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HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

PROJET DE RECOMMANDATION A LA VINGTIEME SESSION DE LA CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE RELATIVE A L'ADMISSION DE LA COMMUNAUTE EUROPEENNE AU SEIN DE LA CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE

NOTES EXPLICATIVES

établies par le Bureau Permanent

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DRAFT RECOMMENDATION TO THE TWENTIETH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW ON THE ADMISSION OF THE EUROPEAN COMMUNITY TO THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

EXPLANATORY NOTES

drawn up by the Permanent Bureau

Document préliminaire No 21B de février 2005
à l'intention de la Commission spéciale de mars / avril 2005
sur les affaires générales et la politique de la Conférence

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for the attention of the Special Commission of March / April 2005
on General Affairs and Policy of the Conference

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DRAFT RECOMMENDATION TO THE TWENTIETH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW ON THE ADMISSION OF THE EUROPEAN COMMUNITY TO THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

for the attention of the Special Commission on General Affairs and Policy of the Conference (31 March–1 April 2005)

EXPLANATORY NOTES

Introduction

1. These Notes provide explanation of the draft Recommendation to the Twentieth Session of the Hague Conference on Private International Law (Prel. Doc. No 21A) which the Special Commission on General Affairs and Policy at its March / April meeting may wish to adopt. The draft Recommendation consists of a package of six points:

Recommendation 1 –	amendments to the Statute;
Recommendation 2 –	establishment of an English version of the amended Statute equally authentic to the original French text;
Recommendation 3 –	a procedure for the vote on the amendments;
Recommendation 4 –	amendments to the "Rules of Procedure for Plenary Meetings";
Recommendation 5 –	concerning certain assurances to be given by the European Community;
Recommendation 6 –	concerning the decision to admit the European Community as a Member of the Conference.

2. This package may be completed by a further proposal for amendment of the Regulations on Budgetary Matters, following further discussions between the Conference and the Community on an annual "sum" to be paid by the Community to the Conference. A possible amendment of these Regulations could then, following Article 9 of the Statute, be submitted to the Council of Diplomatic Representatives.

3. The package and these Notes build on the work of the Special Commission on General Affairs and Policy at its 2003 and 2004 meetings and that of the Informal Advisory Group, chaired by H.E. Ambassador Xue Hanqin, at its meetings of 21-23 January and 16-17 December 2004. These meetings have led to a considerable amount of agreement among the participants, which has greatly facilitated the task of drawing up these Recommendations. However, certain issues have remained unresolved, which are reflected in the text by passages in square brackets.

4. In conformity with the decisions of the Special Commission of April 2004, the proposed amendments to the Statute (Recommendation 1) and the Rules of Procedure (Recommendation 4) are not restricted to the admission of the Community but allow for the admission of any Regional Economic Integration Organisation (REIO) to which its Member States have transferred competence on matters of private international law.

Recommendation 1 – Amendments to the Statute

Although the focus of the proposed amendments to the Statute is on opening Membership for REIOs (*infra* A), they go to some extent beyond this purpose, and, in conformity with the decisions of the Special Commission, also include revisions of some other provisions (*infra* B). However, these revisions are limited to making certain amendments to the text so that it conforms better to existing practices that have

developed since the Statute came into force nearly fifty years ago. They do not introduce any novelties, do not have any cost implications and are without prejudice to the possibility of further reform at a later stage. There was agreement in the Informal Advisory Group that further amendments at this stage would take more time, which in light of the primary aim of facilitating the admission of the European Community, was to be avoided.

For the sake of clarity, paragraphs of Articles have been numbered, and it is proposed to add those numbers as part of the amendments to the Statute.

A Amendments aimed at opening membership for REIOs

Article 2, paragraph 2: Article 2 applies to the admission of new Member *States* only; the proposed change puts that beyond doubt.

Article 2A:

Introduction

1. Article 2A applies to the admission of Member *Organisations*. It is based essentially on the precedents established at the Food and Agricultural Organisation – see Article II of the FAO Constitution; Rule XLI of the General Rules of the Organisation relevant to REIOs; Rule II of the amended Rules of Procedure of the Codex Alimentarius Commission (a joint FAO-WHO body) – (Annex 1).

2. The term "Regional Economic Integration Organisation" was adopted by the FAO at a time when the European Community's competences were still limited mainly to economic matters. Since these competences now also include other areas, the Informal Advisory Group discussed the possibility of a broader term, not restricted to REIOs. In the end, however, it preferred to follow the precedents of other international organisations such as FAO, because, in any event, the Community was also an REIO.

3. The question of how competences of the Community (and other REIOs) should and could be declared and exercised, and how it could be ensured that the necessary clarity is provided was the subject of lengthy discussions both in the Special Commission and in the Informal Advisory Group. There was agreement that some rules on declaration of competences of the Community or concerning the capacity in which the Community was speaking were necessary. On the other hand, such rules should not necessarily be of the level of detail of those of the Provisional Guidelines for the Participation of the Community in FAO meetings (Annex 2). The Informal Advisory Group felt that, on the whole and in principle, Article 2A presents a set of provisions that could well work for the Conference.

