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International representation of Europe in the area of Economic and Monetary Union: legal issues and practice in the first ten years of the Euro

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Outline

1. Introduction

Brief description of my presentation

"The Union's role in global governance is thus constrained by a bewildering pattern of external representation". Thus concludes an author writing recently on the European Union (EU)'s representation in international institutions under the catchy title "'Patchwork Power' Europe?".[1] Referring to the Bretton Woods institutions, she mentions "complicated *ad hoc* solutions in the Bretton Woods institutions (where the Member States are dispersed over several voting groups that also include third countries)" as an example of the variation in external representation of the economic giant on clay feet. Way back in 2001, other authors spoke of "cacophony and confusion on the part of Europe", with which "international financial management in the G7 and IMF are met".[2] In this paper, I will explore the legal issues underpinning the current and possible future arrangements in respect of the external representation of the EU in the area of Economic and Monetary Union (EMU). I will focus on the most visible area where EMU's external representation is in need of reparations to the patchwork, the connection with the International Monetary Fund (IMF). I will also mention the informal groups of nations that convene regularly and sometimes coordinate their economic, monetary and exchange rate policies, the G7, the G8, the G10 and the G20. After a brief *tour d'horizon* of the legal issues under EU and IMF law, respectively, I will go into the last decade's practice, the possibility of 'out of the box' thinking in respect of legal provisions, the extra-legal need for reform and end with concluding remarks about the way forward.

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[1] Sieglinde Gstöhl, "'Patchwork Power' Europe? The EU's Representation in International Institutions", *Bruges Regional Integration & Global Governance Papers* 2/2008, available at: http://www.coleurop.be/template.asp?pagename=BRIGG.

[2] Kathleen R. McNamara and Sophie Meunier, "Between National Sovereignty and International Power: What External Voice for the Euro?" *International Affairs,* 78, 2002, pp. 849-868.

2. The legal bases (current and prospective) in the EU

The relevant pivotal provision is Article 111(4) EC, which reads as follows:

> Subject to paragraph 1, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the ECB, shall decide on the position of the Community at international level as regards issues of particular relevance to economic and monetary union and on its representation, in compliance with the allocation of powers laid down in Articles 99 and 105.

Paragraph 1 of Article 111 relates to "formal agreements on an exchange-rate system for the [Euro] in relation to non-Community currencies" and concerns Bretton Woods-type arrangements of formally fixed exchange rates.

Paragraph 2 of the same provision allows the Council to "formulate general orientations for exchange-rate policy", whereas paragraph 3 concerns the conclusion of international "agreements concerning monetary or foreign-exchange regime matters".

Paragraph 5 is a superfluous reiteration of Member States' powers to act internationally "[w]ithout prejudice to Community competence and Community agreements as regards economic and monetary union", i.e. where the external competences of the Community have not pre-empted State action. In respect of monetary and exchange rate matters, this is a very rare occurrence.

The mentioning of Articles 99 and 105, respectively, at the end of paragraph 4, refers to the fundamental distinction in EMU matters between monetary affairs, which have been fully *communautarisés*, and subjects falling under economic union, where the Member States have largely retained their powers subject to certain prohibitions and procedures of coordination.[3]

[3] For an extensive discussion of economic union competences, see my publications "Some Reflections on Economic Policy" in *Legal issues of economic integration* 34(1): 5-25, 2007 and "The impact of EMU law on national budgetary freedom: An inquiry into the limits of State sovereignty in economic policy matters" in Dr. D. Obradovic and Dr. N. Lavranos (editors), *Interface between EU Law and National Law*, University of Amsterdam, The Hogendorp Papers 7, Europa Law Publishing, 2006, pp. 131-168.

A qualified majority is defined in Article 205 EC as "at least 232 votes in favour cast by a majority of the members".[4] Pursuant to Article 122(5) EC Treaty, the States with a derogation do not have a vote on decisions taken pursuant to Article 111 EC and "qualified majority shall be defined as two thirds of the votes of the representatives of the Member States without a derogation weighted in accordance with Article 205(2) EC".[5]

If the Lisbon Reform Treaty is ratified, the Treaty on the Functioning of the European Union will take effect, i.e. the EC Treaty as amended by 'Lisbon'. It replaces the text of Article 111(4) with the following provision:

Article 138

(ex Article 111(4), TEC)

1. In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences. The Council shall act after consulting the European Central Bank.
2. The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences. The Council shall act after consulting the European Central Bank.
3. For the measures referred to in paragraphs 1 and 2, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

Note that the Council's powers are described less strictly: it is to decide on common positions ("shall") but it may decide on unified representation. It may also be noted that the provision appears under the heading "Provisions specific to the Member States whose currency is the euro", without a reference to the Union in either this heading or the text of the provision itself, unlike the current text of Article 111(4), which mentions "the Community". Whether this will influence

[4] In case of a decision based on a proposal from the Commission, as in Article 111(4) EC.

[5] The Member States with an opt-out, the United Kingdom and Denmark, do not vote either. This follows from their respective Opt-out protocols.

the interpretation of the new clause, if it enters into force, remains to be seen. The provision concerning voting requirements makes clear that a qualified majority vote (QMV) is defined as "at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States"; "[a] blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained".[6]

For an analysis of the legal basis for external representation of the EU, including IMF membership, I refer to my thesis.[7] Although published in 1997, and glaringly in need of a new and revised edition, it is topical in its analysis of the legal state of affairs with respect to international representation.

My analysis was, and is, that the transfer of competence in the areas of monetary and economic union to the Community implied the assumption of external competences in this respect, too. This follows from the case law of the ECJ, notably the AETR judgment[8], that the Community is externally competent whenever it has exercised internal competences in a certain subject matter.[9] Thus, the Community should act internationally in respect of the three components of EMU:

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[6] Article 238(3)(a) of the Treaty on the Functioning of the European Union (TFEU) specifies that different rules apply if the Council does not act on a proposal from the Commission (such a proposal is required under Article 138 TFEU), and before 1 November 2014. Before that date, the voting rules laid down in Article 3(3) of Protocol (No 36) on transitional provisions apply. They attribute a number of votes to each Member State and require, normally, "at least 255 votes in favour representing at least two thirds of the members". Special arrangements apply in respect of votes when not all States take part, such as in the area of EMU when non-participating Member States are barred from voting on measures pursuant to, e.g., Article 138 TFEU.

[7] René Smits, "The European Central Bank – Institutional Aspects", The Hague/London/Boston, 1997, 2000 reprint, notably Chapter 6 – External Policies of EMU.

[8] Judgment of 31 March 1971 in Case 22/70, *Commission vs. Council – AETR Case* [1971] ECR 263.

[9] Declaration No. 10 attached to the Maastricht Treaty on European Union refers to this judgment. The Intergovernmental Conference adopting the Treaty considered the principles of this judgment not to be affected by, inter alia, Article [111](5) EC. The latter provides: "Without prejudice to Community competence and Community agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude international agreements." This Declaration is wholly redundant given the precedence of external powers in accordance with case law.

1) for the internal market, already with the assumption of full freedom of payments and capital movements upon the beginning of Stage II of EMU (i.e., on 1 January 1994), the Commission and the Council should act externally in this area;

2) for the economic union, also from the beginning of Stage II, when most economic union provisions became applicable, but certainly from the beginning of Stage III (i.e., on 1 January 1999), the Council and the Commission should act externally together with the Member States. Since the latter retain the main competences in this field, they should coordinate their actions among themselves in the context of the appropriate Community organs, as the internal coordination required implies that external coordination (with third countries and in international bodies) be aligned, as well. The external competence in this area is "mixed", hence non-exclusive because of the allocation of powers predominantly to the State and residually to the Community level of government; and

3) for the monetary union that, as from 1 January 1999, the Community organs have exclusive competence to act externally. Which bodies are to exercise this power is to be determined in accordance with the internal allocation of competences and the relevant provisions of the EC Treaty.[10] Thus, it falls upon the Council to decide on the Community's position and representation, even though the Council is bound by the special independent position of the ECSB which it has to respect.[11]

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[10] I would not favour membership of the IMF for the ECB, as proposed by Chiara Zilioli and Martin Selmayr, *The Law of the European Central Bank*, 2001, at p. 236. The ECB would represent the Community as a member, i.e. the Community acting for the joint Eurozone States as long as the two do not yet fully overlap. The ECB should so act in close collaboration with the Council. This situation is similar to the division of labour between central banks and Ministers of Finance in current situations of single-nation IMF membership.

[11] This is further elaborated in my thesis, see note 7, at pp. 409-414.

