INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS

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ABSTRACT
This working paper analyzes the law-making processes of international organizations and the impact thereof, particularly in the light of the functionalism-constitutionalism dichotomy and the agency theory. Both doctrines are introduced briefly before expanding upon the attribution of law-making powers to international organizations, their decision-making methods and the decisions of their judicial organs. The working paper then focuses on the impact of international organizations on the adoption of treaties and the development of customary international law. Finally, the issues of democratic deficit and multilevel regulation are addressed. The paper demonstrates that international organizations have become increasingly active players in the field of international law-making. This evolution has not always and necessarily been the result of deliberate considerations on the part of the Member States who hired the international organizations. It rather follows from a combination of constitutionalist-inspired measures taken by the principals in order to minimize and otherwise rectify the agency costs and losses inherent in all functional PA-relationships.

KEY WORDS

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1. INTRODUCTION

The purpose of this paper is to analyze the law-making processes of international organizations and the impact thereof, particularly in the light of the functionalism-constitutionalism dichotomy and agency theory. The former distinction essentially juxtaposes the claim of international organizations to such rights, privileges and authority as are necessary to fulfil their functions, and the call for more control over these organizations. The constitutionalist approach is more recent and has been developed mainly in reaction to apparent flaws in the functionalist model. There are two strands of constitutionalism\(^1\): one emphasizes the existence of a number of universal core values such as human rights that permeate every level of the world legal order, the other rather focuses on the possibility of controlling international organizations through various provisions in their constituent charters.

Agency theory, on the other hand, is a socio-political and microeconomic theory\(^2\) that can and has been applied equally well to political science and international relations.\(^3\) It will be discussed briefly in a separate section below (2). Afterwards, we will elaborate on the basic premises underlying the attribution of law-making powers to international organizations (3).

We will then proceed to discuss how agency theory compares to the classic doctrines of functionalism and constitutionalism in explaining the law-making methods of international organizations (4) and the decisions of their judicial organs (5). The same approach will be applied in order to study the impact of international organizations on the adoption of treaties (6) and the development of customary international law (7). We will then turn to the issue of

\(^1\) See E. de Wet, “The international constitutional order”, ICLQ 2006, 51-76.
the apparent democratic deficit in the law-making processes of international organizations (8) and the subject of multilevel regulation (9) before formulating our conclusion (10).

2. AGENCY THEORY

Agency theory, applied to international organizations, implies that certain States (the principals) set up an international organization (the agent) to perform certain functions that will benefit the members. The Member States will set certain goals for the international organization to accomplish.4 This will enable the principals to turn their attention to other matters, knowing that the ‘outsourced’ functions will be dealt with by a more expert agent.5 If the agent, however, does not fulfil the functions and realize the goals as set out and envisaged by the principals, the members will try to intervene and change the operating methods of the international organization in order to minimize the so-called ‘agency losses’ or ‘costs’, incurred by ‘agency slack’.6 Agency slack is understood to comprise independent action of the agent that thwarts the original goals of the principal and is thus considered undesirable by the latter. The costs incurred by and needed to rectify such behaviour are called agency costs. The risk of incurring high agency costs tends to increase with the autonomy given to the agent by the principal to achieve its goals.7

In order to prevent the occurrence of agency slack, principals will only conditionally delegate certain authority and functions to the agent and will try to design adequate mechanisms of control. These measures will usually be laid down in the contract that rules every principal-agent (PA) relationship.8 In the case of international organizations it can be said that this contract takes the form of the constituent treaty establishing the organization.9

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5 The International Seabed Authority (ISA) possibly escapes this narrow formulation of agency theory. As the seabed and ocean floor and the subsoil thereof are ‘the common heritage of mankind’, they are, in principle, beyond the limits of State sovereignty and under direct control of the ISA. H.G. Schermers, “We the Peoples of the United Nations”, Max Planck Yb. UN L. 1997, 114-115.
Principal-agent relationships exist in many forms and can more specifically be comprised of one or more principals, with the further complication that each principal can be an individual or a corporate entity.\(^{10}\) A delegation relationship comprised of ‘multiple principals’ exists when each principal has a separate contract establishing a relationship with the agent, whereas a relationship with a ‘collective principal’ is like a PA-relationship with one principal, but the principal is composed of multiple actors.\(^{11}\)

Functionalism, when explained in terms of agency theory, implies that principals, when setting up an international organization as an agent, deliberately grant the latter a certain level of discretion since this is thought to be the best strategy for achieving set policy goals.\(^{12}\) Even though putting an agent into a straitjacket by explicitly delineating its powers and law-making procedures may limit the risk of incurring high agency losses later, negotiating the details of said rules and regulations is already in and of itself a very time-consuming process and thus costly in agency terms. Nevertheless, Member States usually opt for certain control mechanisms to monitor to a certain extent the activities and decisions of the agent in question. Such measures, then, can be said to constitute a form of constitutionalism as briefly defined previously. However, it should be noted that not every constitutionalist measure will succeed in limiting agency losses, as will be demonstrated later on in this paper.

3. LAW-MAKING BY INTERNATIONAL ORGANIZATIONS

It is undisputed that international organizations can take decisions that are binding upon their Member States and that they can even exercise sovereign powers. This is evident in such organizations as, for example, the United Nations (UN), the European Community (EC), the World Health Organization (WHO), the International Civil Aviation Organization (ICAO), the Organization of American States (OAS), NATO, the Organisation for Economic Co-operation and Development (OECD), the Universal Postal Union (UPU), the World Meteorological Organization (WMO) and the International Monetary Fund (IMF).\(^{13}\) Traditionally, each

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analysis of the law-making powers of international organizations starts from the following three propositions: (1) Member States provide the international organizations they establish with the law-making powers as they see fit, laid down in the constituent instrument of the organization (constituent treaty); (2) international organizations have only the law-making powers that have been attributed to them in the constituent treaty by their Member States (doctrine of attributed powers); and (3) the law-making powers of international organizations are generally limited to internal matters.\footnote{J.E. Alvarez, \textit{International organizations as law-makers}, Oxford, OUP, 2006, 120-121.}

The aforementioned propositions would ideally result in international organizations creating law through predictable mechanisms in a way consistent with the original goals of the Member States, without any need for further measures of control. Recent developments and observations suggest, however, that the traditional propositions no longer hold true. This development has great implications for the functionalism-constitutionalism distinction noted earlier, as will be discussed in the following paragraphs.

Constituent instruments establishing international organizations are, like all national and international norms, subject to interpretation by the parties and organs applying it. It is possible, therefore, that the treaty provisions pertaining to the law-making powers of the organization will be construed in a different way than was originally intended by the drafting nations, as it proves very difficult to draft an instrument in such a manner as to effectively preclude any other possible interpretation.\footnote{See, more generally, D.C. Smith, "Beyond indeterminacy and self-contradiction in law: transnational abductions and treaty interpretations", \textit{AJIL} 1995, 1.}

The customary rules for international treaty interpretation have been codified in the Vienna Convention on the Law of Treaties (Vienna Convention).\footnote{Vienna Convention on the Law of Treaties, 22 May 1969. Pursuant to Art. 5, the Convention also applies to any treaty which is the constituent instrument of an international organization.} Art. 31 (1) Vienna Convention provides that:

\begin{quote}
“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
\end{quote}

This provision supports the functionalist approach insomuch as it implies that provisions attributing powers to an international organization shall be interpreted in light of the purpose of the constituent treaty and thus of the function of the organization. A judicial organ applying this principle to the law-making provisions of a constituent treaty will therefore typically conclude that the organization has such powers as are necessary to realize its goals.
Art. 31 (3) Vienna Convention further states that:

“There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.”

