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Treaty-making by international organizations

Introduction

For many years, it has been seriously debated whether international organizations could actually enter into international commitments.[1] In other words: did they have the capacity to conclude treaties? Or was treaty-making rather something they were incapable of doing unless specifically and explicitly empowered to do so? And if the latter would be the case, then how should commitments entered into by organizations be explained in the absence of explicit powers?

The constitutions of the earlier organizations did not contain specific provisions with respect to treaty-making, with the League of Nations Covenant constituting a prime example. Indeed, the absence of any specific provision in the Covenant was one of the reasons why some of the judges of the International Court of Justice, in the various *Mandate* cases, found that the Mandate could not be regarded as a treaty between South Africa and the League of Nations. Such would, they reasoned, presuppose treaty-making competence on the part of the League, and in the absence of a clause conferring such power, treaty-making competence was not lightly to be presumed.[2]

Nowadays, it is reasonably well established that international organizations may conclude treaties, although there is still some debate going on as to whence the capacity to conclude treaties springs if no explicit competence is contained in the constituent documents.

[1] As Higgins puts it without further ado, before the creation of the UN, treaties concluded by international organizations were considered to be unusual. See Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford, 1963), p. 241.

[2] See in particular the joint dissenting opinion of Judges Spender and Fitzmaurice to the *South West Africa cases* (Ethiopia v. South Africa; Liberia v. South Africa), preliminary objections, [1962] ICJ Reports 319, pp. 483 and 502 (recording the debated capacity of the League of Nations to conclude treaties).

At this point, much is often made of a distinction between the capacity to do something and the competence to engage in that activity. The former is abstract, denoting a general capability, whereas the latter is more concrete and specific.[3]

The leading theory holds that capacity, as an abstract notion, derives from general international law; indeed, Professor Hungdah Chiu, in a rich and detailed study in 1966, already reached the conclusion that organizations had been granted treaty-making capacity by virtue of a rule of customary international law.[4] After all, lots of organizations do indeed conclude agreements both with each other and with states and other entities, and there is, since 1986, even an unratified convention: the 1986 Vienna Convention on the Law of Treaties with or between International Organizations which, moreover, seems to argue that capacity derives directly from international law.[5] Its preamble notes 'that international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfillment of their purposes'.[6]

Where capacity is said to derive from general international law, competence (or power), on the other hand, would derive mainly from the rules of the organization, leading to the situation that an organization would have the capacity under international law to conclude a treaty on a given topic, but might lack the competence to do so under its own rules.

In the end, the discussion on the treaty-making capacity of international organizations is predominantly a historic discussion, evidenced by the circumstance that the main academic studies were written in the 1950s and 1960s.[7] The majority of observers nowadays accept that organizations can and do conclude treaties, and that the specific sorts of treaties they can conclude depend on their constitution. Thus, practice walks the middle

[3] See, e.g., Gunther Hartmann, 'The Capacity of International Organizations to Conclude Treaties', in Karl Zemanek (ed.), *Agreements of International Organizations and the Vienna Convention on the Law of Treaties* (Vienna, 1971), 127–63, esp. pp. 149–51.

[4] Hungdah Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties so Concluded* (The Hague, 1966), p. 34.

[5] See also Karl Zemanek, 'The United Nations Conference on the Law of Treaties between States and International Organizations or Between International Organizations: The Unrecorded History of its "General Agreement" ', in Karl-Heinz Böckstiegel *et al.* (eds.), *Völkerrecht, Recht der internationalen Organisationen, Weltwirtschaftsrecht: Festschrift für Ignaz Seidl-Hohenveldern* (Cologne, 1988), 665–79.

[6] The Convention was concluded in 1986, but has yet to enter into force. The text is reproduced in (1986) 25 ILM 543.

[7] These include, apart from Hungdah Chiu, *The Capacity of International Organizations to Conclude Treaties*, and the collection edited by Zemanek (*Agreements of International Organizations*), also Karl Zemanek, *Das Vertragsrecht der internationalen Organisationen* (Vienna, 1957).

ground, more or less ignoring the doctrinal debate on capacity and competence; moreover, with the help of the implied powers doctrine many treaties which the founders had never envisaged have been concluded by international organizations.[8]

Indeed, it is precisely this circumstance which renders the distinction between capacity and competence somewhat artificial; excess reliance on implied powers suggests that competences are not always clear-cut and self-evident, and may well lapse into the more abstract notion of capacity.[9]

The 1986 Vienna Convention

Despite the fact that it has yet to enter into force (it had thirty-four parties in December 2001[10]), the starting point for our analysis is the 1986 Vienna Convention.[11] The Convention was prepared by the ILC, on the basis of the work of Special Rapporteur Paul Reuter, and finally adopted at a conference taking place in February and March of 1986.[12] Ironically, but tellingly perhaps, international organizations themselves were rather reluctant to participate, and indeed even to see a separate convention drawn up, for a codified law of treaties might impede the liberty which they had enjoyed in treaty-making.[13] Its preamble, as noted, implies that capacity derives from international law generally, and perhaps it is good to realize that also the terms of the preamble are subject to heavy negotiations between the states who conclude a treaty.[14]

[8] For an impressive early overview of UN practice, see Higgins, *The Development of International Law*, pp. 241–9.

[9] It is hardly a coincidence that Hartmann, 'The Capacity of International Organizations', p. 143, ends up suggesting the existence of something like inherent (rather than implied) treaty-making powers, which ultimately negates the distinction between competence and capacity.

[10] The Convention needs the approval of thirty-five states to enter into force; at present, quite a few of its thirty-four parties are international organizations, whose approval is irrelevant for purposes of the entry into force of the Convention.

[11] For a general overview, see R. G. Sybesma-Knol, 'The New Law of Treaties: The Codification of the Law of Treaties Concluded between States and International Organizations or between Two or More International Organizations' (1985) 15 *Georgia Journal of International and Comparative Law*, 425–52.

[12] For a brief account by a participant, see Gerard Limburg, 'The United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations' (1986) 33 Neth ILR, 195–203.