Paragraph 1: It is proposed, following the example of Article II, paragraph 3, of the FAO Constitution, that the application for membership by an REIO be submitted directly to the Secretary General (as has, in fact, already been done in the case of the European Community), as opposed to a proposal by a Member State as is the case for new Member States under Article 2 of the Statute of the Conference. This will enable the Secretary General to conduct consultations and organise a discussion of the application at a Diplomatic Session or a meeting of the Special Commission (in the future: Council, see Article 3 *infra*) on General Affairs and Policy. Since the idea of an agreement between the Hague Conference and the REIO applying for membership, which would of course have been discussed at a meeting of the Conference, was not retained, a discussion of the

application will be needed. A written voting procedure, as is the case for a new Member State, will not suffice. A vote could then be taken by a majority of the votes cast (the FAO Constitution requires a two-thirds majority), provided the majority of Member States is present.

Paragraph 2: this paragraph follows the example of Article II, paragraph 4, of the FAO Constitution. However, no unanimity was reached in the Informal Advisory Group concerning the words “a majority of which are Members of the Conference”.

> One view is that in a situation where an REIO has competence over a particular matter within the purview of the Conference, it is from a legal point of view irrelevant whether any of the Member States of the REIO are also Members of the Conference. According to another view, given that the main “product” of the Conference, the Conventions on private international law, depend for their implementation on courts, authorities and other officials of States, it may be problematical for an REIO to ensure in its relations to other Member States of the Conference that Convention obligations are fully implemented by States that are not themselves also Members of the Conference. Moreover, deleting these words may have financial consequences, since the REIO does not contribute to the budget.
>
> It should be noted, in the context of the admission of the European Community, that all Member States of the Community, and all the candidate Member States, are Members of the Conference.

Paragraph 3: *cf.* Article II, paragraph 5, FAO Constitution.

Paragraphs 4-5: these paragraphs follow the example of Article II, paragraphs 7 and 6 respectively of the FAO Constitution. It remains to be resolved if, in paragraph 4, the words “and its Member States” (possibly: “*or* its Member States”, *cf.* Article II-7, FAO) should be maintained.

> In favour of including these words it is argued that it cannot be anticipated in advance that the REIO Member will have exclusive competence to speak for its Member States regarding the transfer of competence. Against, that no interest is served if the REIO Member and its Member States were to provide differing notifications; and that it is for such a Member Organisation and its Member States to co-ordinate their views on issues of competence.

Paragraph 6: this paragraph is inspired by Rule XLI, paragraph 1, of the FAO General Rules of the Organisation. Issues regarding the words “and / or its Member States”, similar to those in respect of paragraph 4, arise under this paragraph.

Paragraph 7: this paragraph follows the example of Article II, paragraph 8, FAO Constitution.

Paragraph 8: this paragraph is inspired by Article II, paragraph 10, of the FAO Constitution and Rule II, paragraph 3, of the Codex Alimentarius. It establishes the principle of “non-additionality”. The Rule, which also appears in the Rules of Procedure, will be of little practical importance in the Conference, since current practice, now also to be laid down in the Rules of Procedure as a Rule (Article 1A), is that decisions are taken by consensus. The words “and are present at the time when the vote is taken” are nevertheless controversial.

> One view is that where the Member Organisation acts within areas of its competence, it binds all its Member States regardless of their physical presence. Another view is that in the Conference, where Member States may not vote for each other (Article 2, paragraph 1, Rules of Procedure), votes, if taken, need to be informed votes.
>
> It may be noted that according to the Provisional Guidelines for the Participation of the Community in FAO meetings (Annex 2), the number of votes of the European Community depends on the number of Community Member States that, for a particular meeting, have complied with the necessary formalities (registration, presentation of credentials, etc).
>
> The practice in the Conference when votes were taken was that in any meeting of the Conference the vote would include only those States present at the time the vote was taken (*cf.* Article 3 of the Rules of Procedure).[1]

Article 4, paragraphs 1 and 2

The added language in paragraph 1 seeks to avoid a situation where all the lawyers-diplomats of the Permanent Bureau were to have the nationality of Member States of one and the same Member Organisation. The purpose of paragraph 1 is, in fact, as paragraph 2 says, to ensure diverse geographic and legal expertise.

Article 6

The device of a National Organ, with which the Permanent Bureau can communicate directly, has proven its great utility over the years. The added language seeks to create an equivalent liaison office for Member Organisations.

Article 8

Like Member States, Member Organisations are supposed to bear the travel and living expenses of their delegates when participating in meetings of the Conference. Hence the proposed substitution of the word **Members** for Governments at the end of the *first* paragraph.

The *second* paragraph is based on Article XVIII, paragraph 6, FAO Constitution. The Informal Advisory Group could not agree on the language between brackets.

According to Article XVIII, paragraph 6, of the FAO Constitution,

> "A Member Organization shall not be required to contribute to the budget (...), but shall pay to the Organization a sum to be determined by the Conference to cover administrative and other expenses arising out of its membership in the Organization. A Member Organization shall not vote on the budget."

[1] It should be noted, however, that according to Article 8 of the Regulations on Budgetary Matters "Member States, in arrears by more than two years in the payment of their contributions, lose their right to vote within the Council of Diplomatic Representatives, the Diplomatic Sessions and the Special Commissions. They recover this right on paying the entirety of contributions due from them."

It has not proven easy in the context of FAO to agree on the methodology for the determination of the "sum", and in fact, the FAO Conference has set, every two years since 1991, a lump-sum payment due by the European Community to cover administrative and other expenses arising out of its membership.