The possibilities of misconstruing treaty provisions laying down the law-making powers of international organizations are further exacerbated by the interpretation technique codified in Art. 31 (3)(b) Vienna Convention. The classical example is the UN Security Council’s practice of not considering the abstention from voting (or absence) of one of the permanent members as precluding the adoption of a decision, even though Art. 27 (3) of the United Nations Charter expressly states that, on substantive matters, “[decisions] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.” The International Court of Justice (ICJ), however, seems to construe this practice as a mere progressive interpretation of the last phrase of Art. 27 (3) UN Charter, which adds to the previously quoted part: “provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52 [both pertaining to the pacific settlement of disputes], a party to a dispute shall abstain from voting.”

The judicial organs of some international organizations have applied the aforementioned and other interpretation techniques in their decisions in order to attribute more power to themselves and to other organs of the organization by following a more teleological approach, arguably sometimes reading more into the provisions of the constituent treaty establishing the organization than originally intended by the authors thereof (infra, V.).

However, Art. 31 (3) Vienna Convention also contains two provisions that can be applied to rein in the powers of international organizations that are thought to stray from their intended functions and goals. If the perceived agency losses become too significant to ignore for the

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17 Compare the Rules of Procedure of the League of Nations’ Assembly (Art. 19 (5)) and Council (Art. 9 (3)), which stated that representatives who abstained from voting were considered not present, so that abstentions would not prevent the adoption of decisions by unanimity. See B. Simma, S. Brunner and H.-P. Kaul, “Article 27” in B. Simma (ed.), The Charter of the United Nations. A commentary, Munich, Verlag CHB, 2002, 480.

18 ICJ, Advisory Opinion Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) [1971] ICJ Rep. 22, para. 22. See B. Simma, S. Brunner and H.-P. Kaul, supra note 19, 493. See also Art. 6 (2) of the Convention on the Organisation for Economic Co-operation and Development, 14 December 1960 (“If a Member abstains from voting on a decision or recommendation, such abstention shall not invalidate the decision or recommendation, which shall be applicable to the other Members but not to the abstaining Member”).
Member States, the principals can decide to collectively negotiate a subsequent agreement clarifying the – in their view – correct interpretation of the relevant law-making provisions (Art. 31 (3)(a) Vienna Convention), and thereby force the international organization into correctly applying said treaty articles.\textsuperscript{19} Further, international organizations are, like all subjects of international law, bound by rules of customary international law. If the interpretation of the law-making powers is found to violate certain customary principles, Art. 31 (3)(c) Vienna Convention could be applied to call the agent to order.

Furthermore, with respect to the third traditional presupposition, limiting the law-making powers of international organizations to purely internal matters, it is to be noted that internal rules issued by these organizations tend to have normative spill-over effects which reach beyond the internal sphere of the organization. The United Nations Security Council (UNSC) is a good example of a body increasingly active in creating 'international regulation', particularly in the field of anti-terrorism and the fight against impunity, promulgating measures which are not directed at the Member States as such, but which directly affect citizens.\textsuperscript{20} One can note, in this respect, the establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and the issuance of so-called 'smart sanctions' directed against individuals rather than States.\textsuperscript{21} Similarly, the decisions of the World Trade Organization's (WTO) Dispute Settlement Body, and various norms proclaimed by, for example, the UN High Commissioner for Refugees, the WHO and the World Intellectual Property Organization (WIPO) may also have far-reaching consequences for individuals.\textsuperscript{22} Indeed, nowadays, most decisions of international organizations have an internal and an external normative impact. Hence, the line between internal and external law-making is fading (\textit{see also infra, VI.}).

\textsuperscript{19} Illustrations thereof can be found in EU treaty-making practice. Thus, the Maastricht Treaty on the European Union contained a number of protocols attached to the EC Treaty which were clearly meant to 'correct' certain judgments of the European Court of Justice. For example, the Protocol concerning Article 119 of the Treaty establishing the European Community of 7 February 1992 (OJ C 191, 29.7.1992, 68) was adopted by the Member States in order to impose a certain time limit upon the effects of the \textit{Barber} judgment of the ECJ of 17 May 1990. See W. Devroe and J. Wouters, \textit{De Europese Unie. Het Verdrag van Maastricht en zijn uitvoering: analyse en perspectieven}, Leuven, Peeters, 1996, 225. The Court in \textit{Barber} held that a British pension fund applying a non-contributory 'contracted-out' scheme fell within the scope of Art. 119 EC, finding that this provision precludes national legislation that results in different treatment of workers as a result of the application of an age condition that varies according to sex (ECJ, Case C-262/88 \textit{Barber} [1990] \textit{ECR} I-1889). The Court followed the interpretation imposed by the protocol in ECJ, Case C-109/91 \textit{Ten Oever} [1993] \textit{ECR} I-4879. See, however, ECJ, Case C-7/93 \textit{Beune} [1994] \textit{ECR} I-4471; ECJ, Case C-57/93 \textit{Vroege} [1994] \textit{ECR} I-4541 and ECJ, Case C-128/93 \textit{Fisscher} [1994] \textit{ECR} I-4583.


\textsuperscript{22} R.A. Wessel and J. Wouters, \textit{supra} note 15, 19.
4. Decision-making methods

The decision-making processes in international organizations can take multifarious forms that range from anywhere between consensus, voting and unanimity.

International organizations frequently resort to adopting decisions by means of consensus, which implies that they continue to debate and discuss options until a general agreement is reached, rather than force a decision by taking a vote. While it is possible that one or more Member States have some reservations on the outcome, they decide, for various reasons, not to block it. Nevertheless, constituent treaties of international organizations from time to time resort to majority voting if no consensus can be reached.

Examples of law-making by international organizations by consensus can be found in, inter alia, the practice of the United Nations Security Council since as early as 1948. Occasionally, when a decision of substance has to be taken, the President of the UNSC would propose a statement, which, if no member voices express disagreement, would be accepted by consensus. Further, due to circumstances peculiar to the situation at the time, no voting took place during the 19th annual session of the UN General Assembly in 1964. The practice of deciding by consensus has subsequently been adopted by a number of organs of the United Nations, and increasingly by the General Assembly itself.

An important number of international organizations require unanimity for all or certain categories of decisions. An example from the past is the League of Nations, which notoriously required unanimity for all the decisions of the Council and the Assembly, except for procedural matters. Unanimity is currently still the rule in, inter alia, the following (mostly

23 The UN defines consensus as the “adoption of a decision without formal objections and vote; this being possible only when no delegation formally objects to a consensus being recorded, though some delegations may have reservations to the substantive issue at issue or a part of it” (definition proposed by the UN Office of Legal Affairs, UNJY 1987, 174). Compare the description of consensus decision-making in footnote 1 to Art. IX.1 of the Agreement establishing the World Trade Organization, 15 April 1994 (WTO Agreement) (“The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision”).

24 See, for example, Art. 7 (1) and 11 (1) of the Constitutive Act of the African Union, 11 July 2000; Art. 9 (6) of the Treaty establishing the Common Market for Eastern and Southern Africa, 5 November 1993 and Art. IX.1 of the WTO Agreement. The latter provision states that, “[e]xcept as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.” However, the practice in the WTO is that a vote is never taken: see J. Wouters and B. De Meester, The World Trade Organization. A legal and institutional analysis, Antwerp, Intersentia, 2007, 180-182 for the decision-making modes in the WTO (including ‘explicit consensus’ and ‘reverse consensus’). See also, for the difference between ‘passive consensus’ and ‘active consensus’ in the WTO, M. Footer, An institutional and normative analysis of the World Trade Organization, The Hague, Nijhoff, 2005, 136–139.