[13] See G. E. do Nascimento e Silva, 'The 1986 Vienna Convention and the Treaty-making Power of International Organizations' (1986) 29 GYIL, 68–85, p. 71.

[14] See, e.g., Martti Koskenniemi, 'The Preamble of the Universal Declaration of Human Rights', in Gudmundur Alfredsson & Asbjorn Eide (eds.), *The Universal Declaration of Human Rights* (The Hague, 1999), 27–39.

Nonetheless, the capacity of organizations to enter into treaties is, so it seems, not unlimited. Article 6 specifies that the capacity of an international organization to conclude treaties is governed by the rules of the organization, and is thereby a wonderful example of a compromise between the demands of the international system and those of individual actors therein (organizations) who, in turn, have to live up to the wishes and desires of their members and for that reason alone cannot claim unfettered capacity.[15]

Those rules of the organization include, according to the definition of Article 2, para. 1 (j) of the 1986 Convention, 'in particular, the constituent treaty, decisions and resolutions adopted in accordance with them, and established practice of the organization'.

The organization's rules may also, in rare cases, have a bearing on the validity of an agreement concluded by an organization. Article 46 spells out that a manifest violation of a rule of fundamental importance may possibly be successfully invoked in order to get the treaty invalidated. The conditions are so strict, however, that no examples are on public record.[16]

Apart from those rules as referred to in Article 2 of the 1986 Convention, here too the implied powers doctrine plays a tremendously important role. Many treaties concluded by organizations are difficult to trace back to the constituent treaty, decisions or resolutions, or established practice. Instead, they themselves constitute established practice, and find their justification not in an explicit power, but rather by implication. The external relations law of the European Union, to name a well-known example, is based to a large extent on the notion of implied powers.[17]

And this gives rise to some curiosity. Thus, while arguably treaties concluded by an organization ultra vires would be void, the organization can (almost) always boast that its members supported the conclusion of the agreement, and, if that is the case, how can it possibly be void?

[15] Reportedly, some representatives of Soviet doctrine went so far as to consider the treaty-making powers of organizations to be merely the delegated treaty-making powers of their member-states: as mentioned in Liviu Bota, 'The Capacity of International Organizations to Conclude Headquarters Agreements, and Some Features of Those Agreements', in Zemanek (ed.), *Agreements of International Organizations*, pp. 57–104, esp. p. 73.

[16] For a discussion of the (similar) article of the 1969 Vienna Convention, see Theodor Meron, 'Article 46 of the Vienna Convention on the Law of Treaties (*Ultra Vires* Treaties): Some Recent Cases' (1978) 49 BYIL, 175–99. Similarly, under Article 27, the organization cannot invoke its internal rules to escape from its treaty obligations, as confirmed by an IMF memorandum reproduced in UNJY (1982), pp. 212–13.

[17] See generally I. MacLeod, I. D. Hendry & Stephen Hyett, *The External Relations of the European Communities* (Oxford, 1996), and Dominic McGoldrick, *International Relations Law of the European Union* (London, 1997).

If supported by all members (or even by only a majority), three possible arguments may be used in support of the conclusion of the agreement in question. First, the members were of the apparent conviction that the agreement was intra vires; their very support for its conclusion suggests as much. Second, if the power to conclude an agreement is not expressly provided for in the organization's constituent document, it may nonetheless be implied in it. Third, at the very least, the conclusion itself qualifies as subsequent practice of the organization and, if meeting with support, can be deemed to be acquiesced in.[18] In other words, the main mechanism that exists so as to protect an organization's members from excess authority in the organization, i.e. the doctrine of ultra vires, may always be manipulated out of existence by those very same member-states.[19]

Hence, even where the outside observer may have doubts about the legality (and therewith validity) of an agreement in terms of the powers of the organization concerned, as long as the members do not agree with the outside observer, any finding of invalidity is bound to fall upon deaf ears, and this in turn renders the doctrine of ultra vires a paper tiger.

It is perhaps largely symbolic that the 1986 Vienna Convention, although dealing explicitly with the activities of international organizations, still puts organizations on a lesser footing than states. Thus, while international organizations may sign the Convention[20] and may, through acts of 'formal confirmation' (the euphemistic equivalent of ratification[21]), express their consent to be bound, nonetheless entry into force of the Convention is dependent on the number of ratifications received from states.[22] No matter how many organizations confirm their consent to be bound, what matters legally is the acts of states, not those of organizations.[23]

[18] It is no surprise then that Hungdah Chiu, *The Capacity of International Organizations to Conclude Treaties*, can write, without blinking an eye, that treaties concluded ultra vires are void (p. 83), but also, in the same study, that an absence of specific powers may well be cured by subsequent practice (p. 46, concerning the League of Nations).

[19] See also, on the limits of the ultra vires doctrine more generally, chapter 11 above.

[20] Although even this was controversial; see Limburg, 'The United Nations Conference', p. 202.

[21] A number of states felt that ratification was a prerogative of sovereigns only, therefore an organization's expression of consent to be bound should be termed differently.

[22] Article 85, para. 1. The only exception, if such it is, was that, at the time, the United Nations Council for Namibia was also to be counted among states, as the Council represented Namibia prior to the latter's independence.

[23] It has been convincingly argued that the international legal system has a hard time accommodating non-state entities such as organizations, and that this difficulty would be visible in particular with respect to the law of treaties. See Catherine M. Brölmann, 'The Legal Nature of

And another element symbolizing the curious position of international organizations is that an agreement between various states and an international organization will be governed by two separate documents: the relations between those states and the organization will be governed by the 1986 Convention, whereas the relations between those states *inter se* will remain within the ambit of the 1969 Convention.[24] In practical terms, this may not be terribly important, but once again the symbolic value need not be underestimated.[25]

The reason why, practically, the precise coverage of the 1986 Convention is not overly relevant resides foremost in the consideration that many of its rules are based on the same principles which underpin the law of treaties generally and which have also found elaboration in the 1969 Vienna Convention on the Law of Treaties between states. While the precise rules take duly into account that organizations are differently structured, the underlying principles are the same, whether it concerns the conclusion of treaties, their application and effect, their validity or their termination.[26]

Treaty-making powers

What then, are the rules of various organizations? There are, actually, not that many explicit treaty-making powers to be found in the constitutions of international organizations (although many will contain some). In the UN, for example, there are only scant references. Article 43 authorizes the Security Council to enter into agreements with the UN's member-states in order to get military troops put to its avail. Articles 57 and 63 empower the Economic and Social Council to conclude agreements with various other international organizations in order to bring them into a relationship with the UN, and Article 105 can be read as suggesting a power to conclude an agreement on the UN's privileges and immunities (without specifying whether the UN will be a party).

