Prieur and *Avianca* are a new stage of a 40-year-long process of liberalization of the French law of judgments. It will now be interesting to observe how the new *Avianca* test will be applied by French courts.

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II. THE ACCESSION OF THE EUROPEAN COMMUNITY TO THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

A. Introduction

On 3 April 2007, the European Community (EC) became the 66th[1] Member of the Hague Conference on Private International Law (HCCH). This event marks the beginning of a new third phase in the 114-year-long history of the HCCH and a new era in the cooperation between the two organizations. This article gives an overview of the developments that led to the EC's request for accession and discusses the legal and political issues that had to be resolved.

B. The Historical Development Leading to the EC's Request for Accession

Today, the HCCH is an intergovernmental organization with its own legal personality under public international law. Its 'constitution', the 'Statute',[2] adopted in its initial form in 1951, entered into force in 1955 and remained unchanged for over 50 years until it was revised in order to make it possible for the EC (and other regional economic integration organizations (REIOs)) to become Members of the Hague Conference. The Conference, however, dates back much further than 1951: its First Session took place in 1893. Six more Sessions were held in 1894, 1900, 1904, 1925 and 1928. At that time, there was no permanent secretariat or other structure that continued to exist between the Sessions, and the Sessions were prepared by the Netherlands Standing Government Committee on Private International Law. After World War II, the Conference convened again in 1951, and it was at that Eighth Session that it was given a Statute, which equipped it with legal personality and a permanent secretariat, the so-called 'Permanent Bureau'. Over the years, the number of diplomats serving at the Permanent Bureau gradually grew from one to five (since 2002), and the number of Member States grew from eight (on 15 July 1955[3]) to 47 (1 May 1999[4]) and further to 65 (1 April 2007[5]), but the Statute remained unchanged. Towards the end of the 20th

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[1] Montenegro had submitted a declaration of succession to Yugoslavia's acceptance of the Statute on 1 March 2007, but succession was only established retroactively (with effect as of 1 March 2007) on 15 May 2007. Today HCCH counts 67 Members.

[2] For the text of the Statute in its 1951 version as well as in its amended version, see the HCCH website at <http://www.hcch.net> under 'Conventions'.

[3] Entry into force of the Statute.

[4] Entry into force of the EC Treaty as revised by the Treaty of Amsterdam, [1997] OJ C 340/1 (Amsterdam Treaty), the relevance of which will be discussed below.

[5] Day on which the EC joined the HCCH (but see also n 1).

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century, however, increasing European integration made it necessary to reconsider the situation.

The mandate of the HCCH is 'to work for the progressive unification of the rules of private international law'.[6] Over the years, this was done mainly by elaborating conventions on international jurisdiction to adjudicate, and the recognition and enforcement of judgments in civil and commercial matters, on applicable law and on international judicial and administrative cooperation.[7] As among any other States, these matters were a subject of intergovernmental cooperation until 1999 among EC Member States. As a result, during negotiations in The Hague each Community Member State could act independently. This changed, however, with the entry into force of the Amsterdam Treaty revising the EC Treaty on 1 May 1999 and some subsequent developments. The Community was now entitled to enact secondary Community legislation on private international law matters.[8] Although there is no explicit rule on *external* Community competence (for relations with third States) in the Treaties, following the case law of the European Court of Justice[9] the existence of *internal* competence also has consequences for the *external* competence: if and to the extent that there exists internal Community law for a certain subject-matter, the Community acquires external competence for international instruments covering the same scope, which might affect these internal rules. Even if such Community law is not yet in place but *could* be enacted because there is internal competence over a certain subject-matter, a decision of the Council under Article 300 of the EC Treaty that external Community competence should be exercised by way of concluding a treaty between the Community and one or more third States on such matter might have the same effect.

