contrast with its goals of multilateralism and evidently proved to show a disconnect with its internal policies. This legal inconsistency equally had a domino effect in how the Union translated its objectives on this specific international human rights stage. Moreover, it demonstrated that the EU is not always the constructive international player in the UN system that it strives to be.

1.1.1. A cross-case, within-domain comparison: identifying key factors contributing to the EU's position in UN human rights governance fora

The interdisciplinary framework applied in each of the case study chapters facilitated the exercise of identifying key facets that contribute to the EU's position in UN human rights bodies. This section follows suit of the framework of analysis, highlighting each analytical unit, and assesses the extent

to which the individual categories have a correlation with the EU's overall position.

The UN human rights fora examined in the four chapters (Chapters 4–7) all embrace the same *rules of procedure* established by the UNGA and moreover follow the rights to membership as prescribed in Article 4 of the UN Charter. At the international level of analysis, this may be regarded as the common legal thread between all four bodies (Chapter 3). Analogous to this is the political climate in each of the UN human rights fora. The deep-rooted regional bloc politics ever so present in the negotiations of resolutions and other human rights-related matters seemingly continue to have a significant impact on the EU's marginal/aspiring-outsider position in each of the four bodies. Interestingly, the Union is faced with the same political challenges in each, markedly its struggle to be the bridge builder of the North–South divide in order to receive the necessary endorsements for its initiatives. There are only a few instances where the Union has succeeded, prime examples of this are the initiative it sponsored on the Special Session on Darfur in the Human Rights Council (Chapter 5) and its participation in the negotiations of a Moratorium on the Death Penalty (Chapter 6). The cases thus demonstrate that the political dimension plays a larger role in shaping the EU's position than the legal and institutional architecture of the UN human rights system.

Whilst the *legal and political dimensions of the governance mode* are consistent throughout all of the chapters, the same also holds true for the EU's *recognition* in each forum. Aside from the EU's full participant status in the Durban Review Conference and its recently enhanced observer status at UNGA, the Union maintains to hold observer status in each of the UN human rights bodies. However, its low status is not reflected in how the EU is recognized by third countries. Observably, the EU's *de facto recognition* as a unitary actor is constant across the board. Even in the case of the Durban Review Conference (Chapter 7), where the EU disengaged from the conference, it was still perceived as a unitary actor, albeit in a negative manner. Thus, its recognition has apparently little effect on the EU's position as a whole.

The EU's *actor capacity* may also be regarded as a constant variable in the analysis. Its limited competences in the area of human rights, with Member States having to always 'check-in' with authorities in their national capitals (Chapter 5) at times slowed down the *coordination and decision-making processes* – processes that non-EU (individual) parties to the examined UN fora are not faced with, thus allowing them to respond much more quickly on a real-time basis (Chapter 4). Correspondingly, the EU must and does spend much of its time in internal coordination meetings *sur place*, notwithstanding the fact that many of the preliminary decisions are already taken in the Council Working Group on Human Rights (COHOM) in the run-up to conferences and preparatory sessions. Decisions in COHOM, however, as

explored in Chapter 7, are not always respected. This has given rise to challenges for the EU at the international level, and has on occasion impacted on the Union's position, as seen with its disengagement in the Durban Review Conference.

The role of the Presidency, prior to the entry into force of the Lisbon Treaty, may also be observed as key to shaping the EU's position. Beyond its internal role of holding the reigns for the Union's coordination process, analyses have shown that the Presidency had great bearing on the EU as an actor in UN proceedings. The Member State holding the Presidency generated a certain type of EU profile, and how that very profile is perceived by third countries had a direct effect on the EU's position as a whole (Chapter 6). Moreover, as it spoke on behalf of the EU, the Presidency offered the bridge between being a Member State of the Union and a full member to the UN with rights therein, thereby enabling the EU, despite its observer status, to be (formally) almost on equal footing with other UN members at the UN level (Chapter 4).

Lastly, an area that also proved to be a commonality across the analysed fora, is the utilization – or lack thereof – of human rights *instruments* at the EU's disposal. The Union rarely uses demarches (Chapter 7) or includes UN human rights institutional aspects in its human rights dialogues (Chapter 6) or utilizes legal frameworks, such as the Cotonou Agreement, to further its position in UN human rights fora. Using such instruments however has the capacity and potential to enhance the EU's position in each body (Chapter 4; see also Section 4.2 in this chapter).

1.1.2. The EU's general position in the UN human rights governance architecture: extracting key explanatory factors

In examining the EU's position across each of the four bodies, it may be concluded that it generally holds an aspiring outsider-marginal position within the framework of the UN human rights architecture (see Table 13.1).

Noting that there are many other bodies that contribute to this architectural framework, the examined areas nevertheless illustrate the different types of fora in which human rights issues are addressed in (e.g. permanent bodies and ad hoc conferences). With each of the fora generating resolutions with no binding force, it is difficult to compare whether the EU's participation and position would be different should the outcome documents have a binding legal effect. Nevertheless, what may ultimately be deduced is that, at least in the pre-Lisbon setting, the EU's formal legal status had a limited impact on the EU's role and position in each of the bodies.

The main outlier in the EU's form of participation between the four bodies was that of its participation in the Durban Review Conference. The EU's disengagement at the conference, leading it to have a distinctively marginal position, evidently stands in contrast to its multilateral and human

Table 13.1 The EU's positions in selected UN human rights governance fora

	The EU in the UNGA Third Committee	**The EU in the Human Rights Council**	**The EU in the negotiations on a moratorium on the Death Penalty**	**The EU in the Durban Review Conference**
Legal status	Low (observer)	Low (observer)	Low (observer)	High (full participant)
Role	Functionally significant	Functionally significant, however at times is weak/ dysfunctional when conceding to initiatives	Functionally significant	Weak
Position	*Aspiring outsider- marginal*	*Aspiring outsider- marginal*	*Aspiring outsider*	*Marginal*

rights objectives. The underlying cause of disengagement was not a lack of internal coordination efforts, but rather the topical issue of the conference itself and the political climate amidst which it was held (Chapter 7). This type of issue-based challenge, in parallel, may also be observed in the Human Rights Council in discussions over the Occupied Palestinian Territories (Chapter 5). Thus, what may be identified here is that the leading force behind the EU's variance in its position in UN human rights fora is topical/political rather than legal/procedural.