Additional cost factors caused by Community membership in the Hague Conference include costs of personnel, telecommunications, paper, representation and meeting facilities.

Article 9

It is proposed to add, in the second paragraph, the word **States** as Member Organisations are not required to contribute to the budget. Unlike Member States, Member Organisations will not, therefore, participate as voting Members in the annual meetings of the Council of Diplomatic Representatives. This does not exclude their participation in meetings of this Council where the sum covering administrative expenses arising out of their membership would be discussed or decided.

Article 12

In the light of the "non-additionality" principle, it is proposed to replace the word "Members" by "**Member States**". Should the amendment concern a matter which has been brought within the competence of a Member Organisation, then the Member States will not vote and the Member Organisation will cast as many votes as it has Member States within the Conference.

Article 14, paragraph 3

Provision should be made for the admission of a Member Organisation.

B Amendments aimed at reflecting existing practice

Article 3

The proposed changes here reflect the constitutional evolution which has occurred within the Conference since the Fourteenth Session (1980). These have led to an increasing role of the Member States in the governance of the Conference, and a gradual retreat of the Standing Government Committee as the executive governing body as originally envisaged by the Statute. As a *first* step, since the Fourteenth Session, the Diplomatic Sessions of the Conference held since 1980 have decided directly on the matters to be included in the agenda for future work and have directly charged the Secretary General and the Permanent Bureau to perform certain activities.[2] A *second* step, flowing from the first one, was made, when the practice was established of convening a Special Commission on General Affairs and Policy to prepare the decisions on future work and policy matters of the Sessions. The *third* step was that, at the request of Member States, these Special Commission meetings were then held more frequently, and their "recommendations" to the Session in fact tended to become policy decisions. This practice was acknowledged in the Final Act of the Nineteenth Session (Part B, under 1).

The proposed amendments to paragraphs 1-3 reflect current practice. The Special Commission on General Affairs and Policy, meeting in between Diplomatic Sessions and, in principle, on an annual basis, has in fact become the governing body to which the Secretary General and the Permanent Bureau have become accountable. It is proposed to refer to this body as "Council on General Affairs and Policy", since it is the governing body in between the Diplomatic Sessions. On the other hand, the Standing Government Committee, and in particular its Chairman, continue to play an important role, in

[2] See Final Act of the Fourteenth Session, Part E, *Actes et documents de la Quatorzième session, (Proceedings of the Fourteenth Session) (1980)*, Tome I, *Miscellaneous matters*, p. I-64.

particular as a neutral advisory body and advisor to the Secretary General and the Permanent Bureau, in relations between the Conference and the Host Country, and in connection with the organisation and presidency of the Diplomatic Sessions. The amendments to the remaining paragraphs reflect this continuing helpful role of the Standing Government Committee.

Article 4, paragraphs 1 and 3

In *paragraph 1*, the number of "Secretaries" has been brought in line with the present situation.

In *paragraph 3*, the procedure for increasing the number of "Secretaries" has been made explicit.

Articles 5, 7 and 8, paragraph 1

The word Council has been substituted or inserted, as a corollary of the modification of Article 3.

Article 11

In the French text, the word "*Règlement*" which appeared in the singular now appears in plural. The reason is that there are already three Regulations in operation: the Rules of Procedure for Plenary Meetings, until now adopted at each Diplomatic Session, the Pension Scheme Rules, which entered into force on 1 June 1981, and the Regulations on Budgetary Questions, adopted on 4 November 1994.

Article 13

As under Article 11. The words "the Governments of" have been deleted since Members may include Member Organisations.

Recommendation 2

The Informal Advisory Group, at its December 2004 meeting, agreed that it would be desirable to take the opportunity to establish, as part of the amendment to the Statute, an English version of the Statute, equally authentic to the French text. There are precedents for this proposal in other organisations.[3]

Of course, the adoption of an English text equally authentic to the French text, will concern the text *as amended*; it will, as such, enter into force at either of the dates referred to in Recommendation 3 *infra*.

Recommendation 3

Assuming that the Special Commission on General Affairs and Policy at its meeting in March / April 2005 reaches agreement on the amendments to the Statute including the adoption of an authentic English version (and the Rules of Procedure), consultations at the Special Commission may then lead to a decision on the next steps: the vote on the amendments, upon which the decision on the admission of the European Community depends.

[3] The Chicago Convention on International Civil Aviation of 7 December 1944 is a case in point. This Convention was originally drawn up in the English language only, but since then other languages have been added, as equally authentic to the English text, using the amendment procedure provided in the 1944 text. The first to be added were the French and Spanish versions (24 October 1968), next came the Russian text (30 September 1977), and Arabic and Chinese versions are still in the process of being accepted.

As the *Actes et documents* (*Proceedings*) of the Seventh Session confirm, Article 12 of the Statute provides for amendment to the Statute by a two-thirds majority of the Member States, either at a Diplomatic Session or by written consultation (see Annex 3A and B). Obviously, it would be best if, given the importance of the decision for the Conference, the amendments would have the support of the (quasi-)unanimity of the Member States. Consultations should therefore be held to ensure that sufficient time is given to Member States to determine their position. Depending on the outcome of these consultations, a vote on the amendments could then be taken either at the Twentieth Session in June 2005 (the amendments would then enter into force on the day of the vote), or following a written voting procedure during a reasonable period to be determined by the Special Commission (or the Session). In the latter case, the Secretary General will draw up a *procès-verbal* specifying the Member States that will have cast their votes and declaring that the amendments have been adopted. The date of the *procès-verbal* would then be the date of the entry into force of the amendments.