This shift of competences had a second consequence: as the private international law relations between the EC Member States were more and more covered by EC legislation, Hague Conventions lost their importance for this particular area in their mutual relations. However, this loss of relevance was compensated for by the increasing importance of these Conventions on a worldwide level, including the relations between EC Member States and other 'global players' like the US, Russia or China.

The project under negotiation at the HCCH at the time of the entry into force of the Amsterdam Treaty was the so-called 'Judgments Project'—negotiations for a global convention on jurisdiction, recognition and the enforcement of judgments in civil and commercial matters.[10] Between 1997 and 1999 a Special Commission elaborated a

[6] Art 1 of the Statute.

[7] For a list of the 36 Conventions elaborated since 1951 and their respective status of signatures, ratifications and accessions, see <http://www.hcch.net> under 'Conventions'.

[8] Art 61 et seq, in particular Art 65, of the Amsterdam Treaty (n 4).

[9] See in particular Case 22/70 *Commission v Council* [1971] ECR 263; Opinion 1/76 *European laying-up fund* [1977] ECR 741; Opinion 1/94 *WTO* [1994] ECR I-5267 and the Open Skies decisions: Cases C–467/98 *Commission v Denmark* [2002] ECR I-9519; C–468/98 *Commission v Sweden* [2002] ECR I-9575; C–469/98 *Commission v Finland* [2002] ECR I-9627; C–471/98 *Commission v Belgium* [2002] ECR I-9681; C–472/98 *Commission v Luxembourg* [2002] ECR I-9741; C–475/98 *Commission v Austria* [2002] ECR I-9797 and C–476/98 *Commission v Germany* [2002] ECR I-9855; Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

[10] On the origins of the project, see PH Pfund, 'Contributing to Progressive Development of Private International Law, The International Process and the United States Approach' (1994) 249 Recueil des cours 9, 83; A Schulz, 'International Organizations: The Global Playing Field for US–EU Cooperation in Private Law Instruments' in RA Brand (ed), *Private Law, Private International Law, & Judicial Cooperation in the EU-US Relationship* (Thomson West, Eagan, Minnesota, 2005) 257.

'preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters',[11] which was adopted by vote in October 1999 in accordance with the Hague Conference's Rules of Procedure. A Diplomatic Session was expected to adopt the Convention in 2000. An important number of HCCH Member States felt, however, that open issues such as the impact of the Internet on traditional jurisdiction rules and issues of intellectual property required further discussion. Moreover, it was felt that voting—which in the past had often produced rather narrow majorities, leaving a large number of delegations unsatisfied—was no longer appropriate. Consequently, following almost two years of informal discussions, a 'First Part of the Nineteenth Diplomatic Session' reconsidered the draft in June 2001, but the resulting text was still far from reflecting consensus. The Special Commission on General Affairs and Policy[12] in April 2002 invited the Permanent Bureau to explore, assisted by an informal working group of experts representing different legal traditions and the global membership of the Conference, how consensus could be established on a more limited number of jurisdictional bases. The group held three meetings in 2002 and 2003 and produced a draft which was limited to choice-of-court agreements in business-to-business (B2B) cases. The 2003 Special Commission on General Affairs and Policy agreed that this draft could form a useful basis for formal negotiations, which was confirmed by further consultations carried out by the Secretary General of the Hague Conference. Two Special Commissions were held in December 2003 and April 2004, and a preliminary draft Convention on Choice of Court Agreements was adopted by consensus. A Diplomatic Session to finalize the Convention was convened for June 2005.

At the same time, in the EC negotiations aiming at a revision of the Brussels Convention[13] had taken place between 1997 and 1999. On 27 May 1999, shortly after the entry into force of the Amsterdam Treaty, the Council on Justice and Home Affairs adopted the substantive results agreed upon by the working group charged with the revision and, in light of the new legislative powers of the Community, invited the Commission to submit a proposal for a Community instrument reflecting these results. The Commission presented its proposal in July 1999,[14] and on 1 March 2002 the Brussels Convention was replaced by Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[15] In light of the ECJ case law mentioned above, at that moment

[11] The text of the preliminary draft Convention 1999 and its Explanatory Report by P Nygh and F Pocar have been published in Preliminary Document No 11, available at <http://www.hcch.net> under 'Conventions', 'Convention 37' and 'Preliminary Documents'. For further details, see the Report, ibid 25 et seq.