Specifically in respect of the IMF, I concluded that the devolution from State to EU level of powers implied a common approach by the Community as long as IMF law did not yet allow for direct EU membership, which I advocated.[12] This is in line with further case law, requiring Member States to cooperate with the Community bodies to ensure unified action in an area of exclusive Community competence where, at the international level, only the Member States can act.[13] Furthermore, I proposed that, unlike other monetary unions where sovereign States adopt a common currency, EMU implies the limitation of sovereignty in favour of the Community which introduces a single currency, albeit that not all States have adopted it yet[14], and two among them are under no obligation to do so.[15] But, even if the Community would qualify as a "country" under the terms of the IMF's Articles of Agreement, the reshuffle of quotas require an amendment to the latter for the EC's membership to be given full effect. I concluded that the Member States are under an obligation to strive for such an amendment. The responsibility for overseas territories for some Member States may require them to remain separate members of the IMF for this purpose, which is beyond the constraints of their EU membership.

[12] This is further elaborated in my thesis, see note 7, at pp. 429-453.
[13] Opinion 2/91 of the ECJ *re: Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-1061.
[14] Most of the non-participating States have thus far failed to meet the convergence criteria for the adoption of the single currency and are Member States with a derogation. See Articles 121 and 122 EC and Articles 139 and 140 of the Treaty on the Functioning of the European Union (TFEU), which would become applicable after the ratification of the Lisbon Treaty.
[15] The United Kingdom and Denmark, pursuant to their respective Opt-out Protocols in respect of EMU. For the Treaty on the Functioning of the European Union (TFEU), which would become applicable after the ratification of the Lisbon Treaty, see Protocol (no 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, the preamble to which reminds us that "on 16 October 1996 and 30 October 1997 the United Kingdom government notified the Council of its intention not to participate in the third stage of economic and monetary union", and which further specifies the exceptions applying to the UK, and Protocol (no 16) on certain provisions relating to Denmark, the preamble of which reminds us that "on 3 November 1993, the Danish Government notified the Council of its intention not to participate in the third stage of economic and monetary union" and which further specifies that the Danish EMU exemption puts it in the same position as Member States with a derogation. The text of the TFEU can be found in the Official Journal of the European Union (OJ) 2008, No. C 115/201, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0201:0328:EN:PDF.

Instead of quoting from my own thesis, I should perhaps quote a fellow Benelux national, IMF Executive Board member Willy Kiekens from Belgium who, in 2003, summed up the situation as follows:

> "When the EU Member States adopted a common currency, a common monetary and exchange rate policy, and the management of members' external reserves by the European System of Central Banks, and gave the European Community the exclusive right to regulate international flows of funds, they irrevocably transferred essential parts of their monetary sovereignty in the international legal order to the European Union. This action has made the European Union competent and responsible for complying with the most important commitments of its member states under the IMF's Articles of Agreement."[16]

Mr. Kiekens' views contrasts with those of Lorenzo Bini Smaghi who, in a contribution in 2004, while still working at the *Tesoro*, the Italian Ministry of Finance, argued that creating a single seat for the EU in the IMF required either an intergovernmental agreement between the Member States or a change in the EU Treaty.[17] Although I acknowledge that an agreement among the Member States could result in a single representation at the IMF while national quota would be retained, I consider that unified representation, as a legal requirement, already follows directly from the EC Treaty. European law requires the Member States to effect a single representation. They may enter into any arrangements conducive to this, provided they do not work outside the Community framework. Organising a single representation through an intergovernmental agreement whilst another venue would be open, i.e. a decision on the basis of Article 111(4) EC, may be at variance with Community law. An analogy could be drawn with the harmonisation of criminal measures for environmental infringements, adopted on the basis of EU law (third pillar)

[16] During an OeNB-Seminar on 2 June 2003 in Vienna (A) on The European Convention on the Future of Europe – Implications for Economic and Monetary Union, where Mr. Kiekens spoke under the title "What kind of External Representation for the Euro"; available at: http://www.oenb.at/en/img/statement_kiekens_tcm16-16877.pdf.
[17] Lorenzo Bini Smaghi, "A Single EU Seat in the IMF?", in *Journal of Common Market Studies* 2004, Volume 42, Number 2, pp. 229-248.

and then quashed by the Court as this measure would have had to be adopted under Community law (first pillar), ultimately leading to the adoption of a directive.[18]

3. The legal basis in IMF law

Purposes of the IMF

Before going into more details of its organisation, let me remind you of the purposes of the IMF. Article I (quoted in the Annex) enumerates the purposes of the IMF, among which promoting international monetary cooperation comes first, promotion of exchange stability is mentioned in the third place, behind promoting growth of trade, high levels of employment and real income, whereas assistance in the establishment of "a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade" is mentioned in fourth place. Balance of payments assistance and shortening the duration of balance of payments disequilibria follow as 5th and 6th purposes. A reader well-versed in the areas of competence of the EC will be struck by the fact that monetary and exchange rate matters, as well as payments and balance of payments assistance are all primary areas of concern, and are all covered by the EMU chapters of the EC Treaty. Trade and general economic policy matters come either under the Community's exclusive trade policy competences or under the powers of the Member States, to be exercised in the context of mutual coordination and "with a view to contributing to the achievement of the objectives of the Community".[19]

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[18] See the ECJ judgment of 13 September 2005 in Case C-176/03, *Commission v Council* [2005] ECR I-7879 on Decision 2003/80/JHA which the Court annulled on the grounds that the Decision should have been based on the EC Treaty and not on the EU Treaty. The Court thus upheld the Commission's submission, holding that the Community may take measures in relation to the Member States' criminal law where the application of criminal penalties is an essential measure for combating serious environmental offences. See Directive 2008/99/EC of the European Parliament and of the Council
of 19 November 2008 on the protection of the environment through criminal law, OJ L 328/28, 6.12.2008.

[19] Article 98 EC begins as follows: "Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Community, as defined in Article 2, and in the context of the broad

Article II, Section 2, Articles of Agreement

The IMF's charter is clear that, apart from the original members[20], only "countries" can be members of the Fund.[21] In line with this requirement, and in view of the difficulties of adapting to the new realities of the single currency in an organisation based on members' quota, their representation largely through constituencies composed of various members, and with the precedence of other monetary unions not being represented as such, the previous situation largely prevailed. Below, I will sketch the practice. In the following sections, I will discuss the many proposals for change that have been brought forward since the beginning of EMU.

Practice

The IMF's relationship with other international organisations has not always been smooth. Apart from the vexed question of the relationship of the Bretton Woods institutions with the UN family, of which they are members, its relationship with organisations with exchange rate and monetary responsibilities at regional level or with global responsibilities in adjacent areas is not clear-cut. The most notable example of the difficulty with international organisations is the IMF's response to the request of the Palestine Liberation Organisation (PLO) to have observer status at the 1979 meeting of the Board of Governors. This led to a long process of deliberations, resulting in a formal end to the practice of inviting observers, well described in the Fund's history.[22] The members of the other major monetary unions in the world are represented as individual countries

guidelines referred to in Article 99(2)." See Article 120 of the TFEU which provides the same (with different references to renumbered other provisions).

[20] Article II ("Membership"), section 1 ("Original members"), reads as follows: "The original members of the Fund shall be those of the countries represented at the United Nations Monetary and Financial Conference whose governments accept membership before December 31, 1945."

[21] Article II ("Membership"), section 2 ("Other members"), reads as follows: "Membership shall be open to other countries at such times and in accordance with such terms as may be prescribed by the Board of Governors. These terms, including the terms for subscriptions, shall be based on principles consistent with those applied to other countries that are already members."

[22] For the IMF's history, see James M. Boughton, *Silent Revolution - The International Monetary Fund 1979–1989*, October 2001, at: http://www.imf.org/external/pubs/ft/history/2001/index.htm. On the PLO story, see the chapter on *Governance*, at pp. 1022-1027.

in the IMF. The difference with EMU is that, in Europe, the monetary sovereignty of the participating Member States has now devolved to the Community level of government.

Balance-of-payment assistance

Recently, the IMF has come to the rescue of two EU Member States, i.e. lent to Hungary[23] and Latvia[24], with the Commission granting similar assistance pursuant to Article 119 EC.[25] This led to coordination on conditionality for lending, as both the EU's and the IMF's balance of payments assistance require that the borrowing nation comply with economic policy prescriptions.[26] The background to this is that the lenders will not want to grant financial assistance for a prolonged period of time without the underlying factors leading to the balance of payment deficit being remedied.[27] According to the General Counsel of the IMF[28], not only the <outs>, i.e. the Member States which have not yet adopted the euro, but also, the <ins>, i.e. the participating Member States, can rely on the IMF for balance of payments assistance. The fact

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[23] IMF's Press release No. 08/275, November 6, 2008: *IMF Executive Board Approves €12.3 Billion Stand-By Arrangement for Hungary,* available at: http://www.imf.org/external/np/sec/pr/2008/pr08275.htm. Commission's Press Release IP/08/1612: *Commission proposes financial assistance to Hungary and an increase in overall BoP loans ceiling*, available at: http://europa.eu/rapid/searchResultAction.do?search=OK&query=finance&username=PROF&advanced=0&guiLanguage=en. Also, see Council decision 2009/102/EC and 2009/103/EC providing Hungary with a medium-term loan amounting to a maximum of EUR 6,5 billion, OJ 2009 L 37/7 and OJ 2009 L 37/5 respectively.