The dissected analytical findings generated from the application of the interdisciplinary framework have as a result dominoed into uncovering patterns and explanatory factors for the EU's position in UN human rights fora. In brevity, it may be concluded that the EU's aspiring outsider/ marginal position is a result of its observer status in conjunction with its (mainly) functionally significant role. It needs to be stressed that the reason the EU's position stands on the cusp between the two quadrants is to be seen in the fact that it has, on many occasions, failed to be an influential actor. It either had to concede to others' initiatives (Chapter 5) and/or did not receive the necessary endorsements from third countries to push through its own initiatives (Chapter 4). The primary causal factor for attributing it this position concerns, however, the evolving (political) climate of UN human rights governance fora with, for example, emerging economies (BRIC countries) playing an increasingly significant role in UN politics. Aside from the EU's participation in the negotiation of a moratorium on the death penalty, the EU's generally stagnant approach in this context and its

incapacity of adapting to this evolving geopolitical climate represents the main obstacle and hindrance to its overall position.

1.2. The EU's participation and position(s) in UN environmental governance fora

When assessing the different cases studied within the domain of global environmental governance in the UN, it is firstly necessary to recall the similarities and differences of the subject matters dealt with in the analysed fora. While the issues of climate change and biodiversity/biosafety are prime examples of global common goods problems, sustainable development, as it is understood in the context of the Commission on Sustainable Development (CSD) and the World Summit on Sustainable Development (WSSD), incorporates a wide range of problems, from climate change over trade issues to social standards. Even if the focus in the case studies was deliberately placed on the environmental dimension of sustainable development, other dimensions such as trade were inevitably evoked. However, as climate change and biosafety equally touch upon developmental and economic issues, they are at least as multi-facetted and complex as sustainable development matters. For that reason, the cases analysed in Part IV of the volume are indeed *comparable*, and this despite the fact that the examined bodies are, prima facie and from an institutional perspective, also quite different, ranging from a functional body of the UN system over UN-based regimes to a conference under UN auspices. As seen from the case analyses, summarized below, the formal functioning of the different fora was not so dissimilar after all, as all bodies operated under the same rules of UN multilateralism.

1.2.1. A cross-case, within-domain comparison: identifying key factors contributing to the EU's position in UN environmental governance fora

Despite the described subtle differences in the type of UN fora and issues analysed, the *EU's position* across the cases of environmental governance examined in this volume was assessed by all experts as coming close to the ideal-typical classification of *central*. This observation warrants an integrated synthesis of the key findings rather than a chapter-by-chapter summary. The EU's central position was asserted without any doubt by Delreux in his account of the Union's implication in the negotiations on the Cartagena Protocol on Biosafety (Chapter 11). It was Van den Brande's solid, but slightly qualified assertion for the EU's participation at the CSD (Chapter 9), and Lightfoot's relatively straightforward assessment for the Union's involvement in the proceedings of the WSSD (Chapter 12). For its participation in the UN climate regime across time, Schunz assessed its position as central by referring essentially to the past, i.e. the period up to 2009, but not so much to the proceedings in the year 2009 and at the Copenhagen

summit and thereafter (Chapter 10). While it would be premature to speak of a clear-cut trend, the Union's marginalization at Copenhagen was regarded as a risk that the EU may permanently transform into a *sidelined insider* in the future.

As position represents the function of the Union's legal status and role, it has, firstly, to be noted that the EU possessed *a high legal status* across the discussed fora of global environmental governance. It was a party to the negotiations in the UN climate and biodiversity regimes and a full participant in the other two bodies, one with restricted membership (the CSD) and one with UN-wide membership (the WSSD) (Chapters 9 and 12). There is thus little doubt that the EU generally has widely unlimited access to key UN environmental governance fora. Even if it cannot vote as a full participant, its Member States, which are full members to the CSD and the WSSD, can.

Regarding its actual *role performance*, this was, across the board, assessed as *functionally significant*. This implies that in the CSD as much as in the WSSD and the climate and biodiversity regimes, the EU attempted to and did contribute actively not only to the purpose of the governance arrangement, but also to multilateralism – and thus the functioning of the arena it operated in – as such. In the CSD, for instance, it consistently promoted the reform of the body to make multilateralism in this forum more effective (Chapter 9). In global climate governance, it 'saved' the multilateral process after the US withdrawal from the Kyoto Protocol ratification process and in the face of the threat of a complete stalemate of the UN climate regime in 2001 (Chapter 10). This is not to imply that the Union was, in each of the studied cases, successful in reaching its objectives through its foreign policy activities. While this is claimed by and large for its performance in the Cartagena Protocol negotiations (Chapter 11), it was not so much the case for its implications in the WSSD and the various CSD sessions (Chapters 9 and 12). In the latter two bodies, the EU booked only moderate successes (e.g. with its defence of the precautionary approach at the WSSD), far from reaching its objectives on all issues and at all times. Finally, for the Union's participation in the UN climate regime, especially most recently, it is fair to say that it achieved its stated aims to a very limited extent (see Chapter 10). While this situation may only be a snapshot of the Copenhagen conference and its immediate aftermath, the question could be raised more generally as to whether the geopolitical shifts that are most obvious in the climate regime leave a significant space for the EU to fill in UN environmental governance.

The observation that the Union can play a functionally significant role, have a high degree of legal status, and consequently occupy a central position in a multilateral governance forum, but still does not attain its objectives also poses an interesting puzzle as to the link between its position and impact. It is addressed in the further course of this discussion of the book's findings.

Table 13.2 The EU's positions in selected UN environmental governance fora

	The EU in the Commission on Sustainable Development	**The EU in the UN climate regime**	**The EU in the negotiations of the Cartagena Protocol**	**The EU at the World Summit on Sustainable Development**
Legal status	High (full participant)	High (before 1992: none, 1992: full participant, since 1994: full member)	High (full member)	High (full participant)
Role	*Functionally significant*, but without significant impact on outcomes	*Functionally significant*, but without significant impact on outcomes (only on meta-level: keeping negotiations within the UN in 2001)	*Functionally significant*, significant impact on outcomes	*Functionally significant*, mixed impact on outcomes
Position	*Central*	*Central* in the past, but recent risk of permanently becoming **sidelined insider**	*Central*	*Central*, but differences depending on subject matter discussed

1.2.2 The EU's general position in the UN environmental governance architecture: extracting key explanatory factors

In synthesis, a solid cross-case pattern of the EU's position in UN environmental governance fora has emerged (see Table 13.2).

When accounting for the EU's central position in UN bodies in this issue area, the different case studies highlighted various potential explanatory factors.