27 Art. 5 of the Covenant of the League of Nations, 28 April 1919.
regional) organizations: the Benelux, OECD, the Organization of the Petroleum Exporting Countries (OPEC), CARICOM, the African Union (AU), the West African Economic and Monetary Union (WAEMU) and the South Asian Association for Regional Cooperation (SAARC). Further, this method of decision-making is also used for some subject matters in, among others, the European Union, the European Space Agency (ESA), the Arab League and the Economic Community of West African States (ECOWAS).

Voting as a method of decision-making can take many forms and can run the gamut from a simple majority vote with equality of voting power to qualified majority with weighted voting.

The preferred method of law-making by international organizations and their Member States has shifted over time and deserves to be analyzed against the backdrop of agency theory introduced earlier and the discussion of functionalism vs. constitutionalism. It is self-evident that one of the foremost methods of reining in the international organization as an agent, is for the principals to decide upon certain methods of decision-making in the constituent instruments that would allow them to permanently influence the course taken by the agent.

The first international organizations originally took decisions almost exclusively by unanimity, up until the beginning of the 20th century. The Permanent Court of International Justice (PCIJ) confirmed this in its advisory opinion on the Treaty of Lausanne and stated that, with respect to organizations composed of government representatives

> "from whom they receive instructions and whose responsibility they engage [...] observance of the rule of unanimity is naturally and even necessarily indicated. Only if the decisions [...] have the support of the unanimous consent of the Powers composing it, will they possess the degree of authority which they must have."

28 Art. 8 of the Treaty establishing the Benelux Union, 3 February 1958.
29 Art. 6 (1) of the Convention on the Organisation for Economic Co-operation and Development ("mutual agreement of all the Members").
30 Art. 11 (c) of the Statute of the Organization of the Petroleum Exporting Countries, 14 September 1960.
31 Art. 9 (2) and 13 (2) of the Treaty establishing the Caribbean Community, 4 July 1973 ("an affirmative vote of all its members").
32 Art. 7 (1) and 11 (1) of the Constitutive Act of the African Union, 11 July 2000.
33 Art. 114 of the Treaty on the West African Economic and Monetary Union, 10 January 1994.
34 Art. X of the Charter of the South Asian Association for Regional Cooperation, 8 December 1985 ("Decisions at all levels shall be taken on the basis of unanimity").
35 See, for example, Art. 57 (2) and 93 EC.
36 See Art. V (3), VII (1)(d) and XI (5)(a)(ii) and (iii) of the Convention for the establishment of a European Space Agency, 30 May 1975.
38 See Art. 6 of the Pact of the Arab League of States, 22 March 1945.
39 For an extensive discussion of the various methods and their implications, see H.G. Schermers and N.M. Blokker, International Institutional law, Leiden, Nijhoff, 2003, paras. 791-856.
41 PCIJ, Advisory Opinion Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne [1925] Publ. PCIJ 29.
See also J. Klabbers, An introduction to international institutional law, Cambridge, CUP, 2002, 227-228.
This practice is logical from the perspective of the agency theory since requiring unanimity for all decisions is one of the most certain ways of minimizing agency losses. However, it cannot be explained as easily from the vantage point of the functionalist theory, nevertheless thought to be more applicable to international organizations of the past, for the unanimity rule strongly restricts the international organizations in their freedom to functionally fulfil the goals for which they were established. Functionalist needs were apparently overruled by national concerns when international organizations first appeared.

Times have changed, though. By 1945, more and more international organizations had opted for majority voting in their constituent treaties, not in the least the United Nations, which, unlike its predecessor, the League of Nations, requires that all decisions be taken by majority vote (notwithstanding the veto power of permanent members in the UN Security Council). Likewise, (some type of) majority voting is the method of choice in many a specialized agency of the UN, such as the International Labour Organization (ILO), ICAO, WHO, the Food and Agriculture Organization (FAO), WMO, IMF, the International Bank for Reconstruction and Development (IBRD), the World Tourism Organization and WIPO. Various regional organizations also apply this method, including, for example, OAS, the Asian Development Bank (ADB) and the Organization of the Islamic Conference (OIC). This change of heart was probably spun by the realization that giving a de facto veto to each and every member of an international organization could lead to full-fledged paralysis, although instances where this has happened are very rare indeed.

42 Art. 18, 67 and 89 UN Charter provide for a majority vote.
44 Art. 48 (c) and 52 of the Convention on International Civil Aviation, 7 December 1944 (simple majority).
45 Art. 60 of the Constitution of the World Health Organization, 22 July 1946 (two-third majority for decisions on important questions, otherwise simple majority).
46 Art. III (8) and V (5) of the Constitution of the Food and Agriculture Organization, 16 October 1945 (simple majority).
47 Art. 10 (b) of the Convention of the World Meteorological Organization, 11 October 1947 (in principle two-third majority).
48 Art. XII, Section 5 (c) of the Articles of Agreement of the International Monetary Fund, 22 July 1944 (simple majority).
49 Art. V, Section 3 (b) of the Articles of Agreement of the International Bank for Reconstruction and Development, 27 December 1945 (simple majority).
50 Art. 29 of the Statutes of the World Tourism Organization, 27 September 1970 (simple majority for most issues, two-thirds for some, including budgetary and financial questions).
51 Art. 6 (3) of the Convention establishing the World Intellectual Property Organization, 14 July 1967 (two-third majority for most issues, three-fourths or nine-tenths for some).
52 Art. 59 of the Charter of the Organization of American States (simple or two-third majority, depending on the organ and subject matter).
53 See, for example, Art. 11 (iii) of the Agreement establishing the Asian Development Bank, 4 December 1965 (majority of the total number of Governors, representing a majority of the total voting number) and Art. 30 (1) (ii) (simple majority of the number of Governors, representing a two-third majority of the members’ total voting power).
The practice of majority voting fits better the functionalist approach than unanimity – it is easier for an international organization to reach decisions and fully realize its functional goals when it can disregard the isolated objections of an irksome minority. However, the level of autonomy an international organization is granted by the law-making method of majority voting will almost certainly provide for possibilities and opportunities of agency slack.

It should come as no surprise then, that, even though most constituent instruments of international organizations to some extent provide for a majority vote, in practice, organizations nevertheless often resort to decision-making by consensus. This practice became particularly widespread in the second half of the 20th century and was subsequently often formalized and codified in the treaties of the respective organizations, as has been observed in, for example, the decision-making rules of MERCOSUR, the Commonwealth of Independent States (CIS), the African Economic Community (AEC), ECOWAS, the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), the Association of Southeast Asian Nations (ASEAN) and the Assembly of States Parties to the Rome Statute of the International Criminal Court.

This shift in practice from majority voting to adopting decisions by consensus is most commonly explained by the huge expansion of the membership of many international organizations in the second half of the 20th century, especially following the coming into being of a great number of new States as part of the decolonization process. The founding members of most international organizations created an agent with common expectations.

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57 Consensus was also the main decision-making method under GATT. See Art. IX.1 of the WTO Agreement, which provides that “[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947”.