International Organisations and the Law of Treaties' (1999) 4 ARIEL, 85–125. See also Catherine M. Brölmann, 'A Flat Earth? International Organizations in the System of International Law' (2001) 70 Nordic JIL, 319–40.

[24] Article 73. See also E. W. Vierdag, 'Some Remarks on the Relationship between the 1969 and the 1986 Vienna Conventions on the Law of Treaties' (1987) 25 *Archiv des Völkerrechts*, 82–91.

[25] Moreover, as Nascimento e Silva, 'The 1986 Vienna Convention', p. 85, observes, some delegations still felt the treatment accorded to international organizations to be excessive.

[26] On termination of trusteeship agreements, see UNJY (1974), pp. 181–2.

Yet, the UN has concluded numerous other agreements.[27] An obvious example is the Headquarters Agreement with the USA,[28] although here too authority can be read into Article 105, but there are other examples in abundance. For instance, peace-keeping or peace-enforcement operations are, ideally if not invariably,[29] based on agreements with those states that make troops available as well as with host states. Such agreements serve, for example, to outline the legal position of those troops: issues of immunities and the like. Moreover, whenever the UN wishes to offer humanitarian assistance, some form of agreement with the host state will be at the heart of the effort.

In short: the UN concludes treaties on a far grander scale than was ever envisaged by the founders, and while the implied powers doctrine can be of some help in explaining and justifying this situation, one may wonder whether the legal situation has not become strained when most activities can only be explained with the help of implied powers.[30]

Most other organizations will have concluded at least a headquarters agreement, and increasingly organizations participate in activities relating to their field of expertise, and such participation includes the conclusion of treaties. In addition, increasingly organizations are concluding agreements with one another.[31]

The EC in particular concludes agreements on an impressive scale. With respect to the EC, the power to conclude certain types of agreements is explicitly laid down in the constituent treaties. Thus, under Article 133 (ex-Article 113), the Community is entitled to conclude trade agreements; under Article 310 (ex-Article 238), association agreements may be

[27] Usually they are concluded by the Secretary-General upon authorization by the competent organ. See UNJY (1981), p. 149.

[28] Hungdah Chiu (*The Capacity of International Organizations*, p. 71) usefully reminds us that the UN is not a party to the 1946 General Convention on Privileges and Immunities, which nonetheless was a factor upon which the ICJ seemed to rely in coming to terms with the legal personality of the UN in *Reparation for injuries*. See also chapter 8 above.

[29] See, generally, Robert C. R. Siekmann, *National Contingents in United Nations Peace-keeping Forces* (Dordrecht, 1991).

[30] As Rosenne observed, as early as 1954, the UN uses implied powers far more intensively than express powers. See Shabtai Rosenne, 'United Nations Treaty Practice' (1954/II) 86 RdC, 281–443, p. 296. Rosenne also provides the amazing statistic (p. 303) that, between 1945 and the end of 1953, the UN, its subsidiary organs and the Specialized agencies together had entered into 809 agreements with individual states and 54 agreements with other organizations.

[31] See below, pp. 295–9.

concluded. And, in addition, there are a number of provisions empowering the Community to conclude agreements on other topics: development co-operation,[32] environmental protection,[33] et cetera.

The power to conclude other sorts of agreements has been found to be implied in the treaty. Thus, in the classic *ERTA*[34] case, the power to deal with the external aspects of transport was implied on the basis of the existence of a power to regulate transport within the Community: if the EC would lack the external power, then the member-states could circumvent EC law simply by entering into external agreements. Thus, an existing internal regulatory power had to be complemented by an external power.[35]

In *Opinion 1/76*,[36] the Court proceeded on the basis of the same logic, and even extended it a little. In *ERTA*, the power of the EC to act externally was based, in the end, on the thought that, since the EC had already legislated internally, external powers were required in order to safeguard the integrity of the internal legislation. In *Opinion 1/76*, however, the Court extended this reasoning to apply also to situations where the EC had not yet legislated internally. Thus, even the integrity of possible future internal legislation had to be protected.

In *Opinion 1/76*, at issue was whether the EC would be competent to take part, together with Switzerland, in the creation of a fund for vessels engaged in Rhine and Moselle navigation. Clearly, the Court thought that, under EC law, the Community would be competent to do such a thing internally. The problem was, however, that such would be a rather empty gesture without the participation of Switzerland. Since the Rhine springs in Switzerland, it does not make much sense to try and adopt legal rules without Swiss participation. Thus, in order not to render the internal power meaningless, an external power was deemed implied, even though the internal power had not yet been used.

While both *ERTA* and *Opinion 1/76* unabashedly solved a power struggle between the EC and its members by taking the side of the Community, in

[32] Which may include a human rights component: see case C-268/94, *Portugal* v. *Council* [1996] ECR I-6177. See more generally Jutta Gras, *The European Union and Human Rights Monitoring* (Helsinki, 2000).

[33] See, e.g., Lena Granvik, *The Treaty-making Competence of the European Community in the Field of International Environmental Conventions* (Helsinki, 1999).

[34] Case 22/70, *Commission* v. *Council (ERTA)* [1971] ECR 273.

[35] For further discussion, see chapter 4 above.