In the study on the CSD, the EU's clear negotiation positions and efficient internal organization were underscored as factors explaining its strong role performance and, thus, centrality in the forum, while its outlier preferences and its behaviour vis-à-vis others were emphasized as explanatory factors for the limits of its impact on the actual negotiation rounds within the Commission (Chapter 9). In a similar vein, the Union's central position at the WSSD was explained with its strong engagement and internal coherence

on environmental issues, which was not matched by an equal degree of coherence for other, non-environmental issues. The limits to its position were then also explained with reference to these internal cleavages, but also the obstructive role played by other players, notably the United States and the oil-producing countries (OPEC), at the summit (Chapter 12). As far as the negotiations on the Cartagena Protocol are concerned, it was argued that the EU assured a central position by becoming, over time, a coherent actor and defending its interests via efficient diplomatic activities (Chapter 11). Finally, in the climate change case, the Union's central position was, for a long time, assured by its centrality to the problem, its proactive approach and relative internal coherence. The shift in the EU's position became, then, visible only more recently, resulting from factors such as an increasingly outlier negotiation stance, inadequate comportment vis-à-vis other key players and unsuited diplomatic strategies in the face of greater politicization of climate change. While the context evolved, the EU's position remained largely inflexible (Chapter 10). This observation was also stressed for the Union's participation in the WSSD and the CSD, and might therefore qualify as a major explanatory factor for the limits of its position and impact in global environmental governance fora.

To further elaborate on these explanation attempts of the EU's position, the different cases can be set more explicitly in relation to each other regarding the various legal and political science components of the analytical framework. Remarkably, all chapters invoke the informal, deeply political components of the concept of the analytical framework rather than its formal, legal and institutional elements as potential sources of explanation for both the limits to and the preconditions for a highly developed EU position.

This could have to do with the fact that the *legal-institutional parameters* were and have remained relatively stable for longer periods of time, both at the EU (at least until the entry into force of the Lisbon Treaty, which postdates the cases studied in this work, but possibly also thereafter) and international levels of analysis (Chapter 8). Moreover, a fairly high degree of homogeneity between the studied cases regarding both the international and the EU legal framework could be observed. This degree of homogeneity across cases is not matched if one examines the various elements of the analytical framework on *the political science side*.

At the *international level of analysis*, regarding the de *facto dimension of the global governance mode*, the cleavages among actors in the different fora are not completely dissimilar, but do display some important differences. Typically, the EU was among the more ambitious actors in all UN fora, and found itself thus somewhere in the middle between developing countries, which demanded even more far-reaching policy solutions (to be enacted by the developed world), and the United States and other industrialized players (JUSCANZ/the Umbrella Group in the UNFCCC regime), which tended to be more wary of the international regulation of environmental problems.

Deviations from this pattern were noted for the negotiations on the Cartagena Protocol, where the cleavages pervaded the traditional groupings, and the EU found natural coalition partners in the European Group and the Compromise Group (Japan, Norway, South Korea, Mexico, Switzerland, Singapore and New Zealand). Generally, there seemed thus to be a space available for the EU to play a balancing role in many fora, allowing it to occupy a central place. The availability of this space seemed to a large degree dependent on the behaviour and role of other major players, especially the United States, but also, particularly in the climate regime, the major developing countries (BASIC). If these behavioural patterns shifted, and the EU came into conflict not just with the United States and some other industrialized countries, but also with a range of developing countries on key issues discussed in a UN body, it risked being moved away from the core of the action. This was emblematically illustrated in its (even physical) exclusion from the deal-making at the Copenhagen summit. By contrast, if the EU's preferences and behaviour were in sync with those of major countries from the G-77/China, as in the Cartagena Protocol negotiations, not only was its position central, but its impact also tended to be substantial.

At the *EU level of analysis*, and *focusing again on the political dimension*, the Union's actor capacity was quite similar in the CSD and WSSD cases, which could be classified in the middle of a spectrum, which – as its extremes – has the EU's preparation for the biosafety negotiations (at its later stages, as a case of great homogeneity) and its participation in multilateral climate governance (as a case of frequent disagreements on key issues, especially during its later phases).

In terms of its de facto *internal decision-making and representation processes*, the different cases of EU participation in UN fora can clearly also be located on this spectrum. In the Cartagena Protocol negotiations, the EU's internal debates yielded, after initial problems, relatively unproblematic internal decision-making and clear-cut representation arrangements, in which roles were assigned to the Council Presidency and the Commission. This arrangement was fairly efficient, and arguably also contributed to the success the Union booked in these negotiations. Certainly, this contributed to its central position (Chapter 11). In the CSD and the WSSD, the hybrid nature of the subject matter complicated decision-making and representation, with the emergence of mixed negotiation arrangements in both arenas, testifying to the EU's disunity (Chapters 9 and 12). A major difference between these two cases concerns, however, the involvement of the highest political level. While preparatory talks of the CSD as well as the sessions themselves are held at the expert level, the WSSD represented an arena for the profiling of political leaders, and witnessed a certain degree of EU cacophony involving diverse Member State representatives and EU Commissioners. In this regard, the EU's participation in the climate regime can be considered as an even stronger case of incoherence, at least during the final stages of the global negotiations,

visible also in the way the EU was *de facto recognized* by other actors, namely as an, at times, incoherent player (like in the WSSD) (Chapter 10). Not only is the European Council generally implicated in the decision-making on the EU's external actions on climate change, but the heads of state and government became even directly involved in the negotiations at Copenhagen, where they gathered in an informal European Council sur place. Also because they could not decide on a common approach on that occasion, the Union became sidelined during the final stages of COP 15.

Where the EU's involvement in the discussed arenas can be classified on such a spectrum regarding decision-making and representation, little differences were observed for its *objectives* and the *instruments* used to defend them. In the former case, the EU generally intended to play a lead role across all fora, in line with its treaty objectives discussed in the various case analyses. Regarding its foreign policy instruments, while the studies on the CSD and the Cartagena Protocol do not explicitly address these analytical units, both point to a strong reliance on tools of multilateral diplomacy, which, in the latter case, was quite successful. The analyses of the WSSD and the climate regime showed that the EU's foreign policy behaviour was limited to the use of diplomatic tools and occasional economic incentives, but not to the Union's benefit at all moments in time. Especially in the climate regime, but also for the CSD, it was remarked that the EU's behaviour was not always in line with the evolution of the discussions (Chapters 9 and 10).

These differences between the four cases do not imply that the EU's actor capacity was insufficient or low per se in any of the bodies studied in Part IV of the book. Across all cases, the actor capacity varied primarily as a function of the politicization of the discussed issues and resultant internal divergences on the concrete substantial positions (beyond the overarching objectives) to defend and the modalities of how to defend them (representation, instrument use).