The adoption of the amendments to the Statute is a necessary condition for the decision on the admission of the European Community (see *infra* Recommendation 6).

Recommendation 4

It is proposed to delete the words “for Plenary Meetings” in the title so as to bring out their general applicability, also to meetings of the Council and of Special Commissions.

Article 1 – Quorum

In the English text the word “committee” should be replaced by “commission” to conform to the usual Conference terminology. The new second sentence ensures general applicability of the Rule.

Article 1A – Consensus

This Article establishes the consensus principle. Starting with the negotiations on a Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters after the adoption of a preliminary draft Convention in 1999, voting has been consistently avoided in meetings of the Conference. The Hague Securities Convention was adopted without a single vote being taken. The current negotiations on a Convention on exclusive choice of court agreements and on the international recovery of child support and other forms of family maintenance are likewise being conducted without taking votes. It is proper to include a provision in the Rules of Procedure to reflect current practice. As a result, the provisions on voting in Article 2 and most of the following Articles will be of a residuary character.

Article 2 – Voting rights

This Rule also appears in the proposed Article 2A, paragraph 8, of the Statute. For practical purposes, no cross-reference is made. See the commentary on Article 2A (para. 8) *supra*.

Article 4 – Method of voting

Should it come to voting by roll-call and should a Member Organisation be entitled to vote and exercise its right to vote on the matter in question, then that Member Organisations should be included in the call.

Recommendation 5

1. With the exception of the Hague Securities Convention, which in its Article 18 provides expressly for the possibility of REIOs to join the Convention, all previous thirty-four Hague Conventions adopted since 1951 do not contain such a provision. It is in the common interest of all Members of the Hague Conference and their citizens to avoid a situation where, as a result of the Community exercising its legislative competence in a field covered by any one of these Hague Conventions, the usefulness or potential of these Conventions would be adversely affected.[4]

Ratification by all Community Member States, as in the case of the 1980 Child Abduction Convention or joint ratification, as envisaged, "in the interest of the Community", in the case of the 1996 Child Protection Convention may bring substantial benefits for the Community, its Member States and other Member States of the Hague Conference and their citizens.

It is therefore to be welcomed that the Community intends to make an express declaration that the Community will endeavour to examine possibilities to ensure participation of the Community or its Member States in Hague Conventions which do not contain a clause providing for accession by REIOs, in particular the Conventions on judicial and administrative co-operation. Of course, the Hague Conference will offer its co-operation in achieving this objective.

2. Co-operation between the Community, its Member States and the Hague Conference will be further promoted, if the Secretariat (Permanent Bureau) of the Conference is able to take part in Community meetings of experts where matters of interest to the Conference are being discussed. This will also promote an efficient use of resources by both the Community and the Conference. It is therefore to be welcomed that the Community intends to declare expressly that it will endeavour to make participation of representatives of the Permanent Bureau possible in meetings of experts organised by the Community (or the Commission – to be clarified).

It is conceivable that these and other matters concerning co-operation between the Commission and the Permanent Bureau could be further elaborated in an agreement or memorandum between the Hague Conference and the Commission as has been done, for example, between Eurocontrol and the Commission.

Recommendation 6

Any decision on the admission of the Community will depend on the adoption, by a two-thirds majority of the Member States, of the amendments to the Statute and their entry into force. Therefore, the admission decision is conditional upon the vote on these amendments which, if the procedure suggested in Recommendation 3 is accepted, could take place either during the Twentieth Session or in writing during a period to be determined following the Session. If the vote on the amendments to the Statute is taken during the Twentieth Session, the way to admission of the Community would be open immediately after the vote on the amendments. If the vote on the amendments is taken

[4] See also Preliminary Document No 13 of February 2004, Nos 12-15 (pp. 5-6).

through a written consultation, the admission of the Community would have to wait until after the *procès-verbal* referred to in Recommendation 3 has been drawn up. One possibility would be that the Session decide on the admission subject to the adoption of the amendments of the Statute (whether at the Twentieth Session or on the date of the *procès-verbal*). Another possibility would be not to decide on the admission until after the amendments have entered into force.

A N N E X E S

ANNEX 1

FOOD AND AGRICULTURE ORGANISATION OF THE UNITED NATIONS

Article II of the Constitution of the Food And Agricultural Organisation of the United Nations reads as follows:

Membership and Associate Membership

1. …

2. …

3. The Conference may by a two-thirds majority of the votes cast, provided that a majority of the Member Nations of the Organization is present, decide to admit as a Member of the Organization any regional economic integration organization meeting the criteria set out in paragraph 4 of this Article, which has submitted an application for membership and a declaration made in a formal instrument that it will accept the obligations of the Constitution as in force at the time of admission. Subject to paragraph 8 of this Article, references to Member Nations under this Constitution shall include Member Organizations, except as otherwise expressly provided.

4. To be eligible to apply for membership of the Organization under paragraph 3 of this Article, a regional economic integration organization must be one constituted by sovereign States, a majority of which are Member Nations of the Organization, and to which its Member States have transferred competence over a range of matters within the purview of the Organization, including the authority to make decisions binding on its Member States in respect of those matters.