[36] *Opinion 1/76 (Laying-up Fund)* [1977] ECR 754.

its famous (or infamous) *Opinion 1/94* the Court backtracked.[37] The Commission had asked the Court for an Opinion on the WTO agreement, and more specifically on who was competent to conclude it. The Commission had argued that, since the World Trade Organization deals with world trade, it falls under the heading of the EC's commercial policy which belongs to the EC's exclusive competence.

The Court, however, disagreed to some extent, and did so in two ways. First, it narrowed down the scope of the phrase 'commercial policy' in what used to be Article 113 TEC,[38] and rather curiously found that commercial policy is basically limited to trade in goods, and only a few aspects of trade in services (those aspects which can be analogized to trade in goods): since other forms of trade involve the movement of persons (for example, a patient visiting a doctor abroad, a plumber repairing a sink abroad), the Court chose to analyse these types of trade in terms of the EC's internal rules on the free movement of persons, and as it is undisputed that the Community here has to share competences with its members, so too external competences would have to be shared.[39]

But second, it also narrowed down the scope of the implied powers doctrine. Whereas in *ERTA* and *Opinion 1/76*, the Court had been quite liberal (so much so as to warrant the suggestion that it went even beyond the implied powers doctrine), in *Opinion 1/94* it limited the implied external powers of the EC to those cases where Community action would be 'inextricably linked' to the objectives of the EC.

That differs from the *ERTA* and *Opinion 1/76* doctrine in one fundamental respect: the underlying logic has been abandoned. Instead of finding a power to exist because otherwise another, existing power would make little sense, the Court found another basis, far more in line with the ICJ's finding in the *Reparation for Injuries* case – some power can be implied if necessary for the effective functioning of the international organization, and here the EC Court decided, moreover, to subject this to a rather narrow test: a power can only be implied if inextricably linked to these objectives.[40]

[37] See, e.g., Meinhard Hilf, 'The ECJ's Opinion 1/94 on the WTO – No Surprise, But Wise?' (1995) 6 EJIL, 245–59, esp. p. 254.

[38] Nowadays Art. 133 TEC.

[39] What puzzles, then, is why the Court found it necessary to analyse these types of trade in services through the prism of movement of persons.

[40] And that, in turn, suggests that the implied powers doctrine never properly applied to cases such as *ERTA* and *Opinion 1/76*, something which is increasingly recognized in the literature.

The ties that bind

Apart from the question of competence, the conclusion of treaties by international organizations provokes several other legal problems. One problem is to assess which is the exact entity that becomes bound: the organization itself, or, as the case may be, the particular organ of the organization that entered into the agreement? A second problem, not wholly unrelated, has to do with the position of the member-states of the organization: if the organization concludes an agreement, are the member-states also bound?

Usually, treaties concluded by organizations are concluded by one of the organs of the organization. Thus, with the UN, most agreements are entered into by the Secretary-General (or his representative), although Article 43 keeps open the possibility of agreements being entered into by the Security Council, and other articles envisage yet other possibilities.

Within the EC, the conclusion of agreements is regulated in Article 300 TEC (ex-Article 228 TEC, the same article which also allows the Court to be asked for an opinion), and the basic rule is that treaties are entered into by the Council, having been negotiated by the Commission.

The question then is: who exactly becomes bound under international law? In other words: upon whom, all else remaining equal, do international obligations come to rest, and who becomes the bearer of international legal rights? The matter as such has never been subjected to the ICJ, but it stands to reason to hold that, as far as UN treaty-making is concerned, it will be the UN which is bound, not just the Council or the Secretary-General. One argument for this finding springs from considerations of legal logic: neither the Security Council nor the Secretary-General possess treaty-making powers in their own right. Whatever powers they may have to enter into agreements, they have by virtue of being principal organs of the UN.

Second, in the *Effect of awards* case,[41] the ICJ did pronounce itself on the establishment of the Administrative Tribunal, and reached the conclusion that the Tribunal, although having been set up by the Assembly, served the whole UN, and that any employment disputes were to be regarded as disputes between employee and the UN as such, not between employee and

Dashwood, e.g., prefers to think of such cases as exploring inherent powers. Compare Alan Dashwood, 'The Limits of European Community Powers' (1996) 21 ELR, 113–28.

[41] *Effect of awards of compensation made by the United Nations Administrative Tribunal*, advisory opinion, [1954] ICJ Reports 47.

General Assembly, or between employee and Secretariat. By analogy, one may reach the conclusion that agreements entered into by the principal organs (or other organs, for that matter) will come to bind the organization as a whole.

The EC Court has had the opportunity to pronounce itself on the matter, and has found that an agreement entered into by the Commission would be binding upon the whole Community. In September 1991, the Commission had concluded an agreement with the US Department of Justice to cooperate in antitrust affairs. France argued that the Commission, in doing so, had acted ultra vires, and went to Court, claiming that only the Council can conclude agreements on behalf of the Community.[42]

One of the Commission's arguments was that the agreement would merely be of an administrative nature,[43] binding only the Commission but not the Community as a whole.[44] Therefore, there should be no problem. The Court, however, rejected the argument, claiming in essence that there is in international law no such thing as an administrative agreement which can bind only administrative units. Instead, an agreement entered into by the Commission would bind the Community as a whole, and there can be little doubt that the Court was correct in its assessment. International law[45] does not readily recognize administrative entities as being capable of

[42] Case C-327/91, *France* v. *Commission* [1994] ECR I-3641. The case highlights difficult problems in the relationship between EC law and international law. For a useful discussion of those aspects, see Christine Kaddous, 'L'Arrêt France c. Commission de 1994 (accord concurrence) et le contrôle de la légalité des accords externes en vertu de l'art. 173 CE: la difficile réconciliation de l'orthodoxie communautaire avec l'orthodoxie internationale' (1996) 32 CDE, 613–33.

[43] The same type of argument sometimes surfaces in other organizations. With respect to the treaty-making powers of the UN Secretary-General, see UNJY (1981), p. 149.