From this discussion of the findings produced by a consistent application of the interdisciplinary analytical framework to a select set of cases of EU involvement in global environmental governance, several key patterns on the Union's position and its explanation suggest themselves. First, the EU occupies a central position across the board, but risks becoming a sidelined insider especially in the climate regime. Second, this central position results from a high degree of legal status and the functionally significant role played by the EU across all studied fora. Third, a set of key conditions can be identified that either enable or constrain the EU's capacity to occupy a central position. The Union seems to be able to occupy such a position whenever its degree of actor capacity (as a function of competences, decision-making, representation and instrument use suited for multilateralism) is high, when it possesses a high-degree legal status and can find coalition partners either because its interests overlap with those of others or because it actively engages in forging alliances. By contrast, its central position is

challenged whenever its internal coherence is under pressure, either as a result of structural preference heterogeneity or of the politicization of a topic, and when the external context is unfavourable, i.e. when the EU – with its capacities, what it stands for and/or what it does – does not fit into the evolving global (geopolitical, power, interest) constellation. EU inflexibility and the incapacity to adapt strategically to these evolutions can lead to a vicious circle that carries the risk of durably removing the Union from the centre of UN environmental governance fora.

2. Comparing the EU's participation in UN governance fora across domains: EU positions and their explanation

Generalizing from the empirical findings via a cross-case comparison of the two studied domains needs to be done with a maximum degree of caution. On the one hand, the patterns that can be detected within and across domains represent a useful and necessary starting point for building theoretical propositions on the EU's participation in UN governance fora based on the rich empirical observations. The fact that they were produced by way of a rather coherent application of a single analytical framework by experts of the various subject matters provides a very solid argument for coming to tentative generalizing statements for the domains of UN human rights and environmental governance more widely. On the other hand, these findings were only based on a synthesis of a small set of cases, which cannot per se be considered as representative of a broader set of phenomena. Additionally, as most of these cases were analysed in a pre-Lisbon Treaty context, our attempts at generalizing should be taken with a grain of salt (see Chapters 3 and 8). Particularly for these reasons, the exercise undertaken in this section can best be characterized as a 'plausibility probe' of sorts, which serves to extract the most robust general findings regarding the explanation of the EU's position in UN governance fora *in the two studied domains*, whilst at the same time indicating promising areas for future research, further elaborated on in the next section (cf. for a similar argument on generalization in a comparative study of NGO diplomacy: Betsill, 2008, p. 188).

The picture that emerged from the previous section was one of fairly great coherence for each one of the two studied issue areas by itself, and of fundamental formal differences, but also several key similarities across the two areas. In the human rights domain, the Union was formally – due to its comparatively lower legal status of observer/full participant – consistently kept at the sidelines of the bodies it participated in. In the domain of environmental governance, it was generally central to the analysed UN bodies, as it possessed in each case at least full participant status. These differences are set forth at the EU level of analysis, where the legal conditions for the Union's participation in UN governance fora are more advantageous in the environmental than in the human rights domain. This fundamental formal

difference between the two studied policy fields makes a generalized vision of the EU's position in UN governance fora impossible. Nonetheless, when it comes to the political determinants of this position, similarities do crop out. Strikingly, in both cases, the same key observations and analytical units for accounting for the EU's position were highlighted. These apparently robust findings necessitate therefore a discussion in more depth, grouped into four main conclusions.

> *1. The political, de facto dimensions of the analytical framework have greater explanatory power for the Union's position across the different governance arenas than the formal, de jure aspects.*

This finding warrants the greater emphasis placed on the political science dimension of the findings in this section of the present chapter. When accounting for it, one could imagine that it has to do with the fact that the legal-institutional parameters were – and have remained – relatively stable for longer periods of time for the two studied domains, both at the EU (at least until the entry into force of the Lisbon Treaty) and international levels of analysis, as the two chapters providing the legal framework for the case analyses demonstrate in quite some detail (Chapters 3 and 8).

At the international level, concerning the global governance mode, the rules of procedure in the different bodies in either the human rights and environmental fora are very similar, as they are all strongly influenced by the rules and regulations of multilateralism under the UN umbrella and follow suit of the UNGA Rules of Procedure. Moreover, the EU on occasion has gained entry into various fora by way of a REIO arrangement, which gives it a set of rights that come with the legal status it holds in the discussed fora.

At the EU level of analysis, although the Union's competences for action on human rights and sustainable development/environmental issues respectively are somewhat different, the institutionalization of decision-making (by consensus, as a general rule) and representation was governed by similar or, in most cases, identical legal rules (Chapters 3 and 8, also for the changes that come with the Lisbon Treaty).

Yet, possessing competence and a highly developed legal status does not guarantee the EU a central position, while having a low status does not exclude it from playing a significant role in or impacting on a UN governance process or forum. The analysis of the EU's participation in the case of the Moratorium on the Death Penalty showed that it can be a decisive actor even in the absence of a highly developed formal legal status. Being a party to a UN governance forum, by contrast, as the case of EU involvement in the UN climate regime demonstrated, does not always imply effective multilateral action. This finding is to a certain extent counterintuitive if one looks at it from the perspective of the legal debate, in which the question of EU status in UN fora has been so central (Chapter 2, see also Emerson, Kaczyński,

Balfour, Corthaut, Wouters and Renard, 2011). By contrast, political scientists, who have mostly ignored the issue of legal status (see, however, Gstöhl, 2009, who comes to the same conclusion as this volume), would argue that this confirms their implicit assumptions that the legal component may be largely omitted as an explanatory factor of the EU's performance in multilateral institutions. While we do not share this view, this is a first finding that a purely legal approach would have overseen, demonstrating the usefulness of the interdisciplinary approach (see Section 3).

Where legal status and legal competences may not hold as such a high degree of explanatory power – at least not in the analysed fields of shared competence and in a pre-Lisbon setting[1] – in determining the EU's position as such, the type of legal outcome document (soft law vs. hard law) generated from a given UN body can, and does at times, help us understand how the EU participates and fares in UN fora. In addition to the legal consistencies of the EU's status and competences between all of the examined human rights bodies (aside from the Durban Review Conference in which the EU held full participant rights), another commonality is that each body adopted/adopts non-binding resolutions and outcome documents on politically charged issues. Significantly, the EU, for the most part, did not fare as well in the human rights domain as it did in UN environmental bodies generating international legally binding instruments, more specifically in the climate change and biodiversity regimes. In the negotiations of legally binding instruments, as there is more at stake for the EU as a negotiating party due to the (potential) legal effect to its own legal order and the legal order of its Member States, it is not surprising that the EU does not concede to initiatives which it does not necessarily fully agree with, as has been the case on many occasions in the Human Rights Council. Rather, in negotiations that aim to agree upon legally binding standards, the Union tends to have a more rigid stance in its negotiating practice so as to consolidate a central role in the process. Thus, parallel to political considerations, the type of legal output negotiated in a given body may not only play a role in explaining and shaping the EU's position but can also serve an explanatory aim regarding the EU's contribution(s) to UN multilateralism, markedly in a legal context. When it comes to other conditioning factors of the EU's position, a first determinant can be isolated at the international level of analysis.

