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**EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW**

Sergei A. VOITOVICH

**INTERNATIONAL ECONOMIC ORGANIZATIONS
IN THE INTERNATIONAL LEGAL PROCESS**

Thesis submitted for assessment
with a view to obtaining
the Degree of Doctor of the European University Institute

Florence, June 1993

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1. P. VerLoren van Themaat. *The Changing Structure of International Economic Law*. Hague/Boston/London, 1981.

2. P.I.B. Kohona. *The Regulation of International Economic Relations Through Law*. - Dordrecht/Boston/Lancaster, 1985.

important for the understanding of how international economic organizations practically work.

I owe a special debt to my colleagues and friends in Kiev University, who carried my teaching burden during the research period in Florence, and above all, to my wife and daughter for their patience, love and encouragement.

LIST OF ABBREVIATIONS

AEC	African Economic Community
AfDB	African Development Bank
AIOEC	Association of Iron Ore Exporting Countries
AJIL	American Journal of International Law
AMF	Arab Monetary Fund
ANRPC	Association of Natural Rubber Producing Countries
AOI	Arab Organization for Industrialization
APPA	African Petroleum Producers' Association
AsDB	Asian Development Bank
ASEAN	Association of South-East Asian Nations
ATPC	Association of Tin Producing Countries
BISD	Basic Instruments and Selected Documents of GATT
BYIL	British Yearbook of International Law
CAEU	Council of Arab Economic Unity
CARICOM	Caribbean Community
CCASG	Cooperation Council for the Arab States of the Gulf
CCC	Customs Co-operation Council
CEAO	West African Economic Community
CEPGL	Economic Community of the Great Lakes Countries
CFC	Common Fund for Commodities
CIS	Commonwealth of Independent States
CJCA	Court of Justice of the Cartagena Agreement
CMEA	Council for Mutual Economic Assistance
EAC	East African Community
EBRD	European Bank for Reconstruction and Development
ECCAS	Economic Community of Central African States

ECE	UN Economic Commission for Europe
ECJ	Court of Justice of the European Communities
ECOSOC	Economic and Social Council
ECOWAS	Economic Community for West African States
ECR	European Community Reports
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EJIL	European Journal of International Law
ESCAP	UN Economic and Social Commission for Asia and the Pacific
FAO	Food and Agricultural Organization of the UN
GATT	General Agreement on Tariffs and Trade
GYIL	German Yearbook of International Law
IADB	Inter-American Development Bank
IAEA	International Atomic Energy Agency
IBA	International Bauxite Association
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Center on Settlement of Investment Disputes
IDA	International Development Association
IEA	International Energy Agency
IFAD	International Fund for Agricultural Development
IFC	International Financial Corporation
ILC	International Law Commission
ILM	International Legal Materials

ILO	International Labour Organization
ILR	International Law Reports
IMF	International Monetary Fund
ITPA	International Tea Promotion Association
ITU	International Telecommunication Union
JWT	Journal of World Trade
LAS	League of Arab States
LAEO	Latin American Energy Organization
LAFTA	Latin American Free Trade Association
LALA	Latin American Integration Association
MERCOSUR	Common Market of the Southern Cone
MIGA	Multilateral Investment Guarantee Agency
NYIL	Netherlands Yearbook of International Law
OAPEC	Organization of Arab Petroleum Exporting Countries
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
OEEC	Organization for European Economic Co-operation
OJ	Official Journal of European Communities
OPEC	Organization of Petroleum Exporting Countries
OWPEAC	Organization of Wood Producing and Exporting African Countries
PTA	Preferential Trade Area for Eastern and Southern African States
UDEAC	Central African Customs and Economic Union
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNEP	United Nations Environment Program
UNIDO	United Nations Industrial Development Organization

UNIDROIT	International Institute for Unification of Private Law
UNTS	United Nations Treaty Series
UPU	Universal Postal Union
WACU	West African Customs Union
WARDA	West Africa Rice Development Association
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
WTO	World Tourism Organization

PREFACE

This paper is intended to expose in what manner and forms international economic organizations (IEOs) participate in the two main stages of international legal process: law-making and law-implementation. Intensive development of international economic institutions in the post-Second World War period gave birth to a vast legal practice in this field, which has been examined in numerous juridical studies but still needs a generalized analysis. As E.-U. Petersmann rightly noted, " an explanatory 'theory of the law of international economic organizations' based on comparative and systematic inquiries into the 'infrastructure', objectives, basic legal norms, steering instruments, procedures, organs and activities of international organizations, could greatly contribute to the understanding and reform of the institutional framework of the world economy"³. The same idea was stressed by P.van Dijk: "...a comparative analysis of these organization may lead to the formulation of certain general features of the law of international economic organizations as part of a general theory of international economic law, from which conclusions may be drawn as to the legal structure and contents of the existing international economic order and concerning the question of which changes are needed to make it a more just and equitable order which benefits all States"⁴.

This study is not supposed to go into substantive problems of IEOs' activities,

3. E.-U. Petersmann. *International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order*. - In: *The Structure and Process of International Law* / Ed. by St.J.Mcdonald and D.M.Johnston. Hague, 1983, p. 258-259.

4. *Supervisory Mechanisms in International Economic Organizations*. P.van Dijk: General Editor. Deventer, Kluwer, 1984, p. XIX.

neither to tackle all numerous institutional and legal issues⁵. These matters will be touched only in so far as being related to law-making and law-implementation within the frameworks of IEOs. The subject-matter of the present inquiry necessarily deals with a lot of procedural and technical issues, as well as a number of quotations from various documents. It makes the author apologize for those parts of his presentation which will inevitably be somewhat dry. I hope that this shortcoming will be partially compensated by my efforts to focus the analysis on the legal facets of IEOs which have not yet been comprehensively examined⁶.

* * *

The emergence of the early elements of institutional mechanism in economic sphere dates back to the last century when the first administrative unions came into being (1865 - the International Telegraphic Bureau, 1874 - the Universal Postal Union, 1875 - the Metric Union, 1886 - the International Copyright Union)⁷. The general premises for this process were the formation of the world market and increasing internationalization of the economic life⁸, which, however, did not

5. For instance, such essential facets of the IEOs' legal existence as privileges and immunities, legal responsibility, withdrawal from membership, etc. are basically beyond the scope of the present paper.

6. Some parts of the present study were published in: S.A.Voitovich. Normative Acts of the International Economic Organizations in International Law-Making. - In: 24 JWT 4 (1990) 21-38; S.A.Voitovich. The Law-Implementing Functions of International Economic Organizations. - In: GYIL 34 (1991), p. 230-253; S.A.Voitovich. The Concept and Classification of the International Economic Organizations as the Subjects of International Law. - In: Gosudarstvo i pravo, 1992, N5 (in Russian); S.A.Voitovich. Legitimacy of the Use of Economic Force in International Relations: Conditions and Limits. - In: World Competition, June 1992, vol.15, N 4, p. 27-36.

7. See more details in: G.I.Mangone. A Short History of International Organization. Westpoint, 1975, p. 67-97.

8. F.Moravetsky. The Functions of International Organization. Moscow, 1976, p. 41 (in Russian). All the titles and quotations have been translated from Russian by the author of the present paper.

appear to suffice the establishment of a comprehensive institutional mechanism for economic cooperation in that period. Practically, up to the time when the UN system was formed, only separate fragments of such mechanism had existed (e.g. the League of Nations, the Genoa Conference of 1922, the Geneva Conference of 1927, the London Conference of 1933, the first commodity organs, and some others). The scope and intensity of international economic relations of that time determined their mainly bilateral treaty regulation to be sufficient for ensuring individual economic interests of interacting States. The attempts for multilateral cooperation in the economic field did not give any considerable effect. However, under the influence of the world economic crisis of 1929-1933 which showed the danger of free-market anarchy and trade wars, the idea of global IEOs started to conquer the minds of scholars and politicians⁹.

In the post-war time the international community faced the new realities, which led to increasing economic interdependence of States. A coherent institutional mechanism started to be formed, first, at the global level, primarily within the framework of the UN system. The initial steps towards the establishment of multilateral regulation of trade and finance were inspired by the USA, the most powerful State of that time, which planned to use a shift from protectionism to liberalization in international economic relations for its economic expansion on a world scale¹⁰. The European States, whose economies heavily suffered during the war, had nothing to do but support the US efforts in order to use foreign capitals for their economic restoration. Under those conditions, the first global IEOs (the IMF, the IBRD, the GATT, the FAO) emerged.

9. See G.Anulova. The IMF and IBRD in the World Economy: a view from new positions. - In: World Economy and International Relations, 1990, N1, p. 111 (in Russian);

10. See A.Cassese. International Law in a Divided World. Oxford, 1986, p.325.

In 1950s-1990s the new factors, such as scientific and technical revolution, decolonization, regional economic integration, global economic problems (New International Economic Order, international economic security, energetic and food problems, etc.), as well as the radical reforms in Eastern and Central Europe, gave more weight to the necessity of institutional instruments and caused a considerable rise of global and regional IEOs. At present, together with States they are the main actors affecting the state and developments of the international economic order¹¹.

It should be noted, that unlike political and some specialized institutions of the UN system, the first global economic organizations initially caused a restrained, not to say reluctant, attitude of the USSR. The Soviet holding aloof was determined by two main considerations: (1) a simplified view, that market-oriented IEOs are useless for a planned-economy State; (2) a fear of being debarred from active decision-making by an overwhelming majority of the Western Member States. Things had changed by the mid-80s. The Soviet economy of the "perestroika" period (1985-1991) was trying to turn its face towards market on both national and international scales, and this inevitably raised the question of membership of the global IEOs. This trend obtained stronger incentives in the new independent States that have emerged within the borders of the former Soviet Union after its dramatic dissolution in the late 1991. Their economies, confronting the exigency of economic survival and gradual adjustment to the market economy conditions, make pressing demands for deeper integration into the world economy that is unthinkable now without broad participation in the world-wide and regional IEOs.

* * *

11. This statement does not mean an underestimation of multinational corporations as another protagonist of international economic scenarios, which basically operate at the non-interstate level, and therefore are intentionally left out of consideration.

In this paper the term "IEOs" is used in a broad sense, for denoting all intergovernmental organizations dealing prevalingly (or considerably in the case of international organizations of general competence) with international economic problems. Since practically every international organization one way or another touches financial and other economic issues in its activity, the stress is made here on the prevailing or considerable involvement of an IEO in the coordination of the Member States' economic policies. Such approach narrows to certain extent the applied notion of IEOs, although, its margins may be arguable. In general, the distinction between the IEOs as a functional category¹² and other international organizations is made for concentrating on the institutional foundation of the international economic order and the impact of intensifying institutionalization on international economic law.

The author does not pretend to compete with extensive literature on individual IEOs, on which he strongly relied doing his study. The latter's purpose is basically considered as comparative analysis and generalization in order to see some common "wood" behind the individual "trees".

Apparently, it is hardly possible to embrace all numerous IEOs in one comparatively short inquiry. For this reason, the present writer intentionally leaves out of consideration such well-examined specialized organizations partly involved into economic problems, as the ILO, the ICAO, the WHO and some others. Several IEOs have not been covered by the analysis due to the lack of available information on them. Nonetheless, this study is based on the normative instruments and accessible elements of practice of about fifty organizations.

The author is aware of certain limits of his academic study which is not a result of personal experience, but of the outside observation of the IEOs. A great deal of

12. See Stephen Zamora. Voting in International Economic Organizations. - In: AJIL, 1980, vol. 74, No 3, p. 568.

internal mechanisms of the IEOs' law-making and law-implementation has been inevitably hidden from the author's view.

In sum, the present inquiry modestly continues the efforts of P.van Dijk, P.I.B.Kohona,E.U.Petersmann,I.Seidl-Hohenveldern,P.VerlorenvanThemaatandmany other scholars to contribute to the legal theory of IEOs, leaving, in turn, enough space for the following researchers, and, hopefully, making their work somewhat easier.

FIRST PART: INTERNATIONAL ECONOMIC LAW AND INTERNATIONAL ECONOMIC ORGANIZATIONS

CHAPTER I. INTERNATIONAL LEGAL REGULATION IN THE ECONOMIC FIELD: GENERAL FEATURES

This Chapter gives a general outline of international legal regulation of economic relations, that is the field where IEOs act as international legal persons.

1. International Economic Relations as the Object of Regulation

The object of regulation is likely to be a starting point for juridical analysis in any field, since the efficiency of legal instruments perceptibly depends on how the law-makers realize the character of the social relationships they intend to rule. As I.I.Lukashuk writes, "the object of international legal regulation plays a decisive role in everything relating to the character of regulation, its objectives and principles, methods and means"¹³.

In general view, the object of legal regulation may be defined as the social relationships which are directly ruled by the subjects of law by virtue of legal instruments. Three basic components of any system of legal regulation can be observed in this definition: (1) the subjects of law; (2) certain social relationships as the object of law; (3) the complex of legal means applied by the subjects (i.e. the mechanism of legal regulation)¹⁴. These components are functionally interconnected through two main phases of legal process: law-making and

13. I.I.Lukashuk. International Legal Regulation of International Relations. Moscow, 1975, p. 9 (in Russian).

14. See I.I.Lukashuk. The Mechanism of International Legal Regulation. Kiev, 1980 (in Russian).

law-implementation (each of them contains a number of sub-phases). Such general scheme works in both municipal and international laws, having, along with common features, some notable peculiarities in each of them.

What sort of relationships does belong to the object of international economic law (IEL)? A traditional answer is as simple as: international economic relations. However, more complicated is to describe this phenomenon through the prism of law. Here the term "economic" reveals the substantive character of the IEL object, while the term "international" indicates the sphere covered by it and the circle of the involved subjects.