60 Art. 9 (2) and (3) of the Treaty establishing the Economic Community of West African States, 25 May 1975 (“Unless otherwise provided in this Treaty or in a Protocol decisions of the Authority shall be adopted, depending on the subject matter under consideration by unanimity, consensus or, by a two-thirds majority of the Member States. [...] Matters referred to in paragraph 2 above shall be defined in a Protocol. Until the entry into force of the said Protocol, the Authority shall continue to adopt its decisions by consensus”).

61 Art. 10 (8), 11 (6), 13 (6) and 19 of the Declaration and Treaty establishing the Southern African Development Community, 17 August 1992.

62 Art. 8 (7) and 9 (6) of the Treaty establishing the Common Market for Eastern and Southern Africa, 5 November 1993.

63 Art. 20 (1) of the Charter of the Association of the Southeast Asian Nations, 20 November 2007 (“As a basic principle, decision-making in ASEAN shall be based on consultation and consensus”).


and conceptions as to the functions and goals to be realized by the latter. Often, these Member States could also as regards their interests act as a collective principal in the PA-relationship with the international organization they established, and adopting decisions by majority vote posed no great risk. With the arrival of a large number of new actors with often competing interests on the scene, however, this prospect abruptly changed. Voting suddenly held a rather large risk of loss of influence for the original members. From an agency theory point of view, therefore, it proved more profitable for the original, often Western, members to try and reach a consensus where possible.

It is sometimes noted that very little practical difference exists between unanimity, the preferred method of decision-making in the early days of international organizations, and the modern-day practice of decision-making by consensus. While the two are obviously not interchangeable and are sufficiently different to warrant the distinct terminology, it should be noted that both methods do support a more constitutionalist approach and have been used to preclude ‘rebel’ behaviour in agents. However, the reasons for decision-making by unanimity and consensus, when placed in their historical context, are different. The unanimity rule was mainly inspired by issues of sovereignty relied upon by States opting for a more functional approach when dealing with international organizations, whereas the method of consensus can be interpreted as a reaction to agency slack and the need for more control over international organizations and thus as a constitutionalist response to failed functionalism.

From the above it appears that there is a certain trade-off between measures that benefit the functionalist approach and agency losses. The autonomy that is necessarily granted to allow agents to realize their functional goals as set out in the constituent instrument depends to some extent on the method of decision-making that has been adopted. When this autonomy is perceived to be too large by a sufficient number of actors, efforts will usually be made to rein in agency losses, inter alia, through modifying the decision-making process.

5. JUDICIAL ORGANS AS LAW-MAKING ACTORS

In the previous section it was established that principals can try to monitor agency activity by incorporating certain decision-making processes in the constituent instrument of the organization. Another method for principals to control their agent is by establishing certain checks and balances within the structure of the international organization, sometimes in the form of a judicial organ, which will then monitor the activities of the organization’s organs and their compliance with the constituent treaty and general norms and principles of international

law. Examples of such judicial organs are the International Court of Justice, the Court of First Instance (CFI) and the Court of Justice (ECJ) of the European Communities, the WTO’s Standing Appellate Body, the Court of Justice of the African Union, the COMESA Court of Justice, the SADC Tribunal and the Courts of Justice of CARICOM and the Andean Community. An additional advantage of these and other international judicial bodies is that, through their case-law and the authority thereof, compliance with global and regional international norms is enhanced.

From the perspective of agency theory, judicial organs of international organizations can be seen as being established in order to reduce agency losses by ensuring compliance by the organizations with their own functional powers and goals. To this end, States, organs of the international organizations and (in some cases) individuals, can bring complaints before these judicial bodies. An interesting example in this respect is the creation in 1994 of an independent inspection panel in the seat of the World Bank to hear complaints from private and public groups as one of several measures to reduce agency slack. The creation of international adjudicatory bodies is thus testament to a more constitutionalist approach towards international organizations. However, the very nature of judicial dispute settlement mechanisms at the same time also entails substantial risks of agency losses. Indeed, the members of judicial agents will typically be rather reluctant to relinquish their own legal views in favour of the wishes of their principals. Furthermore, the normative principles of international law pertaining to due process obligations, including the imperatives of impartiality and independence, will make it very difficult for the principals to adjust the provisions regulating the workings of these judicial organs so as to align them with their own interpretations of the international organizations’ functions and goals. Such attempts at reducing the adjudicatory body’s discretion in reaching decisions will not only be costly, but also largely ineffective and, it is submitted, undesirable.

Inasmuch as the principle of constitutionalism is thought to refer to the incorporation of control mechanisms to monitor the decisions of international organizations, the establishment of international judicial organs can rightfully be considered a means of reducing agency

67 D.L. Nielson and M.J. Tierney, supra note 5, 262-263. No similar body exists in the IMF. An Independent Evaluation Office (IEO) was established in 2000 to systematically conduct objective and independent evaluations of the Fund’s activities. It regularly reviews compliance with operational policies and makes recommendations to the IMF Executive Board for remedial action and/or revision of the operational policies. However, the IEO’s mandate does not permit interested parties to challenge IMF programs – it can merely address public concerns about accountability. As such, the IEO recently carried out an evaluation “Governance of the IMF”, in which it assessed the degree to which Fund governance is effective and efficient, and whether it provides sufficient accountability and channels for stakeholders to have their views heard. The evaluation called for a framework to be put in place to hold Management accountable for its performance, noting that work is under way to set up such a framework, which should specify criteria and a process for regular assessments. See the Annual Report of the IMF Independent Evaluation Office, 30 April 2008, http://www.ieo-imf.org/pub/ar/pdf/2008Report.pdf (accessed on 19 December 2008).

68 P.B. Stephan, supra note 5, 336.
losses. However, if constitutionalism entails the recognition of a vertical rather than a horizontal legal world order, held together by a number of universal core values, the principals’ goals to reduce said losses will possibly be thwarted, since the principle of impartiality of judicial organs implies, by definition, that their decisions are beyond the sphere of influence of the Member States. Generally, principals shall nevertheless allow a certain level of agency discretion in judicial bodies, since the independence of their rulings is needed to make the Member States’ commitments credible.

As noted previously, judicial organs will construe the provisions in the treaty establishing an international organization according to certain interpretation techniques. A functionalist approach would imply that one should allow international courts and tribunals to do so, even though this might entail judicial decisions that stray from the wordings of the constituent instrument, and possibly the drafters’ intentions. A clear case of judicial organs changing norms promulgated by the principals concerns the rules regarding the legality of safeguards drafted by WTO Members. The WTO Appellate Body in a number of recent cases added the requirement that imports must have increased as a result of unforeseen developments, in order for a safeguard measure to be legal, thus clearly going against the intentions of the principals.

Further, the Appellate Body recently allowed for public hearings upon request of the parties, notwithstanding the fact that a WTO provision unambiguously States that “[t]he proceedings of the Appellate Body shall be confidential.” Similarly, the European Court of Justice is regularly accused by the EU Member States of being too ‘activist’, resulting, sometimes, in drastic measures reining in the perceived agent on the loose.

The law-making powers of international judicial bodies have also steadily increased through the jurisprudential development of the implied powers doctrine, as exemplified already in a 1928 advisory opinion of the PCIJ concerning the interpretation of the Greco-Turkish agreement of 1 December 1926. In this case, the PCIJ held that, when no solution could be

Supra, I. and E. de Wet, supra note 3.
Supra, II.
See supra note 21.
reached by the Mixed Commission established by the Greco-Turkish agreement, said Commission could have recourse to arbitration, since

“from the very silence of the article on this point, it is possible and natural to deduce that the power to refer a matter to the arbitrator rests with the Mixed Commission when that body finds itself confronted with questions of the nature indicated.”

