

# Lesson 8

## EXTERNAL RELATIONS OF IOs

International Institutional Law  
Prof. Alessandra Annoni

# 1. TREATY MAKING POWERS

- **Capacity to conclude a treaty** – is vested in the IO under international law, because the IO is a subject of International law

Preamble of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT '86): “international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes”

- **Competence to conclude a treaty** – is vested in the IO by Members States, either through an express provision of the constituent treaty, by subsequent practice, or through the implied powers doctrine

Art. 6 VCLT '86: “The capacity of an international organization to conclude treaties is governed by the rules of that organization”

# 1.a.UN TREATY-MAKING POWER

- **Art. 43 UN Charter** – agreements between UN and MSs in order to allow for military troops to be made available
- **Art. 57 and 63 UN Charter** – ECOSOC may conclude agreements with other IOs in order to bring them into relationship with the UN (s.c. specialized agencies)
- **Art. 105 UN Charter** – GA may propose international convention to the UN MSs in order to ensure privileges and immunities to the UN and to UN officials
- **Implied powers** – e.g. when the UN is to deliver humanitarian assistance, it usually concludes an agreement with the host State

# 1.b. EU TREATY-MAKING POWER

**1. The Union may conclude an agreement with one or more third countries or international organisations where the EU Treaties so provide**

e.g. artt. 207 TFEU (trade agreements), 198 (association agreements with non-EU countries with special relations with certain EU States), 217 (association agreements with other States), 209 (development cooperation), 214 (humanitarian assistance)

# 1.b. EU TREATY-MAKING POWER

## 2. The EU may conclude agreements on the basis of the implied powers doctrine

ECJ case-law on parallelism between internal powers and external powers

The existence and extent of the EU treaty-making power depends on the existence and extent of an EU competence to adopt normative acts on a given subject matter on the internal level

# 1.b. EU TREATY-MAKING POWER

Internal competences may be classified as follow:

- **The EU enjoys exclusive competence in certain areas (Art. 3 TFEU)**

e.g. Custom union, Establishment of competition rules, Monetary policy,  
Conservation of marine biological resources, Common commercial policies

In these areas, only the Union may legislate and adopt legally binding acts. MS cannot adopt normative acts, unless for the implementation of Union acts

- **The Union enjoys also certain competences that are shared with MS**

e.g. Internal market, Social policy, Transport, Area of freedom, security and justice

Both the Union and the Member States may legislate and adopt legally binding acts in these areas.

**The Member States** shall exercise their competence to the extent that the Union has not exercised its competence.

**The Union** shall exercise its competence on the basis of the principle of *subsidiarity*, that is “ only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.” – Art. 5 TFEU

# 1.b. EU TREATY-MAKING POWER

- a) **Exclusive internal power ---- exclusive external power (Opinion 2/91:** “the existence of [an exclusive] competence arising from a Treaty provision excludes any competence on the part of Member States which is concurrent with that of the Community, in the Community sphere and in the international sphere” (para. 8)

# 1.b. EU TREATY-MAKING POWER

## b) Concurrent internal power ---- concurrent external power, but:

- **ERTA Case (c-22/70, 1971)**: an existing internal regulatory power, once exercised, has to be complemented by the exclusive power to conclude international agreements on the same subject matter

Rationale: otherwise MSs could circumvent EU law simply by entering into external agreements

- **Opinion 1/76**: the Court extends its reasoning also to situations where the EU exercises its internal regulatory powers for the first time upon the adoption of the treaty
- **Opinion 1/03**: “It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis “ (para. 126)



# 1.b. EU TREATY-MAKING POWER

**Article 216 TFEU:** 1. The Union may conclude an agreement with one or more third countries or international organisations where:

- the Treaties so provide, or
- where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties,
- or is provided for in a legally binding Union act or
- is likely to affect common rules or alter their scope.

# 1.b. EU TREATY-MAKING POWER

**Article 3(2) TFEU:** The Union shall also have exclusive competence for the conclusion of an international agreement

- a) when its conclusion is provided for in a legislative act of the Union or
- b) is necessary to enable the Union to exercise its internal competence,
- c) or in so far as its conclusion may affect common rules or alter their scope.