[24] IMF's Press Release No. 08/332, December 19, 2008: *IMF Announces Staff-Level Agreement with Latvia on a €1.7 Billion Stand-By Arrangement as Part of Coordinated Financial Support*, available at: http://www.imf.org/external/np/sec/pr/2008/pr08332.htm
Commission's Press Release IP/08/1756: *Joint statement by the Presidency of the ECOFIN Council and the Commission on providing medium-term financial assistance to Latvia*, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1756&format=HTML&aged=0&language=EN&guiLanguage=en. Council Decision for Latvia has not been published in the Official Journal yet, see: http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/09/16&format=HTML&aged=0&language=EN&guiLanguage=en.

[25] Under Council Regulation 332/2002, the EU can grant medium-term financial assistance to Member States outside the euro area. See Commission's Press Release IP/08/1612, note 23, on the possible increase in overall BoP loans ceiling.

[26] The EU regulation laying the groundwork for balance of payments assistance to <out> Member States requires that such a State, before "call[ing] upon sources of financing outside the Community which are subject to economic policy conditions", first consults with the Commission and other Member States, inter alia to explore making use of the EU's own facility. See Article 2 of Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, OJ L 53/2, 23.2.2002.

[27] In the case of the IMF, the requirement of repayment follows from the "adequate safeguards for the temporary use of the general resources of the Fund" which Article V, section 3, of the Articles of Agreement mentions among the necessary conditions for use of the Fund's resources. See Decision No. 12864-(02/102), available at: http://www.imf.org/external/pubs/ft/sd/index.asp?decision=12864-(02/102).
For the EU, see Article 3(2)(b) of Regulation 332/2002 requiring the Council to decide on "the economic policy conditions attaching to the medium term financial assistance with a view to re-establishing or ensuring a sustainable balance of payments situation".

[28] In his speech during the Conference *10 years of European Monetary Union: a legal perspective*, 29 January 2009.

that their balance of payments deficit may arise from trade with other members of the EU, or of the Euro area, and be denominated in the same, shared currency, does not detract from their rights under the IMF's Articles of Agreement. This state of affairs may be true under IMF law but only buttresses the disconnectedness of this law from the reality of the European Union.

Other issues: legitimacy and seat

Europe's continued representation at the IMF through its Member States even though 16 out of the 27 share a single currency and do no longer possess the legal powers to represent their nations externally in the IMF's prime areas of responsibility, monetary cooperation and exchange rate oversight, has made it look overrepresented. The legitimacy of the current division of the IMF's quota and the resulting voting power has been an issue for some time now. The IMF reform agenda has already led to increases in the shares of several developing nations but, short of a general quota overhaul, the unbalance resulting from the current make-up will continue. Some Europeans have acknowledged this situation. Apart from the researchers and writers whose views will be discussed below, I mention Mervyn King, Governor of the Bank of England. In a speech in New Delhi, he noted that legitimacy requires that members "feel that the ownership of the Fund is shared and that all have a voice".[29]

Over- or under-representation of the E(M)U?

It is disputed whether the European Union, and the Eurozone, are over- or under-represented in the IMF. The prevailing view is that with over one-third of voting power exercisable by the EU Member States in the IMF, and with many Europeans around the table, even if their input is coordinated or made under the umbrella of the Presidency, the Europeans have more than their

[29] Quoted in Opinion - IMF reform - Only Basic Reform Can Deliver Legitimacy to the Fund, a joint paper by Jean Pisani-Ferry and André Sapir published in the *Financial Times*, 5 June 2006, available at: http://www.pisani-ferry.net/article.php3?id_article=212. Speech by Mervyn King, Governor of the Bank Of England, "Reform of the International Monetary Fund", speech at the Indian Council for Research on International Economic Relations (ICRIER) in New Delhi, India, 20 February 2006, available at: http://www.bankofengland.co.uk/publications/speeches/2006/speech267.pdf.

fair share in the IMF. This is partially due to their insistence on being represented on a solo basis and because intra-EU trade is included in the calculations of their members' share in international trade. If the EU States would be able to align themselves effectively, they would exercise more power than the United States, even though dispersed over many constituencies. Recent authors have included insightful overviews of the EU's prevalence in the IMF.[30].

In his previously cited contribution on a single EU seat in the IMF[31], Lorenzo Bini Smaghi argued that "each EU Member State would continue to hold its quota share", so that the United States would continue to be the member with the largest quota in the Fund. Thus, there would be no need to transfer the seat of the IMF to Europe pursuant to Article XII, section 1, of the Articles of Agreement. This states that the IMF "will be located in the territory having the largest quota".

4. The practice during the first ten years

Commission's proposal

The Commission duly submitted a proposal on representation and position taking of the Community in the context of EMU.[32] It was a modest proposal, calling for the Council, with the Commission, and the ECB, to represent the Community at the international level in the context of EMU (Article 1). It specified that the Presidency of the Council were to assume the Council's role unless the relevant State had not yet adopted the euro, in which case the next Presidency which had adopted the single currency would take its place (Article 2). It further provided, in Article 3, that Community bodies and Member States were to cooperate to ensure Community representation in accordance with the previous provisions in the G7 and the G10. It concluded with rules on how to operate in respect of organisations whose rules did not yet permit the

[30] I refer to Tables 1 (EU Constituencies in the IMF), 2 (Groupings' Voting Power in the IMF) and 4 (EU 25 Countries' Quotas and Voting in the IMF, of Lorenzo Bini Smaghi's article of 2004 (see note 17, pp. 229-248). See, also, the power point presentation by Cédric Crelo – "EU coordination and representation in the IMF", Presentation, Université Pierre Mendes France, April 2005, at: http://webu2.upmf-grenoble.fr/curei/relext/crelo.pdf.
[31] Lorenzo Bini Smaghi, see note 17, pp. 229-248.
[32] Document COM(1998) 637 final, 09.11.1998, available at: http://aei.pitt.edu/3350/01/000527_1.pdf.

principles of Articles 1 and 2 to be applied, such as the IMF, specifically mentioned and regulated, and on how to prepare for international meetings (Article 5). The Council could not agree on this proposal. Instead, it submitted a report to the European Council which 'adopted' this report.[33] On the basis of this report, the European Council adopted a Resolution on the interpretation of what is now Article 111 EC.[34] It first stated its belief that exchange rates are the result of free market forces reflecting underlying economic policies, relegating to exceptional circumstances any intervention by the Council, made competent by Article 111(1) and (2), as follows:

> While in general exchange rates should be seen as the outcome of all other economic policies, the Council may, in exceptional circumstances, for example in the case of a clear misalignment, formulate general orientations for exchange rate policy in relation to non-EC currencies in accordance with Article [111(2)] of the Treaty. These general orientations should always respect the independence of the ESCB and be consistent with the primary objective of the ESCB to maintain price stability.

The European Council recognised the respective roles of the Council and the ECB in so many words, in the same Resolution just quoted, and even accorded a role to the Commission, albeit in a minimalist tone:

> The Council and the European Central Bank will carry out their tasks in representing the Community at international level in an efficient manner and in compliance with the allocation of powers laid down in the Treaty. (…)
> The Commission will be involved in external representation to the extent required to enable it to perform the role assigned to it by the Treaty.

[33] Christoph W. Hermann, "Monetary Sovereignty over the Euro and External Relations of the Euro Area: Competences, Procedures and Practice" in *European Foreign Affairs Review* **7**:1-24, 2002, at p. 21.
[34] Resolution of the European Council on economic policy coordination in Stage III of EMU and on Articles 109 and 109b of the EC Treaty, OJ C 35/1, 02.02.1998.

IMF

Reaffirmation of country-based status of the organisation

The creation of the euro was greeted by the IMF with a reaffirmation of the "country-based" status of the organisation. According to concluding remarks of the Acting Chairman of the IMF Executive Board Meeting 98/101 on 21 September 1998, the Board concluded that

> "The Fund is a country-based institution, and the transfer of monetary powers by members of the euro area to the institutions of EMU will not affect their legal relationship with the Fund under the Funds' Articles of Agreement. Euro-area members will continue to be members of the Fund in their own individual capacity as countries. All rights of membership will continue to be available to each individual member, and all the obligations that membership in the Fund entails will continue to bind them individually."[35]

This statement was made as if to underscore that change in the economic and political landscape of Europe, even though creating new legal consequences under EU law, would not affect the IMF. The separation of the two legal orders was clear: international law does not recognise fully the change of sovereignty at EU level or, at least, does not give full effect to it. This is because the EU is considered an international organisation, not a country. The fact that the EU has several attributes of a country in the classic sense of the word does not help: you either are a country or an international organisation: "hybrids out" says the IMF. Or, rather: "Hybrids, organise thy affairs such as not to interfere with our neat classifications and established order". And Europe complied.