[12] This is the Conference's steering body which has been meeting annually since 2002 and decides upon the work programme and policy directions of the Conference between Diplomatic Sessions. Under the new Statute it is called 'Council on General Affairs and Policy'.

[13] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, [1998] OJ C 27/1.

[14] See Proposal of the Commission, COM(1999) 348 final, 14 July 1999, [1999] OJ C 376/1.

[15] [2001] OJ L 12/1. Upon its entry into force, the Regulation applied for 14 of the then 15 EC Member States (except Denmark). Since 1 May 2004, the Regulation also binds the 10 new Member States that joined on that date, and since their accession to the EC on 1 January 2007 also Bulgaria and Romania. The Brussels Convention was, however, still in force between Denmark, which due to Protocol No 5 to the EC Treaty as revised by the Treaty of Amsterdam is not bound by Community law in this area, and the 14 EC Member States Parties to it. An agreement between the Community and Denmark along the lines of the Brussels I Regulation replaced it on 1 July 2007, [2005] OJ L 299/62 and [2007] OJ L 94/70.

no further doubts could persist about the existence of external Community competence for the ongoing negotiations in The Hague. The only question remaining was as to its scope: exclusive or rather shared or mixed Community competence?[16]

This meant that the negotiations on the 'Judgments Project' in The Hague, from the entry into force of the Amsterdam Treaty in May 1999 until the change of focus to a Convention on Choice of Court Agreements in 2003, had seen a gradual shift from exclusive Member State competence to (probably exclusive) external Community competence for the—at first very large, later more narrow—topic under negotiation.[17] The practical consequences were rather limited in the first place because the Community, which had always been invited to attend HCCH meetings since it was created in 1957,[18] was being treated like a de facto Member. The fact that in HCCH meetings observers (including non-Member States, intergovernmental organizations and non-governmental organizations)—and not only delegations of Member States—have always also been entitled to submit proposals and participate in the discussion also helped. Formally speaking, however, the EC only enjoyed the capacity of an observer. It did not have a right to vote while its Member States, whose delegates had the right to participate in the discussions and to vote[19] in The Hague, had lost part or all of their competence for the matters under discussion to the Community. This situation was perceived as increasingly odd. Therefore, in December 2002, in a letter cosigned by the then Commissioner for Justice and Home Affairs, Antonio Vitorino, and the Minister of Justice of Denmark, Lene Espersen, on behalf of the then Presidency of the Council of the European Union, the EC applied for membership of the Hague Conference. This required an amendment of the Statute because membership was only open to States.

C. Issues that Had to be Resolved Before the EC's Accession to the Hague Conference

On 30 June 2005, the Twentieth Session of the HCCH unanimously adopted a number of amendments to the Statute. The most important one is the insertion of a new Article 3, which enables REIOs to become Members of the Conference:

> *Article 3*
> 1. The Member States of the Conference may, at a meeting concerning general affairs and policy where the majority of Member States is present, by a majority of the votes cast, decide to admit also as a Member any Regional Economic Integration Organisation which has submitted an application for membership to the Secretary General. References to

[16] In the meantime, on 7 February 2006 the ECJ, upon request of the Council, issued its Opinion on external Community competence for the revised Lugano Convention (n 9) from which it may be concluded that also for the negotiation and conclusion of the Convention on Choice of Court Agreements there is exclusive Community competence.