From a substantive viewpoint, international economic relations have its objective foundation in the international division of labour, which means that national economies are specialized in the domestic production of certain goods with their further international exchange. International economic relations cover a large scope of matters, inter alia trade, monetary and financial issues, investments, scientific and technological cooperation, transports and communications, industrial and agricultural co-operation, taxation, services, etc. By intensity, they vary from episodic economic contacts to elaborate integration systems.

From a viewpoint of the subjects involved, two levels of international economic relations should be borne in mind:

- (a) an interstate or organization-state level covering the relationships among the traditional subjects of international law; and .
- (b) a level of nationals (individuals and legal persons) belonging to different States.

The interstate level deals with co-ordination of economic policies, elaboration of guidelines and mechanisms for international economic co-operation. In other words, interstate relations in the economic field are more political than properly economic. Meanwhile, direct economic interactions on production and exchange of goods are executed at the level of nationals. As R.Ostrihansky stresses, "it is not

governments, but enterprises and individuals, who make most economic decisions"¹⁵. Hence, it is quite evident that international economic relations as a whole can not be regulated isolatedly either by IEL or municipal economic laws. In this sphere close interrelationship between international and national laws is inevitable.

In connection with this, one might rightly ask, whether non-interstate international relations (with participation of nationals) belong to the object of IEL. In most cases these relations are not directly ruled by IEL. Despite the fact that many IEL norms are addressed to the nationals, strictly speaking, most of them regulate directly the relevant interstate relations concerning the application of the uniform rules to the nationals by virtue of the appropriate municipal law procedures (e.g. the unification conventions). However, the rule-making practice of the EEC gives the examples of direct application of international legal acts to the nationals of the Member States.

Hence, there should be a certain flexibility in the approach to the subjects and object of IEL as regards nationals and relationships with their participation. The present-day practice - the only proper guide - witnesses that interstate economic relations make up the prevailing part of the object of IEL, although, in some cases non-interstate relations are also directly regulated by its rules. What is the circle of international legal persons and what types of relationships are within the object of international legal regulation depends on the descretion of States that are the principal destinators of international law. States have created international organizations as the new subjects of international law, and nobody can hinder them to endow other actors, including nationals, with a special international legal personality, if it deems to be necessary. Another point is that it is doubtful

15. R.Ostrihansky. Settlement of Interstate Trade Disputes - The Role of Law and Legal Procedures. - In: NYIL 1991, vol. XXII, The Hague, 1992, p.174-175.

to expect that States would ever make nationals, which are juridically subordinated to them, the full-fledged international legal persons.

The deepest roots of each legal phenomenon are hidden inside the object of regulation. How international economic relations influence the character of legal process in the economic field may be traced in a number of ways:

(1) Why does IEL appear to be one of the largest branches of public international law as regards the amount of norms? Why are the types of international economic agreements so diverse? The answers to these questions can be found in the peculiarities of the existing international economic relations. The variety of spheres and forms of the States' foreign economic activities, as well as their high intensity and, most of all, the vital importance for the interacting subjects determine the complicated system of regulatory means, the immense amount of IEL norms, the multiplicity of the types of international economic agreements.

(2) Why do international economic relations seem to be the most institutionalized sphere of international life? The answer lies in the character of international economic cooperation. Its growing intensity and complication have caused the emergence of numerous international economic institutions, whose number is constantly growing up. The individual or bilateral State's efforts are no longer sufficient to cope with the intricate international economic issues. On the other hand, the cycles of the institutionalization process are very sensible to the changing economic environment, which may entail the dissolution of even seemingly homogeneous IEOs. The notable examples are the 1977 collapse of the EAC because of the hard clashes among the Member States, and the 1991 dissolution of the CMEA, whose methods and forms of operation could no longer match the new socio-economic exigencies.

(3) International economic relations are known for their high dynamics. Economic situations, models and scenarios change rather quickly. This demands adequate renovations of IEL rules according to the changing practical needs, stimulates the

intensity of operative decision-making by virtue of IEOs. That is why most special IEL rules have a short- and medium-term character, while the long-term norms are of prevalingly general contents.

(4) Why for centuries has IEL been developing as a conglomerate of predominantly bilateral rules, while the recent decades have seen a considerable shift to multilateralism on regional, interregional and world-wide levels? The answer can be found in the character of the States' economic interests that are protected by IEL rules. Unlike, for instance, international space law, where the global interests dominate over or coincide with the individual interests of States, the rules of IEL are aimed at ensuring, firstly, individual economic interests, secondly, the group (subregional, regional, interregional) economic interests, and only thirdly, the global economic interests.

(5) Sophisticated economic issues, that are often connected with quantitative parameters, make specific requirements to the formal requisites of IEL norms. The need for clear and precise rules for economic conduct make a treaty and, last time, the IEOs' binding decisions primary sources of IEL, while a custom plays more limited, secondary role in this legal branch.

On the other hand, conflicting economic self-interests of the interacting States, due to the differences in their starting economic positions and opportunities, often lead to the lack of a real consent resulting in numerous drawbacks in both law-making and law-implementation in IEL.

(6) How the IEL rules are executed strongly depends on existing international economic and political climate. The Cold War period was known for the abuse of economic force as a regular economic and political behaviour of many States. Institutional and legal mechanisms, whatever sophisticated they were, failed to realize their potential because of the controversies between West and East, North and South. By now, the decisive changes in international life at the late 1980s and

early 1990s have encouraged more optimism for effective law-oriented world economic order.

Of course, this does not mean that IEL passively reflects the developments in international economic relations. It makes considerable back impact on its object discharging, according to G.I.Tunkin, "stabilizing and creative functions"¹⁶. IEL does not only fix a certain level of requirements to international economic relations, but actively influences the changes and developments in its object.

2. International Economic Law: Concept, Structure, Principles

2.1. Concept of International Economic Law

The analysis of extensive literature on IEL highlights two basic approaches to its concept as regards the normative composition of this legal branch¹⁷.

(1). Some authors consider the law regulating international economic relations a mixed branch comprising the norms of international public law, international private law and the rules of national legal systems. E.-U.Petersmann writes in connection with this: "IEL still presents itself as a conglomerate of private law (including 'law merchant' and 'transnational commercial law'), state law (including 'conflict of laws') and public international law (including supranational integration law as in the EEC) with a bewildering variety of multilateral and bilateral treaties, executive agreements, 'secondary law' enacted by international organizations,

16. See Course of International Law. Vol. 1. Moscow, 1989, p. 152 (in Russian).

17. See numerous definitions of IEL in: H.Fox. The Definition and Sources of International Economic Law. - In: International Economic Law and Developing States. An Introduction. Ed. by Hazel Fox, L., British Institute of International and Comparative Law, 1992, p. 12-15.

'gentlemen's agreements', central bank arrangements, declarations of principles, resolutions, recommendations, customary law, general principles of law, de-facto orders, parliamentary acts, governments degrees, juridical decisions, private contracts or commercial usages"¹⁸.

The other constructions of mixed legal branches were termed by their authors as "the law of international trade"¹⁹, "international trade law"²⁰, "the law of international economic relations"²¹, "international monetary law"²², etc.

In fact, as it has been above noted, international and municipal laws are closely interrelated in the economic field due to the inseparability of the economic matters they deal with. That is why a complex approach to legal regulation of international economic relations can not be seriously challenged. To quote P.Verloren van Themaat, "international economic law should meet the requirements of the infrastructure of national economic policies and national economic law"²³. However, stricto sensu, a branch of law is "the totality of the single-system norms"²⁴. The norms of international and municipal legal systems differ by their

18. E.-U-Petersmann. International Economic Theory and International Economic Law: on the Tasks of a Legal Theory of International Economic Order, p.251. See also R.Durovic. Medunarodno Privredno Pravo, Beograd, 1977, p. 3-5,11-12; J.Gilas. Problems of Methodology in International Economic Law. - In: Polish Yearbook of International Law 1984, Wroclaw, 1985, p. 79.

19. See J.-D.Bredin. Droit du commerce international. P., 1969.

20. See V.I.Menzhinsky, I.V.Shapovalov. Working out the Legal Principles of International Trade Cooperation in the United Nations. - In: Pravovedenie, 1969, N 3 (in Russian).

21. See F.Madl. The Law of International Economic Relations. - In: Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae, Sectio juridica, Budapest, vol. XX, 1978.

22. See A.B.Altshuler. International Monetary Law. Moscow, 1984 (in Russian).

23. P.Verloren van Themaat. Op. cit., p. 16.

24. G.V.Ignatenko. International and Soviet Laws: the Problems of Interrelation of Legal Systems. - In: Sovetskoye gosudarstvo i pravo, 1985, N 1, p. 78 (in Russian).

nature, modes of creation, subjects, objects and methods of regulation. Therefore, it would be methodologically incorrect to unite them into a "mixed" branch of law²⁵. It seems to be more reasonable to speak about the complex of legal regulation of international economic relations²⁶ comprising IEL (as the branch of international public law) and relevant municipal legal branches. Within this complex, the rules of different legal nature interrelate by virtue of various procedural means (implementation, incorporation, reference, unification, etc.). Being less important from the practical viewpoint, such distinction between a legal branch as a single-system normative entity and a legal complex as a multi-system conglomerate of norms seems to be theoretically noteworthy.

(2). By now, the concept of IEL as a branch of international public law has been perfectly proved and broadly shared in the legal doctrine²⁷. IEL possesses the same branch-making features as those of international maritime law, diplomatic law and

25. G.Schwarzenberger suggesting his considerations in favour of public IEL pointed out a common drawback of the "mixed" approaches: "they fail to comply with the, admittedly, rigorous test by which any legal discipline or branch of a such discipline must be judged: assuming a minimum of functional unity, can it count as its own a sufficient number of special legal rules and principles?" (G.Schwarzenberger. *The Principles and Standards of International Economic Law*. - In: *Recueil des Cours*, 1966-I, vol. 117, p. 7).

26. See B.I.Kucher. *The Characteristics of Legal Regulation of International Economic Relations*. - In: *Vestnik of Kiev University. International Relations and International Law*, 1981, vol. 13 (in Russian).

27. See G.Schwarzenberger. *Economic World Order? A Basic Problem of International Economic Law*. Manchester University Press, 1970, p. 4; P.VerLoren van Themaat. *The Changing Structure of International Economic Law*. Hague/Boston/London, 1981, p. 9; B.M.Ashavsky. *On the Problems of International Economic Law*. - In: *Soviet Yearbook of International Law* 1984, Moscow, 1986 (in Russian); M.M.Boguslavsky. *International Economic Law*. Moscow, 1986 (in Russian); I.Seidl-Hohrenveldern. *International Economic law. General Course of Public International Law*. - In: *Recueil des Cours*, 1986-III, vol. 198, Alphen aan den Rijn, 1987, p. 21; S.A.Voitovich. *International Economic Law: Concept, Structure, Specific Features (the Soviet Point of View)*. - In: *Jus Gentium -Kansainoikeus*, Finland, 1987, N 3-4; G.Theodoropoulos. *The Development of International Economic Law in the Context of Cooperation among States with Different Levels of Economic Development*. - In: *Indian Journal of International Law*, 1988, N 1; *The Course of International Law*, vol.4, ed. by I.I.Lukashuk, Moscow, 1990, p. 211-265 (in Russian).

other traditional branches. These are: (1) specific object of regulation (international economic relations), (2) voluminous normative material, (3) special principles, and (4) ramified structure.

Thus, IEL may be briefly defined as a system of norms of public international law regulating international economic relations of prevalingly interstate character.

2.2. Structure of International Economic Law

IEL has a relatively complicated composition which reflects the structure of international economic relations it regulates. From the viewpoint of genesis, international trade was the first form of international economic ties. Hence, IEL has emerged as commercial law. At the first stage it consisted of the ancient primitive commercial customs and usages applied in different trading markets and ports, as well as of some commercial provisions included from time to time into ancient and medieval interstate treaties. In the 17 - 19 centuries it took the shape of international lex mercatoria which was strongly influenced by the national codes of commerce of the primary trading nations²⁸. Nowadays, the numerous norms governing international trade constitute a considerable part of IEL²⁹. Therefore, it is understandable why some commentators considered international trade law a

28. See C.M.Schmitthoff's Selected Essays on International Trade Law. Ed. by Chia-Jui Cheng. Dordrecht/Boston/London, 1988, p. IX.

29. E.-U. Petersmann notes that "hardly any other area of the international economy has such a detailed national, regional and worldwide international legal framework as foreign trade" (E.-U.Petersmann. Constitutional Functions and Constitutional Problems of International Economic Law. Fribourg, 1991, p. 17).

separate branch of public international law³⁰. However, the present-day international economic cooperation can not be confined to trade. Industrial, investment, financial, transport, scientific and other varieties of international economic relations are intensively developing now, and on this basis the relevant sub-divisions of IEL are gradually forming up.

Trying to describe the structure of IEL and its relationships with other components of international law one should bear in mind the prior attempts made for this purpose in the legal writings. Thus, B.M.Ashavsky distinguished international trade law and international financial law as traditional subbranches of IEL from its newly forming sub-branches, inter alia the law of scientific and technical cooperation³¹. In turn, M.M.Boguslavsky held the view, that international taxation law in addition to trade law and financial law, are subbranches of IEL. He also mentioned the law of IEOs and separate complexes of rules regulating industrial cooperation, scientific and technical cooperation, transfer of technology, investments, joint economic activities, peaceful settlement of international economic disputes, prohibition of trade war and economic blockade, unlawful economic "sanctions" and other measures of economic coercion³².