5. Each regional economic integration organization applying for membership in the Organization 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.

6. Member States of a Member Organization shall be presumed to retain competence over all matters in respect of which transfers of competence have not been specifically declared or notified to the Organization.

7. Any change regarding the distribution of competence between the Member Organization and its Member States shall be notified by the Member Organization or its Member States to the Director-General, who shall circulate such information to the other Member Nations of the Organization.

8. A Member Organization shall exercise membership rights on an alternative basis with its Member States that are Member Nations of the Organization on the areas of their respective competences and in accordance with rules set down by the Conference.

9. Except as otherwise provided in this Article, a Member Organization shall have the right to participate in matters within its competence in any meeting of the Organization, including any meeting of the Council or other body, other than bodies of restricted membership referred to below, in which any of its Member States are entitled to participate. A Member Organization shall not be eligible for election or designation to any such body, nor shall it be eligible for election or designation to any body established jointly with other organization. A Member Organization shall not have the right to participate in bodies of restricted membership specified in the rules adopted by the Conference.

10. Except as otherwise provided in this Constitution or in rules set down by the Conference, and Article III paragraph 4 notwithstanding, a Member Organization may exercise on matters within its competence, in any meeting of the Organization in which it is entitled to participate, a number of votes equal to the number of its Member States which are entitled to vote in such meeting. Whenever a Member Organization exercises its right to vote, its Member States shall not exercise theirs, and conversely.

FOOD AND AGRICULTURE ORGANISATION OF THE UNITED NATIONS
(General Rules of the Organisation relevant to REIOs)

Rule XLI
Competence

1. Any Member Nation of the Organization may request a Member Organization or its Member States to provide information as to which, as between the Member Organization and its Member States, has competence in respect of any specific question. The Member Organization or the Member States concerned shall provide this information on such request.

2. Before any meeting of the Organization the Member Organization or its Member States shall indicate which, as between the Member Organization and its Member States, has competence in respect of any specific question to be considered in the meeting and which, as between the Member Organization and its Member States, shall exercise the right to vote in respect of each particular agenda item.

3. In cases where an agenda item covers both matters in respect of which competence has been transferred to the Member Organization and matters which lie within the competence of its Member States, both the Member Organization and its Member States may participate in the discussions. In such cases the meeting, in arriving at its decisions, shall take into account only the intervention of the party which has the right to vote.

APPENDIX II

AMENDMENTS TO THE RULES OF PROCEDURE OF THE CODEX ALIMENTARIUS COMMISSION[1]

CLARIFICATION OF RULE VI.4 (VOTING AND PROCEDURES)

Amend Rule VI.4 as follows (inclusion underlined):

> Subject to the provisions of paragraph 5 of this Rule and paragraph 2 of Rule X, any Member of the Commission may request a roll-call vote, in which case the vote of each Member shall be recorded.

MEMBERSHIP OF REGIONAL ECONOMIC INTEGRATION ORGANIZATIONS

Add a new Rule 1.3 to the Rules of Procedure, and re-number current Rule 1.3 as Rule 1.4:

> "Membership shall also comprise regional economic integration organizations members of either FAO or WHO that notify the Director-General of FAO or WHO of their desire to be considered Members of the Commission".

Add a new Rule to the Rules of Procedure after Rule I to read as follows:

"Rule II - Member Organizations

1. A Member Organization shall exercise membership rights on an alternative basis with its Member States that are Members of the Commission in the areas of their respective competence.

2. A Member Organization shall have the right to participate in matters within its competence in any meetings of the Commission or its subsidiary bodies in which any of its Member States is entitled to participate. This is without prejudice to the possibility for the Member States to develop or support the position of the Member Organization in areas within its competence.

3. A Member Organization may exercise on matters within its competence, in any meetings of the Commission or any subsidiary body of the Commission in which it is entitled to participate in accordance with paragraph 2, a number of votes equal to the number of its Member States which are entitled to vote in such meetings and present at the time the vote is taken. Whenever a Member Organization exercises its right to vote, its Member States shall not exercise theirs, and conversely.

4. A Member Organization shall not be eligible for election or designation, nor to hold office in the Commission or any subsidiary body. A Member Organization shall not participate in voting for any elective places in the Commission and its subsidiary bodies.

5. Before any meeting of the Commission or a subsidiary body of the Commission in which a Member Organization is entitled to participate, the Member Organization or its Member States shall indicate in writing which, as between the Member Organization and its Member States, has competence in respect of any specific question to be considered in the meeting and which, as between the Member Organization and its Member States, shall exercise the right to vote in respect of each particular agenda

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[1] Amendments to the Rules of Procedure of the Codex Alimentarius Commission come into force upon approval of the Directors-General of FAO and WHO, subject to such confirmation as may be prescribed by the procedures of the two Organizations (Rule XIII.1).

item. Nothing in this paragraph shall prevent a Member Organization or its Member States from making a single declaration in the Commission and each subsidiary body in which a Member Organization is entitled to participate for the purposes of this paragraph, which declaration shall remain in force for questions and agenda items to be considered at all subsequent meetings, subject to such exceptions or modifications as may be indicated before any individual meeting.