[17] For a detailed discussion of the development of external Community competence during these negotiations and its impact on them, see the second part (written by the author of this article) of H van Loon and A Schulz, 'The European Community and the Hague Conference on Private International Law' in B Martenczuk and S van Thiel (eds), *Justice, Liberty, Security: New Challenges for the External Relations of the European Union* (Institute for European Studies of the Free University of Brusssels, Brussels, forthcoming 2007).

[18] See already the list of observer organizations including the EEC in the *Actes et Documents de la Neuvième session—5 au 26 octobre 1960, Tome I, Matières diverses*, 15.

[19] This distinction to a large extent lost its importance when the Conference moved to consensus-based negotiations in 2000.

> Members under this Statute shall include such Member Organisations, except as otherwise expressly provided. The admission shall become effective upon the acceptance of the Statute by the Regional Economic Integration Organisation concerned.
> 2. To be eligible to apply for membership of the Conference, a Regional Economic Integration Organisation must be one constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters within the purview of the Conference, including the authority to make decisions binding on its Member States in respect of those matters.

This text—as well as the other amendments adopted—had been carefully prepared over a period of two and a half years within the institutional framework of the HCCH. Following receipt of the EC's request for admission in December 2002, the issue was put before the Special Commission on General Affairs and Policy of the Conference in April 2003. The meeting agreed that the Secretary General of the Hague Conference would convene an informal advisory group of experts, including persons with experience in public international law as well as in the work of the Conference, representing various regions of the world and different legal systems, which would examine the issues linked to the request, and assist him in the preparation of recommendations for the next meeting of the Special Commission in April 2004.[20] The informal advisory group,[21] chaired by the Ambassador of China to the Netherlands, Mrs Xue Hanqin, first met in January 2004. The Secretary General reported back to the Special Commission on General Affairs and Policy in April 2004, and the meeting unanimously decided that, as a matter of principle, the EC should become a Member of the Conference. The Secretary General was invited,[22] with the assistance of the informal advisory group and in consultation with the European Commission, to draw up a complete proposal for the spring 2005 meeting of the Special Commission, which was adopted by the latter with few modifications following an extensive debate.[23] The Twentieth Session, held from 14 to 30 June 2005, which had convened with a view to adopting the Convention on Choice of Court Agreements, also dedicated a considerable amount of time to the finalization of the amendments of the Statute and eventually adopted them as they are now set out in Part C of the Final Act.[24]

1. The term 'regional economic integration organization (REIO)'

During the Diplomatic Session, a number of old and new concerns of non-EC Member States of the HCCH had to be addressed. Russia and China were both unhappy with the term 'REIO' and its definition, but for different reasons. Russia, supported by the observer from the Eurasian Economic Community,[25] suggested replacing 'REIO' by

[20] See the Conclusions of the Special Commission, available at <http://www.hcch.net> under 'Work in Progress', 'General Affairs', 10.

[21] The group included, in addition to its Chair, diplomatic representatives, government officials, judges and academics from Australia, Belgium, Brazil, Canada, Egypt, France, Germany, Italy, Japan, Netherlands, Russia, Spain, Sweden, the United Kingdom, and the United States of America, as well as representatives of the European Community.

[22] See Conclusions of the Special Commission on General Affairs and Policy of the Conference held from 6 to 8 April 2004, available at <http://www.hcch.net> under 'Work in Progress', 'General Affairs', 10.

[23] See Preliminary Document No 32B of May 2005 for the attention of the Twentieth Session, available at <http://www.hcch.net> under 'Work in Progress', 'General Affairs'.

[24] Available at <http://www.hcch.net/upload/finalact20e.pdf>.