This is not to say that IMF practice was completely unaffected. In three areas, the IMF takes into account the emergence of the single currency: meetings, surveillance and the SDR.

Meetings

The ECB has observer status on the Executive Board of the IMF. The ECB President also attends, as an observer, the meetings of the International Monetary and Financial Committee, the

[35] Declaration quoted by Mr. Willy Kiekens, Belgian Executive Director at the IMF, in his presentation under the title "What kind of External Representation for the Euro", see note 16.

committee advising the Board composed of Governors or officials of similar rank from the 24 countries that appoint members of the IMF's Executive Board or chairs of the constituencies electing a Board member. Furthermore, *M.* Trichet is an observer at the annual meetings of the Board of Governors. As is elaborated below, the EU and euro area members organise concertation at the IMF, which results in common understandings and common views.

Surveillance

With respect to the "firm surveillance of a member's exchange rate policies", which the IMF is to conduct pursuant to Article IV of its Articles of Agreement, it is common practice that the euro area monetary and exchange policies are surveilled. This is done in the context of the annual Article IV consultations of its individual members, but discussions are also held between the IMF and the ECB, the European Commission and the Eurogroup.

SDR

The changeover to the euro has been reflected in the SDR, created in 1971 as "a supplement to existing reserve assets". The SDR has been a composite currency as from 1974. Before 1999, the SDR was composed of the US dollar, the Japanese yen, pound sterling, the Deutschmark and the French franc. The components of the latter two have been replaced by a euro component. As announced by the IMF:[36]

> "[e]ffective January 1, 1999, the date of introduction of the single currency in the 11 countries initially participating in the EMU, the value of the SDR will be the sum of the values of the following amounts of each currency:
> Euro (France) 0.1239
> Euro (Germany) 0.2280
> Japanese yen 27.200
> Pound sterling 0.1050
> U.S. dollar 0.5821".

[36] See IMF Survey, Volume 28, Number 1, 11 January 1999, at p. 5.

Note the double indication of the amount for the euro as reflecting the French and German currencies' input. This method of calculating ensured continuity vis-à-vis the previous situation but, also, denied the role of the euro as the single currency of other EU States. IMF practice has since evolved. "The currencies included in the SDR shall be the four currencies issued by Fund members, <u>or by monetary unions that include Fund members</u>, whose exports of goods and services during the five-year period ending 12 months before the effective date of the revision had the largest value", according to the IMF press release upon the latest review of its composition.[37]

Current situation

The current situation in respect of EU Member States' quota, voting shares, association with constituencies and membership of the latter is extensively described in several publications to which I refer.[38]

Recent changes

Only recently, changes have been brought about. The EU Ministers of Finance asked the EU Member States' IMF Executive Board Representatives to elect a longer-term chair. It is reported that details have been agreed upon but had not yet been implemented by May 2007. Agreement was further reached to appoint a Commission official in the office of a euro area IMF Executive Director.[39]

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[37] Press Release No. 05/265, 2 December 2005 (underling added, RS), available at: http://www.imf.org/external/np/sec/pr/2005/pr05265.htm. Note that an additional requirement for inclusion in the basket is that the IMF has determined them "to be freely usable currencies in accordance with Article XXX(f)" of its Articles of Agreement. See Decision No. 12281-(00/98), 11 October, 2000, as amended by Decision No. 13595-(05/99), 23 November 2005, effective 1 January 2006, available at: http://www.imf.org/external/pubs/ft/sd/index.asp?decision=12281-(00/98).

[38] See Lorenzo Bini Smaghi, "Powerless Europe: Why is the Euro Area Still a Political Dwarf?", *International Finance* 9, pp.1-19, 2006 at p. 268-269, and "EU coordination and representation in the IMF", Presentation by Cédric Crelo, see note 31.

[39] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, the Committee of the Regions and the European Central Bank – Annual Statement on the Euro

In the meantime, coordination takes place in a Subcommittee of the Economic and Financial Committee[40] on IMF and related issues (SCIMF). In Washington, the EU Executive Directors, other Member States' representatives and the Commission and ECB observers provide day-to-day coordination of the EU's imput in the IMF's activities in a group called EURIMF.[41] All these efforts doubtlessly contribute to a level of joint input and, thus, joint influence. They fall short of a real single voice and, seen from the EU perspective, fail to provide the best results for Europe. Seen from the outside world, the coordination, if effective, may give Europe an overpowering influence even if uttered through 27 different voices. Therefore, the current arrangements do not satisfy from the viewpoint of effective governance, whereas they fall short of what is legally required pursuant to Community law.

Thus, at the IMF, as Jean Pisani-Ferry and André Sapir noted in 2006:

> "the EU occupies 7 of the 24 seats on the IMF board and essentially selects the Fund's managing director, who chairs the board. It also holds more than 30 per cent of the IMF quotas and votes. By contrast, the US has only one seat on the board and 17 per cent of the quotas and votes, whereas China and Japan together have two seats and 9 per cent of the quotas and votes".

They also note, referring to Lorenzo Bini Smaghi, that failure to coordinate their positions means that EU member States actually exert far less power than the US. They argue that Europeans, still in a comfortably strong position, should agree fundamental quota reforms now and not wait until their relative economic power has diminished further, saying:

Area 2007 – Document COM(2007) 231 final, 3 May 2007, paragraph 32. The Communication can be found at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0231:FIN:EN:PDF.

[40] Pursuant to Article 114(2) EC, the Economic and Financial Committee is entrusted with the task of contributing to the preparation of the work of the Council referred to in Article 111 and other Treaty provisions on EMU. It is composed of two members appointed by the Member States, the Commission and the ECB each. See Article 134 of the Treaty on the Functioning of the European Union (TFEU) after the adoption of the Lisbon Treaty (OJ C 115/47).

[41] Two authors on the subject of the EU's external monetary representation call the EURIMF's President speech "weak soup because it cannot contain anything objectionable to any of the EU [States] on the Board", seeing in this result the limits of soft coordination. See: Alan Ahearne and Barry Eichengreen, "External monetary and financial policy: a review and a proposal," in Andre Sapir (ed.), *Fragmented Power: Europe and the global economy*, Bruegel, Brussels, July 2007, pp. 128-155, at p. 153.

States "belonging to the euro area should unify their representation within the Fund as soon as possible. At the same time, they should offer to reduce quotas (and thus votes) to numbers commensurate to their economic size. In doing so, the euro area would trade off formal, but largely ineffective, power for a formally diminished, but more effective influence in world economic affairs".

This would, also, free seats and votes for Asian and African countries that are under-represented.

External representation at the G7, G8, G10 and G20

The state of affairs with respect to the informal grouping can best be summarised as such: not much has changed since 1999.[42] Before the introduction of the single currency, it was already established practice that the G7 meetings were attended by the Commission President and by the President of the Council, if that did not happen to be one of the four big Member States, who were represented anyway, in which case their representatives were double-hatted. This acknowledged the exclusive competence of the EC in trade matters, which are among the many political, economic and exchange-rate issues discussed during such meetings. Even though the EU representation went (and still goes) largely unnoticed, and was (is) not reflected in the naming of the groupings, nor in the chair (the EU, as such, does not chair meetings which convene in the territory of the member presiding over the grouping), it existed and paid lip-service to the Community dimension of the external relations of the members. Since the introduction of the euro, the Ministers of Finance of France, Germany and Italy continue to gather, together with the central bank Governors from these States, in the context of G7/G8 meetings, and preparatory meetings, even though their currency is the euro and the President of the ECB, who is invited as an observer, should take their place. A case can be made for the

[42] For an early overview of the representation of the EU/Eurosystem in G10 and OECD, see Tommaso Padoa-Schioppa, at the time Member of the Executive Board of the European Central Bank, "The external representation of the euro area", Introductory statement at the Sub-Committee on Monetary Affairs European Parliament, Brussels 17 March 1999, available at: http://www.ecb.int/press/key/date/1999/html/sp990317.en.html.

Chairman of the Ecofin Council, or of the Eurogroup, to take part, as well, since external representation does not fall solely upon the ECB.

It is telling that the explanation on the IMF website of the various groups operating in the area of international economic and monetary coordination, the EU membership of the G7 and the G8 is not even mentioned.[43] In line with outward perceptions, when demonstrators put on masks of the seven or eight world leaders represented at these gatherings, or when journalists report about their meetings, the representation of the EU is not seen, let alone its exclusive competence recognised. Apart from a public relations failure, this is also a failure to abide by the law, a reproach which lawmakers and politicians should not want to be made against them.