2.2.1. Structural Sub-divisions of International Economic Law

The analysis of normative contents of IEL gives grounds to distinguish its following basic structural units: (1) sub-branches, (2) normative institutes, (3) International economic development law, and (3) law of IEOs.

30. See G.M.Veljaminov. Legal Regulation of International Trade. Moscow, 1972, p. 16; V.I.Lisovsky. International Trade and Financial Law. Moscow, 1974, p. 3 (both in Russian).

31. B.M.Ashavsky. Op. cit., p. 44.

32. M.M.Boguslavsky. Op. cit., p. 43-44.

(a) Sub-branches

Sub-branches may be termed as the large bodies of norms regulating certain basic varieties of international economic relations. From this viewpoint, the most developed sub-branches of the present-day IEL are: international trade law, international financial law, international investment law, and international transport law. Certainly, these sub-branches do not have strict margins and deeply interpenetrate due to the close interrelationships between international economic issues they deal with. Trade, finance, investments, and transport can not be isolated from each other in the up-to-date international economic life and this is reflected in many normative acts, which simultaneously contain the rules relating to commercial, monetary, investment, and communication matters.

(b) Normative institutes

Normative institutes comprise the rules of a common function which operate in one or several sub-branches. For instance, the norms of the most-favoured-nation (MFN) institute relate to trade, financial, investment matters, etc. The same can be said about a relatively new institute of economic preferences for developing countries, comprising some customary legal rules and a number of treaty norms (e.g. the rules of the GATT, the Lome Conventions, etc.). The group of norms prohibiting or restricting certain forms of economic coercion, discrimination, dumping, etc. makes up another institute, that might be termed as "the institute of international economic security". This list of normative institutes of IEL is not exhaustive. Other relatively compact groups of the rules of common function may be classified within IEL.

(c) International economic development law

Speaking about the structure of IEL one should not miss the concept of "international economic development law", once put forward by W.Friedmann and since shared by many other authors using more often the terms "international development law" or "international law of development"³³. W.Friedmann considered international economic development law as "a body of principles determining the legal relationships of developing countries with foreign investors, and with national or international public development aid institutions"³⁴.

Some commentators from developing countries treat "international development law", which embraces the norms relating to the State sovereignty over natural resources, trade preferences and other aspects of the New International Economic Order, as an antithesis to classical IEL³⁵.

However, it seems better to share the view of those scholars who consider international economic development law an integral part of IEL³⁶, though the margins of this specific subdivision are not easily outlined. One of the most active supporters of the international development law M.Bulajic stresses that it "has emerged as part of universal international law... It is by nature a transitional body of law and its purpose is to establish the NIEO"³⁷. To put it another way,

33. See W.Friedmann. *The Changing Structure of International Law*. N.Y., 1964, p. 374; O.B.Rivero. *New International Economic Order and International Development Law*. Mexico, 1980, p. 141; M.L.Entin. *International Law of Development: the Problems of Establishment and Realization*. - In: *Sovetskoje gosudarstvo i pravo*, 1985, N 2, p. 139-144 (in Russian); *International Law of Development: Comparative Prospectives*. Ed. by Francis Snyder & Peter Slinn. Abingdon, 1987.

34. W.Friedmann. *Op. cit.*, p. 374.

35. See O.B. Rivero. *New International Economic Order and International Development Law*. Mexico, 1980, p. 141.

36. See J.Gilas. *Op. cit.*, p. 93.

37. M.Bulajic. *A Changing World Calls for International Development Law*. - In: *Legal Issues in International Trade*, ed. by Petar Sarcevic and Hans van Houtte, London/Dordrecht/Boston, 1990, p. 5.

this is a "goal-oriented"³⁸ character of international economic development law that specifies its structural position within general IEL. Proceeding from such assumption, the concept of international economic development law may be successfully evolved only in line with strengthening and improvement of existing general IEL, since the development-oriented rules can be found in all traditional subbranches and institutes of IEL. As M.M.Boguslavsky pointed out, "the interrelation between the principles and norms of the NIEO and the principles and norms of IEL is the interrelation of a part and a whole"³⁹.

(d) Law of International Economic Organizations

A special attention should be paid to the structural position of what is called "the law of IEOs".

The idea of an autonomous legal system created by an individual international organization has been reasonably suggested in the legal literature⁴⁰. There is also broad agreement among the international lawyers about the existence of the law of European Communities, the law of GATT and of some other IEOs. One can hardly challenge the fact that each particular IEO has its individual legal system comprising its constituent instruments and subsequent legal acts. A legal system of any IEO consists of two parts: (1) the so-called "internal law" of the organization

38. See: P. Slinn. Differing Approaches to the Relationship between International Law and Development. - In: International Law of Development: Comparative Prospective, p. 32.

39. M.M.Boguslavsky. Op. cit., p. 29.

40. See M. Sorensen. Autonomous Legal Orders: Some Considerations Relating to a System Analysis of International Organizations in the World Legal Order. - In: ICLQ, 1983, Part 3.

dealing prevalingly with procedural, administrative and budgetary issues⁴¹; (2) substantive rules of conduct for the IEO and its Member States. However, the margins between the "internal" or prevalingly procedural law of an IEO and its substantive law cannot always be easily outlined, since the 'internal' rules may have an 'external' effect.

There is more risk to suggest that a "general part" of the law of IEOs is emerging along with their individual legal systems. E.-U.Petersmann seems to be too categorical saying: " There is no "general law" of international economic organizations; each organization has its own legal system"⁴². Obviously, most fundamental issues of the existence and operation of each particular IEO are regulated by its own legal system. However, certain general rules relating to all IEOs and even to all intergovernmental organizations are gradually crystallizing from the common practice of international organizations. These are, for example, the rules codified in the 1986 Vienna Convention on Treaties between States and International Organizations or between International Organizations, the customary rules saying that the obligations of an international organization are distinct from those of the members, or that an international organization may not intervene into the competence of their Member States without their voluntarily expressed consent, etc. Apart from this, there are hundreds of rules of inter-IEOs agreements, as well as of the agreements between IEOs and other organizations and States, which go beyond the scope of the individual IEOs' legal systems. Therefore, as a sectoral

41. On the 'internal' law of an organization see: H.G.Schermers. *International Institutional Law*. Leiden, 1980, p. 585-597; Ph.Cahier. *L'ordre juridique interne des organisations internationales*. - In: *A Handbook of International Organizations*. Ed. by Rene-Jean Dupuy. Dordrecht/Boston/Lancaster, 1988, p. 237-257.

42. E.-U.Petersmann. *Economic Organizations and Groups, International*, p.165. See also P.Verloren van Themaat. *Op. cit.*, p. 29.

sub-division of a more capacious international institutional law⁴³, the law of IEOs may be treated as a large, rather heterogeneous body of law dealing with IEOs, and comprising:

- (1) numerous legal systems of individual IEOs (each consisting of the "internal" (prevaillingly procedural) and substantive law of an IEO);
- (2) rules of inter-IEOs agreements⁴⁴;
- (3) general treaty and customary rules (however few these may be) applicable to all IEOs.

Obviously, the suggested concept of the law of IEOs is not a result of a practical codification of the relevant legal rules. Any codification attempts within this body of law might be taken only in some narrow limits (by analogy to the 1986 Vienna Convention), since the individual IEOs' legal systems are likely to remain of primary importance compared to general and inter-IEOs rules. However, there are both theoretical and practical arguments in favour of the "law of IEOs" concept.

The law of IEOs differs from the traditional branches of public international law. It occupies a specific inter-branch structural position being simultaneously a

43. More than thirty years ago Alexandrowicz wrote that, though the law of international organizations "has not grown to the level of a separate and self-contained discipline, a special place deserves to be (and in fact has been) assigned to it in the general framework of international law. The two most important parts of this new sub-discipline deal with the internal law of international organizations and with their contributions to the generation or strengthening of lasting principles or rules of international law capable of existence independently of their temporary treaty bases" (C.H.Alexandrowicz. World Economic Agencies. Law and Practice. L., 1962, p. 302).

In turn, to quote Schwarzenberger, "...it appears safe to state that the Law of International Institutions has attained a functional and normative unity of its own. This justifies its claim as a distinct branch of international law" (Georg Schwarzenberger. International law As Applied by International Courts and Tribunals. Vol. III. International Constitutional Law. L., 1976, p. 115). It was noted during a discussion in the ILC that for the time being the law of international organizations as a "new branch of international law was in its infancy" (Yearbook of the ILC 1983. Vol.I, p. 247).

44. Certain intermediary position, as regards the law of IEOs and other subdivisions of international law, is occupied by the rules of agreements between IEOs and other subjects of international law.

part of international institutional law and IEL (as a segment of the two intersecting circles). This is a logical argument proving that the law of IEOs is not an abstract construction, as it may seem at first sight, but a concept reflecting certain real phenomenon. Without this concept it would be difficult to define a structural position of the hundreds of legal rules dealing with IEOs within the system of public international law. As these rules apparently belong to both international institutional law and IEL, and may be graphically depicted as a segment of the two intersecting circles, then it is logical to suggest that this segment highlights a relatively autonomous inter-branch body of law which deserves its identification as the law of IEOs.

Along with this quite formal argument, a more substantial consideration in favour of the concept of the emerging law of IEOs is the functional need to distinguish within IEL a voluminous body of legal rules which set up the institutional framework for the world economic order. These rules, however diverse they may be from one organization to another, have much in common (e.g. mode of creation, addressees, contents, implementing peculiarities), that justifies treating them as a relatively autonomous body of law, as well as a special legal sub-discipline within a more general course of IEL.

Moreover, the phenomenon described by E. Lauterpacht as "crossfertilization" of constitutions and used as an argument in favour of a "common law of international organizations"⁴⁵ may be well applied to its integral part - the law of IEOs. To put in a wider context, the commonality of individual legal systems of various IEOs is taken into account in a number of ways in the process of rule-making, interpretation and application within each of them. For example, the constitutional acts of

45. E. Lauterpacht. The Development of the Law of International Organization by the Decisions of International Tribunals. - In: *Recueil des Cours*, 1976-IV, vol. 153, Alphen aan den Rijn, 1980, p. 396.

comparable IEOs, like the UN specialized economic agencies, international commodity organizations, organizations of producers and exporters, are drafted under similar models with a mutual account of useful innovations. This can be illustrated by the unsuccessful experience of the International Tin Council in 1985 which forced the Member States of some other international commodity organizations to narrow the financial and contractual competence of these institutions⁴⁶. On the other hand, if an analogy with the International Tin Council case emerges with regard to any other international commodity organization, the precedent experience of the interpretation and application of the constitutional rules might be applied to a similar case. These examples demonstrate the existence of certain functional law-making and law-implementing links between comparable legal systems of individual IEOs.

Finally, the problem of compatibility, competitiveness and conflicts between the individual IEO's legal systems, which inevitably emerges, for example, in the relationships between the "umbrella" and subregional IEOs in Africa and Latin America, as well as between the GATT law and the legal orders of regional integrational organizations (e.g. the EEC), gives more weight to the complex approach towards the law of IEOs.

2.2.2. Structural Position of International Economic Law in the System of Public International Law

IEL has a developed structure of links with other branches and normative institutes of public international law. Thus, the law of treaties regulates the conclusion, operation and termination of international economic agreements. The institute of peaceful settlement of international disputes deals with the use of procedural means of resolving international disputes in the economic field. The

46. See Chapter VII 2.2.

institute of legal succession relates to international economic treaties, State property and international debts. The institute of international legal responsibility covers inter alia the responsibility for breaches of IEL rules. IEL also closely interrelates to international maritime law in the matters of exploration and exploiting of the sea-bed resources, fishing, navigation. Some other rules of international law that, using Zamora's expression "carry indirect economic implications"⁴⁷, can be found in international environmental law⁴⁸, international air law, international space law, etc. Therefore, economic aspects naturally penetrate into practically all spheres of interstate relationships giving IEL a somewhat specific "piercing" structural position in the system of public international law.

2.3. Principles of International Economic Law

It may appear strange, but the sets of principles of IEL considered by many authors who have written on this subject never completely coincided. And even two collectively produced documents (the UNITAR study on the Progressive Development of the Principles and Norms of International Law relating to the New International Economic Order of 1984⁴⁹ and the Seoul Declaration of the International Law

47. See Stephen Zamora. Is There Customary International Economic Law. - In: GYIL 1989, Vol. 32, B., 1990, p. 15.

48. For the links between international trade law and international ecological law see: E.-U.Petersmann. International Trade Law and International Ecological Law - Prevention and Settlement of International Disputes in GATT. - In: 27 J.W.T.1 (1993), 43-81.

49. The UNITAR study identifies the three principles of international law relating to the NIEO within the ambit of the fundamental principle of sovereign equality: (1) the right of States to

(Footnote continues on next page)

Association of 1986⁵⁰), which are worth the highest appreciation, suggest somewhat different lists of the relevant principles. An explanation to this may be found in the fact that the principles of IEL, having been crystallized from a voluminous normative material, exist at the universal level in the form of customary rules which are differently termed in numerous binding and recommendatory documents.

Apart from the basic principles of international law ruling, inter alia, international economic relations⁵¹, the special principles of IEL which can not be challenged now are: the permanent sovereignty of a State over its natural resources, the free choice of a country's economic system, economic non-discrimination, mutual economic benefit, free trade and economic cooperation, and the consensual principle of the most-favoured-nation (MFN) treatment. There are also enough grounds to speak about the formulation of the principle of economic preferences for developing

(Footnote continued from previous page)

choose their economic system; (2) permanent sovereignty by States over their natural resources; (3) the principle of participatory equality of developing countries in international economic relations; and the five principles deriving from the general principle called the duty to co-operate: (1) the principle of preferential treatment for developing countries; (2) the principle of stabilization of export earnings of developing countries; (3) the principle of the right of every State to benefit from science and technology; (4) the principle of entitlement of developing countries to development assistance; (5) the principle of common heritage of mankind.