[25] The Eurasian Economic Community counts Belarus, Kazakhstan, Kyrgyzstan, Russia,

'international organization', arguing that even the EC, whose request had triggered these negotiations, was no longer limited to 'economic' issues. Moreover, it was argued that the term would exclude organizations that transcend regional boundaries, such as the Eurasian Economic Community. The meeting decided, however, to retain the term 'REIO', which had already become a term of art and was used in other Conventions, such as the Constitution of the United Nations' Food and Agricultural Organization (FAO), which had equally been amended to enable the EC to become a Member.[26] The Diplomatic Session stressed that the terms 'regional' and 'economic' only described the minimum requirements that the candidate organization has to fulfil. Extension beyond regional boundaries, or beyond economic matters, would not have a negative impact on its eligibility for HCCH membership. Finally, and most importantly, the meeting held that the term 'international organization' was not specific enough in the context at issue here. It is not limited to organizations to which their Member States have *transferred* competences which, as a consequence, they no longer possess themselves, while the REIO is now in a position to take decisions directly binding its Member States. As a sort of compromise, however, a definition of the term 'REIO' was added in paragraph 9 of Article 3, and it contains the term 'international organization', which is then further qualified in order to define under which circumstances an international organization becomes an REIO:

> 9. 'Regional Economic Integration Organisation' means an international organisation that is constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters.

While Russia was concerned that the concept of 'REIO' might be too narrow, China was worried that it might be too wide. At the Diplomatic Session in 2005, the Chinese delegation strongly insisted that the criterion of eligibility for HCCH membership in Article 3(2), which followed the precedent of the FAO Constitution, should be limited to organizations constituted *solely* by sovereign States, while the word 'solely' was lacking in the precedent. China, obviously concerned about the possibility of an Asian or Asian-Pacific REIO to which Taiwan would have been admitted, insisted upon the inclusion of the word 'solely' in an effort to exclude any such organization from future membership of the Conference. This proposal was accepted, although it is not entirely clear what the content of the rule agreed upon actually is. The ambiguity arises from the use of the word 'constituted': some delegates stated for the record that they understood this as meaning 'established' or 'created', so that the moment of the creation of the REIO is decisive. In more concrete terms: should Taiwan join an REIO later which was originally founded solely by sovereign States, according to this first interpretation, the REIO would be eligible for HCCH membership. Others, however, stated that they understood

Tajikistan and Uzbekistan as its Members. Armenia, Moldova and Ukraine are observers. It is a trans-regional organization mainly focused on economic matters but which also addresses other issues, eg the development of common guidelines on border security.

[26] See Basic Texts of the Food and Agricultural Organization of the United Nations, Volumes I and II-2006 edition, Vol I, A, Constitution, available at <http://www.fao.org/docrep/009/j8038e/j8038e00.htm>. Further examples of the use of the term 'REIO' in 'ordinary' conventions other than constitutions of intergovernmental organizations include the Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (Art 18) and the UNIDROIT Convention of 16 November 2001 on International Interests in Mobile Equipment (Art 48).

'constituted' as a synonym of 'composed' or 'consisting of' and thus referring to the composition at any given moment. Under this view, an REIO composed solely of sovereign States would lose its eligibility for HCCH membership as soon as Taiwan joins it.

Finally, it is worth mentioning that in one respect the definition of REIOs eligible for HCCH membership is considerably wider than its FAO precedent. While under the FAO Constitution, all of the Members of the REIO must be Members of FAO in order for the REIO to be eligible for membership, this was not taken up in the HCCH Statute—not even in the more limited form of a minimum number of REIO Member States that must be Members of the Hague Conference. Although all current EC Member States are Member States of the Conference, the EC strongly insisted on this point and received support from other regions of the world where only this difference in wording might in fact enable an REIO to be eligible for HCCH membership.