2. The political dimension of the global governance mode – and thus the external political environment the EU operates in – is a central conditioning factor that either restrains or enhances the Union's capacity to occupy a central position in a UN governance forum.

The external political environment, with its formal institutions as well as the interest, power and value constellations, is an often overlooked factor in studies of EU foreign policy (Chapter 2). Overcoming the intra-disciplinary

divides between international relations and EU studies by explicitly linking EU actions to the international level of analysis was one of the key motivations for designing the analytical framework guiding the case studies conducted in the book. The findings of the volume validated this choice. Be it the regional bloc mentality that dominates negotiations in the human rights sphere, the power shift that comes with the rise of the emerging economies or the North–South (industrialized vs. developing countries) and North–North (industrialized leaders vs. industrialized laggards) divides characteristic of UN bodies in the environmental sphere, the context 'matters'. In most cases, it complicates the Union's task, as seen for the Third Committee, the Human Rights Council, the Durban Review Conference, the climate regime or the WSSD, in all of which the EU was mostly unable to effectively mediate between varying interests. But the context can also be advantageous, as in the case of the negotiations on the Cartagena Protocol on Biosafety, where the Union benefitted from a favourable interest constellation to leave its mark on the final outcome. Ignoring the external context the Union operates in is therefore outright problematic, as it implies neglecting exogenous variables that are key to understanding and explaining its position.

Yet, the findings produced by the case studies were even more precise, suggesting, to put it bluntly, that 'the external context matters only in context'. In other words, real explanatory power regarding the determination of the EU's position unfolds if one looks at how the Union *inserts itself* into its external environment.

3. The interplay between what the EU stands for and does on the one hand and the political dimension of the global governance mode is a powerful explanatory factor of its position.

Across the two domains, almost all experts highlighted the importance of this finding for understanding the EU's position in their case studies. For the Union's participation in the CSD, the Third Committee, the Human Rights Council and the climate regime, to cite the four most obvious examples, they suggested that it did not find the right ways of engaging its partners because it was incapable of adjusting its negotiation stance and behaviour to the evolving negotiation contexts. This led to EU underperformance, which meant that it was marginalized (Human Rights Council) or risked losing its centrality (climate regime), and also proved incapable of impacting the negotiations. Where the incongruence between what the EU stands for and does and the external context can partially help to explain its limited role and, by consequence, position in these areas, higher degrees of congruence in the Cartagena Protocol and, importantly, the Moratorium on the Death Penalty cases confirm this finding in a positive way. In these instances, the EU did adapt its behaviour to the demands of the external context and this immediately paid off in the form of a central position as well as leverage

over the outcome of the multilateral negotiations. What both these cases also underscore, however, is the necessity for the EU to possess a highly developed actor capacity, if it is to be central to any UN forum. In the case of the Moratorium on the Death Penalty, the role of the Presidency became essential in redefining the Union's positions and strategy. In lowering the EU's profile, it actually reinforced the Union's actor capacity. In the Cartagena Protocol negotiations, the settling of internal quarrels paved the way for not only playing a functional role in the regime, but also gaining leverage over the outcome of this specific negotiation process via a solidified actor capacity.

This leads to a fourth and final conclusion:

> *4. The degree of actor capacity is an important conditioning factor of the EU's position. If it is highly developed, it helps the EU to play a functionally significant role and, by consequence, occupy a central position. If it is underdeveloped, it jeopardizes its chances of a significant role performance that would enhance its position.*

To be capable of acting in governance fora at all, the EU needs to possess a sufficient degree of actor capacity. This is not a new finding. As a matter of fact, concerns about the EU's actorness have long been central to many studies of the Union's foreign policy behaviour (Caporaso and Jupille, 1998, see Chapter 2). What the studies undertaken in this volume underscore, however, is that the performance of the Union apparently often varies with its degree of actor capacity. Is this capacity underdeveloped, as in the cases of its involvement in the Third Committee or, at times, the UN climate regime – if, for instance, endless internal coordination meetings are needed for the Union to define a common stance – this makes the EU's role become quickly dysfunctional. In turn, its position in a UN body cannot be central any more. By contrast, effective EU participation in the negotiations on the Biosafety Protocol and on the Moratorium on the Death Penalty demonstrates, as discussed above, that actor capacity represents a key enabling factor for the EU to perform a functionally significant role and occupy a central position.

This is not to suggest that the Union will automatically occupy a central position in a UN governance forum if only it possesses a high degree of actor capacity. Other favourable conditions, especially related to the context, need to apply. In sum, the findings therefore appear to point to a highly developed degree of actor capacity[2] as a necessary, but not a sufficient condition for the EU to play a significant role, and thus occupy a central position in a multilateral body.

In synthesis, whilst this section comprised only a cautious exercise of identifying general cross-cut patterns, the strength with which the findings suggested these trends make a further application of these potential

explanatory factors to other cases of EU foreign policy in multilateral contexts plausible. They furthermore point to promising research areas, which the analytical framework may help to further explore, as discussed in the subsequent section. The implications for the EU's future foreign policy of the fact that it regularly performs well when it has a highly developed actor capacity and adapts to negotiation contexts, but has problems when it is internally incoherent and the international context is complex, will be picked up in the final section, which contains relevant policy recommendations.

3. The interdisciplinary approach: critical appraisal and future research

The interdisciplinary approach applied in the case study chapters (Chapters 4–7; 9–12) yielded numerous insights into not only the underlying factors contributing to the EU's position in each given fora, and more generally, in each policy domain, but also into the virtues and limits of interdisciplinary research itself in the context of this specific area of study. Each case study chapter consistently applied the interdisciplinary framework expounded upon in Chapter 2 (Table 2.1) to come to a conclusion about the EU's position in each UN body (Table 2.2). When concluding this edited volume, it is therefore important to equally address the utility of both the framework and concept of position.