50. The Declaration considers the following nine principles: (1) The rule of Public International Law in International Economic Relations; (2) Pacta sunt servanda; (3) The Principles of Equity and Solidarity and the Entitlement to Development Assistance; (4) The Duty to Co-operate for Global Development; (5) Permanent Sovereignty over Natural Resources, Economic Activities and Wealth; (6) The Right to Development; (7) The Principle of Common Heritage of Mankind; (8) The Principle of Equality or Non-Discrimination; (9) Participatory Equality of Developing Countries in International Economic Relations (see The International Law Association. Report of the Sixty-Second Conference held at Seoul. August 24th to August 30th, 1986, p. 2-11).

51. These are: sovereign equality of States, non-intervention, non-use of force or threat of force, peaceful settlement of international disputes, equal rights and self-determination of nations and peoples, pacta sunt servanda.

countries (substantive equality) and to raise the issue of gradual crystallization of the special principle restricting the abuse of economic coercion (although, the latter is rather the matter of lex ferenda than lex lata)⁵². International legal practice brings to mind the examples when the Resolutions of the IEOs were the focal point for the development of the new special principles of IEL, namely, the principles of permanent sovereignty over natural resources, and economic preferences for developing countries.

The principles of IEL are supposed to discharge a number of functions that are requisite for building a law-oriented international economic society:

(1) they formulate the basic minimum requirements to States and other subjects on proper economic conduct;

(2) they are important instruments for universal regulation in the economic field, promoting coordination among particular, regional and global rules;

(3) they perform a branch-organizing function outlining the margins for permissible law-making in IEL.

However, at present, one should not idealize a practical regulatory impact of the principles on international economic relations. Life gives numerous examples of their breaches. Not only scholars, but the States themselves differ in their interpretation. It can be concluded, that nowadays the strengthening of the regulatory effect of principles is indispensable for the establishment of effective legal foundation for international economic order.

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52. See S.A.Voitovich. Legitimacy of the Use of Economic Force in International Relations: Conditions and Limits.- In: World Competition, 1992, No 4, p.31-32.

International legal regulation of economic relationships appears as two interpenetrating facets: (1) the system of three principal components: the subjects, object and mechanism of legal regulation (a static aspect); (2) the process comprising two main phases: law-making and law-implementation (a dynamic aspect). If the glance is cast at international legal regulation in the economic field through the prism of IEOs, their active involvement in both the system and process would be easily found. As the subjects of international law, IEOs take part in law-making and law-executing, that way influencing the changes and developments in the mechanism and object of legal regulation. To know how that is done, the present writer has started to do this study.

CHAPTER II. THE CONCEPT AND TYPOLOGY OF INTERNATIONAL ECONOMIC ORGANIZATIONS AS SPECIAL SUBJECTS OF INTERNATIONAL LAW

1. International Legal Personality of IEOs

Even at first sight it is quite easy to notice those features of IEOs which distinguish them from the other typical international institutions, i.e. conferences and joint intergovernmental committees. Unlike international conferences convoked for a limited time, IEOs have a permanent character (as a rule, the duration of IEO's functioning is not limited in their constituent documents⁵³). Unlike joint intergovernmental committees of mainly bilateral character, IEOs have multilateral membership, as a minimum of three parties. More thorough analysis of IEOs' statutory acts and practice reveals their following typical features: (1) establishment on the basis of international agreement in conformity with international law; (2) membership of sovereign States⁵⁴; (3) permanent functioning; (4) system of organs; (5) the purpose for coordination of economic cooperation in certain fields; (6)

53. A rare exception is the ECSC created for 50 years (Art 97 of the ECSC Treaty).

54. The constituent acts of some IEOs assume the possibility of membership for other than States subjects of international law. Under Art.4(b) of the Agreement Establishing the Common Fund for Commodities of 1980, apart from States, a member of the Fund may be "any intergovernmental organization of regional economic integration which exercises competence in fields of activity of the Fund. Such intergovernmental organizations shall not be required to undertake any financial obligations to the Fund; nor shall they hold any votes". Membership in the EBRD is open, along with States, to the EEC and the European Investment Bank (Art. 3 of the Establishing Agreement).

international legal personality⁵⁵.

On this ground an IEO⁵⁶ can be defined as a structurally organized, permanently operating international legal entity, which is established by an agreement of sovereign States for the coordination of their economic policies in the specified fields.

Since there are few international legal rules laying down a concept of "international legal personality", the legal science makes attempts to define it on the basis of existing practice⁵⁷. However, different initial criteria of what is international legal person used by various authors do not allow to create a generally accepted concept. Most often a legal person is associated with the possession of legal rights and duties. According to H.Kelsen, a legal person "is that legal substance to which duties and rights belong as legal qualities"⁵⁸. P.K.Menon suggests a similar interpretation: "Legal personality is an

55. On the essential features of international organizations see: E.T.Usenko. The Council for Mutual Economic Assistance - a Subject of International Law. - In: Soviet Yearbook of International Law 1979. Moscow, 1980, p. 20; E.A.Shibaeva. The Law of International Organizations. Moscow, 1986, p. 23-26 (both in Russian); The Concept of International Organization. Ed. by G. Abi-Saab. P.: UNESCO, 1981, p. 11-12.

56. Among other definitions of IEO it is worth to mention the one proposed by P.Verloren van Themaat: "any lasting form of cooperation in the economic field between at least five countries, which is based directly or indirectly on one or more treaties of public international law" (P.Verloren van Themaat. The Changing Structure of International Economic Law, p. 12); and another by E.-U.Petersmann: "The term international economic organization denotes an association of States, established by agreement and possessing a permanent set of organs with autonomous functions and powers, which pursues common economic objectives by means of cooperation among its members" (E.-U.Petersmann. Economic Organizations and Groups, International, p. 161).

57. See International Legal Personality. Moscow, 1971; D.I.Feldman, G.I.Kurdukov. The Main Trends in the Development of International Legal Personality. Kazan, 1974; G.M.Veljaminov. International Legal Personality.- In: Soviet Yearbook of International Law 1986. Moscow, 1988, p. 77-97 (in Russian); P.K.Menon. The Subjects of Modern International Law. - In: Hague Yearbook of International Law 1990, The Hague, 1991, p.30-86.

58. Quoted from P.B.Moring. European Community - Financial Autonomy for the European Community: An Integrationist Approach to International Legal Personality. - In: Vanderbilt Journal of Transnational Law, 1982, vol. 15, p. 310.

acknowledgement that an entity is capable of exercising certain rights and being subject to certain duties on its own account under a particular system of law"⁵⁹. That is right for both municipal and international laws. But this general quality of legal persons neither shows their peculiarities in the different legal systems, nor distinguishes the concepts of legal personality and legal status, both connected with rights and duties.

Two criteria seem to be important for the definition of a traditional international legal person. First, unlike most subjects of municipal law, traditional international legal persons are not, as a rule, subordinated to any superior power. The phenomenon of supranational power known, for instance, in the EEC, has its functional limits allowing the Member States to maintain their sovereignty. Second, traditional subjects of international law are capable of not only observing legal provisions and of bearing legal rights and duties deriving from them, but also have a capacity to create legal norms themselves. As E.T.Usenko stated: "the subjects of international law are simultaneously the creators of objective international law and the bearers of subjective international rights. This is the peculiarity"⁶⁰. Therefore, in a traditional sense, "international legal personality" means the ability of autonomous international actors to perform independently international legal actions including law-making and implementation of legal norms. If one accepts the idea of distinguishing the law-making and non-law-making subjects of international law (the latter term applies to the nationals of States)⁶¹, then the above suggested definition of international legal

59. P.K.Menon. Op. cit., p. 31.

60. E.T.Usenko. The Correlation of the Categories of International and Municipal (National) Laws. - In: *Sovetskoje gosudarstvo i pravo*, 1983, N 10, p. 51 (in Russian).

61. See N.V.Zakharova. An Individual as a Subject of International Law. - In: *Sovetskoje gosudarstvo i pravo*, 1989, N 11, p. 112 (in Russian); R.A.Mullerson. Human Rights and the Individual as Subject of International Law: A Soviet View. - In: *1 EJIL/JEDI* (1990), p. 36.

personality would be true only for the law-making subjects, to which IEOs, undoubtedly, belong.

After a well-known statement of the International Court of Justice in the "Reparations for Injuries Suffered in the Service of the United Nations" case, which recognized the "objective" international personality of the UN⁶², the fact that international organization can possess international legal personality has no longer been seriously challenged⁶³. This is confirmed in the 1986 Vienna Convention on Treaties between States and International Organizations or between International Organizations. However, the question of whether all intergovernmental organizations possess international personality is not unambiguously answered in the doctrine⁶⁴. The constituent documents do not always contain an explicit indication on this matter⁶⁵. That is why A.N.Talalaev, for instance, suggests to solve this problem

62. International Court of Justice Reports, 1949, p. 174. The Court stated that if the organization has personality, "it is an entity capable of availing itself of obligations incumbent upon its members". It also declared that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims".

63. The attempt of R.Reutersward to prove that an international organization "does not act as a subject of law but as an international organ" does not look very convincingly especially after reading the comments on it by F.Seyersted (see R.Reutersward. The Legal Nature of International Organizations. - In: Nordisk Tidsskrift for International Ret, 1980, N 1-2, p. 14-30; F.Seyersted. The Legal Nature of International Organizations. - In: Nordisk Tidsskrift for International Ret, 1982, N 3-4, p. 203-205).

64. See A.N.Talalaev. The Law of International Treaties. Treaties with Participation of International Organizations. Moscow, 1989, p. 59-59 (in Russian).

65. In many cases the founding documents of IEOs fix their international legal personality either explicitly:

"The Center shall have full international legal personality" (Art. 18 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) 1965); "The Association shall have the capacity of a legal person under international law to perform any acts

"only proceeding from the entire totality of the contents of functions and competence of the concrete international organization which are fixed in its Charter and other relevant normative acts"⁶⁶. Without challenging the latter thesis one can, however, assert that the absence of international personality can practically impede performing the organization's functions. It is hard to disagree with Kohona's view, that international personality of organizations is "an essential attribute in discharging the objectives for which they are established"⁶⁷. The authors who contend that not all intergovernmental organizations possess international legal personality, as a rule, do this in a hypothetical way and do not give any practical examples. Much more persuading is Schermers' conclusion: "At present it is generally recognized that all public international organizations have some international legal personality, limited to the fields in which they have competence to operate. In practice, virtually all international organizations perform acts under international law"⁶⁸.

(Footnote continued from previous page)

appropriate to its purpose within the powers granted to it by the Constitution" (Art. II of the Constitution of the WARDA);

or implicitly by enumerating the concrete international rights and duties: "In order to achieve its aims the Organization may (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organizations" (Art. 5 of the Convention on the OECD). But some of the IEOs' constituent documents do not at all contain any provision on their international legal personality (e.g. the Statute of the OPEC of 1962, the Agreement Establishing the APPA of 1987).

66. A.N.Talalaev. Op. cit., p. 58-59.

67. P.I.B.Kohona. The Regulation of International Economic Relations Through Law. - Dordrecht/Boston/Lancaster, 1985, p.35.

68. H.G.Schermers. The International Organizations. - In: International Law: Achievements and Prospects. General Editor M.Bedjaoui, Paris - UNESCO, 1991, p. 74.

Taking into account the functional necessity of possessing international legal personality for each intergovernmental organization and a lack of the facts witnessing that the founding States refrain from vesting any organization with this quality, the present writer shares the concept of "objective" (erga omnes) international personality of an intergovernmental organization possessing a number of essential features (the first five qualities enumerated above). Such objective international legal personality exists irrespective of its official recognition on the part of any third persons including non-members.

Another thing is that the scope of the powers (the competence) of the organization is to be determined in each particular case individually. The difference between "personality" and "powers" was noted in the above mentioned Advisory Opinion of the ICJ (1949) on Reparation for Injuries. Commenting on this matter, E.Lauterpacht wrote: "...the mere possession of personality does not dispense with the need to determine whether in the particular case the person possesses the appropriate power"⁶⁹. The same point was stressed by M.Rama-Montaldo: "Special care must be taken not to confuse the field of rights arising from international personality common to all international organizations, and the field of implied powers or functions particular to each organization"⁷⁰.

It is well-known, that the foundation for international legal personality of a State is its sovereignty, i.e. the superiority of the State power within the State's territory and its independence outside. As regards an organization not possessing sovereignty, two foundations for its legal personality - a legal and an objective one - may be distinguished. The legal foundation is the statutory act and other

69. E.Lauterpacht. The Development of the Law of International Organization by the Decisions of International Tribunals. - In: Recueil des Cours, 1976-IV, vol. 152, Alphen aan den Rijn, 1980, p.407.

70. M.Rama-Montaldo. International Legal Personality and Implied Powers of International Organizations. - In: BYIL 1970. Oxford, 1971, p. 155.

relevant documents of the organization, which make the normative basis for its establishment and operating. The organization's will being formed as a result of the consent of the Member States was termed by M.K.Ivanov as "an objective foundation" for its international legal personality⁷¹. The statutory documents fixing the order of decision-making endow the organization with a relatively autonomous will, without which no independent international legal actions are possible. The bearers of the IEO's will are its organs. The will of the organization is determined by the wills of the Member States and in this sense is termed as relatively autonomous. However, it may considerably differ from the wills of the individual Member States (for example, this is well seen in the way the Member States vote a resolution of the organization adopted by the majority)⁷². Without an autonomous will a subject of international law is inconceivable, since international legal activities are the process of making decisions of will.