In respect of the G10, it should first be remarked that this grouping was formed in the context of IMF activities. In 1962, the "General Arrangements to Borrow" (GAB) were agreed by the world's ten largest industrial nations to supplement the lending resources of the IMF to countries with balance-of-payments needs."[44] The G10 countries actually number eleven: Canada, Japan, Switzerland and the United States plus seven EU Member States: Belgium, France, Germany, Italy, the Netherlands, Sweden and the United Kingdom.[45] The Bank for International Settlements (BIS) in Basle provides the secretariat for the G10. As is remarked on the website of the Swedish central bank: "The G10 circle has a key role in the BIS through its dominance of the BIS Board of Directors (…)".[46]The European Commission has observer status[47] at the G10. The

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[43] See *A Factsheet - October 2008, A Guide To Committees, Groups, And Clubs*, at: http://www.imf.org/external/np/exr/facts/groups.htm#G7.
[44] See: http://www.riksbank.com/templates/Page.aspx?id=19450. Actually, eight countries and the central banks of two others (Germany and Sweden) decided to provide additional funding to the IMF in order for it to lend to other members. See: http://www.imf.org/external/np/exr/facts/groups.htm#G10.
[45] See: http://www.bis.org/publ/g10.htm.
[46] See: http://www.riksbank.com/templates/Page.aspx?id=19450.
[47] See: http://www.imf.org/external/np/exr/facts/groups.htm#G10.

main function of the G10, apart from the lending to the IMF[48], is the coordination of economic and financial policies among of its members, and the embedding for the Basle Committee of Banking Supervision, the world's leading organisation in the area of banking regulation, which was established by the central-bank Governors of the G10 at the end of 1974.[49] The Basle Committee brings together the central banks and/or financial supervisors, if the two agencies are not the same, of thirteen nations: Canada, Japan, Switzerland and the United States, polus nine EU States: Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden, the United Kingdom.[50] In the Basle Committee, the ECB has observer status.[51]

In respect of the G10, the same remarks can be made as with respect to the G7/G8 where economic and monetary/exchange rate policy coordination is concerned: the EU should have taken over the role of the Member States which are participating. Because some of the work of the G10 is very specialised and falls in an area of shared competences (the internal market in financial services, as far as banking supervisory norms are concerned), joint participation may respond to the legal exigencies of Community membership for the current EU members. The membership of Sweden, as a State with a derogation, is less likely to conflict with its Community obligations if and when the G10 act in the monetary and exchange rate field.

Finally, on the G20, this 'new' grouping, established at the turn of the millennium, is to serve "as a new forum for cooperation and consultation on matters pertaining to the international financial

[48] Later expanded through New Arrangements to Borrow (NAB) which established a new facility for the IMF to borrow from a widened group of nations; see: http://www.imf.org/external/np/exr/facts/gabnab.htm.
[49] See: http://www.bis.org/bcbs/history.htm.
[50] I.e., the G10 nations plus EU States Spain, Luxembourg and Switzerland. See: http://www.bis.org/bcbs/.
[51] According to Tommaso Padoa-Schioppa, at the time Member of the Executive Board of the European Central Bank, "The external representation of the euro area", Introductory statement at the Sub-Committee on Monetary Affairs European Parliament, Brussels 17 March 1999, available at: http://www.ecb.int/press/key/date/1999/html/sp990317.en.html: "Finally, with respect to central banking forums, the President of the ECB participates in meetings of the G10 Governors organised in the context of the BIS. In addition, ECB representatives also take part in the Committees set up under the G10 Governor's aegis"

system. It studies, reviews, and promotes discussion among key industrial and emerging market countries of policy issues pertaining to the promotion of international financial stability, and seeks to address issues that go beyond the responsibilities of any one organization."[52] It comprises the finance ministers and central bank governors of the G7, 12 other countries[53], and the European Union Presidency (if not a G7 member), the ECB, the Managing Director of the IMF, the Chairman of the International Monetary and Financial Committee of the Board of Governors of the International Monetary Fund (IMFC), the President of the World Bank, and the Chairman of the Development Committee of the IMF and the World Bank.[54] In the recent meeting of the G20 on the reform of the international monetary system[55], the Netherlands and Spain managed to get a seat at the table, as well.[56] Here, again, the same analysis as given in respect of the G7/G8 applies, even though the EU Council Presidency and ECB are represented in this forum.

Let me say two more things about these groups. I would like to quote Mervyn King again who said, in New Delhi, in 2006:[57]

> "One symptom of the Fund's decreasing effectiveness has been the proliferation of "G" groups – the G-5 that became the G-7, the G-22 that became the G-33 and then the G-20; the G-10; the G-24 and the G-77. All of these were attempts to create opportunities for serious discussions among countries in the international monetary system. But as the world economy, and hence the relevant issues, have changed so it has been necessary to set up new "G" groups. Such groups are perceived as exclusive and lack legitimacy, and their meetings have increasingly become communiqué-driven events."

[52] See: http://www.imf.org/external/np/exr/facts/groups.htm#G10.
[53] Argentina, Australia, Brazil, the People's Republic of China, India, Indonesia, Korea, Mexico, the Russian Federation, Saudi Arabia, South Africa, Turkey. See: http://www.imf.org/external/np/exr/facts/groups.htm#G10.
[54] See: http://www.imf.org/external/np/exr/facts/groups.htm#G10 and: http://web.worldbank.org/WBSITE/EXTERNAL/DEVCOMMEXT/0,,menuPK:64060743~pagePK:60000303~piPK:64000842~theSitePK:277473,00.html.
[55] See: http://www.brettonwoodsproject.org/art-562975 for a critical analysis.
[56] See: http://www.g8.utoronto.ca/g20/g20plans/g20leaders081111.pdf at p. 11.
[57] Speech by Mervyn King, see note 29.

Another observation concerns the intensity of the coordination with the United States, Canada and Japan which the four major EU economies engage in while conducting their "groupings" (G7 etcetera). Willy Kiekens rightly observed that "[c]oordination among the G-7 countries is often more comprehensive and detailed than coordination between EU [States]. Sometimes the G-7 even pre-empts EU coordination". I consider this observation, if true, an indictment of the four major EU States participating in the G7, and of the Council and Commission representatives. The former do not adequately coordinate within the EU on the basis of Articles 99 and 104 EC if the measure of their external coordination goes beyond what they achieve among their fellow States in the Union. The latter do not do their job properly if they permit this state of affairs to continue and cannot stand up against the Big Four, or at least the Big Three, acknowledging that, as an <out> State, the United Kingdom has more leeway than France, Germany and Italy. Elsewhere, I have described the lack of coordination among EU members of their input into global economic policy coordination.[58]

External representation generally

Let me sum up the state of affairs in respect of the EU's and the Euro area's external representation in general. The ECOFIN Council President may act, or his successor if she or he does not represent a State whose currency is the euro (in which case a participating State may take its place), as well as the Chairman of the Eurogroup, as well as the European Commissioner responsible for Economic and Monetary Affairs and, of course, the President of the ECB. This is hardly a unified external representation. In 2007, an EU delegation went to Beijing to discuss the renminbi's exchange rate with the Chinese authorities. The delegation consisted of the Chairman of the Eurogroup, the President of the ECB and the Commissioner for Economic and Monetary

[58] See my publication "The European Central Bank's Independence and its Relations with Economic Policy Makers", based on a presentation before the 50 Years of EU Law Conference organised by Fordham Law School, 29 February - 1 March 2008, in *Fordham International Law Journal* Vol. 31:301 (Number 6, June 2008), pp. 1614-1636.

Affairs. The representation of Europe by a Luxembourger, a Frenchman and a Spaniard was hailed as a step forward.[59]

5. Out-of-the-box thinking on IMF law and EU politics

Quoting, again, Willy Kiekens in his 2003 speech in Vienna, I would like to cite my support for his view that:

> "[a] comprehensive clarification of the legal effects of EMU for the IMF would require examining the issue from both standpoints" and with his views that "[i]f such an exercise should reveal that the two legal orders are not congruent, the European members and the IMF would have to cooperate in interpreting and amending the Fund's Articles of Agreement."

It is this cooperative spirit in interpreting and amending the Articles of Agreement that I call for. In line with others, I advocate a deviation from the classical view of sovereignty. Former Dutch EU Affairs Minister Laurens Jan Brinkhorst reminded us, when giving his inaugural address in Leiden last year as professor of international and European law and governance, that the classical concept of sovereignty implied a nation, a territory and exclusive authority over both. He argued that: "This classical concept of sovereignty sits uncomfortably with the developments in the European Union. Here, a change of identity has taken place".[60] Further on, he states that: "The classical concept of sovereignty with the indivisibility of sovereignty does no longer fit the political and legal reality of the Community order" and concludes that "essential competences are henceforth exercised in a European context and this affects the sovereignty of the nation State".[61] Although the nation States have not made place for a European "super state", their autonomy has

[59] Wolfgang Muchau, "The global euro needs a stronger apparatus', in the *Financial Times*, 12 May 2008, saying: "But the eurozone is clearly not yet prepared for a global role. European economic debate has been historically parochial. Last year's first joint foreign visit by the eurozone's three most important policy officials – to China – was applauded as the beginning of a more outward-looking approach. But it is telling that it took nine years for this to happen. So do not hold your breath."