2. Distribution of competences between the REIO and its Member States

Other concerns raised at the Diplomatic Session had already given rise to considerable discussion at earlier meetings. They related to three aspects, in particular: the distribution of competences between the REIO and its Member States; the exercise of membership rights, in particular meeting participation and voting; and the financial aspect of membership. The text adopted with regard to the first aspect—distribution of competences between the REIO and its Member States—for Article 3 of the Statute reads as follows:

> 3. Each Regional Economic Integration Organisation applying for membership shall, at the time of such application, submit a declaration of competence specifying the matters in respect of which competence has been transferred to it by its Member States.
> 4. Each Member Organisation and its Member States shall ensure that any change regarding the competence of the Member Organisation or in its membership shall be notified to the Secretary General, who shall circulate such information to the other Members of the Conference.
> 5. Member States of the Member Organisation shall be presumed to retain competence over all matters in respect of which transfers of competence have not been specifically declared or notified.
> 6. Any Member of the Conference may request the Member Organisation and its Member States to provide information as to whether the Member Organisation has competence in respect of any specific question which is before the Conference. The Member Organisation and its Member States shall ensure that this information is provided on such request.

During the preparatory discussions, this was the issue which raised the greatest political, legal and practical difficulties. Traditionally, when a new Convention is being negotiated at the Hague Conference, negotiations start at a rather informal level. A Special Commission open to all Members and Observers is convened with a view to preparing a preliminary draft Convention. At this stage, participants are considered as 'experts' on the subject-matter rather than as 'government representatives'. Only at the Diplomatic Session, when the Convention is finalized and adopted, do participants turn into 'delegates' and 'representatives', expressing official government positions. Nevertheless, a number of non-EC States stressed that throughout the course of the negotiations they would need to know who is competent to negotiate on a particular issue, and also to commit to a binding text in the end—the Community or its Member States. This is ensured by the rules contained in Article 3, paragraphs 3–7 of the amended Statute. The initial declaration of competences required by paragraph 3 was

submitted by the EC when it joined the Hague Conference on 3 April 2007.[27] Any changes will have to be notified under paragraph 4, and the default rule in paragraph 5 contains an important presumption: EC Member States shall be presumed to retain competence on matters not covered by any declaration of a transfer of competence under paragraphs 3 and 4.

This should already provide a sufficient framework for EC participation in Hague negotiations.[28] Should any doubts nevertheless arise, paragraph 6 entitles other Members of the Hague Conference to request clarification from the REIO and its Member States, and obliges them to provide such information. The question of whether this request may be addressed to 'the REIO *and* its Member States', or rather 'the REIO' or 'the REIO *or* its Member States', gave rise to considerable debate. Several non-EC delegations urged for a rule leaving them as wide a choice as possible whether to ask the REIO, one or more Member States or all of these. The Community, on the other hand, pleaded for 'the REIO' because, it was argued, if one or more EC Member States were asked and responded, their response would not necessarily be within their remaining sphere of competence and would not commit the Community. Different States might even give contradictory responses. The result now allows the question to be put to both the EC and its Member States, and it will be a matter of Community law to establish the competence for and content of the response.

3. Exercise of membership rights

In the course of the discussions it was proposed that the EC and its Member States should participate in meetings on an alternative basis, depending on the respective attribution of competences. This might be theoretically feasible in the case of exclusive Community competence or exclusive Member State competence. However, the topics under negotiation at the Hague Conference might also fall into the area of shared or mixed competence, and during the negotiations these issues are normally all interrelated and intertwined. This makes it almost impossible to arrange alternating participation, even though already under the old Statute with the EC attending in an observer capacity, regular EC coordination meetings were held (sometimes on a daily basis) in

[27] See the Declaration available at <http://www.hcch.net> under 'Conventions', 'Statute of the Hague Conference', 'Status Table'. In the list of Members, click on the 'D' in the row concerning the European Community.