International legal personality of an IEO has a special functional character. It is not to be equated to the universal personality of a State. While sovereign States are able to perform any international legal actions not prohibited by international law, IEOs possess a capacity for only a limited scope of international legal activities which are necessary for the objectives of these organizations in conformity with their constituent documents. I.Seidl-Hohenveldern states, that "...international organizations may be subjects of international law only for

71. M.K.Ivanov. The Objective Foundation of International Legal Personality. - In: Pravovedenie, 1988, N 6, p. 91 (in Russian). See also: S.A.Malinin, T.M.Kovaleva. The Legal Personality of International Organizations. - In: Pravovedenje, 1992, No 5, p. 61.

72. In the Individual Opinion on the Membership in the United Nations case (1948) Judge Alvarez noted: "an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life" (I.C.J.Reports 1948, p. 68).

their acts intra vires"⁷³.

Here the difference between international legal personality and international legal status of an IEO should be stressed. These concepts interpenetrate and are sometimes mixed. They are two closely connected, but different facets of the legal existence of a subject of international law. To be better understood, it is worth to begin with States, in which a correlation between legal personality and status is better visible.

Being sovereign entities, States are formally equal as the subjects of international law, though, in fact, they vary in many parameters (territory, population, economic and political systems, geographical position, level of economic development, etc.). And these actual distinctions are also taken into consideration by international law (e.g. the peculiarities of the legal position of developing and land-locked States, the veto right for the five permanent Members of the UN Security Council, "weighted" voting procedures in some IEOs, etc.). But in principle, States are equal from a viewpoint of their international legal personality as a capacity for independent international legal actions.

In the course of realization of this capacity States acquire and execute their international rights and duties, which taken in complex are individual for each State. This complex of international rights and duties of a subject obtained and realized within the framework of its international legal personality is termed as international legal status⁷⁴. International legal status of a State covers a common for all the States "nucleus" (primary sovereign rights and duties embodied in the basic principles of international law) and an individual part containing the secondary rights and duties which are acquired in the course of realization of their primary rights and duties (for instance, each State has an individual system of

73. I.Seidl-Hohenveldern. International Economic Law. General Course of International Law, p. 105-107.

74. See G.M.Veljaminov. International Legal Personality, p. 94.

treaty relations with other subjects, individual membership to international organizations, etc.)⁷⁵.

A similar correlation between personality and status is true for IEOs. International legal personality is a premise for the international legal status of an IEO, whereas the latter is a result of possessing personality. International legal personality in general indicates of the existence of the organization's capacity for independent international legal actions, while international legal status characterizes the concrete legal position of the organization in the process of the realization of this capacity.

One of the components of an IEO's legal status is its competence, i.e. the powers of the organization in the person of its organs which derive from the constituent instruments and relate to the scope of subject-matter and the character of decision-making. The basic elements of an IEO's competence are the subject competence, decision-making competence, treaty-making competence, interpretative competence and sanctional competence.

International legal status of an IEO covers its primary and secondary rights and obligations. The primary rights and obligations are fixed in the founding documents or derive from general international law. These are: the right to participate in legal standard-setting, the right to cooperate with other subjects, the right to make decisions and recommendations, the right to bring an international claim, the right for immunities and privileges, the right of representation, the duty to refrain from interference into internal affairs of the Member States, etc. The secondary rights and obligations are acquired by the IEOs in the course of realization of their right for participation in international law-making. Their contents are specific for each particular IEO.

75. See International Law. Ed. by G.I.Tunkin. Moscow, 1982, p. 82-83 (in Russian).

2. Classification of IEOs

Examining the present-day IEOs, one can find out a dialectical interrelation between their common and specific features. Their general signs combining with individual qualities result in a vast variety of IEOs' types which, at first sight, may seem as a disorderly conglomerate of numerous organizations. However, the classification⁷⁶ distinguishing common and specific features of the analyzed objects helps to elaborate a more systematic notion of IEOs. The principal criteria for classification, relating to the most significant aspects of IEOs as special subjects of international law, are: (1) form of statutory act; (2) legal status; (3) volume of powers; (4) accession to membership; (5) character of membership; (6) subject of activities; (7) geographical sphere of activities; (8) decision-making competence.

2.1. Form of statutory act

All the IEOs are established by an agreement of the Member States. However, the forms of the expression of such agreement may vary. In this respect it is possible to distinguish: (1) the IEOs whose constituent documents are international treaties (the major part of the existing IEOs); (2) the IEOs established by a document other than a treaty (e.g. the UNCTAD, the UNIDO founded by the UN General Assembly resolutions, the IEA established by the OECD Council decision, the ASEAN formed by virtue of the Bangkok Declaration of the Ministers of foreign affairs of the Member States); (3) the IEOs which do not have a single formal statutory act. The GATT may serve as an example of the latter type. Its organizational structure has been formed

76. On classification of international institutions see: Georg Schwarzenberger. A Manual of International Law. Sixth edition. Milton, 1976, p. 192-194.

on the basis of a number of acts adopted in different years. Up to 1959 there also had been no Charter of the CMEA. During the first decade this organization had been functioning in accordance with the decision of the 1949 Moscow Economic Meeting (i.e. informal intergovernmental agreement) and the customary rules expressed in the decisions of the CMEA organs⁷⁷.

It must be borne in mind, that international institutions other than IEOs may also operate on the basis of an informal agreement. Thus, the COCOM (the Coordinating Committee for Multilateral Strategic Export Controls) formed in 1949 does not possess a clear legal status; it acts only through the Member States (the NATO Members minus Iceland, plus Japan) and, as it was noted by some authors, can not be properly called an "international organization"⁷⁸.

2.2. Legal status

Each IEO has an individual legal status, though, there are some elements common for all of them. The most general division on this basis may be made for autonomous and quasi-autonomous IEOs.

Most IEOs possess independent status, i.e. do not have any form of legal subordination to any other institution (e.g. the OECD, the EFTA). The term "quasi-autonomous" is somewhat conditional, since it is used for the indication of different forms of legal dependence of one IEO from another organization. For example, the UN specialized agencies being in principle independent organizations,

77. See E.T.Usenko. The Council for Mutual Economic Assistance - a Subject of International Law, p. 22-23.

78. See Shinya Murase. Trade versus Security: The COCOM Regulations in Japan. - In: The Japanese Annual of International Law 1988. - Tokyo, 1988, p. 2; P.J.Kuyper. International Legal Aspects of Economic Sanctions. - In: Legal Issues in International Trade, ed. by Petar Sarcevic and Hans van Houtte, p. 172 (145-175).

to some extent are "subordinated" to the UN (in more detail see Chapter III). The same can be said about the IBRD affiliates (the IFC, the IDA, the ICSID, the MIGA)⁷⁹, as well as about African regional economic communities in their relationships to the AEC, which is what P.Verloren van Themaat called "umbrella organization"⁸⁰. Another example is the IEA, which was established in 1974 as an autonomous organization within the framework of the OECD. A specific form of legal subordination exists between the OAPEC and OPEC. The Member States of the OAPEC, even if they are not the members of the OPEC, are bound by the ratified resolutions of the latter organization⁸¹. There are also some formally non-autonomous institutions which actually possess all essential features of IEOs (e.g. the UNCTAD, which according to UN General Assembly resolution 1995/XIX is the organ of the UN General Assembly⁸²).

2.3. Volume of powers

IEOs considerably vary in the volume of powers delegated to them by the Member States. At the extremes, ordinary intergovernmental and supranational organizations

79. See about the World Bank's affiliates: H.G.Petersmann. The World Bank Contribution to the Law of International Finance and Development (1944-1984). - In: Archiv des Volkerrechts, 1985, p. 244-245; Ibrahim F.I.Shihata. The World Bank in a Changing World. Selected Essays. Dordrecht: Nijhoff, 1991.

80. See P.Verloren van Themaat. Op. cit., p. 8.

81. See Article Three of the Agreement of the OAPEC of 1968.

82. K.de Vey Mestadagh stated in this regard: "UNCTAD is not an independent, separately established international entity. Although it functions as an international organization, being an organ of the General Assembly, it is subordinated to decisions and recommendations stemming from the latter" (K.de Vey Mestadagh. Supervision within the United Nations Conference for Trade and Development. - In: Supervisory Mechanisms in International Economic Organizations, p. 283).

are often distinguished in this respect. Most of the existing IEOs are considered as ordinary intergovernmental institutions, while the term "supranational" is usually associated with the EEC, which possesses certain volume of powers to act on the behalf of the Member States and to take decisions binding directly upon the nationals of the Member States. Supranationality should be differed from certain elements of subordination that exist in international organizations, including most IEOs, which take binding decisions upon the Member States in substantive matters. The term "supranationality" used to be applied only to those organizations that can produce the rules binding on the Member States' nationals without recourse to the national enforcement procedures⁸³.

Along with the EEC, a somewhat more limited pattern of "supranationality" can be observed in the Andean Group. Article 3 of the 1979 Treaty Creating the Court of Justice of the Cartagena Agreement states: "Decisions of the Commission are directly applicable in the member countries from the date of their publication in the Official Gazette of the Cartagena Agreement, unless the Decision provides for a later date.

In the event that the text of a Decision so provides, such Decision must be adopted as internal law by means of an express act indicating the date of entry into force in each member country". Here, the general principle of direct applicability of the Commission's Decisions in the member countries, provided in the first part of this Article, may have exceptions, as it is specified in its second part.

Some authors noted that the term "supranationality" is used in a relative sense, since there is no one completely supranational organization⁸⁴. Even the Treaty on

83. Arbitral practice knows another manner of interpretation of the term "supranational", in the meaning that the interstate organization is not subject to the laws of the Member States. This way "the supranational status of the AOI" was interpreted by the Arbitral Tribunal in the case Westland Helicopters Ltd. v. AOI and others (1982). - In: 80 I.L.R. 610-612.

84. H.G.Schermers. International Institutional Law. Lieden, 1972, vol. 1, p. 21.

European Union, providing further extension of the European Community powers, makes a reservation for the principle of subsidiarity delimiting the Community competence and the competence of individual Member States: "In area which do not fall within its exclusive competence the Community shall take action, in accordance with the principle of subsidiarity, only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of effects of the proposed action, be better achieved by the Community. Any action of the Community shall not go beyond what is necessary to achieve the objectives of this Treaty" (Article G (3b))⁸⁵.

In other words, at present, most States remain very reticent to surrender their powers to a supranational body and admit supranationality only in relatively narrow limits. The more compatible are political and economic systems, the more integrated are the States, the higher level of supranationality they afford. One can find various facets of supranationality in the integrational units such as the European Communities, in the federations such as the former USSR⁸⁶. (However, the up-to-date practice witnesses that even in the integrational IEOs "supranationality" is so far rather an exception, than a general rule). The very supranationality is neither blessing nor curse. This is a specific form of organization of interstate relationships. All depends on the conditions under which it is used and on the contents it is filled with.

2.4. Accession to membership

85. See comments on the principle of subsidiarity in : Trevour C. Hartley. Constitutional and Institutional Aspects of the Maastricht Agreement. - ICLQ, 1993, Vol. 42, Part 2, p. 214-218.

86. Nowadays, the constituent instruments of the CIS emphasize that the Commonwealth "is neither a State nor a supra-State entity" (see 31 I.L.M. 148 (1992)). Apparently, the CIS States had too much experience of excessive "supranationalism" within the former Soviet Union to be willing to renovate it again.

This criterion reflects a distinction between the open IEOs, the accession to which is not restricted by the statutory documents, and the IEOs of limited accession. The UNIDO is an example of the first type. According to Art. 3 of its Constitution, "membership in the Organization is open to all States which associate themselves with the objectives and principles of the Organization". As a rule, the term "open organization" does not mean that an applicant State may enter into membership automatically. A positive decision of the competent body of the organization on the admission of a new member is necessary. However, some open IEOs provide different accession procedures for different categories of applicant States. Under Art. 3 of the UNIDO Constitution, the member States of the UN and its specialized agencies become the members of the UNIDO by depositing instruments of accession (i.e. according to their own will only), while other applicant States need the approval by the two-thirds majority of the Conference upon the recommendation of the Board.

Some formally open organizations have quite complicated accession procedures. Thus, according to Art. XXXIII of the GATT, a new party may accede to this Agreement on terms agreed upon by an applicant State and the Contracting Parties. The final decision on this matter is to be taken by a two-thirds majority of the Contracting Parties. An applicant State submits a memorandum on its foreign trade system to the working group established for this purpose. According to the concept of "effective reciprocity", the planned-economy countries were requested to make additional concessions⁸⁷ in order to get the so-called "ticket of admission"⁸⁸.

87. See E.R.Petterson. Improving GATT Rules for Non-Market Economies. In: JWTL, 1986, N 2, p. 185-205; W.Benedek., K.Ginther. Planned-Economy Countries and GATT: Legal Issues of Accession. - In: GYIL 1988. Berlin, 1989, p. 70-106; Feng Yu-Shu. China's Membership of GATT: A Practical Proposal. - In: JWT, 1988, N 6, p. 53-70; J.H.Jackson. State Trading and Non-Market Economies. - In: The International Lawyer, 1989, N 4, p. 891-908.