[44] The Commission was arguably forced to do so as its own treaty-making powers are rather limited; the most important is the power, under Art. 302 (ex-Art. 229) TEC, to ensure and maintain relations with other international organizations. Article 300, para. 2 (ex-Art. 228, para. 2) TEC moreover suggests that there may be treaty-making powers 'vested in the Commission', but the meaning of that phrase is debated. For a Commission-friendly interpretation, see Alain-Pierre Allo, 'Les accords administratifs entre l'Union Européenne et les organisations internationales', in Daniel Dormoy (ed.), *L'Union Européenne et les organisations internationales* (Brussels, 1997), 56–67.

[45] All this presupposes that the Community is bound by customary international law, something which, although not immediately self-evident, has increasingly become recognized. See, e.g., case C-286/90, *Anklagemyndigheden* v. *Poulsen & Diva Navigation* [1992] ECR I-6019; case C-405/92, *Mondiet SA* v. *Armement Islais SARL* [1993] ECR I-6133; and, more explicitly, case T-115/94, *Opel Austria GmbH* v. *Council* [1997] ECR II-39. Some problems involved in the Community's relationship with customary international law are discussed in Vaughan Lowe, 'Can the European Community Bind the Member-States on Questions of Customary International Law?' in

bearing independent rights and duties under international law as long as they remain part of another entity.[46]

A more difficult situation arises when it comes to the legal position of member-states: if an international organization concludes an agreement, are the member-states to be considered as, somehow, parties to that agreement, or are they considered to be third parties?

That is a complicated question, which would require a clear theoretical perspective on the overall position of member-states towards their organizations in order to be answered.[47] The International Law Commission, while drafting the 1986 Vienna Convention, tried in vain to develop a general rule. In a famous draft Article 36bis, it opted for the solution that members should be considered as third parties, primarily. They could, generally, only be regarded as being parties to the treaty concluded by their organization if three distinct conditions were met.

First, the treaty concerned must intend to create rights or obligations for the member-states of the organization in question. Second, the members must have unanimously agreed to become bound by such a treaty, either by specific act or by virtue of the constituent treaty. And third, the fact that the members will be bound must have been notified to the organization's treaty partner.

The proposal was, ultimately, defeated. What it indicated, though, was that, at least within the International Law Commission, there were some strong opinions generally favouring the view of member-states as legally distinct from their organizations, even so as to be able to hide behind their creations.[48]

The Special Rapporteur drafting this particular article, Professor Paul Reuter, defended his choice in terms of state consent. Since states cannot be held bound unless they express their consent to rights and obligations,

Martti Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague, 1998), 149–68.

[46] Compare Jan Klabbers, *The Concept of Treaty in International Law* (The Hague, 1996), esp. pp. 97–105. The position that administrative agreements would be non-legally binding seems to have been discarded; compare Allo, 'Les accords administratifs'.

[47] For a general analysis, see Catherine M. Brölmann, 'The 1986 Vienna Convention on the Law of Treaties: The History of Draft Article 36bis', in Jan Klabbers & René Lefeber (eds.), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* (The Hague, 1998), 121–40.

[48] See also Philippe Manin, 'The European Communities and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations' (1987) 24 CMLRev, 457–81.

the same would apply to situations in which the entities they created (i.e., international organizations) entered into commitments.[49]

Clearly, the underlying argument is that organizations may and do have a will distinct from the will of their member-states; therefore, they can take actions which may not be to the liking of their member-states, and therefore it follows that those members cannot be bound to treaties concluded by the organization except if they express consent to be bound.

The question then is, of course, whether such a view is in accord with realities, and here some caution may be in order for, if it is true that decision-making (including decisions to conclude treaties) usually takes place by the unanimous consent of the member-states, then it follows that the will of the organization is identical to the will of all its members. Therefore, whatever the will of the organization may be, it can usually be considered the aggregate will of the member-states, rather than the distinct will of the international organization. With that in mind, organizations could simply be regarded as exercising a delegated power: there would be no need for specific acts of consent, because it would be clear that all the organization's acts would be based on consent anyway.

Such a conception, however, would mean getting rid of the element of the distinct will, and therewith getting rid of an important justification for the existence of organizations. For if an organization does not have a distinct will, why then establish one to begin with?

Ironically, the main organization to which the problem may apply, the EC, has itself dealt with it in its constituent treaty. Article 300 (formerly Article 228) TEC proclaims, in para. 7, that treaties entered into by the EC shall be binding upon the member-states.[50] Indeed, the EC Court has even held that treaties concluded between the Community and a third state may well have direct effect in the laws of the member-states. The leading case is *Kupferberg*,[51] in which a German wine importer claimed that German levies on Portuguese wine were in violation of the then-existing association agreement with Portugal. The German Court wondered whether Mr Kupferberg could invoke the provisions of an association agreement before the German

[49] See in particular Reuter's Tenth Report on the Question of Treaties Concluded between States and International Organizations or Between Two or More International Organizations, in (1981/II) YbILC, part one, pp. 43–69, esp. p. 67.

[50] Indeed, they 'form an integral part of Community law', although it remains as yet unclear why and how they do so. See case 181/73, *Haegeman* v. *Belgium* [1974] ECR 449, para. 5.

[51] Case 104/81, *Hauptzollamt Mainz* v. *C. A. Kupferberg & Cie* [1982] ECR 3659.

courts, and the EC Court held that indeed Mr Kupferberg could do so, provided that the provisions of the association agreement would lend themselves to being directly effective. As it was, *in casu* those provisions were sufficiently precise and unconditional as to be directly effective.[52]

At any rate, it is clear that, under EC law, treaties concluded by the EC and third states bind the member-states and the institutions. It is important to realize, though, that the binding force stems from EC law: it is EC law which proclaims, in Article 300 (ex-Article 228), para. 7 TEC, that treaties shall be binding upon the member-states and the institutions.[53]

International law itself is less clear about the topic, and perhaps the rule formulated by the International Law Commission, in the defeated draft Article 36bis, still stands: member-states will only be bound if they have expressed their consent.