The Court in this case thus made an early application of the so-called doctrine of implied powers.76

The doctrine of implied powers, which is a corollary to the theory of attributed powers embraced by the traditional approach to the law-making powers of international organizations (supra, III.), is also regularly applied by the successor of the PCIJ, the ICJ, and by the ECJ, although in the case of the latter, the theory is to a certain extent codified in the constituent instrument of the organization. Indeed, Art. 308 of the Treaty establishing the European Community (EC Treaty) provides that:

“If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”77

This article in particular, and the doctrine of implied powers in general, is clearly indebted to a functional approach by the Member States of international organizations. It provides for ample opportunity for the appropriate adjudicatory organ to develop a progressive take on its own competences and on the powers of the international organization whose actions it is supposed to monitor ‘on behalf of’ the Member States. In the case of the European Union, the ECJ has most definitely done so, inter alia under the guise of the ‘effet utile’ or ‘useful effect’ doctrine, also sometimes referred to as the principle of effectiveness.78 This theory implies that “the rules laid down by an international treaty or a law presuppose the rules


77 For an application of this article in the context of the implied powers doctrine, see, ECJ, Opinion 2/94 Accession by the Community to the European Convention for the protection of human rights and fundamental freedoms [1996] ECR I-1759. Another interesting and more recent illustration is offered by Art. 3 (2) of the Treaty on the Functioning of the European Union, which provides that “[t]he Union shall […] have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.”

without which that treaty or law would have no meaning or could not be reasonably and usefully applied.\textsuperscript{79} This theory, developed by the ECJ, can be seen as an application and further elaboration of the long-standing interpretation technique laid down in the maxim \textit{ut res magis valeat quam pereat}.\textsuperscript{80}

The ICJ on its part accepted the doctrine of implied powers in the well-known \textit{Reparations for injuries} advisory opinion,\textsuperscript{81} in which it held that,

\begin{quote}
\textit{[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.}
\end{quote}

The Court expressly confirmed this functional theory more recently in its WHO advisory opinion of 1996, where it held that \textit{“[i]t is generally accepted that international organizations can exercise such powers, known as ‘implied’ powers.”}\textsuperscript{82}

As to the European Court of Justice, the law-making impact of the rulings of the European Court of Human Rights (ECtHR) can hardly be overstated. Every Member State of the Council of Europe (CoE) has, at more than one point in time, had to make substantial changes to its domestic law and policies as a result of the decisions of the Strasbourg Court.\textsuperscript{83} Hawkins and Jacoby note in this regard, interestingly, that the ECtHR has, consciously or unconsciously, ‘persuaded’ CoE Member States to gradually delegate more authority to it by adopting a more careful and restrained approach in the first years after its inception, which it later abandoned in favour of a more expansive and progressive interpretation of the obligations entailed by the European Convention of Human Rights (ECHR). Indeed, the authors convincingly show that accepting a limited number of cases and finding few human rights violations by State practices in the beginning, can convince principals to delegate more authority to judicial bodies, after which a more progressive interpretation along the lines indicated previously can be adopted.\textsuperscript{84}


The evolution described above shows that the distinction between making, interpreting and adjudicating law has become blurred. The same goes for the classical distinction between the players in the PA-relationship, since agents (in casu the adjudicatory bodies of international organizations) are increasingly becoming actors/principals in the process of law-making themselves. In this context, the principle of constitutionalism takes on a whole new meaning. In the traditional sense, where powers of international adjudicatory bodies are thought to be restricted by the prevalence of general and peremptory norms of international law, said principle can be considered an (indirect) instrument of control over international organizations, forcing them through their judicial organs to comply with hierarchically higher norms. When these adjudicatory bodies are acting as principals in law-making themselves, however, constitutionalism becomes an instrument through which international organizations can force Member States to change their domestic law in accordance with the judicial bodies’ interpretation of international law, thus creating a new, vertical legal order. In this sense, international organizations, through their judicial organs, have deeply ‘constitutionalized’ the international legal order by presupposing the supremacy of international (and regional) law, combining this with such instruments as direct effect.

Most famous perhaps in this respect, and most striking definitely, is the case-law of the European Court of Justice, a judicial institution that has been defined as being driven mainly by a policy to enlarge the powers of the European Community in order to strengthen European integration. The Court established the supremacy of Community law and the principle of direct effect in two landmark cases, Costa/ENEL and van Gend & Loos, both well-known to legal scholars. The Court further developed said principles and also introduced new doctrines in later cases, such as those pertaining to indirect effect and implied

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85 J. Alvarez, supra note 16, 257 and 597-600.
powers (supra), and thus effectively established a new international (regional) legal order with radical implications for the domestic orders of the ‘principals’, i.e. the EU Member States. From now on, these States were obliged to adopt new legislation c.q. interpret their current legislation, including their national constitution, in conformity with Community law, which directly conferred certain rights to their citizens. Whether the founding parties to the Treaty establishing the European Community had the intention of granting such far-reaching powers to the agent they created at the time is highly uncertain.

However, the ‘constitutionalization’ of the Community legal order was not only driven by expansionist aspirations of the ECJ. Almost equally important were the national courts and individual citizens of the EU Member States, who, by bringing cases before the ECJ on certain key issues, spurred the ECJ into developing a more progressive approach. In this regard, one could argue that the citizens of the EU Member States, who gave their governments and parliaments through the workings of the representative democracy the mandate to set up an international organization, again, albeit only partly and indirectly, become the original principal in the PA-relationship with the EU. Further, it is noted that the complicity of national courts in the development of Community law radically increased the costs for national governments to avoid complying with ECJ decisions, since they also had to defy their own national courts system.

If States cannot substantively influence the outcome of the rulings of international adjudicatory bodies, they can always tweak the procedural rules that govern the workings of these organs so as to minimize agency costs. One frequently applied method is to limit the tenure of the members of judicial organs. This measure, provided for in, inter alia, the International, European and African Courts of Justice, the ECtHR and the WTO Appellate

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94 K.J. Alter, supra note 73, 329. Garrett, however, argues that the EU Member States should still be viewed as the main principals in their relationship with the ECJ. In his view, condoning the Court’s jurisprudence in the short term would ultimately favor the Member States, since the enforcement of EU law would be to their benefit in the longer term. See G. Garrett and B. Weingast, “Ideas, interests and institutions: constructing the European Community’s internal market” in J. Goldstein and R.O. Keohane (eds.), Ideas and foreign policy, Ithaca, Cornell UP, 1993 and G. Garrett, “International cooperation and institutional choice: the European community’s internal market”, Int’l. Org. 1992, 533-560.
96 M.A. Pollack, The engines of European integration: delegation, agency and agenda-setting in the EU, supra note 5, 192.
97 If no renomination is possible the effect of temporary tenures on agency losses will of course be minimal.
98 Art. 13 (1) of the Statute of the International Court of Justice (nine years); Art. 223 EC (six years) and Art. 8 of the Protocol of the Court of Justice of the African Union (six years).
99 Art. 23 (1) ECHR (six years).
Body,\textsuperscript{100} is mainly intended to provide the respective agent with an incentive to not be overly critical of the principals with nominating authority, since the latter can (theoretically) retaliate by not prolonging the respective mandate.\textsuperscript{101} Procedural measures at the disposal of principals further include limiting the access of certain actors (especially individuals) to international judicial bodies while safeguarding their own privileged status before these bodies. For example, in the field of human rights, most major global conventions and treaties\textsuperscript{102} do not provide for a complaint procedure for individuals, or only optionally so. Comparable limitations apply to State petitions.\textsuperscript{103} A notable exception is the ECHR, which honours the principles of both State and individual complaints, and provides for compulsory jurisdiction as well. Compulsory jurisdiction is also frequently mentioned as one of the reasons why the judicial organs of the WTO do not shy away from delivering decisions that go against the wishes of the principals.\textsuperscript{104} Agency cost-reducing measures have been taken successfully with respect to the ICJ and the International Tribunal for the Law of the Sea (ITLOS), since States can decide whether or not to recognize the (compulsory) jurisdiction of these bodies.\textsuperscript{105} Important in this respect are also the provisions in the Statute of the ICJ stating that special \textit{ad hoc} judges can be appointed in individual cases to ensure that each party has a national voting on their case.\textsuperscript{106} A final and much used tactic is to establish tribunals to satisfy public opinion and enhance the principals’ credibility, but then deny them the funding they need to function properly. The case of various criminal and human rights courts, such as the ICTY and the Inter-American Court of Human Rights (IACHR), comes to mind.\textsuperscript{107}