The framework of analysis proved to demonstrate that examining the EU's participation in UN fora through a combined legal and political science lens provides a better understanding about the EU's position and why it is successful in achieving its aims and objectives in certain areas of the UN's work and not in others. On the one hand, its application confirmed the conclusions of previously published authors in the field, notably with respect to the implications of EU internal coordination and cohesion in UN bodies (Smith, 2006; Laatikainen, 2004; Luif, 2003). On the other hand, it yielded many novel insights into why the EU fares the way it does in the selected fora, proving its empirical utility and that of the concept of position. An important finding between all of the case study analyses, (again, in a pre-Lisbon setting), is that the legal status as such does not seem to be as centrally indicative of the Union's position in UN human rights and environmental fora as one would expect from a purely legal perspective. The analytical output generated from applying the framework rather suggested that the challenges the EU faces have more to do with the external environment it operates in and its difficulties to adapt to the evolving global governance mode, inter alia vis-à-vis new emerging economies and reinforced regional blocs. This has analytical implications for the legal aspects of multilateralism, as it is these very dynamics that have the capacity to shape legal outcomes. Yet, any examination of the political dynamics within this environment equally requires an

understanding of the legal-institutional parameters formally regulating the behaviour of the actors in UN governance arenas. While the two disciplines thus prove to be mutually reinforcing, the volume suggests that it is analytically relevant to take contextual factors into consideration in both legal (international and EU) and political science (IR and EU foreign policy) studies.

In its disaggregated form, the interdisciplinary approach also uncovered a tangential virtue, namely that of highlighting the utility of bridging the existing *intra*disciplinary divides of the international and EU perspectives (see Table 2.1, Chapter 2). The international and EU levels of analysis are mutually dependent. As observed in some of the case studies, the legal statuses granted by the UN to the EU are inextricably linked to the formation to which the EU takes in its representation. For example, in the Third Committee, and against the backdrop of the EU's observer status, it always used its Presidency (prior to the entering into force of the Lisbon Treaty) to convey the positions of the EU as opposed to waiting for the EU delegation to speak on behalf of the Union, mainly because an observer's speaking rights are limited to the time slot after all full members to the UN have given their interventions. Thus, in order to fully understand the EU's participation and position in a UN body, an understanding of the rules of procedure at the UN level (*international perspective*) as well as an understanding of the EU's representational architecture (*EU perspective*) are needed. In sum, the interdisciplinary approach taken enhanced the understanding of the EU in UN human rights and environmental fora at both *inter- and intradisciplinary* levels.

The ultimate purpose of applying the analytical framework to the case studies was to come to a general conclusion about the EU's position in the examined body. The concept of position, constructed from the interdisciplinary components falling under actor (EU) capacity, recognition and global governance mode facilitated a deeper understanding of the EU's participation in the body vis-à-vis other players in the UN system. Commonly, literature is quick to criticize the EU's lack of a leadership role in, for example, human rights governance (Roth, 2007) or conversely – and often in an unqualified manner – praise the EU's frontrunner role in, for example, the climate change regime (Oberthür, 2009), but give very little basis to *why* its position is what it is. In efforts to overcome this research gap, the concept of position was developed and employed in the eight case studies. Observably, the global governance mode and actor capacity criteria played a more significant role than the EU's de jure and de facto recognition in analysing the Union's position in the given fora. The process of *informal policy making* was probably the most important in this regard, given the fact that the governance mode/political climate of the body and how the EU adapts to it plays an indispensible role in understanding the EU's overall participation and position.

Where the matrix (Table 2.2) in Chapter 2 outlined a basic typology of the concept of position, this concept was clearly meant to offer ideal-types as operative labels. Following the extensive use of the analytical framework it builds on, an evaluation of this typology suggests itself. In the original matrix, legal and political science dimensions of the concept of position were given equal weight. After applying the concept in each of the cases and policy fields, it could be discerned that it would be more accurate to give greater weight to the political dimension. To give a concrete example, Kissack in Chapter 6 concluded that the EU held an aspiring outsider position in the negotiations of the UN moratorium on the death penalty on the basis of the EU's legal status as an observer on the one hand and its functionally significant role on the other hand. Should the EU have been a full member, it would have been labelled – more appropriately – as occupying a central position according to the typology. So while the concept of position developed in Chapter 2 is a useful tool to compare and contrast the EU's participation in the UN towards other actors, and moreover, to identify the reasons why the EU fares in the given body the way it does, it nevertheless needs to be adapted to the impact, or lack thereof, the legal status has on the EU in UN fora. This critique of the matrix, in our view, merely reinforces the need for interdisciplinary research in the field of EU/UN studies. It also demonstrates the utility of the concept of position, which helps – in conjunction with the analytical framework that comes with it – to clarify the relationship between the neighbouring concepts role and status (see Chapter 2).

Lastly, by systematically accounting for each of the interdisciplinary components falling under the constructed concept of position, additional research gaps and policy implications (see Section 4.2) were uncovered. One of the key areas that emerged as being underutilized by the EU was the employment of foreign policy instruments (falling under actor capacity) that rest at the Union's disposal in both the human rights and environment policy fields. Strikingly, this is an area that has also received almost no scholarly attention (Wouters, Bruyninckx, Keukeleire, Corthaut, Basu and Schunz, 2010).

In general terms, the findings generated from applying the interdisciplinary framework and the concept of position offer a rich well of research gaps and under-researched areas that require further exploration for an even more enhanced understanding of the EU in UN fora. The following are three core areas that were identified when applying the framework to the cases:

1. *Political context/external environment*: The commonly applied analytical approach to studying the EU in the UN has as its primary focus the internal dimensions of the EU's actor capacity. Research on EU foreign policy in general needs to transcend these boundaries and pay greater attention to the political environment of the fora the Union operates in.

Insights drawn from the analytical exercise of employing the concept of position demonstrate that the new political power constellations have great implications for the degree to which the EU can achieve its goals and objectives in the given UN bodies. An understanding is therefore needed of why the EU struggles to adapt to this changing global governance context and why these new major global players do not perceive the EU as a natural partner in UN multilateral governance.

2. *Bilateral relations and external coalition-building*: As it may be discerned from many of the case studies, the EU faces great obstacles in its external coalition-building exercises. An understanding of its bilateral relationships, especially with its strategic partners like the United States and BRIC countries, would allow for a better assessment of why such countries, which choose to engage in strong bilateral relationships with the EU, show reluctance to translate that same relationship at the multilateral level. Complementing the first identified research gap, this understanding would help scholars to better understand the Union's strategic interactions, while allowing for making policy recommendations on what the EU can do to enhance its relationship at the UN level to further its own objectives. Furthermore, it would shed light into key elements for successful coalition-building in UN fora.
3. *EU foreign policy instruments*: A common thread between all of the chapters was the EU's limited use of financial, legal and political instruments that rest at its disposal in both policy fields. A wider survey of instances where the EU has used such instruments and/or why it does not would be beneficial to the understanding of the (potential) power these instruments can have at the UN level, notably in its external coalition-building. A lesson learned exercise may also be useful in this context, more specifically, to explore whether there has been an exchange of best practices between different policy divisions of the EU institutions and to observe the extent to which employing these foreign policy instruments have furthered any Union objectives.