While, as noted, the underlying argument may not be entirely persuasive, there is widespread doctrinal support and, more importantly, any other reasoning would presumably be equally unpersuasive: a hypothetical rule that member-states are bound by definition is ultimately based on the thought that there is no distinction between the organization and its members, and that, in turn, is difficult to maintain as well.

As it is, the 1986 Vienna Convention contains nothing on the topic; writers, however, fall back on the 1969 Convention, and, since the 1969 Convention prescribes that treaties shall create neither rights nor obligations for third states, neither do treaties concluded by international organizations. Nonetheless, while this seems to be the doctrinal majority position, it is perhaps important to realize that it seems to presuppose its own position: the argument presupposes that indeed member-states are to be regarded as third parties, but that is precisely the question.

Mixed agreements

A phenomenon peculiar to international organizations is that of the so-called 'mixed agreement', whereby both an international organization and

[52] Generally, the Court relies on criteria first established in case 26/62, *Van Gend & Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1.

[53] Treaties emanating from the 'second and third pillars' (foreign affairs and justice) are already deemed to bind those member-states that have accepted them, according to Art. 24 TEU. The Nice Treaty will add, upon entry into force, that they also bind the institutions (Art. 24, para. 6 TEU).

some or all of its member-states become parties to a treaty. The main legal reason for doing so resides in the circumstance that an international convention may deal with topics which are partly within the powers of the organization, partly within the powers of the organization's member-states.

Again, the practical occurrence of this phenomenon is largely limited to the EC,[54] which is a party to a number of treaties, alongside some or all of its member-states. The question addressed earlier cannot, strictly speaking, arise: if both the organization and all member-states are parties, then both the organization and the member-states will be bound. The question then becomes, however, a slightly different one: who is bound to what?[55] For the underlying idea with mixed agreements is that each party, be it the organization or its member, will take care of the things arising within the scope of its own powers.[56]

To determine the distribution of powers, the other contracting parties usually insist that the EC hand over some declaration on this distribution of powers.[57] Thus, upon signing the 1982 United Nations Convention on the Law of the Sea, the EC declared that the member-states have transferred competence to it with regard to the conservation and management of sea fishing resources, as well as some powers relating to the protection of the marine environment and commercial policy.[58]

[54] At one point, the UN considered accession to two conventions on nuclear accidents. See UNJY (1987), pp. 173–4. On other occasions, the UN may strive to include international provisions into its internal rules or possibly into bilateral agreements (for instance on peace-keeping) without actually joining multilateral regimes. This applies, e.g., to the law of armed conflict; see UNJY (1992), pp. 430–1.

[55] In addition, there may be cases where EC law gives the EC competence, but the EC is not accepted as a treaty partner. In such a case (it applies e.g., to some ILO conventions), the EC's 'external competence may, if necessary, be exercised through the medium of the Member-States acting jointly in the Community interest', according to the EC Court. See *Opinion 2/91* (ILO) [1993] ECR I-1061, para. 5. The ILO's position on the matter is set out in UNJY (1991), pp. 340–6. Similar problems may arise with respect to representation within organs; see UNJY (1980), p. 192.

[56] An excellent general analysis is Joseph H. H. Weiler, 'The External Legal Relations of Non-unitary Actors: Mixity and the Federal Principle', reproduced in his *The Constitution of Europe* (Cambridge, 1999), 130–87.

[57] For a critical view, holding that what is the EC's distribution of competences is not of concern to the EC's treaty-partners, see John Temple Lang, 'The Ozone Layer Convention: A New Solution to the Question of Community Participation in "Mixed" International Agreements' (1986) 23 CMLRev, 157–76, p. 172.

[58] The text is reproduced in, e.g., the UN publication *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1993* (New York, 1994), pp. 805–6.

While such a declaration is already rather vague in its own right, the Community obfuscated matters even more by adding: 'The exercise of the competence that the Member-States have transferred to the Community under the Treaties is, by its very nature, subject to continuous development. As a result the Community reserves the right to make new declarations at a later date.'[59] It is not uncommon for the EC to issue such declarations on distribution of competencies. The 1992 Climate Change Convention, for example, has been signed by the EC with a similar declaration.[60] It should be noted, though, that usually the obligation to make such a declaration derives from the treaty concerned. Thus, the United Nations Convention on the Law of the Sea specifies that international organizations may become parties, under conditions set out in one of the annexes to the Convention: Annex IX.[61]

Annex IX, in turn, specifies that the Convention is open for participation by organizations enjoying both competence over substantive law-of-the-sea issues and treaty-making powers in respect of those issues,[62] and provided a majority of their member-states have ratified.[63] Article 5 of Annex IX demands a declaration be included in the instrument of formal confirmation[64] or accession 'specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member-States which are parties to this Convention',[65] with Article 6 adding that responsibility for failure to comply shall follow the declaration of competences.

If the treaty concerned remains silent, then there most likely is no obligation to indicate clearly the distribution of competences. A case in point is the Marrakesh Agreement establishing the World Trade Organization, although much clarity (substantively largely unexpected) has been provided by the EC Court of Justice in its *Opinion 1/94*.

Another issue that may sometimes arise is that occasionally the EC has to reserve its internal position. Thus, upon signing the Environmental Impact Assessment Convention of 1991, the EC declared that it signed 'on

[59] Upon depositing its instrument of formal confirmation, on 1 April 1998, the Community confirmed that the scope and exercise of Community competence are, by their very nature, subject to continuous development, and added that 'the Community will complete or amend this declaration, if necessary'. The Declaration can be found at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty6.asp (visited 14 November 2001).

[60] See *Multilateral Treaties*, p. 889. [61] Article 305 UNCLOS. [62] Annex IX, Art. 1.

[63] *Ibid.*, Art. 3. [64] The act analogous to ratification.