6. Any Member of the Commission may request a Member Organization or its Member States to provide information as to which, as between the Member Organization and its Member States, has competence in respect of any specific question. The Member Organization or the Member States concerned shall provide this information on such request.

7. In cases where an agenda item covers both matters in respect of which competence has been transferred to the Member Organization and matters which lie within the competence of its Member States, both the Member Organization and its Member States may participate in the discussions. In such cases the meeting, in arriving at its decisions,[2] shall take into account only the intervention of the party which has the right to vote.[3]

8. For the purpose of determining a quorum, as specified in paragraph 6 of Rule IV, the delegation of a Member Organization shall be counted for a number equal to the number of its Member States which are entitled to participate in the meeting and are present at the time the quorum is sought, to the extent that it is entitled to vote under the relevant agenda item."

Renumber the subsequent Rules accordingly.

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[2] The word 'decisions' should be understood to mean both voting and situations where a decision is taken by consensus.

[3] The above is without prejudice to the question of whether or not the views of the party not having the right to vote shall be reflected in the report of the meeting. Where the views of the party not having the right to vote are reflected in the report, the fact that they are the views of the party not having the right to vote shall also be reflected in the report.

PROVISIONAL GUIDELINES FOR THE PARTICIPATION OF THE EC IN FAO MEETINGS

The European Community was admitted as a Member of FAO at the Twenty-sixth Session of the FAO Conference in November 1991. The ways in which Member Organizations in general, and the EC in particular, may participate in the work of the Organization are set out in detail in the amendments to the Constitution and General Rules of the Organization adopted by the same session of the Conference. Those amendments are annexed to these Guidelines, and are the authoritative texts governing all matters relating to the status, rights and responsibilities of the EC in FAO. The present guidelines have been prepared primarily as a guide to the organizers of meetings in FAO and for the Chairmen and Secretaries to such meetings. They cover not only invitations to such meetings and conduct in the meetings themselves, but also such matters as the conduct of sessions of the drafting committees and procedures relating to the adoption of reports and the listing of the EC in the report itself.

Invitations to meetings

Article II.9 of the FAO Constitution provides in general for the participation of Member Organizations in any meeting of the Organization in which any of its Member States are entitled to participate.

There are a number of exceptions to this general rule.

First, the EC is not entitled to participate in any meeting of the Programme Committee, the Finance Committee and the Committee on Constitutional and Legal Matters. It is also not entitled to participate in the General Committee of the Conference, the Credentials Committee, the Nominations Committee, or any other body of the Conference dealing with the internal working of the Conference as the Conference may decide.

Secondly, the EC will not be entitled to participate as a member in any meeting of an Article XIV body until such time as the constituent agreement of the Article XIV body is amended to allow for its participation.

Thirdly, the EC will not be invited to participate as a member in any body established jointly with other organizations in the UN family, such as the Codex Alimentarius and the CFA, until such time as the statutes or other constituent texts of the bodies concerned and their rules of procedure are amended as appropriate to allow for such participation.

It is to be noted that the EC will not of course be invited as such to any meetings of experts. In this sense the EC is no different from any other Member of FAO: experts are invited to meetings in their own right and not as representatives of their governments or institutions.

Declarations of competence and voting rights

Under Rule XLI.2 (GRO), the EC or its Member States is required to indicate, before any meeting of the Organization, which, as between the EC and its Member States, has competence in respect of any specific question to be considered in the meeting and which, as between the EC and its Member States, will be exercising the right to vote in respect of each particular agenda item.

- **Declarations in respect of specific agenda items**

In practice, both declarations of competence and of voting rights are made in respect of each agenda item. Declarations of competence, however, may include the category "mixed competence" where a single agenda item covers both subjects within the competence of the EC and subjects within the competence of its Member States. The declaration of voting rights, on the other hand, must list either the EC or its Member States as being entitled to exercise voting rights in respect of each agenda item, and may never, subject to the following qualification, chose both.

- **Declarations in respect of the agenda item "Adoption of the Report"**

The one qualification is in the case of the agenda item "Adoption of Report". Just as with any other agenda item, the declaration to be made by the EC or its Member States in respect of the agenda item "Adoption of the Report" must list either the EC or its Member States and not both as being entitled to exercise voting rights. If the report is adopted in block or questions arise as to procedure for the adoption of the report, then the party listed will be recognized as exercising the voting rights and for the purpose for giving rise to a quorum. This listing will not in itself however preclude the other party from speaking on sections of the report dealing with individual agenda items on which it has competence and indeed from voting on such sections of the report dealing with agenda items in respect of which it has been accorded the voting rights in the main body of the agenda. This interpretation of Rule XLI.2 will avoid the patent absurdity of either the EC on the one hand or its Member States on the other hand voting on matters that are clearly outside their declared competence.

- **Timing of the declarations**

Without prejudice to the legal requirement that declarations be made merely "before the meeting", in practice declarations should normally be received at least two clear working days before the meeting, and earlier if possible, in order to allow sufficient time for the declaration to be translated and reproduced as an information document and made available to the participants at the meeting before or when it opens.