The conditions for restricting accession to the membership of IEOs may be various. Thus, the Articles of Agreement of the IFC of 1955 (Art. 2) and the Articles of Agreement of the IDA of 1960 (Art. 2) prescribe that the membership to them shall be open only to the members of the World Bank. In turn, the Articles of Agreement of the IBRD of 1944 lay down a peculiar restriction on the membership: any member of the Bank "which ceases to be a member of the International Monetary Fund shall automatically cease after three months to be a member of the Bank unless the Bank by three-fourths of the total voting power has agreed to allow it to remain a member" (Art. VI, section 3).

The regional restrictions to the membership can be met rather often. Art. 237 of the Treaty of Rome of 1957, for instance, permits the EEC membership merely for the European States. According to Articles 2 and 46 of the Treaty for the Establishment of the PTA of 1981, the membership of this organization is open to 21 States of the subregion or to the immediately neighbouring African States. A sort of combination of regional and non-regional restrictions to membership can be found in the Agreement Establishing the EBRD. The membership in the Bank is open (1) to European countries and (2) non-European countries which are members of the IMF (Art. 3).

(Footnote continued from previous page)

88. The following formulas of admission were used by Yugoslavia, Poland, Romania and Hungary which joined GATT respectively in 1966, 1967, 1971 and 1973. Yugoslavia abrogated the State monopoly on foreign trade and declared the introduction of the market-economy system. Poland was obliged to increase the total value of its imports from the territories of the contracting parties by not less than 7 per cent per annum. Romania also agreed to increase its imports from the contracting parties proportionally to the growth of total Romania imports provided for in its five-year plan. Hungary reduced its customs tariffs and stated that its foreign trade enterprises could do business competitively in world markets, and foreign businessmen could also do business freely in Hungary. At present, China and the independent republics of the former USSR endeavor to make their foreign trade systems compatible with the GATT provisions aiming at further accession.

Sometimes, the IEOs' founding acts contain provisions restricting accession to the membership on the grounds of the subject of the organization's activities. This is mostly typical for the organizations of producers and exporters. Art. 2 of the Agreement establishing the ITPA of 1977 stipulates, that it "shall be open to the Government of any country that produces and is a net exporter of tea and that is a Member State of the United Nations or a Member of any of its specialized agencies or of the International Atomic Energy Agency". Membership to the ANRPC is open only to the countries producing natural rubber⁸⁹. Art. 7 of the Statute of the OPEC of 1962 restricts the opportunity to become a member of this organization for the countries without a substantial net export of crude petroleum, and excludes such opportunity for the country which does not fundamentally have interests and aims similar to those of Member Countries⁹⁰. The OAPEC may be joined solely by an Arab country in which petroleum constitutes a significant source of its national income⁹¹. The membership to the ATPC is open only to 12 countries-net exporters of tin listed in Annex A to the constituent Agreement of 1983 which may be revised from time to time by the Conference (Art. 6). As regards the AIOEC, a new member may be accepted to this IEO only upon the unanimous decision of the existing Member Countries, provided that the applicant State is an exporter or a holder of substantial reserves of iron ore⁹².

Finally, the accession to IEOs' membership can be limited or prohibited as a form of international legal sanctions. A special resolution of the original members

89. Art. 2 of the Constitution of the ANRPC.

90. In 1965 the requirement of a developing country status was added to meet Saudi Arabia's concern about a possible application for membership by the USSR (see D.E.Pollard. *Law and Policy of Producers' Associations*. Oxford, 1984, p. 104-105).

91. See Article Seven of the Agreement of the OAPEC.

92. Art. 4 of the Agreement Establishing the AIOEC.

of the AfDB of 1963 prohibited an admission to the members of the Bank for the South African Republic, until its Government has terminated its apartheid policies⁹³.

2.5. Character of membership

This criterion reveals the distinction between the IEOs with a single status of Member States (e.g. the OECD, the EFTA) and the IEOs having different categories of membership. The examples of the latter type are the FAO, the WTO, the GATT, the OPEC, the Council of Europe.

Art. 2 of the FAO Constitution makes distinction between full and associate members. Unlike the first, associate members (non-selfgoverning territories) take part in the Conference deliberations without holding office and voting power (Art. 3). After gaining independence the territory loses an associate membership and can be admitted to full members.

The Statutes of the WTO lays down three categories of membership: (1) full Members, (2) associate Members, and (3) affiliate Members (Art.4). The distinction between the first two categories is similar to that of the FAO. Affiliate membership is open to international bodies, both intergovernmental and non-governmental, concerned with specialized interests in tourism and to commercial bodies and associations whose activities are related to the aims of the WTO or fall within its competence (Art.7). Affiliate Members may participate in the WTO organs as observers, without the right to vote.

In GATT developing countries (the former dependent territories that acceded to GATT through the "sponsorship" of the former metropolitan countries) having de-facto membership participate side by side with the full members. De-facto members can obtain the full membership by a declaration submitted to the Director-General.

93. UNTS, vol. 510, p. 44.

The Statute of the OPEC also makes difference between the full members (which are the founder Members and the Countries with a substantial net export of crude petroleum accepted by a majority of three-fourths of full Members) and associate Members - the countries exporting petroleum in a limited volume. Associate Members may be invited by the Conference to attend any meeting of a Conference, the Board of Governors or Consultative Meetings, and to participate in their deliberations without the right to vote (Art. 7). A special status is provided for the OPEC founder members (Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela) which are empowered to veto membership applications.

Associate membership in the Council of Europe differs from that in the FAO and OPEC. Pursuant to Art. 5 of the Statute, an associate Member is entitled to be represented in the Consultative Assembly, without participation in the Committee of Ministers. H.G.Schermers defines this as a "partial membership"⁹⁴.

The PTA in principle has the single status of the Member States. However, the special temporary exemptions from the full application of certain provisions of the Treaty are granted to Botswana, Lesotho and Swaziland being the Members of the Southern African Customs Union (Articles 3 and 30 of the Treaty of 1981); and to the Comores and Djibouti in view of their specific economic conditions (Art. 31). A similar exemption as regards Botswana, Lesotho, Namibia and Swaziland is provided by Art. 78 of the Treaty Establishing the AEC.

A quite rare phenomenon of "group membership" should be also mentioned here. Under Art. 6 of the 1983 International Coffee Agreement, two or more Contracting Parties which are the net exporters of coffee may declare that they are joining the Organization as a Member group which conducts a common coffee policy.

And, finally, it must be borne in mind, as H.G.Schermers writes, that "within each group of participants there are large differences in power and influence. Some

94. H.G.Schermers. *International Institutional Law*. Alphen aan den Rijn, 1980, p. 97.

full Members contribute more to expenses of the organization than others. Some have privileged positions such as right of permanent membership in subsidiary organs or the right of veto"⁹⁵.

2.6. Subject of activities

The most marked diversity of the IEOs can be found while analyzing the subject of their activities, which covers various forms of economic cooperation. On the ground of the subject competence IEOs are subdivided into the following types:

(1) Organizations of the general competence dealing, among others, with economic problems (e.g. the UN, the Council of Europe, the LAS, the OAU, the OAS, the CIS).

(2) Organizations of general economic competence (e.g. the OECD).

(3) Organizations for economic integration, including the free trade area associations (e.g. the EFTA), the customs unions (e.g. the UDEAC), and the economic communities (e.g. the EEC, the AEC).

(4) Specialized economic organizations:

(a) trade organizations including general trade organizations (the UNCTAD, the GATT) and international commodity organizations (e.g. the International Cocoa Organization, the International Organization on Natural Rubber);

(b) financial organizations (e.g. the IMF, the IBRD, the EBRD);

(c) investment organizations (e.g. the MIGA, the ICSID);

(d) organizations for industrial cooperation (e.g. the UNIDO);

(e) organizations for agricultural cooperation (e.g. the FAO, the IFAD);

(f) transport and communication organizations (e.g. the ITU, the UPU);

(g) organizations of producers and exporters (e.g. the OPEC, the IBA, the ATPC);

95. H.G.Schermers. *International Institutional Law*, Leyden, 1972, vol.1, p. 26.

(5) Other organizations of economic character (e.g. the WIPO, WTO)⁹⁶.

2.7. Geographical sphere of activities

A sphere of IEOs activities is, as a rule, determined in the statutory documents due to the organizations' objectives and subject of activities. The sphere of activities embraces both the membership and the geographical area of operating of the IEO. According to the criterion "sphere of activities", IEOs may be classified into universal, interregional, regional and subregional ones. Such classification is based on the terms "universality" and "region".

Being applied to international organizations the term "universality" covers both geographical aspect (embracing all main geographical regions) and quantitative aspect (the majority of the States of the world community). The latter one indicates of the degree of universality which differs from one IEO to another. At present, there is no one absolutely universal organization with the participation of all the States. That's why some scholars prefer to speak about "potentially universal" or "world" organizations⁹⁷. They are, first of all, the organizations of the UN system. Among the other IEOs approaching the criteria of universality GATT is worth to be mentioned. More than 100 States representing the main economic systems and geographical regions participate on the different grounds in this organization.

96. In this context, the classification of multilateral economic agreements which establish institutional regimes proposed by Kohona is worth mentioning. Combining a subject matter with a manner of regulation as the classification criteria, the author subdivides multilateral economic agreements into three types: (1) agreements that are comprehensive in scope and intensity of regulation (the EEC Treaty, the Montevideo Treaty, the Treaty Establishing the CARICOM, the Convention Establishing the EFTA, and some others); (2) agreements that are comprehensive in the scope but not in the intensity of regulation (the agreements establishing the CMEA, the OECD, the UNCTAD, the ASEAN, the UN regional economic commissions, etc.); (3) agreements that are intensive in the manner in which they regulate specific matters (the GATT, the agreements establishing the IMF, the IBRD, the FAO, commodity agreements, etc.). See P.I.B.Kohona. Op. cit., p. 43-80.

97. M.Virally. Definition and Classification of International Organizations: a legal approach. In: The Concept of International Organization. Ed. by G.Abi-Saab. P., 1981, p. 57, 60.

However, by the degree of universality the GATT yields to another global trade organization - the UNCTAD, uniting more than 180 States. In this connection, the GATT's membership is sometimes qualified as "approaching quasi-universality"⁹⁸, while the UNCTAD is characterized as "the only universal institution"⁹⁹.

The contents of the term "region" in international law have been analyzed in detail by A.F.Visotsky, who emphasized, that the regions are "distinguished on the basis of the criteria reflecting the objectively existing features of those regions as relatively separate units and for achieving some practical or scientific and theoretical goals"¹⁰⁰.

The most numerous among IEOs are the regional institutions. This is quite understandable, since "regional cooperation is practiced between States with comparable political systems and compatible cultural and economic backgrounds"¹⁰¹. The regional IEOs have greater homogeneity, than universal institutions, and therefore, more powers can be transferred to them by the Member States¹⁰². This point has been stressed by P.VerLoren van Themaat: "The main organizations with a limited territorial scope have a far more comprehensive area of operation as to subject matter. Moreover, in a number of problem areas they often have access to far more effective instruments than the above-named specialized international organizations at a world level"¹⁰³.

98. W.Benedek., K.Ginther. Op. cit., p.76.

99. T.Weiss. UNCTAD: What Next? - In: JWTL, 1985, N 3, p. 253.

100. A.F.Visotsky. The Marine Regionalism. Kiev, 1986, p. 100 (in Russian). See also the discussion on regional organizations in Yearbook of the ILC 1983. Vol. I, p. 255-256.

101. H.G.Schermers. International Institutional Law, vol., 1, p.17.

102. Ibid., p. 18.

103. P.VerLoren van Themaat. The Changing Structure of International Economic Law, p. 2.

In order to designate an IEO having the sphere of activities within the vaster region of another organization, the term "subregional" is used. For instance, the Benelux Economic Union is a subregional organization in relation to the EEC; the Andean Group is a subregional organization within the framework of the LAIA.

Finally, some IEOs have the sphere of activities extending over one region but not covering all the geographical regions. This kind of IEOs may be called interregional or transcontinental¹⁰⁴ (e.g. the OPEC, the OECD).

The question may be posed the following way: to what extent territorial sphere of the organization's activities influences the efficiency of its operation¹⁰⁵; and what is the optimal interrelationship between universalism and regionalism in IEOs in this connection. It is apparent, that the more global are the problems intended to be covered by the organization, the more approaching to universalism is desirable. Under otherwise equal conditions, "the closer an organization comes to universality, the stronger its position will be"¹⁰⁶. However, the existing heterogeneity of interacting States limits the scope of issues available for effective regulation at the universal level. The greater homogeneity of regional and interregional IEOs resting on the unity of interests and purposes of the Member States is essential for efficiency of institutional instruments. Therefore, at present, the ideal of universalism for IEOs should be collated with the reality of regionalism in international economic relations.

2.8. Decision-making competence

104. See P. Verloren van Themaat. Op. cit., p. 2.

105. On the connection between the objectives and scope of operations of IEOs, on the one hand, and the territorial area of operations, on the other, see: P. VerLoren van Themaat. Op. cit., p. 105-106.

106. H.G.Schermers. International Institutional Law, vol. 1, p. 16.

The criterion of decision-making competence permits to subdivide IEOs in two major groups: (1) the organizations whose acts, except the decisions on procedural matters, are of recommendatory character (e.g. the UNCTAD); (2) the organizations making both recommendations and binding decisions on the matters of economic cooperation (most of the existing IEOs). The legal force of the IEOs' normative acts and their impact on international law-making will be examined in Chapter V of the present paper.

3. System of International Economic Organizations

By means of classification, IEOs can be divided into various groups which highlight their essential common and specific features. However, a mere classification does not reveal the character of inter-IEOs links (although, it suggests some initial information on this).

What are the existing IEOs as a whole: a disorderly conglomerate of individual institutions or a structurally organized system? This is not stricto sensu a legal question. However, a lawyer dealing with IEOs should have an idea of what structural links exist among numerous individual organizations and their groups.