[65] Article 5, para. 1. Article 2 demands a similar declaration upon signature.

the understanding that, in their mutual relations, the Community Member-States will apply the Convention in accordance with the Community's internal rules . . . and without prejudice to appropriate amendments being made to those rules'.[66] That is, in fact, little else than saying that Community law will prevail over the terms of this EIA Convention, if a conflict occurs or, in other terms, that the workings of the international obligation may be overruled by internal rules. And this, in turn, effectively boils down to making a reservation of the type which usually meets with objections: a reservation proclaiming the supremacy of internal (in this case Community) law over international obligations is usually almost by definition deemed difficult to reconcile with the object and purpose of the convention in question.

More difficult problems arise when the agreement is a so-called 'incomplete mixed agreement', meaning that the organization and some of its members have become parties, but that some other members have not. Usually, this is defended by pointing out that the subject matter of the treaty at hand does not involve the other member-states individually; thus, say, Austria may have little interest in a convention on North Sea cabotage, while Finland will hardly be deemed interested in Rhine shipping. In such circumstances, there is no practical reason to insist on the participation of Austria and Finland, respectively.[67]

As a theoretical matter, mixed agreements (whether covering all or only some of the organization's members) are far from elegant solutions to practical problems.[68] They rupture the unity, or would-be unity, of an organization's external actions, and even place question marks around the very idea of unity to begin with. In particular where mixity is inspired not so much by

[66] See *Multilateral Treaties*, p. 882.

[67] It has been pointed out though that in such a case member-states that do not become parties to the treaty at hand themselves are subject to the suspicion of attempting 'to secure a form of limited accession . . . with major reservations' by having the Community become a party. Compare Kenneth R. Simmonds, 'The Community's Declaration upon Signature of the UN Convention on the Law of the Sea' (1986) 23 CMLRev, 521–44, p. 530. Such a view seems premised upon a conception of organizations being mere vehicles for their member-states.

[68] And, additionally, bring their own practical problems with them. A recently discovered problem relates to whether the EC Court has the jurisdiction to apply or interpret an entire mixed agreement, or only those parts which fall within the Community's powers. Case-law tends to lean towards jurisdiction over the entire mixed agreement; see, e.g., case C-53/96, *Hermès* v. *FHT* [1998] ECR I-3603. For a brief discussion, see Joni Heliskoski, 'The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements' (2000) 69 Nordic JIL, 395–412.

legal necessity but rather by demands arising from concerns relating to the legitimacy of agreements amongst those who have to implement them (i.e., the member-states), one may well regard them as a sign of defeatism on the part of the organization concerned: it sends the message that its ambitions cannot be realized without the separate involvement of its member-states.

On the other hand, mixity also signifies that there might be situations where an analysis in terms of a distribution of powers between the organization (meaning mostly the EC) and its members is no longer very useful, in the sense that a power analysis might not say a lot about actual restraints on the behaviour of member-states arising out of Community law. This might find its cause in the circumstance that, even exercising its proper powers, a member-state may nonetheless interfere with EC law,[69] or in the circumstance that, increasingly, Community law prescribes that Community powers or policies be complementary to member-state powers or policies.[70] Where it is no longer possible or useful to separate the powers of the Community from those of its members, mixity becomes an obvious answer when it comes to the conclusion of treaties.[71]

Organizational liaisons

Treaty-making by international organizations is so well established that few eyebrows are raised when organizations enter into relations with one another. There is little doubt that, under general international law, organizations can and do conclude treaties with other organizations, on all possible topics and in all possible forms. Thus, to provide a random example, NATO and WEU, in 1995, signed a Memorandum of Understanding on communications co-operation.[72]

[69] The classic example derives from case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd* v. *Stephen Grogan and others* [1991] ECR I-4685; Ireland found out that, in regulating abortion, it ran the risk of interfering with EC rules on the free movement of persons. See also chapter 4 above.

[70] See Marise Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy', in Paul Craig & Gráinne de Búrca (eds.), *The Evolution of EU Law* (Oxford, 1999), 137–75. The Treaty of Nice, once it enters into force, goes even further, and stipulates that certain trade agreements may only be concluded on the basis of mixity. See Art. 133, para. 6 TEC (as amended at Nice).

[71] Note, however, that mixity may engender problems of responsibility. See Martin Björklund, 'Responsibility in the EC for Mixed Agreements – Should Non-member Parties Care?' (2001) 70 Nordic JIL, 373–402.

[72] See NATO Press Release (95) 102 of 27 October 1995.

The capacity of international organizations to help create, or join, other international organizations is not yet generally accepted. The UN's Office of Legal Affairs, for one, has expressed some hesitation in a memorandum relating to UNDP: 'International intergovernmental organizations which are the creation of States cannot in and of themselves create new international organizations, endowed with the same legal personality, unless they are specifically mandated by States.'[73] Still, on occasion, organizations have joined other organizations, or have been among the founding members of another organization, and at least one organization is established solely by other organizations without any direct state involvement: the so-called Joint Vienna Institute.[74]

Many of the problems discussed earlier return in this context, albeit in more complicated form. Thus, to take the example of an agreement between NATO and WEU, again the question may arise of who is bound: the organizations, or their members? Matters are more complex here, for two reasons. First, and obvious, there is not one organization involved, but two. Second, and more problematic, those two organizations have overlapping membership: all WEU members are also members of the larger NATO. This seems immediately to make clear that the agreement must be considered to bind only the organizations (and their organs); otherwise, the construction would arise in which at least the states that are members of both would find the agreement reduced to one that they concluded with, among others, themselves: Belgium, NATO-member, cannot meaningfully be considered as having concluded an agreement with Belgium, WEU-member.[75]

This, however, may re-introduce questions related to when things go wrong: if WEU fails to perform, whom should NATO address? Surely, if WEU remains unwilling to perform and refuses to provide remedies, some

[73] See UNJY (1991), pp. 296–301, at p. 297. This confirmed an earlier opinion, in which the Office held that international organizations 'do not have the legal capacity to establish new organizations', as represented in *ibid.*, at p. 298. Incidentally, the UN Office of Legal Affairs has also held that UNDP's mandate does not include 'the capacity to establish or participate in the establishment of a legal entity under the national laws' of its members either. See UNJY (1990), pp. 259–60, at p. 259.