- **Announcement of the declaration of competence and voting rights**

If the declaration is circulated in time and is available at the opening session of the meeting, the Chairman should make the following announcement before he formally opens the meeting:

> **" Before opening this meeting, I would like to make a short announcement. As you know, the EC is participating in this meeting in accordance with paragraphs 8 and 9 of Article II of the FAO Constitution.**
>
> **I have been asked to inform you that the declaration made by the European Economic Community and its Member States is contained in information document —, which has already been distributed to all members of the meeting. I would draw the attention of the meeting to this declaration."**

If the document cannot be distributed in time, then the Chairman should make the following declaration:

> " **Before opening this meeting, I would like to make a short announcement. As you know, the EC is participating in this meeting in accordance with paragraphs 8 and 9 of Article II of the FAO Constitution.**
>
> **I have been asked to make the following announcement with regard to the declarations required to be made by the EC or its Member States under Rule XLI, paragraph 2 of the General Rules of the Organization.**
>
> **(READ OUT THE DECLARATION)**
>
> **I should like to inform you that this declaration will be reproduced as an information document and will be made available to the meeting as soon as possible."**

Normally this statement concludes the proceedings on the declaration of competence and voting rights. It is however open to any Member Nation to request a Member Organization or its Member States to provide more detailed information as to which, as between the Member Organization and its Member States has competence in respect of any question. In such cases the EC or its Member States would be required to furnish the supplementary information. (Rule XLI.1 (GRO))

Implications of a failure to produce a statement of competence and voting rights

Should the EC and its member states fail for any reason to produce a statement of competence and voting rights, the EC delegation should be allowed to maintain its seat as a full participant (member) in the meeting, but shall not be entitled to speak or circulate documents, or participate in the work of the drafting committee or other subsidiary bodies established by the meeting.

Seating arrangements for the meeting

Subject to the exceptions noted below in this paragraph, where any individual Member states are entitled to participate as members in any particular meeting, the EC should also normally be seated as a member, in alphabetical order along with the Member Nations. Where individual Member states are entitled to participate only as observers, then the EC should normally be seated with the observers. For **Council** meetings, the EC should be seated in the penultimate seat of the membership block after all Member Nations, Members of the Council. For **Drafting Committees**, the EC should be seated on the right-hand side of the EC Member State entitled to participate in the Drafting Committee.

Conduct of the meetings

- **Determining a quorum**

For the purposes of determining a quorum before the opening a session, the EC delegation should be counted only if it has the voting rights for the first item of the agenda to be considered by the particular session of the meeting for which the quorum is sought. If the need to determine a quorum arising during the course of a session, as for example in connection with a call for a vote, then the EC should be counted if the item under discussion at the time or in respect of which the vote is being called for, is on in respect of which voting rights have been assigned to the EC. In such cases, the EC should be counted as representing a number of potential votes equal to the number of its Member States that are entitled to vote in the meeting. In some cases, as for example in the Conference, a Member State must be registered and have presented credentials in order to be entitled to vote. In other cases these formalities are not necessary. In any case, provided that any necessary formalities have been complied with, it is not required that each of the individual Member States actually be present in the meeting room for the EC to be able to vote.

- **Voting**

If a vote is called for during the course of a meeting, the EC will be entitled to exercise a number of votes equal to the number of its Member States that are entitled to vote in the meeting, applying the same rules as above.

The EC is not entitled to participate in voting for elective offices in meetings of the Conference or Council, nor may it hold office in the Conference or the Council or any subsidiary body of the Conference or Council. This implies that the EC should also not propose or second any candidates for office at such meetings. The EC is also not entitled to participate in voting on the budget. This would include not merely the vote on the level of the budget, but also other votes connected with the approval of the budget.

During the course of the meeting both the EC and its Member States should speak on matters within their declared competence. This means that on agenda items declared as being within the exclusive competence of the EC, its Member States should not intervene, and vice versa. As noted above, any Member Nation may at any time request the EC or its Member States to provide information as to which, as between the EC and its Member States has competence in respect of any question. In such cases the EC or its Member States must furnish the information. The question of what is within the competence of the EC or its Member States is, of course, essentially a matter for the EC and its Member States to determine and not a matter on which either the FAO Secretariat or the meeting should take any position.

Some agenda items will cover both matters within the competence of the EC and matters within the competence of its Member States and will thus be declared as items of "mixed competence". On such agenda items both the EC and its Member States will have the right to participate in the discussions, though in their interventions, they must each restrict themselves to the matters falling within their own spheres of competence. Where both the EC and its Member States speak on an agenda item of "mixed competence", then only the intervention of the party having the voting rights should be taken into consideration by the meeting in arriving at its decision (Rule XLI.3 (GRO)). Where the views of the party not having the voting rights are reflected in the report, the fact that they are the views of the party not having the voting rights must also be reflected in the report (Commentary to Rule XLI.3 (GRO)).

Participation in the work of the Drafting Committees

The EC is not entitled to be elected to the Drafting Committee in its own right (Article II.9 of the Constitution). However if any of its Member States are elected to serve on the Drafting Committee, then the EC will be entitled to participate in the work of the Drafting Committee on matters within its competence. The same rules apply to discussions in the Drafting Committee as apply to discussions in the plenary. This means that the Member States should not intervene on agenda items declared as being within the exclusive competence of the EC, and vice versa. On agenda items declared as items of "mixed competence" both the EC and its Member States may intervene from the standpoint of their own respective competence, but they must restrict themselves in their interventions to the matters falling within their own spheres of competence. Only the intervention of the party having the voting rights will be taken into consideration by the Drafting Committee in arriving at its decisions. The EC should **not** be listed as a member of the Drafting Committee in the report of the session.