[28] Art II, paras 5–8 of the FAO Constitution, available at <http://www.fao.org/docrep/009/j8038e/j8038e00.htm>, provided the basis for these rules. However, the FAO General Rules of the Organisation (Art XLI, ibid), the Provisional Guidelines for the participation of the EC in FAO meetings (available on the website of the Hague Conference at <http://www.hcch.net/upload/wop/genaff_pd21be.pdf>, 18–23) 1–6, and the Rules of Procedure of the Codex Alimentarius Commission (CAC), Rule II (available at <ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual_15e.pdf>, 6–19, 6–7), a body jointly constituted by FAO and WHO, regulate in considerably more detail how within the FAO and the CAC the REIO/EC competences must be declared and exercised. Under these regulations there is an obligation for either the REIO or its Member States to indicate, preferably at least two working days before any meeting, which has competence in respect of each agenda item; failure to do so will prevent the EC from participating in the meeting. Such level of detail was considered impractical for evolving negotiations of a legislative character as they take place within the Hague Conference, in particular in light of the fact that any resulting Convention will also require a subsequent decision on signature and ratification, or accession, by any potential future Party, thereby necessarily requiring approval of the Council of the European Union.

order to enable the EC Member States to present a common position wherever so required by Community law. Notwithstanding these coordination meetings, it would, however, be very difficult for a delegate who is only allowed to participate in certain parts of the negotiations to make informed contributions. Most delegations, moreover, considered that such a rule would result in a great loss for the discussions. As explained above, traditionally the experts participating in Hague Conference negotiations express themselves quite freely, and the richness of the discussion and views expressed is one of the assets of the Conference, perceived to ensure full information and thereby make it possible to achieve consensus. In light of this prevailing view, the following paragraph 7 was added to Article 3:

> 7. The Member Organisation shall exercise membership rights on an alternative basis with its Member States that are Members of the Conference, in the areas of their respective competences.

The words 'including participation in meetings' which the United States had proposed to insert after 'membership rights' were not inserted, and therefore it can be concluded *e contrario* that the principle of non-additionality, which is expressed in paragraph 7, does not apply to the participation as such.[29] It does in principle apply, however, to other expressions of membership rights, such as election for certain offices or participation in drafting committees or working groups. Nevertheless, it is expected that it will be handled with some flexibility in light of the practical aspects mentioned above, and positive experiences with participation of both Community and Member States' representatives in the past.

The right to vote, however, is not governed by paragraph 7. Paragraph 8 contains a special rule on this:

> 8. The Member Organisation may exercise on matters within its competence, in any meetings of the Conference in which it is entitled to participate, a number of votes equal to the number of its Member States which have transferred competence to the Member Organisation in respect of the matter in question, and which are entitled to vote in and have registered for such meetings. Whenever the Member Organisation exercises its right to vote, its Member States shall not exercise theirs, and conversely.

In this context, it has to be recalled that a new paragraph 2 was added to Article 8 (former Article 7) of the Statute:

> 2. The Sessions, Council and Special Commissions shall, to the furthest extent possible, operate on the basis of consensus.

The Conference's Rules of Procedure were amended accordingly. Both amendments were made with a view to reflecting a practice that has developed since 2000. While, until then, the last meeting of a Special Commission used to adopt by vote a 'prelimi-

[29] It is worth mentioning in this context that in practice it is not so much the fact of the EC being a Member of the Hague Conference or not which has determined meeting participation of EC Member States in recent times. Community external competence seems to be the decisive factor, and some smaller (new) EC Member States which perhaps do not feel strongly about a particular topic have now sometimes limited their involvement to participation in the EC coordination meeting(s) in Brussels prior to the meeting in The Hague without then sending a delegate to The Hague. Other (older and larger) EC Member States have sometimes preferred to reduce their participation in HCCH meetings after having realized that their position was not shared within the EC and therefore not presented in the plenary discussions. Community discipline would prevent them from raising their position in plenary themselves.

nary draft Convention' to be put before a Diplomatic Session, since 2000 the Conference has worked on a consensus basis. Nevertheless, the 2005 Session considered it important to retain the possibility of taking a vote as a fall-back option in the Rules of Procedure, and in this context it had to be decided whether a Member REIO should have a right to vote, and how this should relate to the voting rights of its Member States. Positions ranged from the extreme 'one vote' option, giving the Community one vote and doing away with the voting rights of EC Member States for such matter, to the Community requesting as many votes as it has Member States. Arguments raised against the 'one vote' option were largely the same as for the exercise of membership rights mentioned above. Moreover, it was highlighted that the 'one vote' rule would necessarily have to have financial implications, namely that instead of the individual contributions of the EC Member States one single (and most likely much lower) contribution by the EC might have to be envisaged. The main argument against the EC proposal for a number of votes equal to the number of EC Member States, on the other hand, was that this would discourage EC Member States from participating, which would constitute a loss for the debate.