So far we have only focused on the relationship between States and international organizations when examining the latter’s law-making powers and effects thereof on the legal

\textsuperscript{100} Art. 17.2 of the WTO Understanding on rules and procedures governing the settlement of disputes (four years).
\textsuperscript{103} With the exception of the International Convention on the elimination of all forms of racial discrimination, which does provide for a compulsory State complaint procedure.
\textsuperscript{105} Statements to this effect can be found at \url{www.un.org/Depts/los/convention_agreements/convention_agreements.htm} (ITLOS) and \url{http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&PHPSESSID=984755d0ed414d762d8c0bea0b46c65b0a} (ICJ).
\textsuperscript{106} K.J. Alter, \textit{supra} note 73, 319. See on this subject, also, E.A. Posner and M.F.P. de Figueiredo, “Is the International Court of Justice biased?”, \textit{J. Legal Studies} 2005, 599-630.
\textsuperscript{107} See L. Helfer and A.-M. Slaughter, \textit{supra} note 107, 948 and D.P. Forsythe, “Politics and the International Tribunal for the former Yugoslavia”, \textit{Crim. L. F.} 1994, 401-422.
system of the former. However, with the proliferation of international organizations and their respective adjudicatory bodies – with, to a certain extent, concurring and vaguely delineated competences – comes the question as to what extent the decisions of said organizations and bodies can mutually affect each other.  

The international case-law on this issue is relatively scarce and ad hoc. To put it in constitutionalist terms, no vertical order comparable to national judicial systems has been established between the legal systems of international organizations. Accession by international organizations to conventions and treaties created by other organizations with express provisions regulating the relationship between them remain rare and no PA-relationship is thus established, comparable to the one governing the relationship between international organizations and their Member States. Nevertheless, certain lines and tendencies can be discerned in the practice of international adjudicatory bodies that allow us to draw certain conclusions as to the relationship between the decisions of international organizations.

With respect to the relationship between the law promulgated by the WTO and European Community law, for example, the ECJ has time and again held, in a controversial line of case-law, that WTO rules do not have direct effect, thereby depriving them largely of their effectiveness within the Community legal order.

The relationship between Community law and UN decisions is less straightforward. It is clear that the courts of the European Communities lack the necessary competence to review measures taken by the United Nations in and of themselves. In recent years, the EU has therefore implemented most UN Security Council resolutions on the basis of Art. 301 TEC (concerning actions by the Community to interrupt or to reduce economic relations with one or more third countries), in an attempt at what has been termed a ‘communitarization’ of UN law. The European Court of Justice can then review the Community measures implementing the Security Council resolutions against primary EC law.

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108 See also infra, IX.
109 With the possible exception of the EC. See infra, IX.
110 For more on this subject, see N. Lavranos, “The communitarization of WTO dispute settlement reports: an exception to the rule of law”, Eur. For. Affairs Rev. 2005, 313-338.
The ECJ confirmed this in its recent *Kadi* judgment, holding that

“the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.”

Even though the European Courts can thus indirectly review UN law, no vertical, ‘constitutionalist’ legal order is established between international and regional norms, since the ECJ merely reviews Community law implementing UN measures.

The inversion of roles in the PA-relationship, where (organs of) international organizations are increasingly behaving themselves as actors, is not only apparent in the decisions of international adjudicatory bodies interpreting the constituent instrument of the organization. It also clearly shows in the role international organizations play in the law-making processes pertaining to the negotiation and conclusion of treaties and customary international law.

### 6. INTERNATIONAL ORGANIZATIONS AS TREATY-MAKERS

One of the main reasons for States to set up, or participate in, an international organization is to delegate authority on matters which require expertise, knowledge, information, time and resources they themselves do not readily have at their disposal. Inherent in all delegation is a division of labour and thus specialization. However, agent specialization intrinsically and by definition increases the risk of agency losses since the very fact that the international organization in this hypothesis has more information and expertise at the subject matter at hand than its principals, increases the risk of hidden action and hidden information.

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112 ECJ, *Joined Cases C-402/05 and C-415/05 Kadi and Al Barakaat* [2008] forthcoming, para. 285. The Court thus concluded that “the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations” (para. 326). The ECJ thereby quashed a prior judgement of the Court of First Instance, in which the latter had held that “it is not for the Court to review indirectly whether the Security Council’s resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order” (CFI, Case T-306/01 *Yusuf and Al Barakaat* [2005] *ECR* II-3533, para. 338 and CFI, Case T-315/01 *Kadi* [2005] *ECR* II-3649, para. 283).


114 See also infra, IX.


example in this respect is the Universal Postal Union, which is, to paraphrase Schermers, "run by technical people who do not bother about international law". This tendency towards functional specialization has even lead to a whole new class of international organizations being set up, not in accordance with an international agreement between States, but through a decision by one or more international organizations (see, for example, the Global Environment Facility and UNAIDS). Such 'sub-delegation' and 'sub-specialization' from primary to secondary agents will obviously diminish the control the original principals can exert over (the technical matters outsourced to) their agents. Minimizing these risks through measures of monitoring would proportionally reduce the gains from specialization. Therefore, principals will typically only have recourse to a highly specialized agent and burden him with specific, detailed tasks in order to maximize the potential agency gains.

When considering the international process of law-making through the conclusion of treaties, the above leads us to expect that the treaty-making powers of international organizations, if any, should be limited to their respective fields of specialization. Indeed, principals will mainly benefit from the treaty-making forum offered by their agents if the competences of the latter are closely circumscribed in this respect. The constituent instruments of the major international organizations appear to confirm this. The ILO, for example, is by virtue of its Constitution endowed with the capacity to conclude international conventions, but only so with respect to "subjects relating to the international adjustment of conditions of industrial life and labour." Similarly, Art. 62 UN Charter provides that the Economic and Social Council (ECOSOC) may prepare draft conventions for submission to the General Assembly, "with respect to matters falling within its competence". More narrowly defined competences can be found in the UN Charter in relation to, inter alia, agreements between ECOSOC and specialized agencies of the UN and the deployment of stand-by military forces. In line with the functionalist doctrine of implied powers, it is generally assumed that international organizations can assist in treaty-making processes even when their constituent charter does not expressly provide for such activity.