In sum, the interdisciplinary research approach to the EU in UN human rights and environmental fora proved to demonstrate that an enhanced understanding of how and why the EU fares the way it does in UN fora can only be achieved when looking at both the legal and political science aspects, and moreover, by also taking into account the *intradisciplinary* divides, namely the EU and international levels of analyses. It needs to be stressed that the flexibility of this approach also allows for an analysis beyond the EU in UN bodies addressing the policy fields of the environment and human rights. With the EU's determination to be a frontrunner in the UN system, the application of the framework in other policy domains would be beneficial to this area of study, as it would facilitate a better understanding of the EU as a foreign policy actor. The framework sets the foundation to

explore bodies that have limited membership like the UN Security Council as well as non-UN bodies such as the World Trade Organization, in which the EU holds exclusive competence and full membership rights. The strong legal implications in the context of the latter could serve as the cornerstone for an interesting (future) comparative analysis, notably after the findings of this edition in which the political science dimensions had more bearing on the EU's position.

4. Broader theoretical and political-practical implications of the findings

4.1. The EU, the UN and global multilateral governance

4.1.1. Global problems need global solutions

Global problems need global solutions is a phrase that is frequently echoed by world leaders, but what it entails and means in practice is not always commonly understood. The conceptualization of global multilateral governance spawned from the very fact that global challenges necessitate international cooperation and that this cooperation may come through various means and forms. An understanding of this cooperation, or rather governance process, is key to uncovering the root causes of why certain governance arenas yield concrete outcomes while others are deadlocked. The EU being a strong advocate and active player in finding multilateral solutions to global issues made it a germane actor to analyse in this context. In parallel, the UN architecture and process being representative of what global multilateral governance has to offer equally made it the archetypical institutional system for examination.

The exercise of examining the EU in UN human rights and environmental governance fora through an interdisciplinary lens facilitated an understanding beyond that of only the EU's position in the selected cases. It equally yielded insights into the intricacies of global multilateral governance. This book demonstrated that the United Nations offers a wide range of stages to address global human rights and environmental issues and that these are open to all types of global actors (e.g. states, regional economic integration organizations, NGOs), albeit at times with some constrictions dependent upon the actor's membership to the body. With the overarching purpose of these fora being to 'achieve international co-operation in solving international problems' (Article 1, UN Charter), the findings from the case studies shed light on global governance in terms of the formal and informal relationships between and among actors participating in these bodies to resolve the given issues and help to understand multilateralism 'as a key organizing principle of global governance' in the UN context (Chapter 1).

The EU's choice to participate in UN fora does not come as a surprise given its stated commitment to multilateralism and vast set of foreign

policies. As expressed throughout this book, although the Union is not a traditional global player as such, it has proven to demonstrate that it not only has a role to play in the UN system, but that it can indeed play, in some instances, a significant one. Drawing from the core findings of this volume, it is clear that there is evidence for a mutually reinforcing relationship between the EU and UN. Both bodies need each other. For the EU, with its endeavour to be a frontrunner in international affairs and dedication to uphold international standards, UN fora provide the most suitable stages to achieve these and other foreign policy objectives. For the UN, the EU represents a bloc of 27 Member States that is devoted to the principles of the UN's founding charter and international law. Moreover, its explicit commitment to promoting multilateral solutions to common problems, within the framework of the United Nations (Article 21 TEU) makes the EU, in principle, the perfect actor within its own system.

4.1.2. The EU's contribution to UN multilateralism

The EU's attachment to the UN and multilateralism independently gives rise to the question of how the EU contributes to UN multilateralism as a whole. As it may have been observed, the EU promotes multilateral solutions via the channels established by the UN in a rather significantly functional manner in almost all studied instances. The Union has furthermore reinforced multilateralism by offering a (successful) model of multilateralism within the global multilateral system. At the same time, however, its multilateral behaviour has displayed various limitations. The findings from the case studies have shown that it is not enough just to be a multilateral player of sorts. The model and behaviour of how the EU embraces being a multilateral actor is key to how it can manoeuvre and impact the multilateral processes in the UN system. This brings us back to one of the core findings of this volume, in that how the EU accounts for the external environment is decisive for its position and the degree to which it can influence and contribute to UN multilateralism. Special emphasis in this regard needs to be placed on the EU's interaction with other groups and players in UN bodies. Evidently, the Union does not always think the procedural nature of multilateralism all the way through. It tends to neglect that an engagement with lower profile actors is as important as with major players such as the United States. Thus, in a way, the EU's behaviour is at times 'not multilateral enough'. This was especially the case in the CSD, WSSD and the climate regime, but also in the Human Rights Council and the Third Committee, fora in which the EU to a large degree focuses more on internal coordination than external coalition-building. This EU closed-door politics makes it look like it is an inflexible and regularly selective multilateral player, hampering its contributions to UN multilateralism.

Furthermore, the findings demonstrated that being a multilateral player does not guarantee direct and positive impact on any given UN forum.

This was especially the case in the climate regime and the Durban Review Conference. The EU's disengagement from the conference and strong unilateral positions of each EU Member State had a counter-effect on confirming the EU's true spirit of effective multilateralism.

In a positive light, the EU has on occasion been able to move beyond the entrenchments of the North–South/regional bloc divide by adapting its own profile to the political climate. As a result, it has been able to demonstrate that cross-regional coalition-building is possible. What is more is that this very far-reaching multilateral behaviour proved to show that by adapting to the evolving climate of the governance structures concrete and successful results can be achieved in the Union. This was most aptly observed in the negotiations on a moratorium on the death penalty.

The conditions shaping the EU's contributions to UN multilateralism as well as its position in UN governance by and large have the capacity to be improved with the Lisbon Treaty.

4.2. Looking to the future: EU 'effective multilateralism' after the Lisbon Treaty

This volume's approach to examining the EU's position in UN human rights and environmental bodies uncovered a number of factors that hinder the EU's optimal central position in the given bodies. This exercise, in tangent, revealed insights into areas the EU needs to improve to be a more successful and influential multilateral actor in the UN system. In the previous section, research gaps were identified that generated from the application of the interdisciplinary framework. Here, we transform those gaps into policy-relevant recommendations for the EU, while taking into account the phasing in of the institutional innovations brought forth with the Lisbon Treaty, at the UN level, most notably the institutionalization of the European External Action Service (EEAS), alongside the EU's enhanced rights at the UNGA. The following recommendations, we believe, have the capacity to enhance the EU's position in the UN, which as a result, may positively impact on its contributions to UN multilateralism.