[60] "*Dit klassieke soevereiniteitsbegrip verdraagt zich slecht met de ontwikkelingen in de Europese Unie. Daar heeft zich een gedaanteverwisseling voorgedaan*". From Laurens Jan Brinkhorst, *Europese Unie en nationale soevereiniteit*, inaugural address, Leiden University, 8 April 2008, available at: http://www.leidenuniv.nl/tekstboekjes/content_docs/oratie_brinkhorst.pdf.

[61] "*Het klassieke soevereiniteitsbegrip van de ondeelbaarheid van soevereiniteit past niet meer op de politieke en juridische realiteit van de communautaire orde.*" And "*wezenlijke bevoegdheden worden voortaan in Europees verband uitgeoefend en dat raakt de soevereiniteit van de nationale staat.*" Laurens Jan Brinkhorst, idem.

become part of a larger European transnational structure. He calls for a concept of co-sovereignty to be accepted.

As is known, I would go further and advocate the qualification of the EU as an entity with the characteristics of a "country" in the sense of the IMF's Articles of Agreement. The point now is that even when one takes a more reticent view, the new reality of the EU requires 'out of the box' thinking for the Union to take its rightful place and the developments towards different ways of global interaction to be reflected in the organisations which help us all serve the world. This requires an alternative approach to the current methods of analysis, steeped as they are in clear-cut distinctions of the past. "For the world has changed, and we must change with it".[62]

It should be noted that there are methods for further enhancing of the EU representation in the present legal context. These approaches, summarised below, also require some out-of-the-box thinking, and acting, by the Member States.

According to Mr. Sean Hagan, General Counsel of the IMF[63], the Euro area (EU) Member States, with the exception of Germany and France[64], could form a single constituency representing the Euro area (or the EU). Even though this may be feasible under IMF rules, the practicality of this approach is not very great if the two largest EU economies would have to remain outside the joint Euro area or EU representation. Also, the issue of Europe's over-representation would not be solved.

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[62] US President Barack Hussein Obama's inaugural address, 20 January 2009. He made this remark in the context of global suffering. The full quote is as follows:

"To the people of poor nations, we pledge to work alongside you to make your farms flourish and let clean waters flow; to nourish starved bodies and feed hungry minds. And to those nations like ours that enjoy relative plenty, we say we can no longer afford indifference to the suffering outside our borders, nor can we consume the world's resources without regard to effect. For the world has changed, and we must change with it."

See: http://www.whitehouse.gov/blog/inaugural-address/.

[63] In his speech before the Conference *10 years of European Monetary Union: a legal perspective*, 29 January 2009.

[64] As they are among "the five members having the largest quotas" which, pursuant to Article XII, section 3, of the Articles of Agreement of the Fund are to appoint individual Executive Directors. This means that quota redistribution should be among the means to establish a unified EU or Euro area representation in the Fund. Note that, according to Article III section 3 "The quota of a member shall not be changed until the member has consented (…)"**.**

During the same speech, Mr. Hagan suggested further alignment of EU views in the IMF on areas of activity of the Fund but considered that such alignment might be difficult when wider geopolitical considerations would play a role. Thus, when European IMF members were to give input on issues which imply views on the qualification of the Fund, as a monetary institution[65] or as an agency more geared towards development assistance[66], they might not be able to do so jointly. Also, the competences in these areas touching upon foreign policy may not be shared, let alone be exclusive. Granting the latter point, and thus acknowledging that the IMF's ever wider ambit may include areas of activity for which the Member States retain primary responsibility, I would argue that this state of affairs calls for more coordination and decision-making at EU level. The Europeans should sort out amongst themselves how they view the IMF and what perspectives on the Fund's activities and proposed actions follow from that, rather than cling to their solo representation in an organisation whose overriding purposes are tied up with competences that they can no longer exercise themselves. After all, the monetary and exchange rate policy, and the balance of payments-related purposes of the IMF, all are closely linked to the core of monetary union. Even its financial stability activities, in so far as they affect the EU, lie at the heart of the single market and the single currency even though the Europeans also cling to national approaches to financial stability internally. This touches upon the interplay between the external dimension of the Euro area and the EU and its internal fault lines revealed by the 2008/2009 financial crisis and goes beyond the confines of the present article. Let me just recall the recommendation to work towards unified EU representation in the IMF and other international by the High-Level Group headed by Jacques De Larosière in their Report of 25 February 2009 on financial supervision in the EU[67].

6. The need for reform

In a document preparing for the Convention that was to draft a Constitution for Europe[68], the Commission boldly analysed that the dispersed competences to initiate foreign policy, laying

[65] A view consistently held by Germany and The Netherlands.
[66] A view preferred by France.
[67] At: http://ec.europa.eu/commission_barroso/president/pdf/statement_20090225_en.pdf.
Recommendation 30 on page 67 of the Report by the de Larosière Group.
[68] *Communication from the Commission - A Project for the European Union*, COM(2002) 247 final, 22.5.2002, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0247:FIN:EN:PDF.

with the Commission and the Member States, was at the root of the lack of coherence and strength of Europe's external relations. "[A] single source of initiative and action which is coherent" was needed:

> An impartial, permanent body having the necessary technical expertise is needed to evaluate the situation, examine whether the objectives are consistent with the means available, and submit proposals for action. All the Member States and the European Commission today have the power to propose — the result being confusion and the risk that the common interest is not fully taken into account when the initiatives are prepared. The centre of gravity for policy initiative and for ensuring coherent action should therefore lie within the Commission.

The Commission followed up with proposals which, essentially, have found their way into the Constitution and the Lisbon Reform Treaty: a merger of the functions of High Representative for the Common Foreign and Security Policy (CFSP) and of Commissioner for External Relations. It is not quite clear from this document, which looks almost old-fashioned in its zeal for European integration when viewed in the light of subsequent developments, how the Commission envisioned the external representation in EMU affairs. It is clear, however, that its analysis, even if politically incorrect in the times after the French "*Non*", the Dutch "*Nee*" and the Irish "No", is correct: fully-fledged external representation requires a common source of action. Of course, a more modest approach was followed when the Commission proposed, in 2006, to "examine how, within the present Treaty context, we can address the external challenges facing Europe using the available internal and external policies more coherently and effectively". The document[69] states that "Economic and **monetary union** has led to the emergence of the Euro as the world's second most important international reserve and trade currency, giving major influence to the EU globally" but adds modestly: "We have however yet to resolve the question of EU representation in international economic and monetary institutions." It lists three requirements for effective

[69] Communication from the Commission to the European Council of June 2006 - *Europe in the World — Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*, COM(2006) 278 final, 8.6.2006, at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0278en01.pdf. (bold words in the original)

external action: (1) political agreement among Member States on the goals to be achieved through the EU; (2) whether the available policy instruments are suited to the task at hand, are backed with the necessary resources, and present clear advantages; and (3) the role and responsibility of the EU institutions and the legal environment. It honestly finds that "the impact of EU's policy is weakened by a lack of focus and continuity in its external representation". Among the practical proposals[70], the Commission includes the idea that "[t]he Council, could improve up-stream co-ordination to promote the emergence of consensus on issues of EU relevance that are subject to discussions in multilateral organisations (UN, IFIs) informal bodies (G7/G8, G20) and other fora of global governance, and regional organisations" and "Member States could actively pursue agreement with non-EU members to ensure full Commission participation e.g. in the external representation of the euro-zone in the context of G7, G20 or the Financial Stability Forum". It concludes as follows, rightly emphasising the tension between short-term individual and longer-term common interests:

> In the short-term, individual actors and institutions may see advantages in the freedom of manoeuvre that comes from exercising their responsibilities in an autonomous way. In the medium and long term, the EU has shown its capacity to help Member States to meet their external policy objectives. The overall effectiveness and therefore the global influence of the EU depend on optimal use of all available leverage in support of external goals.

The document does not approach the external aspect of Community action in a systematic way. The situation which an author on the subject has described as "one of over-representation and

[70] Such as improved preparation of input by the Commission, informal six-monthly meetings among the President of the European Council and Foreign Minister, the President of the Commission and External Relations Commissioner and the High Representative, joint Commission/Council papers for discussion, exchange of personnel between Member State representations and Council staff, "double-hatting of Heads of Delegations and EU Special Representatives" and "Member States' representatives in the governing bodies of multilateral institutions [coordinating] with EU institutions at appropriate level in order to promote common positions in matters of common concern".

under-effectiveness of the EU in international economic relations"[71] remains intact even if these modest pragmatic proposals are all put into practice. At the most, they may lead to 'learning by doing'[72] which may, in due time, lead Member States to quasi-automatically, adopt common positions and, thereby, in practice align themselves as if a joint or single EU voice were present. The outside world cannot be expected to wait for this approach to bear fruit for, in the meantime, the over-representation mentioned before will continue, and the under-effectiveness may only slowly diminish. The latter may not bother our fellow global citizens too much, but the former will. They can be expected to argue for improved representation which will need to lead to indents into the combined EU, or Eurozone, representation.