Listing of Participants in the Reports of Meetings

Subject to the exceptions provided for in this paragraph, the EC, where it is entitled to attend a meeting as a member, should be included in the list of participants in alphabetical order together with an indication that it is attending as a Member Organization, thus:

"European Community - Member Organization"

The EC should not be listed as a member of the Drafting Committee. For Council meetings, the EC should be listed at the end of the list of Members, after all Member Nations Members of the Council, together with the title - Member Organization, as above.

Queries regarding the application of these guidelines

Any queries regarding the interpretation and application of the provisions of the Basic Texts in respect of the participation of the EC and its Member States in meetings of the Organization and any queries arising out of these guidelines should be referred to the Legal Office (LEG) or to the Conference, Council and Protocol Division (GIC).

FOR THE SECRETARY OF THE DRAFTING COMMITTEE

Participation of the EC in the work of the Drafting Committees

The EC is not entitled to be elected to the Drafting Committee in its own right (Article II.9 of the Constitution). However if any of its Member States are elected to serve on the Drafting Committee, then the EC will be entitled to participate in the work of the Drafting Committee on matters within its competence. In meetings of the Drafting Committee, the EC should be seated on the right-hand side of the EC Member State entitled to participate in the Drafting Committee. The same rules apply to discussions in the Drafting Committee as apply to discussions in the plenary. This means that the Member States should not intervene on agenda items declared as being within the exclusive competence of the EC, and vice versa. On agenda items declared as items of "mixed competence" both the EC and its Member States may intervene from the standpoint of their own respective competence, but they must restrict themselves in their interventions to the matters falling within their own spheres of competence. Only the intervention of the party having the voting rights will be taken into consideration by the Drafting Committee in arriving at its decisions. The EC should **not** be listed as a member of the Drafting Committee in the report of the session.

ANNEX 3A

Extract from
***Actes et Documents de la Septième Session / Proceedings of the Seventh Session*,**
Tome I, 1951, p. 339
Translation by the Permanent Bureau

The Chair read out Article 12 (former Article 13):
'Amendments to the present Statute may be made if they are approved by two-thirds of the voting Members.'

Mr Julliot de la Morandière (France) asked whether the modifications could be presented during a Session and during the period between Sessions, and whether in the latter case Member States would be consulted.

The Chair felt it was not necessary to settle this matter in the Statute.

Mr Julliot de la Morandière (France) replied that he understood the Standing Government Committee would be free to consult the Members if a proposal is made to it during the period between Sessions, depending on whether it considers the proposal to be a proper proposal or only a suggestion.

Mr Offerhaus (Netherlands) stated that the practice would be, in the event of doubt, that the Standing Government Committee would adjourn the whole issue to a future Session of the Conference. However, if the issue is one admitted by all States, a vote by written consultation will be held.

Mr Julliot de la Morandière (France) concluded that it is therefore correctly understood that it could be either a vote during a Session or by consultation.

Mr Niboyet (France) suggested changing the expression 'voting Members' to 'Members having expressed an opinion'.

Mr Alten (Norway) proposed removal of the word 'voting' because a modification could be imposed by a minority.

Mr Sauser-Hall (Switzerland) felt that the two-thirds majority should be maintained because a sound majority is needed to modify the Statute.

Mr Dennemark (Sweden) asked if a Member who abstains is considered to be voting.

The Chair replied that in accordance with usual practice in international institutions, abstention is not counted as a vote.

Mr Julliot de la Morandière (France) noted that if a large number of Members abstain, there would be no modification and there would be *statu quo ante* until the next Session.

The Chair proceeded with the vote on the proposal by Mr Alten to remove the word "voting".

The proposal was adopted with fourteen votes (Austria, Belgium, Denmark, France, Finland, Great Britain, Italy, Japan, Luxembourg, Netherlands, Portugal, Norway, Sweden, Switzerland) and one abstention (Germany).

Article 12 is adopted, as follows:

'Amendments to the present Statute may be made if they are approved by two-thirds of the Members.'

Ministerie van
Buitenlandse Zaken

Mr J.H.A. van Loon
Secretary-General of the Hague Conference on
Private International Law
The Hague

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Date	26 November 2004	*Author*	Mr. G. Limburg
Ref.	DJZ/VE-1163/04	*Tel.*	070-3484930
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Dear Mr Van Loon,

Some time ago we discussed the interpretation of Article 12 of the Statute of the Hague Conference on Private International Law. In particular, the question arose as to whether amendment of the Statute would be possible by decision of the Conference under that Article. The opinion of the Netherlands on this point can be summarized as follows.

The amendment procedure laid down in Article 12 of the Statute provides for amending the Statute by a decision of the Organisation to be taken by a two-thirds majority of the Members, without the need for any further procedure or validation of the decision.
From the Acts of the 7th Session it would appear that such was the intention of the drafters. There is no indication to the contrary, neither in the Statute, nor in the official documents of the Netherlands used in the ratification procedure of the Statute.
This means that such a decision addresses and binds all Members of the Organisation, and that the decision should indicate the date of entry into force of the amendment in question. As a consequence, an amendment of the Statute will not require parliamentary approval in the Netherlands.
Similar procedures can be found in other treaties establishing international organisations.

I hope that this information is of use to you.

Yours sincerely,

(G. Limburg)
Director of Treaties