It should be noted that international organizations in most of the aforementioned examples merely act as agents, since they only propose draft conventions through gathering

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117 Established by the Convention of the Universal Postal Union, 1 June 1878.
118 H.G. Schermers, supra note 7, 117.
119 Created by the World Bank and joined by the EBDP and UNEP.
122 See C. Martini, "States' control over new international organization", Global Jurist Advances 2006, 1-25. See also infra, IX.
123 Art. 10 of the ILO Constitution.
124 Art. 63 UN Charter.
125 Art. 43 UN Charter.
information and offering their expertise, which then may or may not be entered into by the Member States. They offer a forum for discussion between the principals but typically do not become party to the treaties themselves. However, it is generally assumed that international organizations, to the extent they have international legal personality, can conclude agreements with other subjects of international law, be they States or other international organizations, even in the absence of explicit provisions to that effect in the constituent charter. Indeed, it has been argued that the capacity of international organizations to conclude treaties is a principle of customary international law, and that the competence to do so follows from the functionalist doctrine of implied powers as described previously (supra, V.).

The extensive treaty-making powers of the European Community, for example, follow from a forceful combination of explicit provisions to that effect in its constituent charter and the implied powers theory, as developed and applied in the case-law of the European Court of Justice. Thus, in the *ERTA* (European Road Transport Agreement) case, the ECJ held that the EC had the power to conclude a transport agreement since such external power was implied by the existence of the internal power to regulate transport within the Community. Art. 300 (7) EC further provides that agreements entered into by the EC under the specified conditions “shall be binding on the institutions of the Community and on Member States”. As is the case with decisions taken by the organs of the EC, the principals of this organization may thus very well find themselves in a situation where they are bound by a treaty which they would not have concluded otherwise and which may go against their own interpretation of the functional goals of the Community.

International law is less clear on whether binding consequences should be attached to treaties concluded by international organizations. The majority is of the view that Member States are only bound to the extent that they have consented to such effect since, it is argued, the will of the organization is distinct from the will of its Member States. To a certain extent, this approach is difficult to reconcile with the theory of functionalism. While it is obviously not contended that this doctrine would imply that an international organization and

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128 See, e.g., Art. 133 EC.
its members are one and the same (agency theory would definitely rebut that), it does rely to some extent on the premise that their wills are. After all, international organizations are set up by their principals to fulfil certain functions and are given significant leeway in this respect, precisely because it is assumed that the agents will strive to realize the same goals as the ones their principals have set out. The possibility of agency slack does not, in principle, enter into the equation under the doctrine of functionalism. The fact that most States would nevertheless not accept being bound by treaties concluded by international organizations to which they are party, illustrates that the functionalist approach does not suffice to explain the dynamics of law-making by international organizations. Recourse must be had to the agency theory.

7. IMPACT ON THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW \(^{132}\)

Traditionally, two conditions have to be met for an international custom to originate: a consistent State practice and an *opinio iuris*. The fulfilment of these conditions would ideally be established through laborious historical research of the actions of States. The ever increasing law-making powers and activities of international organizations, however, can help to provide a shortcut for this time-consuming process. Indeed, one of the main reasons for States to delegate certain authority to international organizations is for the latter’s elevated capacity of gathering and sharing information, which in turn will lead to increased specialization of the organization (*supra*, VI.). \(^{133}\) Rules and treaties promulgated by the law-making organs of international organizations, as well as decisions taken by their respective judicial bodies, are therefore nowadays considered as being indicative of the existence of State practice.

The reliance on law of international organizations to reveal State practice could potentially have grave implications and in any case substantially increases the law-making powers and the effects thereof of these institutions. Indeed, every measure taken by international organizations could potentially be seen as revealing norms of customary international law, and will then also become applicable to non-State parties. It is further argued that a State that does not raise objections during the decision-making proceedings of an international organization cannot later claim to be a persistent objector. \(^{134}\)


\(^{134}\) J. Alvarez, *supra* note 16, 593.
It is important to note in this respect that reliance on international organizations tends to make the emergence of norms of customary international law the result of a more normative process, rather than a hermeneutic one – much like the adoption of a treaty.135 This new approach to establishing customary international law could lead to elevated agency losses. After all, a more traditional, thorough examination of State practice would ideally lead to norms of customary law that accurately reflect the opinion of States on a certain issue. When such research is conducted by relying on law promulgated by international organizations rather than actual State practice, however, it is not inconceivable or even unlikely that said practice will to a certain extent become blurred and distorted by actions of these organizations and their independent interpretation of their goals. This risk will typically increase when international organizations are based on a functionalist approach, since in this hypothesis they will have a wider discretion in making law.

One should thus be mindful not to equate the practice of international organizations with State practice. Whether actions of international organizations can be attributed to the State community as a whole is a complex question and the answer depends on such divergent factors as, inter alia, the nature of the organization (political vs. technical), the inclusiveness of its membership (universal and total vs. regional and limited), the composition of the relevant organ adopting a certain measure (plenary vs. partial) and the decision-making method applied (unanimity and consensus vs. majority). The distinction between State practice and the practice of international organizations will typically be rather difficult to make in universal organizations, especially when the decisions in question have been taken by a plenary body. Further, it has been noted that the continuity of State practice is rather high in the context of universal international organizations with a political rather than a technical function.136 Resolutions adopted by consensus by the UN General Assembly should thus, in principle, be highly indicative of State practice and be taken into account when determining the customary nature of international law.137 The ICJ in its advisory opinion on the Legality of the threat or use of nuclear weapons confirmed that

“General Assembly resolutions [...] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule.”

However, the final text of a decision of an international organization will always be incapable of reflecting all propositions and alternatives formulated by each and every party to the negotiations. One should, therefore, not overly rely on the shortcuts provided by the decision-making processes of international organizations in order to identify State practice.

8. DEMOCRATIC DEFICIT

One of the most endemic criticisms regarding international organizations and their law-making processes is the perceived lack of democratic legitimacy with which these institutions and their organs operate. Generally, these criticisms are voiced louder the more power the organization in question has and the more decisions it takes in important areas of policy. This explains why the European Union, an organization with, to a certain extent, directly elected representatives and one which is more strictly bound by democratic principles than most of its counterparts, is nevertheless subject to heavy denunciation for its alleged lack of adherence to democratic principles. Comparable objections have been expressed concerning the modus operandi of, for example, the WTO and the IMF, since States have delegated a considerable amount of national authority on important issues to these institutions.

A discussion of the perceived democratic deficit in international organizations naturally presupposes a workable definition of the concept ‘democracy’. While never fully defined, democracy for the purposes of this paper can be described as consisting of rule by the people characterized by a sovereign authority that is responsive and accountable, be it

138 ICJ, Advisory Opinion Legality of the threat or use of nuclear weapons [1996] ICJ Rep. 226, para. 70. It is not clear whether the ICJ in this case referred to the UN General Assembly resolutions as elements proving the existence of a State practice or an opinio juris. The Court’s ruling in the Nicaragua Case seems to rather point to the latter. See ICJ, Case concerning military and paramilitary activities in and against Nicaragua – Merits [1986] ICJ Rep. 14, para. 188.
139 L.F. Bravo, supra note 138, 302.
140 The preparatory work of treaties concluded in the seat of an international organization may be more capable of revealing State practice, but this research will scarcely be any less laborious than the research conducted to identify State practice outside the context of international organizations.
142 J.E. Alvarez, supra note 16, 631 and E. Stein, supra note 143, 496-499.
directly or indirectly through periodically elected representatives.\textsuperscript{143} International organizations are said to lack democratic authority in this respect since their law-making processes generally take place in the seat of organs that are not chosen by the people they are supposed to represent. A second, more substantive and less procedural approach to democracy rather focuses on the fundamental values and principles to be upheld in a democratic society, such as freedom of speech and association and the right to a fair trial and due process. In this regard, it is commonly alleged that individuals, NGOs and other non-State actors cannot sufficiently influence the decision-making processes of international organizations, which are then thought to lack democratic legitimacy for this reason as well.\textsuperscript{144} Furthermore, it is possible that the decisions and actions of international organizations violate the individual rights of citizens, which is further ground for arguments criticizing these organizations for not upholding democratic principles.