The emergence of each particular IEO was determined by a unique combination of economic, political and historical reasons. The evolution of IEOs came about not as an effect of any systematically taken decisions, but as a result of spontaneously reached compromises and agreements among interacting States. However, such natural, unsystematic process of institutionalization has its internal logic of building a well-organized world economic order at regional, inter-regional and global levels. The more international economic society is ready for such an order, the more cohesive its institutional structure should be.

The present-day IEOs may be divided into several major blocks as regards their structural position and weight in the evolving institutional system:

(1) The U.N. family of economic institutions which has the most diverse structure of inter-links among its elements and components.

It comprises several U.N. economic organs (e.g. the ECOSOC, the regional economic commissions, the UNCTAD, the UNDP) and specialized economic agencies, which are the autonomous IEOs legally linked with the U.N. Within the U.N. economic agencies there is a more compact group of IEOs called the World Bank Group (the IBRD, the IFC, the IDA, the ICSID, the MIGA). The U.N. economic institutions strongly differ in their real impact on international economic relations. Some of them, like the IMF and the World Bank, make up the foundation for the world financial system, while others, like the UNCTAD, are rather deliberative forums than regulatory bodies. At present, the U.N. institutional structure can be hardly considered a core of the evolving system of IEOs, since it does not possess enough structural and functional capacities to coordinate the creation and operation of numerous specialized and regional IEOs¹⁰⁷. Although, such coordinating capacities would be desirable from the viewpoint of improving the existing institutional structure for the world economic order¹⁰⁸.

(2) The OECD occupies a specific position in the system of IEOs as the only inter-regional organization of the highly industrialized countries with a general economic competence, i.e. dealing with a wide spectrum of economic issues. However, this

107. To quote the UN Secretary General Mr. Boutros-Ghali, "the Economic and Social Council, despite its preeminence in the Charter, has proved too weak to provide coherence and form to the work of the specialized agencies, the Bretton Wood institutions, the regional economic commissions and the array of U.N. programs" (Boutros Boutros-Ghali. Empowering the United Nations. - In: Foreign Affairs, Winter 1992/1993, p. 100).

108. See proposals on the further development within the UN system in: P. Verloren Van Themaat. Op. cit., p. 211-215.

organization places more emphasis on analytical and consultative work than on far-reaching standard-setting (albeit, it has accumulated an interesting experience of law-making and law-implementing).

(3) The GATT having a dual nature of a multilateral trade agreement and of an organizational structure makes up the legal and institutional foundation for the world trade. One can meet the GATT's definitions as "de facto if not de jure international trade organization", "paraorganization"¹⁰⁹, etc. It seems possible now to treat GATT as an independent institution¹¹⁰ meeting the above six criteria of an IEO. The GATT's functions and scope of activities have been considerably extended and can not be confined merely to the implementation of the General Agreement¹¹¹.

(4) The organizations of producers and exporters do not present any coherent system¹¹². This is rather a group of IEOs with similar functions which make a notable impact on the world markets of certain commodities. Although, within this group one can find rather strong links between, for example, the OPEC and OAPEC. Furthermore, there are certain working relationships between the organizations of

109. See D.Johnson. The New International Economic Order (1). - In: Yearbook of World Affairs 1983. L., 1984, vol. 37, p. 211; M.M.Boguslavsky. International Economic Law. Moscow, 1986, p. 166.

110. See F.Roessler. Law, De Facto Agreements and Declarations of Principle in International Economic Relations. - In: GYIL 1978, vol. 21, p. 48.

111. Although, the GATT's institutional structure is comparatively weak and needs, in the view of some authors, serious modifications (See J.H.Jackson. Restructuring the GATT System. L., 1990). See more details on the proposals to improve the GATT institutional framework in: E.-U. Petersmann. The Uruguay Round Negotiations 1986-1991. - In: The New GATT Round of Multilateral Trade Negotiations. Legal and Economic Problems. Second updated Edition. Ed. by E.-U.Petersmann, M.Hilf. Deventer/Boston, 1991, p. 501-577.

112. See more detail in D.E.Pollard. Law and Policy of Producers' Associations. Oxford: Clarendon Press, 1984.

producers and exporters and international commodity organizations¹¹³.

(5) International commodity organizations¹¹⁴ are also rather a group of similar IEOs than a well-structured system¹¹⁵. However, certain signs of a structure can be observed in view of the links between individual commodity organizations and, the UNCTAD, on the one hand, and the Common Fund for Commodities, on the other.

(6) A number of compact inter-IEOs structures exist at the regional level (e.g. the EEC-EFTA relationships expected to evolve into a European Economic Area, co-operation links among the African¹¹⁶ and Latin-American IEOs¹¹⁷). Certain inter-regional relationships are also established between some IEOs belonging to the different regions¹¹⁸.

113. E.g. the Cocoa Producers' Alliance has cooperation links with the International Cocoa Organization; the Inter-African Coffee Organization has the observer status with the International Coffee Organization; the Group of Latin-American and Caribbean Sugar Exporting Countries has the observer status with the International Sugar Organization.

114. These are: the International Cocoa Organization, International Coffee Organization, International Sugar Organization, International Natural Rubber Organization, International Olive Oil Council, International Tropical Timber Organization, International Wheat Council. The most visible difference between the commodity organizations and the above mentioned organizations of producers and exporters is that the former unite both exporters and importers of the relevant commodities, while the latter are the associations of solely producers and exporters.

115. See more details in: E.Ernst. International Commodity Agreements. The Hague/Boston/London, 1982; Kabir-Ur-Rahman Khan. The Law and Organization of International Commodity Agreements. The Hague/Boston/London, 1982.

116. For example, Articles 4, 28 and 88 of the Treaty Establishing the AEC of 1991 make stress on "the strengthening of existing regional economic communities and the establishment of other communities where they do not exist" as one of the AEC objectives.

117. For example, the preamble of the Treaty of Asuncion of 1991 (establishing the MERCOSUR) makes reference to the objectives of the Montevideo Treaty of 1980 (establishing the LAIA). Pursuant to Art. 7 of the Cartagena Agreement (Official Codified Text of 1988), the Commission (the highest body of the Agreement) shall, among others, "monitor the harmonious fulfillment of the obligations deriving from this Agreement and the Montevideo Treaty of 1980".

118. See e.g. the Co-operation Agreement between the EEC and the Member countries of the ASEAN of 1980.

These major structural blocks of IEOs, as well as some other IEOs left beyond the scope of this systematization, have a diverse structure of inter-links by virtue of various inter-IEOs co-operation techniques¹¹⁹, that allows to treat them as a forming system¹²⁰. Obviously, this system is still weak. It is neither centralized nor strongly cohesive, since many inter-IEOs links are quite fragmentary and not enough close. In the meantime, the existing system of IEOs possesses a considerable potential for improvement. In the post-World War II period IEOs have demonstrated a good deal of dynamics and flexibility quickly responding to the changing economic and political exigencies. The system of IEOs has a number of strong elements at both regional and global levels (e.g. the EEC, the GATT, the IMF, the IBRD) which make a sensible impact on the economic environment.

* * *

Therefore, the definition, classification and systematization of the IEOs are the first steps in their research, which allow to observe the evolving system of IEOs from the various points, to distinguish their common and specific qualities. Classification and systematization suggest a generalized legal vision of IEOs and

119. The IMF-GATT links can be an illustration to this. The constituent instruments of both organizations contain relevant provisions on cooperation (Art. X of the IMF Agreement and Art. XV-I of the General Agreement). However, in practice, to quote Roessler, "there are cordial and intellectually fruitful relations between the staffs of the Fund and the GATT and an extensive exchange of information between them, but there is nothing that could be described as policy coordination between the governing bodies of the two institutions" (Frieder Roessler. *The Relationship Between the World Trade Order and the International Monetary System*. -In: *The New GATT Round of Multilateral Trade Negotiations. Legal and Economic Problems*. Second updated Edition. Ed. by E.-U.Petersmann, M.Hilf. Deventer/Boston, 1991, p. 385).

120. The central chapter of the fundamental study by P.Verloren van Themaat is entitled "The Existing System of International Economic Organizations" (see P.Verloren van Themaat. *Op. cit.*, p. 67-219).

show that in their natural variety IEOs accumulate an experience necessary for moving towards more elaborate institutional forms.

CONCLUDING REMARKS TO THE FIRST PART

The central idea of the First Part was to envisage a general picture of existing IEOs within the international economic environment through the prism of law. The analysis has shown that the emergence and evolution of IEOs has been basically determined by the changing international economic realities. The most general determinants of the process of institutionalization have been the increasing economic interdependence of States, the growing scope, intensity and complication of international economic co-operation in the 20th century, which in turn have been strengthened in the post-World War II period by such factors as the economic restoration of Europe, decolonization, scientific and technical revolution, regional economic integration, global economic problems, as well as the radical reforms in Eastern and Central Europe. These reasons have caused a striking rise of global and regional international economic institutions, whose number is constantly growing up. Accordingly, the existing international economic relations appear to be the most institutionalized sphere of international life.

Although the emergence of each particular IEO is a consequence of a unique combination of economic, political and historical reasons resulting in spontaneously reached compromises and agreements among interacting States, this seemingly unsystematic process has its internal logic of building an adequate institutional framework for a well-organized world economic order. Consequently, the process of institutionalization of the last decades has shown, along with a quantitative rise of individual IEOs, a definite trend for strengthening the inter-IEOs relationships. The diverse structure of inter-IEOs links established by virtue of various cooperation techniques gives grounds to treat the existing IEOs as an evolving system, which is still rather weak, but has a number of strong elements at the global and regional levels and possesses a considerable potential for improvement.

Plainly, the more international economic society is ready for a law-oriented world economic order, the more cohesive its institutional structure is expected to be.

The process of institutionalization has, among others, a notable legal context. IEOs emerge and operate within law, as well as create and implement the legal rules themselves. For the purpose of the present study, an IEO has been defined, basically from a legal viewpoint, as a structurally organized, permanently operating international legal entity, which is established by an agreement of sovereign States for the coordination of their economic policies in the specified fields. Moreover, it has been emphasized that the international legal personality of an IEO as a capacity for independent legal actions is indispensable for a proper discharge of its functions. That is why, although not all constituent instruments of the IEOs explicitly state their international legal personality, in practice one can hardly find an IEO which does not possess at least an implied capacity for independent international legal actions.

Trying to expose the IEOs' legal nature, one should distinguish, at least theoretically, the two interrelated concepts: an international legal personality of an IEO and its international legal status. Both concepts are closely linked with legal rights and duties of an international legal person, and hence are sometimes confused. However, these are quite distinct facets of the legal existence of an IEO. The international legal personality is a premise for international legal status, whereas the latter is a result of possessing personality. International legal personality in general indicates the organization's capacity for independent legal actions. In turn, the legal status specifies the concrete legal position of the organization in the course of realization of this capacity. To put it another way, within the framework of its international legal personality an IEO acquires and executes its international rights and duties, which, taken as a whole, are individual for each particular IEO and may be termed as its international legal status. An important component of an IEO's legal status is its competence, i.e. the

powers of the organization's bodies in relation to the scope of subject-matter and the character of decision-making. In order to denote various facets of an IEO's competence, this study deals with its subject competence, decision-making competence, treaty-making competence, interpretative competence, and sanctional competence.

Observing the existing IEOs from the various points, one can easily find out that their common features are sophisticatedly combined with specific and individual qualities. This gives a special weight to the classification of IEOs through the prism of legally significant criteria, which helps to elaborate a more systematic legal notion of this functional group of international organizations. The suggested classification of IEOs reveals the following picture:

1. Form of statutory act: (1) the IEOs whose constituent documents are international treaties; (2) the IEOs established by a document other than a treaty; (3) the IEOs which do not have a single formal statutory act.
2. Legal status: (1) autonomous IEOs; (2) quasi-autonomous IEOs.
3. Volume of powers: (1) ordinary intergovernmental IEOs; (2) supranational IEOs.
4. Accession of membership: (1) open IEOs; (2) IEOs of limited accession.
5. Character of membership: (1) IEOs with a single status of Member States; (2) IEOs with different categories of membership.
6. Subject of activities:
 - (1) Organizations of the general competence dealing, among others, with economic problems.
 - (2) Organizations of general economic competence.
 - (3) Organizations for economic integration: (a) free trade area associations; (b) customs unions; (c) economic communities.
 - (4) Specialized economic organizations: (a) trade organizations including general trade organizations and international commodity organizations; (b) financial organizations; (c) investment organizations; (d) organizations for industrial

cooperation; (e) organizations for agricultural cooperation; (f) transport and communication organizations; (g) organizations of exporters and producers.

(5) Other organizations of economic character.

7. Geographical sphere of activities: (1) universal or global IEOs; (2) interregional or transcontinental IEOs; (3) regional IEOs; (4) subregional IEOs.

8. Decision-making competence: (1) the IEOs whose acts, except the decisions on procedural matters, are of recommendatory character; (2) the IEOs making both recommendations and binding decisions on the matters of economic cooperation.

The above classification does not merely present the author's vision of how IEOs can be grouped, but what is more important, gives some initial data for the further analysis of the IEOs' law-making and law-implementing facilities.

Finally, in the First Part of this study an attempt has been made to outline the IEOs' place within the international legal environment, their relationship with IEL. The basic conclusion suggested in this regard is the concept of the emerging law of IEOs as a specific inter-disciplinary body of law, which simultaneously makes up a part of international institutional law and IEL, and comprises: (1) legal systems of individual IEOs; (2) rules of inter-IEOs agreements; (3) few general customary rules applicable to all IEOs.