Although it is too early to come to any, even preliminary, conclusions on its effects, the Lisbon Treaty carries potential to enhance the EU's actor capacity and role as a multilateral player in the UN system through the institutional innovations of the High Representative and the EEAS. Several central opportunities for making the EU a stronger actor can be identified.

First, as already observed in New York and Geneva, the EU delegations are incrementally taking the lead role in chairing internal coordination meetings and delivering statements on behalf of the EU on certain human rights issues. It is expected that once these delegations reach their full capacity, more resources and efforts can be placed on outreaching activities to external partners than in the past, when the EU Presidency struggled with

coordinating the positions of the Union's Member States and often had little time to dedicate to negotiation with partners.

Second, as the EEAS is built upon nearly 140 EU delegations around the world, it provides the EU with the space and time to concretely build relationships with governments in host countries. By identifying common areas of concern and genuine commitments to given causes, these bilateral relationships may be translated at the multilateral level when seeking partners to push forward initiatives of common interest. A key to this, as expressed in Chapter 4, is that the ownership of the initiatives be truly collective.

Third, the EEAS could generally be implicated in the design of the EU's outreach strategy in the human rights and environmental domains. While the organizational set-up of the service, with its regional rather than thematic departments, makes this exercise intricate, the 'Global and Multilateral Affairs' unit of the EEAS could play a lead role in the design of foreign policy strategies for international negotiations under UN auspices in locations other than New York or Geneva.

Drawing on Section 3, there is strikingly a deep-rooted policy implication with the identified research gaps, and policy recommendations can be formulated on each of them. The first gap concerned the political climate and external environment the EU operates in. The Union needs to find better ways to adapt to and/or shape the evolving global governance contexts in the UN. In less politically sensitive areas, this may be easier to attain than in highly politicized domains such as human rights or climate change. A lesson learned exercise could be adopted in this respect, using the negotiations on a Moratorium on the Death Penalty as an example in which the EU recognized it needed to adapt to the political climate by lowering its profile in the negotiations.

However, as this was achieved by a small(er) Member State holding the EU Presidency, namely Portugal, it remains to be seen whether the EEAS, being a new actor with limited diplomatic history in the UN sphere compared to other actors, can make such strategic moves in the observed politically charged environments. At the same time, the absence of such a diplomatic history and a new presence may ideally offer an opportunity to incrementally rejuvenate the EU as an international actor at the UN, exploiting synergies among the Member States, and avoiding the necessity to make last-minute adjustments to a normatively charged environment that had been known beforehand.

This digresses to the second gap, which is that the EU struggles in external coalition-building exercises. This probably has some of the most important policy implications both in the context of the EU's position and contribution to UN multilateralism. Building upon what was said above about the EU delegations and the EEAS, the Union should make greater use of its bilateral relationships at the multilateral level. With the EU's primary efforts at present being placed towards internal coordination, the resources

that will soon be available in general, but specifically in Geneva and New York, should help to rectify this shortcoming, and the Union will need to allot the time and resources to external coalition-building. It is via such efforts at seeking partners that the EU could gain the necessary support and establish durable relations around various issues, which can play out positively in a UN context. The EEAS seems much better placed to perform these synergetic efforts than the rotating Presidencies in the past.

The last identified research gap concerned the use of EU foreign policy instruments. Interestingly, the EU possesses a large toolkit in the fields of human rights and the environment of diplomatic, legal and financial instruments, but does not use them to their full potential to further its objectives or position in the UN. This widely neglected area requires attention. First, a best-practice exercise should be conducted between relevant DGs and directorates of the Commission and the EEAS to see where instruments have had a positive impact in EU external relations. The EEAS and EU delegations have a large role to play in this regard, especially with respect to providing information on how instruments have been employed in the EU's relations at the bilateral level, including summits and the degree to which they have advanced bilateral agreements. The EEAS could, moreover, help the Union to become a more strategic actor in the multilateral system by gaining an oversight of other parties' strategies and identifying possible issue linkages.

When discussing the EU's past and future external relations strategy in a UN context, it is imperative to address the Union's recent upgrade towards enhanced observer status in the UNGA. Interestingly, where the findings of this volume suggest that legal status is not the most significant determinant of its actual performance, the Union fervently insisted on bolstering its status in this body, primarily for political and symbolic reasons, with the aim of demonstrating to the wider world its new foreign policy capacities after the entry into force of the Lisbon Treaty. For the time being, and despite the resolution being adopted, this intiative has casted rather a negative than a positive light on the EU, in several regards. For one, in light of the results of this volume, one can question the original objective of the initiative. Clearly, attaining stronger external representation of the EU through the President of the European Council, the High Representative and the Union Delegations follows the spirit of the new treaty. Yet, the diplomatic damage it did in attaining these symbolic advances in the process of negotiating the resolution – after a failed first attempt in September 2010 (Emerson and Wouters 2010) – stands in no adequate relation to what was to be gained. More significantly, however, the EU did not attain its original objectives: while it essentially only assured the right to speak behind its name plate, it 'accepted to remain in the backseat (...) behind its member states, cementing a long-standing (...) modus operandi in the UNGA', as the resolution holds that it may still only voice its views if its own Member States agree to it

(Wouters, Odermatt and Ramopoulos 2011, p. 4). In short, the EU invested much political capital for little gain. If the EEAS is used to its full potential, coordinating Union positions and providing a greater understanding of its negotiation partners' positions, one can expect that such unpleasant diplomatic experiences may be avoided in the future.

The research gaps and corresponding policy recommendations emerging from the application of the interdisciplinary framework in the examination of the EU in UN human rights and environmental fora demonstrate that future interdisciplinary research is indispensible from both a policy and an academic perspective. Such an exercise not only advances our understanding of the EU's participation and position in these two policy fields, but also of the EU's contribution to UN multilateralism as a whole. Moreover, with the Union's increasing participation in global multilateral bodies, such an assessment process should not stop here, but extend into equally significant policy fields such as global security challenges and international development.

Notes

1. In fields in which the EU holds exclusive competences, which fall outside the scope of this volume, the picture may look differently.
2. Actor capacity is highly developed when the EU possesses extensive competences and is able to forge coherent positions, which necessitate little coordination and are defended via an effective representation arrangement.

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