Turning specifically to the IMF, the Commission has proposed a stronger external representation more recently, i.e. when it adopted the Annual Statement 2007.[73] It stated:

> "**Further steps are needed before the euro-area's external representation is commensurate with its growing weight in the global economy.** A stronger external representation would also allow the euro area to show leadership on issues of its competency, such as global imbalances. While the best option for representation of the euro area in the key international financial fora and institutions remains the creation of a single euro-area chair, there are obstacles to achieving this in the short term, due, in part, to divisions among Member States."

In its analysis of the Euro at ten in May 2008, the Commission went even further.[74] It stated:

[71] Jean Pisani-Ferry, "The Accidental Player: The EU and the Global Economy", Prepared for a lecture at the Indian Council for Research on International Economic Relations, Delhi, 25 November 2005, at: http://aei.pitt.edu/8409/01/Accidental_Player.pdf.

[72] In line with one of the approaches identified by Sieglinde Gstöhl, see note 1. In this paper, she identifies four theoretical approaches which may explain the current manner of EU external representation: issue areas (i.e. legal issues are determining), institutions (institutional factors are conclusive), interests (an intergovernmental approach, arguing that when interests diverge, so will external action) and identities (a constructivist approach, arguing that the EU and Member States may mutually influence their identities which are shaped in the process). It is under this latter approach that Member States may gradually internalise common norms, leading to institutionalising the EU's external representation as a slowly emerging single voice.

[73] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, the Committee of the Regions and the European Central Bank – Annual Statement on the Euro Area 2007 –, Document COM(2007) 231 final, 3.5.2007, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0231:FIN:EN:PDF.

The existence of a single monetary and exchange rate policy in the euro area and of coordination frameworks in other policy areas (notably for fiscal and structural policies) makes it natural and efficient for the euro area to speak with a single voice in international macroeconomic surveillance fora such as the IMF and the G-7.

and added:

The existence of a single monetary and exchange rate policy in the euro area provides a particularly strong rationale for the full consolidation of euro-area representation at the IMF through the adoption of a "single chair". In the case of the G-7/G-8 and G-20, the replacement of the currently fragmented and incomplete representation of individual euro area countries by a consolidated representation would also be conducive to a reform of their structure that increases the role of key emerging market economies.

Objective: in the longer term: i) create a single euro-area chair at the IMF; and ii) support the consolidation of euro area/EU representation in the 'G-groups', which would facilitate entry of some key emerging market economies.

Although the first best option would be to fully consolidate the representation of euro-area countries in the IMF and the G groups, there seems to be at present insufficient support among euro-area countries for such an ambitious step. Given this political constraint, an incremental strategy could be considered, focusing in the short term on improving the infrastructure for European coordination and decision-making so as to facilitate the development of common positions. In particular, the scope and effectiveness of coordination in the Bretton Woods institutions could be increased. This strategy would also involve an increased participation of common institutions in the multilateral fora, consistent with the measures endorsed by the ECOFIN Council in October 2006. Finally, the participation of the euro area as a single entity in ad hoc global consultations such as the IMF-led multilateral consultation mechanism has proved useful and should be continued in the future.

These measures (…) include a more proactive approach of the euro-area Presidency in the G-8 and the G-20, a strengthening of EU coordination at the IMF and the World Bank and the full participation of the Commission in the G-7 in all agenda items within its competences, in the G-20 and in the FSF as an observer.

Calls for a single representation of the eurozone at the IMF have been made in May 2008 by the European Commissioner in charge of economic and monetary affairs, Joaquín Almunia and by Jean-Claude Juncker, chairman of the Euro Group, the informal gathering of the Ministers of Finance of the Member States that have adopted the euro.[75] According to the press report mentioning this support[76], political jealousy and resistance to having one's representation

[74] *EMU@10: successes and challenges after 10 years of Economic and Monetary Union*, European Economy 2/2008, at: http://ec.europa.eu/economy_finance/publications/publication12682_en.pdf. The document was issued on 7 May 2008.

[75] "Pressure grows for single euro seat at IMF", *Financial Times*, 15 May 2008.

[76] *Ibidem*, citing Philip Whyte of the Centre for European Reform in London.

downgraded in international fora stand in the way of realisation of the expectation realising any time soon that the euro zone will be represented by a single seat at the IMF.

Both in his previous capacity as Director General for International Financial Relations at the *Tesoro*, the Italian Ministry of the Economy and Finance[77], and in his current capacity as Executive Board member of the ECB, Lorenzo Bini Smaghi has called the current situation "unsatisfactory from many points of view"[78] and argued for single representation. Prior to that, unified representation needs to be established. Although Sr. Bini Smaghi does not perform a full-fledged legal analysis[79] and, where he does so, on one occasion failed to see that an EC Treaty amendment is not required for this[80], he has his analysis right as to the causes of the state of affairs. He says:

> "The real obstacle to stronger [Euro area] representation does not reside in the aversion of its citizens but rather in its national institutions and policy makers' reluctance to leave their seats at the table." (…) The ultimate argument is 'the political conditions are not yet ripe', which means in plain words 'I don't like it'."

In a Resolution on the strategic review of the International Monetary Fund[81] adopted on 14 March 2006, the European Parliament:

> "[i]nsists that the European positions in the EU representation within the IMF must be better coordinated; calls on the Member States to work towards a single voting constituency - possibly starting as a euro constituency, with a view, in the longer term, to securing consistent European representation, involving the Ecofin Council Presidency and the Commission, subject to the European Parliament's scrutiny"

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[77] Lorenzo Bini Smaghi, see note 17, pp. 229-248.
[78] Lorenzo Bini Smaghi, see, note 38, at p. 267.
[79]Lorenzo Bini Smaghisee, note 38, at p. 273.
[80] Lorenzo Bini Smaghi, see note 17, pp. 229-248. On page 245, Sr. Bini Smaghi mentions "a change in the EU Treaty" as one of the methods to achieve at a single chair in the IMF. Apart from the fact that the EC, rather than the EU, Treaty is presumably meant, I do not agree that the EC Treaty needs amendment to effect this. Rather, it requires Member States to strive for this result. It should be mentioned that, on p. 273-274 of his analysis in *International Finance* [2006], Sr. Bini Smaghi correctly cites the ECJ's case law as requiring Member States to act as Community agents when speaking on EC matters in organisations of which the Community is not a full member.
[81] At: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0076&language=BG.

Several issues need to be decided when the path towards a single representation in the IMF is taken. Among those is the question of the size of the EU's, or the Eurozone's representation. Intra-EU transactions should be excluded when calculating quota[82], as within a single market and single currency area, these trade flows do not reflect the Union´s relative position globally. This will lead to a decrease in voting power for the EU. Lorenzo Bini Smaghi calculated that the EU-25 would have 19-20% of the votes in the IMF.[83] Of course, if the path towards unified representation and ultimately a single seat were chosen, the question as to whether the Euro area or the EU as a whole should be so represented, is paramount. Arguments that, initially, two seats need to be sought, have been made by several authors.[84] The legally more compelling case can be made for single representation of the Eurozone but the internal mechanisms for such external representation are available at EU level only, the Eurogroup not having decision-making power.[85]

If the EU were to work towards unified representation, it would need to rely on Article 111(4) EC, or on Article 138 TFEU if the Lisbon Treaty comes into effect. Also, the question of continued membership of the IMF of States that are responsible for the external affairs of overseas areas or third countries, would have to be solved, probably by continued separate membership of the relevant States for these areas only. More importantly, the vexed question of the respective responsibilities of the EU actors in the external field would become acute. It is clear that the Council is to decide on "establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions

[82] According to Lorenzo Bini Smaghi, see note 17, pp. 229-248, at p. 243, and to Kathleen R. McNamara and Sophie Meunier, see note 2, at p. 11.
[83] Lorenzo Bini Smaghi, see note 17, at p. 243.
[84] Alan Ahearne and Barry Eichengreen, see note 41, pp. 128-155.
[85] Not even if the Lisbon Treaty were ratified, as the Protocol on the Eurogroup attached to the TFEU just provides for informal meetings of the "Ministers of the Member States whose currency is the euro". Thus, it would fall upon the Community to represent the Eurozone, with the <outs> continuing their own separate membership as long as they have not adopted the single currency.

and conferences" and is to "adopt appropriate measures to ensure unified representation".[86] Whether it is the Council that is to represent the Union is another matter altogether. The ECB cannot be denied its role, in line with the IMF's Articles of Agreement which provide, in Article V, section 1, that "(e)Each member shall deal with the Fund only through its Treasury, central bank, stabilization fund, or other similar fiscal agency, and the Fund shall deal only with or through the same agencies". Even though this does not require that the ECB represents the Union, its role should certainly be prominent, also because, absent "formal agreements on an exchange-rate system for the euro in relation to the currencies of third States"[87], the exchange rate policy of the Union (Eurozone) falls on the ECB to pursue, as it will result from the exercise of its monetary policy mandate. This has been accepted by the European Council when it adopted its Resolution on the interpretation of what is now Article 111 EC.[88]