In the end, the principle of non-additionality prevailed also on the issue of voting. As far as they have retained competence, the EC Member States retain their individual voting rights and the EC does not obtain a voting right of its own. In case of Community competence over a certain subject-matter, however, the Community may exercise a number of votes equal to the number of EC Member States having registered for the meeting. They need not actually be present at the time of voting (unlike, for example, at WIPO[30]) but mere EC membership is not enough either (as is the case in FAO meetings).

4. Financial aspects of membership

Article 9 of the amended Statute reads as follows:

> 1. The budgeted costs of the Conference shall be apportioned among the Member States of the Conference.
> 2. A Member Organisation shall not be required to contribute in addition to its Member States to the annual budget of the Conference, but shall pay a sum to be determined by the Conference, in consultation with the Member Organisation, to cover additional administrative expenses arising out of its membership.
> 3. In any case, travelling and living expenses of the delegates to the Council and the Special Commissions shall be payable by the Members represented.

Here again, we see the principle of non-additionality reflected in paragraph 2. Although this is not a requirement for the REIO to be eligible for membership, all current EC Member States are Members of the Hague Conference, and they pay membership contributions to the Conference. The EC will not have to pay a membership contribution of its own but only a sum compensating the Hague Conference for additional administrative expenses arising out of its membership. Such expenses could include, for example, the rent for additional meeting space for EC coordination meetings. The fact that the EC is not obliged to pay a full membership contribution goes along with the fact that only Member *States* of the Conference—and not also Member

[30] The WIPO Rules of Procedure require the actual presence of the EC Member States at the time of voting. This may be explained by the fact that the EC is not a Member of WIPO but WIPO's Rules of Procedure nevertheless take account of Community external competence.

Organizations—are entitled to decide about the admission of new Members (Articles 2(2) and 3(1)) and about the Conference's budget (Article 10).

D. Concluding Remarks

The accession of the EC to the Hague Conference opens a new chapter for both organizations. For the Hague Conference, after a first phase without its own legal personality and permanent structure followed by a second phase where it obtained legal personality and welcomed a growing membership of States, a third phase has begun which has opened the Conference to membership of REIOs. For the EC, the accession to the Hague Conference brings the transition phase which has lasted since 1999 to an end. That period was dominated by the struggle to establish, enlarge and consolidate external Community competence for private international law matters and come to an operable working method with the Member States so as to become a proactive player in international negotiations. The unanimous creation of an institutional framework for such cooperation within the one global organization whose mandate it is to work for the progressive unification of private international law is a promising starting point for future cooperation between the two organizations. In this context it is worth noting that in the declaration deposited upon its accession to the Statute on 3 April 2007[31] the EC has declared that it 'endeavours to make participation possible of representatives of the Permanent Bureau of the Conference in meetings of experts organised by the European Commission where matters of interest to the Conference are being discussed', and this promise has already been put into practice.

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[31] Above, n 25.

* First Secretary at the Hague Conference on Private International Law, from January 2002 to June 2007; having, inter alia, primary responsibility for the negotiations which resulted in the Hague Convention of 30 June 2005 on Choice of Court Agreements. A more detailed discussion of the issues addressed in this article, in particular a detailed comparison with the precedent of the EC's accession to the United Nations' Food and Agricultural Organization (FAO), can be found in the first part (written by Hans van Loon, Secretary General of the Hague Conference) of van Loon and Schulz (n 17). The author greatly benefited from having access to this text.