The problem of the democratic deficit in international organizations is further compounded by difficulties in the so-called delegation chain between the original principal and the eventual agent.\textsuperscript{145} Typically, (the risk of) agency slack increases with each step in the delegation chain since the demands and goals formulated by the original principals will reach the agent in a somewhat contorted form. The longer the chain, the more difficult it is for principals to exert control over the agent.\textsuperscript{146} Add these complications to the difficulties inherent to all PA-relationships and it becomes clear that the decisions of international organizations will not necessarily reflect the democratic interests of the principals.

Solutions proposed to solving these problems generally point towards an elevated participation by non-State actors in the law-making processes of international organizations through direct election of representatives in organs of these organizations and increased involvement of NGOs and other interest groups. It has been argued, for example, that improved NGO access to the WTO would increase the quality of the organization’s work and (thus) its democratic legitimacy.\textsuperscript{147}

It should be noted, however, that the involvement of additional actors in the PA-relationship with international organizations could lead to additional agency losses. After all, agency slack

\textsuperscript{144} J. Weiler, supra note 90, 2468-2469 and D.A. Wirth, “Public participation in international processes: environmental case studies at the national and international levels”, Col. J. Int’l. Env. L. & Pol. 1996, 1.
\textsuperscript{146} See also infra, IX.
tends to increase with the number of actors doing the delegating,\textsuperscript{148} since it gets more complicated to coordinate with the agent.\textsuperscript{149} Increased democratic legitimacy could therefore have the perverse effect of heightening agency losses, thereby reducing the likelihood of Member States to take measures to amend the law-making processes of international organizations in order to enhance democratic legitimacy, in light of the logical presupposition that principals will want to minimize agency losses where possible. The diversification of the group of actors constituting the collective principal by the increased involvement of such players as NGOs and pressure groups can only lead to more decisions that potentially go against the original aims of the principals, unless one assumes that these interest groups are more representative of the population than the parliament and government who originally hired the international organization, which is a highly debatable presumption to say the least.

Furthermore, it can be noted that increased democratization is typically considered a method of increasing the accountability of and thus of exerting control over a given international organization. In light of the noted functionalism-constitutionalism dichotomy, this implies, interestingly, that the constitutionalist approach does not always favour reduced agency losses. After all, the theory of constitutionalism starts from the assumption that international organizations should be limited in their aspirations through effective control, which, in the case of heightened democratisation, does for once not necessarily result in reduced agency losses.

This is by no means to say that democratization always negatively affects the possibility of an international organization to achieve the goals set out by its Member States. Direct election of the members of law-making organs of international organizations should normally result in less agency losses, assuming that these representatives will more adequately reflect the will of the original principals (citizens) than the government that hired the agent, although these two would, ideally, be the same.

Further, it has been noted earlier that a second strand of constitutionalism exists that focuses on the establishment of a vertical legal order dictated by the imperative of certain fundamental principles. Typically, these principles are thought to represent and guarantee certain democratic values and in this respect, ‘constitutionalization’ will, of course, \textit{ipso facto} serve to close the democratic gap.

\section*{9. Multilevel Regulation}

\textsuperscript{149} D.L. Nielson and M.J. Tierney, \textit{supra} note 5, 248.
One final aspect of the law-making processes engaged in by international organizations that merits our attention, and one which can be seen as an additional factor further mortgaging the democratic nature of these organizations, is that of the interplay between the regulatory powers of various agents and the impact thereof on the relationship with their principal(s).\textsuperscript{150}

The direct and logical consequence of States entering into a PA-relationship with international organizations which they have granted law-making powers, is that much of their national legislation has international origins. These origins may lie with the immediate agent of the Member State, but can equally be found to ultimately lie elsewhere. Indeed, international organizations do not operate \textit{in vacuo} and often find the basis for their decisions in regulations by other actors, not unlikely to be another international organization. When this relationship between various international organizations is formalized through the accession of one organization to another, a PA-relationship of the second order is established, which in turn influences the first relationship between the original agent and the Member States.\textsuperscript{151}

Seen from this perspective, the European Community, for example, can be seen as acting as a principal in a multitude of international and regional organizations, participating in the negotiations of and acceding to a whole range of multilateral conventions.\textsuperscript{152} As such, the EC is a member of, among others, the FAO,\textsuperscript{153} the WTO,\textsuperscript{154} the World Customs Organization (WCO), the International Commission for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), the General Fisheries Commission for the Mediterranean (GFCM), the Western and Central Pacific Fisheries Commission (WCPFC), EUROCONTROL and the Energy Community. It has acceded to various conventions adopted in the seat of these and other international bodies, with direct implications upon the national legislation of the EU Member States as original principals in the first PA-relationship.

Most obvious in this respect is the interplay between norms enacted by the WHO, the WTO and the European Union, in particular with regard to the new International Health Regulations and the WHO Framework Convention on Tobacco Control.\textsuperscript{155} Further, one should note the

\textsuperscript{150} For a theoretical underpinning of this section, see V. Mayer-Schönberger and A. Somek, “Introduction. Governing regulatory interaction: the normative question”, \textit{ELJ} 2006, 431-439.

\textsuperscript{151} PA theory now generally recognizes the possibility of politics as a chain of delegation or command. J. Tallberg, \textit{supra} note 13, 24.

\textsuperscript{152} For a (partial) overview, see F. Hoffmeister, “Outsider or frontrunner? Recent developments under international and European law on the status of the European Union in international organizations and treaty bodies”, \textit{CMLRev.} 2007, 41-68.

\textsuperscript{153} See R. Frid, “The European Economic Community: a member of a specialized agency of the United Nations”, \textit{EJIL} 1993, 239-255.

\textsuperscript{154} Art. XI.1 WTO Agreement.

EC’s accession to the Codex Alimentarius Commission (CAC), a common body of FAO and WHO which develops international standards on food safety, as a result of the Community’s membership of FAO. The PA-relationship in the CAC is somewhat more peculiar, though, due to the fact that the voting power of the EC depends on the presence of Member States delegates, in that only the votes of the Member States actually present at the relevant meeting count. This effectively cuts out the European Union as intermediate principal/agent and allows the ultimate principals to exercise more control over the ‘secondary’ agent. Finally, the EU has enacted numerous decisions based on the accession of the EC to the Kyoto Protocol and the Aarhus Convention, which in turn have greatly impacted upon the national legislation of the EU Member States.

10. CONCLUSION

Explaining the law-making dynamics of international organizations is no easy task and one should be careful not to draw overly broad conclusions in this respect. What is clear, however, is that international organizations have recently become increasingly active players in the field of international law-making, most notably with respect to treaties and the interpretation of these and other norms by international adjudicatory bodies. As this paper has tried to demonstrate, this evolution has not always and necessarily been the result of deliberate considerations on the part of the Member States (principals) who hired the international organizations (agents). It rather follows from a combination of constitutionalist-inspired measures taken by the principals in order to minimize and otherwise rectify the agency costs and losses inherent in all functional PA-relationships.

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