There is no need to create a Mr. Euro, a position like the High Representative for the Common Security and Foreign Policy[89], as the tasks can be attributed to the relevant persons responsible on the part of the Council and the ECB or at the Commission. Striving to appoint a "Mr. Euro" would only lead to a recurrence of the discussions between the Chairman of the Eurogroup and the President of the ECB in the past about who is Mr. Euro.[90]

7. Closing remarks

I would like to end by quoting, again, the Belgian Executive Director at the IMF, Willy Kiekens. In 2003, he remarked:[91] "The European Union must fully play its destined role in the governance

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[86] Article 111(4) EC; Article 138 TFEU.
[87] Article 111(1) EC.
[88] Resolution of the European Council on economic policy coordination in Stage III of EMU and on Articles 109 and 109b of the EC Treaty, OJ C 35/1, 02.02.1998.
[89] Contra: Kathleen R. McNamara and Sophie Meunier, see note 2.
[90] See the reference to the battle between two Jean-Claudes in my "The European Central Bank's Independence and its Relations with Economic Policy Makers"; see note 58.
[91] During an OeNB-Seminar on 2 June 2003 in Vienna, see note 16.

of the world economy." Another author has made an, in his own words, modest proposal, to strengthen the EU´s external representation.[92] Basing himself on the theory of fiscal federalism which suggests that the most encompassing level of government should be involved "where tastes are homogenous and there exist economies of scale associated with centralised provision", Barry Eichengreen wonders "why the EU has not already delegated responsibility for formulating a common position on monetary and financial affairs to the Commission and unified its representation". The author suggests taking limited steps towards reform which may convince risk-averse policymakers that further steps may safely be taken once they become convinced of the positive effects. He suggests "investing first in the development of unified representation and common policies toward a set of issues and in a venue where the case for doing so is strongest" and recommends to begin at the IMF as "the infrastructure needed to establish a single European position is relatively well advanced", citing the SCIMF and EURIMF preparatory groups, "preferences on IMF-relevant issues are relatively homogenous" and "economies of scale in representation are strong". A single (pair of) chair(s) may help pave the way for further progress towards an EU external representation in other areas.

Another author, Turkish this time[93], quotes the President of the Eurogroup as saying:[94]

"It is absurd for those 15 countries not to agree to have a single representation at the IMF. It makes us look absolutely ridiculous. We are regarded as buffoons on the international scene."

The euro is not a secured asset, as we know in these turbulent times and the English-language press keeps reminding us of the alleged fragility of a currency union among sovereign States. Of

[92] Barry Eichengreen, University of California, Berkeley, "How to strengthen the EU's external representation: A modest proposal", at: http://www.eurointelligence.com/Article3.1018+M5b88713cfa7.0.html.
[93] Mustafa Kutlay, "Euro@10: A Question of 'Single Representation", at: http://www.usak.org.tr/EN/makale.asp?id=806. He quotes Elitsa Vucheva, "Eurozone countries should speak with one voice", *EUobserver*, 15 April 2008. Available on-line: http://euobserver.com/9/25984.
[94] On Tuesday 15 April 2008. See: http://euobserver.com/9/25984.

course, these journalists do not read law and are blissfully unaware that the single currency implies the transfer of sovereignty to the Community level of government so that there is hardly any sovereignty at State level left, or one would have to consider issuing coins an essential facility of the States' survival as sovereign entities in the monetary sphere. The lack of follow-up of the introduction of the euro with real coordination and structural changes is disappointing and, in times of crisis, undermining. National central banks claiming that lender-of-last-resort competences are national and outside the Eurosystem's area of activities (technically: an Article 14.4 activity[95]) do so at the peril of the single market and the single currency. States which do not act coherently in a Community fashion may prolong their own separate existence and serve their leaders' vanity but they do a disservice to the common cause and their citizens' interests. As to structural change, this has come too late during the good times and may now be forced upon us in bad times. The remarks made by Fred Bergstein on the occasion of the euro's first five years seem odd to our ears now: "Most of the needed changes are structural, relating to labour and capital markets but also to competition policies and the excessive intrusion of the state into numerous areas of the economy".[96] But his general analysis that "(t)he surrounding policy environment (…) has not evolved nearly as rapidly as had been hoped or nearly as fully as will be essential to successfully complete the process of Economic and Monetary Union" still rings very true and even more pressing today. Of course, the academic question is: when is EMU

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[95] Pursuant to Article 14.4 of the ESCB Statute

"National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB."

I presume that LOLR activities are considered an Article 14.4 activity, which would, to my mind, be a defective reading of the Statute. See my presentation on 25 November 2008 before the British Institute for International and Comparative Law in London (GB), available at: http://www.renesmits.eu/Lender_of_last_resort_-_issues_of_competence_and_competition.ppt.

[96] Fred C. Bergsten, "The Euro and the Dollar: Toward a 'Finance G-2'?" in Adam Posen (ed.) *The Euro at Five: Ready for a Global Role?* Washington, DC: Peterson Institute for International Economics, 2005, p. 33 (underlining added, RS).

"successfully completed"? There is probably no agreed benchmark for this. But we can analyse the faults in the financial system (supervisory and institutionally) when looking back on the past year and a half.

Also, we can look ahead and see a giant challenge for the excessive deficit procedure and the Stability and Growth Pact, beyond anything we have seen in the 2003 semi-constitutional crisis.[97] After all, the recent economic forecasts of the Commission project massive excessive deficits for 9 out of the 16 Euro area States for this year and for 10 out of 16 Euro area States in 2010. The only exceptions are scheduled to be: the Netherlands, Finland, Slovenia, Luxembourg, Cyprus and Malta, that is the smaller economies and even not all of them, Belgium, Portugal and Greece being notable exceptions and Ireland being forecast to have double-digit deficits in both years.[98] The major euro nations will have budget deficits exceeding 3%, reaching 5% for France and 6% for Spain. This could easily be the subject of another paper so I will revert to the external dimension. But it is not inconsequential for the external dimension as the relations with the IMF will be involved when EU Member States seek outside help, such as Hungary and Latvia did recently.

Contrary to proposals made by several authors[99], I would not advocate beginning with the IMF but, if incrementalism is the only way, to start with the G7/G8 as the forum to unify Europe's external voice. After all, the legal issues on both sides may make the loss of status in the IMF an easy pretext not to do anything whilst, in reality, they will prove obstacles that can be overcome albeit with understanding cooperation of fellow members and the organisation itself.

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[97] Leading to the ECJ judgment of 13 July 2004 in Case C-27/04 *Commission vs. Council*, [2004] ECR I-6649.
[98] Of 11% and 13% of GDP in 2009 and 2010, respectively. For an overview of the EU interim forecasts for 2009-2010, see: http://ec.europa.eu/economy_finance/thematic_articles/article13727_en.htm.
[99] Alan Ahearne and Barry Eichengreen, "Resetting Europe's place at the global financial table" 18 October 2007, at: http://www.voxeu.org/index.php?q=node/646, with references to previous work.

I would like to underline the urgency of such aligned international representation and unified stance. Only if we face the current crisis together, and are able to withstand the shocks within an agreed context of a single market, a single currency and joint decision-making, will Europe stand a chance of economic survival and political relevance. The challenges are simply too big to face alone: CO2 emission and climate change, the financial and economic crisis, the conflicts raging around us (wars in Iraq, Afghanistan, Israel/Palestine, Darfur, Congo), the humanitarian catastrophe of failed States (Zimbabwe, Somalia), major epidemics (HIV/Aids), the gap between the wealthy and those 40% of humankind who survive on less than $ 2 per day, the challenge of coexistence in this global village whose people are "a nation of Christians and Muslims, Jews and Hindus - and non-believers,"[100] and Buddhists and Bahá'ís, as well. Europe must stand united, internally and externally. We cannot prolong our outdated privileges and cosy special places around the table. We cannot fail the challenge of the present, and of the current American President, and we may not fail the generations of the future.

René Smits Hoofddorp (NL), 4 March 2009.

[100] US President Barack Hussein Obama's inaugural address, 20 January 2009. The relevant quote is as follows:

"For we know that our patchwork heritage is a strength, not a weakness. We are a nation of Christians and Muslims, Jews and Hindus, and non-believers. We are shaped by every language and culture, drawn from every end of this Earth; and because we have tasted the bitter swill of civil war and segregation, and emerged from that dark chapter stronger and more united, we cannot help but believe that the old hatreds shall someday pass; that the lines of tribe shall soon dissolve; that as the world grows smaller, our common humanity shall reveal itself; and that America must play its role in ushering in a new era of peace."

See: http://www.whitehouse.gov/blog/inaugural-address/.

Annex

Articles of Agreement of the International Monetary Fund - Article I - Purposes

The purposes of the International Monetary Fund are:

(i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.

(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.

(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.

(v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.

(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

The Fund shall be guided in all its policies and decisions by the purposes set forth in this Article.