[74] The Agreement for the establishment of the Joint Vienna Institute to provide training support, during the transition of central and eastern European countries to market-based economies, entered into force in 1994 and was concluded between the Bank for International Settlements, EBRD, IBRD, IMF and OECD. The text is reproduced in (1994) 33 ILM 1505.

[75] Of course, this can only arise where there is overlapping membership.

recourse to the underlying member-states must be possible, even if that means that those member-states may have to address themselves.[76]

Other problems are more specific to inter-organizational relations and in particular to the situation where one organization is a member of another organization, such as the question of voting rights and procedure.[77] While practice is hitherto relatively scarce, it would seem that voting rights and voting procedure are to be determined by the target organization, i.e. the organization that comprises another organization. The target organization will also make sure, if only to protect the interests of its other members, that the member organization shall not have more votes than its individual members would have together, and will insist, prior to voting and perhaps even prior to discussing matters, that the member organization provide a detailed overview of the precise distribution of competences between it and its member-states, similar to the type of declarations issued upon signing or confirming a treaty (as discussed above). Thus, with FAO meetings, the Community declares, prior to technical sessions, ministerial sessions and meetings of the Committee on Fisheries, what the actual state of distribution of powers is on every specific agenda-item, and whether the Community or its member-states shall exercise voting rights.[78] Nonetheless, the way those voting rights are exercised is a matter to be decided by the member organization, which shall follow either its usual decision-making procedures or a specific set of rules.[79]

A few other issues are also of relevance. Thus, the constituent document of the target organization must allow accession or membership of international organizations. The few that do,[80] have limited the type of organizations able to become members to regional economic integration organizations, and usually state that at least a majority of the members of the prospective member organizations must also (independently) be members of the target organization. Moreover, target organizations usually attach the condition that such an organization must be able to take decisions which bind its members. Hence, in practice the only prominent candidate to date

[76] Matters of responsibility will be further dealt with below, chapter 14.

[77] For a useful general overview, see Jörn Sack, 'The European Community's Membership of International Organizations' (1995) 32 CMLRev, 1227–56.

[78] For an example of such a declaration, see (1995) 11 *International Organizations and the Law of the Sea Documentary Yearbook*, pp. 782–3.

[79] Compare Case C-25/94, *Commission* v. *Council (FAO)* [1996] ECR I-1469.

[80] These include a number of commodities agreements. See UNJY (1976), pp. 216–18. The FAO, in 1991, changed its constitution in order to allow the EC to join.

to make use of this facility is the EC, which is a member of a number of international organizations.[81]

In addition, at least ideally, the prospective member organization should have an internal rule granting it the power to join other organizations; it has been cogently argued that, with respect to the EC, the existence of such a rule is doubtful.[82] While there is little doubt that the EC can substantively act on the fields covered by the organizations of which it is a member, there is no specific accession provision outlining the proper procedure to be followed analogous to the treaty-making procedure of Article 300 (ex-Article 228) TEC. As so often though, the absence of a specific rule has not prevented the EC from acting, and, as so often, it has been in particular the implied powers doctrine which has come to the rescue: where a substantive power exists, this must be deemed to imply the power to join or even help establish international organizations.[83]

Also of interest is whether an organization, as a member of another organization, can participate in subsidiary bodies set up jointly with other organizations, such as the joint FAO/WHO body Codex Alimentarius. At least the FAO's Legal Counsel answered the question in the affirmative, although it remains unclear whether such bodies allow participation of member organizations in their own right, or rather as exercising the rights of their member-states.[84]

Finally, another issue of relevance is the member organization's contribution to the budget. If the member-states of the member organization themselves contribute in full, there appears to be little reason to expect an additional contribution from the organization, save perhaps to cover any additional costs arising out of its separate membership. Against this, the argument has sometimes been invoked that to insist on state contributions would prevent the member organization from following its planned road to further integration (separate membership would prevent the proper

[81] These include the WTO, the EBRD, the FAO, and several fisheries organizations.

[82] See Rachel Frid, 'The European Economic Community – A Member of a Specialized Agency of the United Nations' (1993) 4 EJIL, 239–55, esp. pp. 242–5. More in-depth, see Rachel Frid, *The Relations between the EC and International Organizations: Legal Theory and Practice* (The Hague, 1995).

[83] As much follows from *Opinion 1/76*, where the Court held the EC to have the power to help found a fund. More generally, the EC has always been empowered to conclude association agreements (Art. 310, ex-Art. 238 TEC). Such associations may establish joint organs whose decisions may be directly effective in the legal order of the EC. See, e.g., case C-192/89, *Sevince* v. *Staatssecretaris van Justitie* [1990] ECR I-3461.

[84] See UNJY (1991), pp. 346–7.

exercise of possible future exclusive competences)[85] but surely it is not the task of the target organization to stimulate the development of its member organization vis-à-vis the member-states of the member organization.

Concluding remarks

The intriguing nature of the relationship between an organization and its members becomes perhaps most visible where the organization aspires to take the place of its members, for example, as a treaty partner or even as a member of yet another organization. There is a constant oscillation between the position of the organization as a party in its own right, and the position of the organization as a vehicle for its own member-states.

Given this complex state of affairs, it should come as no surprise that there are few, if any, hard and fast rules; much depends on the rules of the target organization, as well as on those of the acceding or joining organization, and even then much needs to be decided on a case-by-case basis.

While general doctrines, such as the law of treaties, may remain of help in simple cases (indeed, there is no good reason why an organization should be able to terminate its treaties under conditions which differ from those to which states are subjected), those same general doctrines cannot provide ready-made solutions to questions such as that of whether a treaty binding an organization also binds its members. Here, the indeterminacy of international law in general shows itself with full force, and with a twist: not only is the regular regime relating to third parties not free from uncertainties, but here it is not even clear whether member-states (or organs) are to be regarded as third parties to begin with. The same problem plays an important role when it comes to the responsibility of international organizations.

[85] So, e.g., Frid, 'The European Economic Community', p. 255.