# 1.c. BINDING NATURE OF IO's TREATIES

- **Treaties bind the Organization as such**
  - Even if its organs acted *ultra vires* (ECJ, judgment of 9 August 1994, *France v. Commission*, C-327/91)
- **Treaties do not, in principle, also bind MSs**
  - But: Article 216(2) TFEU: “ Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

# 1.d. MIXED AGREEMENTS

- ❖ **Both the IO and its MSs are parties** to the agreement
- ❖ This is necessary when the agreement deals with **topics which are partly within the powers of MSs, partly within the powers of the IO**
- ❖ The IO may adopt a **declaration on the distribution of powers** to clarify who is bound by which provision of the treaty (e.g. declaration of the EU upon signing of the 1982 UN Convention on the Law of the Sea)
- ❖ **Disconnection clause** – allows EU members to apply EU law in their mutual relations while applying the treaty in relations with non-EU members

## 2. ORGANIZATIONAL LIASONS

### 1) Precondition to membership

e.g. UN members may join the International Labour Organization (ILO) by merely informing ILO of their intention to do so, while non-UN members need to be formally accepted by a majority of ILO's members (artt. 1(3) and (4) of ILO Constitution)


e.g. States may only join the World Bank if they are members of the International Monetary Fund (IMF)

# 2. ORGANIZATIONAL LIAISONS

## 2) Membership of organization “A” in organization “B”

- Requires a **legal basis in the constituent treaty of organization “A”**, but recourse to the implied powers doctrine is also possible +
- Requires a **legal basis in the constituent treaty of organization “B”**: participation should be open also to international organization
- **Practical issues must be addressed** (e.g. voting rights, contribution to the budget...)

What if MS have transferred to organization “A” powers concerning a given matter, falling within the scope of operation of organization “B”, but organization “B” is not open to participation by IOs? (e.g. ILO and EU)

 MSs of organization “A” who are also members of organization “B” must represent the position of organization “A” in matters affecting that organization (ECJ, 19 March 1993, Opinion 2/91)

## 2. ORGANIZATIONAL LIAISONS

### 3) Observer status of organization “A” in organization “B”

e.g. African Union, EU etc. within the UN General Assembly

### 4) Relationships between universal and regional organizations with overlapping mandates

e.g. Chapter VIII UN Charter

- **Art. 52:** encourages development of regional organizations dealing with international peace and security
- **Art. 53:** SC may delegate enforcement actions to regional organizations, but no action should be taken by a regional organization without the authorization of the SC

#### But:

- OAS at the time of the Cuba crisis
- NATO in Kosovo (1999)

# 2. ORGANIZATIONAL LIAISONS

## 5) Families of organizations

Strong mutual relations.

- Tasks are divided and each organization plays a role in the larger unit formed by the family.
- There are institutional links between the members of the family (e.g. common organs)

### e.g. UN specialized agencies (ILO, WHO, IMO)

- ❖ The UN ECOSOC enters into agreement with specialized agencies (SAs), bringing them into relationship with the UN (art. 63 UN Charter)
- ❖ The ECOSOC shall make recommendations for the co-ordination of the policies and activities of the SAs (art. 63)
- ❖ SAs deliver reports on their activities to the ECOSOC (art. 64)
- ❖ Representatives of SAs may participate, without vote, in the deliberations of ECOSOC and of commissions established by it, and vice-versa



# 2. ORGANIZATIONAL LIAISONS

## 6) Other forms of coordination

Established informally or through formal agreements (e.g. IMO and ILO)

### a) Joint programmes

e.g. World Food Programme (executive board is a joint organ of FAO and UN)

### b) Joint ventures

- They enjoy a greater degree of autonomy, sometimes have legal personality under international and/or domestic law
- Participants are usually States, IOs, NGOs, representatives of the private sector
- Legal status: they are usually established under domestic law (e.g. Swiss Law), and yet they enjoy immunities under international law
- Governance: may be fairly complicated
- Responsibility?

# 3. DIPLOMATIC RELATIONS

## 1- Passive Legation

- IOs may receive diplomatic missions from States.

(Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975)

- Host States grant them privileges and immunities similar to those granted to diplomats (**tripartite relationship**)

e.g. Permanent missions at the UN

# 3. DIPLOMATIC RELATIONS

## 2- Active Legation

Rests upon:

- Approval of the receiving State, and
- Decision of an organ of the organization competent to establish a mission (implied powers doctrine)
  - a) Permanent missions (e.g. for development, UN Resident Coordinator)
  - b) Special missions to members (e.g. UNMIK, UNTAC)
  - c) Delegations to non-members (e.g. EU delegations)

# 4. RECOGNITION OF OTHER SUBJECTS OF INTERNATIONAL LAW

- **Recognition of States**

- By admitting them as Members
- By admitting them as non-Member States (e.g. Palestine)
- Through an ad hoc resolution (e.g. GA resolution 3061(XXVIII) 1971) – Guinea Bissau

# 4. RECOGNITION OF OTHER SUBJECTS OF INTERNATIONAL LAW

- **Recognition of governments**

May be particularly relevant in situations of anarchy or internal armed conflict, when 2 or more entities claim to be the legitimate government of a given State

- **Recognition of National Liberation Movements**