SECOND PART: INTERNATIONAL ECONOMIC ORGANIZATIONS IN INTERNATIONAL LAW-MAKING

The capacity to participate in the international legal standard-setting is one of the basic attributes of the IEOs' international legal personality. Their norm-making activities are realized either directly, or as a participation in the norm-creating process of the Member States¹. IEOs are involved into three main forms of international norm-making:

- (1) conclusion of treaties with other subjects of international law;
- (2) multilateral convention-making under the auspices of IEOs;
- (3) adoption of the IEOs' own normative acts (decisions, recommendations, etc.) influencing the formulation of international legal rules.

CHAPTER III. INTERNATIONAL AGREEMENTS WITH PARTICIPATION OF INTERNATIONAL ECONOMIC ORGANIZATIONS

1. Treaty-Making Competence of IEOs

The conclusion of treaties with other subjects of international law is the most typical form of direct participation of international organizations in the international law-making. In general outline, this problem has been a subject of

1. See International Law. Ed. by G.I.Tunkin, p. 176.

numerous studies². In the present paper the analysis begins with a less examined aspect of the problem, which is the treaty-making competence of IEOs.

1.1. Treaty-making capacity and treaty-making competence

It seems logical, firstly, to tackle the correlation between the terms "capacity to conclude treaties" and "treaty-making competence" (or powers) of organization, which are closely connected and, because of this, sometimes confused.

Treaty-making capacity is an essential feature of an international organization as a subject of international law. In this connection, A.N.Talalaev states that "without possessing the capacity to conclude treaties an organization can not be considered a subject of international law"³. According to the preamble of the 1986 Vienna Convention, 'international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfillment of their purposes'. Art. 6 of the same Convention stipulates: "The capacity of an international organization to conclude treaties is governed by the rules of that organization"⁴.

2. See: I.I.Lukashuk. The Parties to International Treaties. - Moscow. 1966, p. 118-144; E.A.Shibaeva. The Law of International Organizations. - Moscow, 1986, p. 106-110; S.A.Malinin, T.M.Kovaleva. The Treaty-Making Capacity of International Organizations. - In: Pravovedenie, 1988, N 4; L.B.Arhipova. The Treaties of International Economic Organizations of the Socialist Countries. - Moscow, 1989; A.N.Talalaev. Op. cit. (all in Russian); G.E. do Nascimento e Silva. The Vienna Convention and the Treaty-Making Power of International Organizations. - In: GYIL 1986. - Berlin, 1987., p. 68-85; G.Gaja. A "New" Vienna Convention on Treaties between States and International Organizations or between International Organizations: A critical comments. - In: BYIL 1987. - Oxford, 1988., p. 253-269.

3. A.N.Talalaev. Op. cit., p. 60.

4. Art. 2 of the 1986 Vienna Convention interprets "the rules of the organization" as "the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".

The term "capacity to conclude treaties" denotes in general a legal right of a subject of international law to enter into international agreements. This is an attribute of its international legal personality (see Chapter II). Accordingly, it may be presumed that the capacity of international organization to conclude treaties is governed not only by the rules of that organization, but also by general international law, especially when the rules of the organization keep silence on this matter. The rules of the organization, as interpreted in Article 2 of the 1986 Vienna Convention, may change in the course of the organization's evolution. But irrespective of such changes, as it follows from general international law and is partly reflected in the preamble of the 1986 Vienna Convention, the capacity of the organization to conclude treaties has a special functional character compared to the universal, in principle, treaty-making capacity of a State⁵. It means that no organization is legally capable: (1) to exceed its functional treaty-making necessity (e.g. at the extreme, a specialized financial organization would hardly ever have a functional need to enter into an agreement on State borders), and (2) to intervene into the treaty-making competence of the Member States without their voluntarily expressed consent.

At the same time, as a party to a particular treaty, an international organization is equal in rights and duties with a State⁶.

In order to realize duly the organization's treaty-making capacity, its treaty-making competence should be laid down in the constituent instruments and/or subsequent rules. In the 1986 Vienna Convention the term "competence to conclude treaties" is briefly mentioned in Art. 46 : "An international organization may not

5. States also can be limited in their treaty-making capacity. For instance, a continental State is physically unable to conclude a treaty delimitating continental shelf. However, as regards States, such limitations to their treaty-making capacity are rather an exception, than a rule.

6. See I.I.Lukashuk. The Parties to International Treaties, p. 125.

invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance". This provision, which mirrors the relevant rule of the 1969 Vienna Convention on the Law of Treaties, can hardly suggest a clear understanding of what is the treaty-making competence of an international organization. More helpful is the analysis of constituent instruments and practice of IEOs, which gives every reason to define treaty-making competence as the powers of the organization, distributed among its bodies, to conclude the particular kinds of treaties, which are regulated by the rules of that organization.

Therefore, though not so clearly distinguished in the 1986 Vienna Convention, treaty-making capacity and treaty-making competence correlate by analogy to the relationship between international legal personality and international legal status of an IEO (see Chapter II, paragraph 1). The term "treaty-making capacity" denotes the mere fact of possession by a particular IEO of a functionally determined legal right to enter into international agreements with other subjects, while "treaty-making competence" is a measurable category, which specifies the types of the treaties to be concluded, the distribution of treaty-making powers among the bodies, as well as the procedures applied within them.

The constituent instruments of IEOs reveal various formulas of their treaty-making competence due to the peculiarities of their establishment, subject of activities, functions, as well as the legal skills of the drafters of those instruments.

1.2. Scope of treaty-making competence

By the scope of treaty-making competence, the IEOs with a relatively wide-ranging competence and the IEOs with a more limited competence may be distinguished.

The drafters of the IEOs' constituent instruments often face the dilemma: to choose between a broadly shaped formula of treaty-making competence, which may appear obscure, and a more detailed description, which in turn may happen to be incomplete. Each option has its pros and cons.

(a) IEOs with a wide-ranging treaty-making competence

A wide-ranging formula of treaty-making competence can be observed in some general economic organizations and integrational organizations, whose constituent instruments do not make any limitations as to the types of the treaties to be concluded or to the list of the potential parties to such treaties. For example, pursuant to Art. 5 of the founding Convention, the OECD may enter into agreements with Member States, non-members and other international organizations. A similar regulation is provided by the Treaty Establishing the CARICOM⁷. The Treaty Establishing the AEC suggests a somewhat more specified formula, under which the Community may conclude the cooperation agreements with the third States and shall ensure the establishment of relations of cooperation with the UN system, particularly the UN Economic Commission for Africa, the UN specialized agencies, and any other international organizations with a view to attaining the objectives of the Community (Art. 92).

It appears to be presumed that even a broadly shaped treaty-making competence of an IEO is limited by its subject-matter and functional peculiarities, and cannot be equated to that of a State. An advantage of a wide-ranging treaty-making competence is that there is no need for an IEO to resort to the concept of "implied powers" in

7. Article 8.4. of the Treaty reads: "Subject to the relevant provisions of this Treaty, the Conference shall be the final authority for the conclusion of treaties on behalf of the Community and for entering into relationships between the Community and International Organizations and States".

its treaty-making practice. On the other hand, there may be disagreements between the Member States and the IEO on proper interpretation of the IEO's wide-ranging treaty-making powers in view of the consequences for the Member States. The conflicts of this sort have been seen in the EEC practice⁸.

(b) IEOs with a limited treaty-making competence

Many IEOs have limited treaty-making powers, when the constituent documents more or less definitely enumerate the types of the possible treaties and/or the list of the subjects with which these may be concluded. Most often such limitations are determined by the subject of activities and functions of the organization.

Thus, the OAPEC "may conclude agreements with members, or with other countries, or with a federation of States, or with an international organization, and especially agreements for establishing joint projects in various phases of economic activity in the petroleum industry"⁹. A wide-ranging treaty-making competence indicated in the first part of this formula is specified in the second part by the reference to the prevailing type of agreements supposed to be concluded by the OAPEC.

The Convention Establishing the EFTA lays down more strict limits to the treaty-making competence of the Council, which may conclude only an agreement relating to the legal capacity and the privileges and immunities of the Association (Art. 35), and negotiate an agreement between the Member States and any other State, union of States or international organization, creating an association. An agreement of the

8. See e.g. Opinion 1/78 given pursuant to Article 228 (1) of the Treaty of Rome (International Agreement on Natural Rubber), 1979 ECR 2871.

9. Article Five of the Agreement of the OAPEC.

latter type, however, is to be submitted to the Member States for acceptance and shall enter into force provided that it is accepted by all Member States (Art. 41).

The statutory acts of some IEOs of the UN system fix only two kinds of agreements to be concluded: agreements with the UN on the status of a specialized agency and agreements on cooperation with other international organizations operating in the relative fields¹⁰. The Constitution of the UNIDO adds a headquarters agreement to this short list (Articles 18, 19, 20).

Some IEOs' constituent instruments definitely mention a single type of agreement to be concluded with other subjects. Thus, the Treaty for the Establishment of the ECCAS of 1983 deals only with the cooperation agreements with the third African States¹¹. The Charter of the CCASG¹² and the Agreement Establishing the ATPC¹³ make references only to a headquarters agreement.

In sum, the method of enumerating a limited number of the types of treaties within the IEO's competence, being attractive for its preciseness and clearness, may appear not that perfect when the need arises to conclude an agreement not foreseen by the narrow formula. In such case a possible way-out is either amending the constituent instruments or resort to the implied powers.

1.3. Manner of formulating treaty-making competence

10. See e.g. Art. 4, sec.7 of the Articles of Agreement of the IFC of 1955; Art.8 of the Agreement Establishing the IFAD of 1976; Art. 29 of the Agreement Establishing the CFC of 1980.

11. Article 89 reads: "(1) Any African State wishing to conclude cooperation agreements with the Community shall make application to the Conference which, having taken the Council's advice, shall take a unanimous decision. (2) Such agreements shall be subject to ratification by Member States in accordance with their respective national legislations".

12. Art. 17.

13. Art. 20.

The character of the wordings of IEOs' constituent instruments gives grounds to distinguish: (a) IEOs with the treaty-making competence defined in detail; (b) IEOs with the treaty-making competence outlined in general; (c) IEOs with implied treaty-making powers.

(a) Treaty-making competence defined in detail

The FAO and the EEC may serve as the examples of the IEOs with the most thoroughly formulated treaty-making powers. Their constituent instruments specify the types of the possible agreements, the distribution of treaty-making powers among the relevant organs and the appropriate procedures.

FAO

The Constitution of the FAO delimits the treaty-making powers of the Conference (the plenary organ) and of the Director-General. The Conference may enter into agreements with international organizations with related responsibilities about the methods of cooperation, whereas the Director-General may, subject to any decision of the Conference, enter into agreements with other intergovernmental organizations for the maintenance of common services, for common arrangements in regard to recruitment, training, conditions of service and other related matters, and for interchanges of staff. The Conference may also approve arrangements placing other international organizations dealing with questions relating to food and agriculture under the general authority of the FAO (Art. XIII). Apart from this, the Conference by a two-thirds voting may authorize the Director-General to enter into agreements with Member States for the establishment of international institutions dealing with questions relating to food and agriculture (Art. XV).

EEC

According to the Treaty of Rome, the agreements between the Community and one or more States or an international organization are to be negotiated by the Commission and concluded by the Council, after consulting the European Parliament where required by the Treaty (Art. 228). Such agreements are binding on the institutions of the Community and on the Member States. This general formula provided by Art. 228 is specified with regard to the tariff and trade agreements (Articles 113,114) and agreements establishing an association (Art. 238). The Commission of the European Communities makes recommendations to the Council concerning the tariff and trade agreements with the third States. In its turn, the Council authorizes the Commission to open the necessary negotiations and conduct them in consultations with a special committee appointed by the Council (Art. 113). The Agreements on the behalf of the Community are concluded by the Council (Art. 114), which in these cases acts by a qualified majority vote. In its turn, the association agreements with a third State, a union of States or an international organization are concluded by the Council, acting unanimously and after receiving the assent of the European Parliament which shall act by an absolute majority of its component members (Art. 238 in the wording of the 1986 Single European Act).

It is easy to notice that taking decisions on the conclusion of the Community's agreements, the Council applies different voting procedures under Art. 114, on the one hand, and Article 238, on the other. The unanimous voting of the association and relevant agreements, compared with the tariff and trade agreements concluded through a qualified majority voting, may be reasoned, at least, in two ways.

First, the individual Member States have more concern about the decision-making relating to the more global association agreements in order not to lose a control over their conclusion (to a certain extent this is explained by the differences in the regional policy approaches of the individual Member States). That is why these agreements have a mixed scheme, i.e. the Member States and the Community participate in them together. As it has been noted in the literature, "the Mixed Agreement is in

fact a federal method of treaty-making. It may well be a suitable model for other federal or supra-national units"¹⁴. On the other hand, "the price of mixity is uncertainty"¹⁵, i.e. it may be unclear how the competence and, hence, the liability burden are shared between the "mixed" partners.

Second, the tariff and trade agreements, being the main treaty-making product of the EEC, need a "green light" procedure in order to avoid an obstructionism of an individual Member's veto right. These considerations of the draftsmen of the EEC constituent documents are quite understandable. However, such a voting procedure (that is good in terms of the promptness of conclusion) is hardly regarded as optimum, since it admits that a tariff or trade agreement may be imposed by a majority on a minority. And one can not be sure that such agreement will be properly implemented by the dissentient minority. The problem of implementation seems to be extremely important in this case, moreover, that the Community agreements under Art. 228 are binding upon both the institutions and the Member States.

Meanwhile, life goes ahead, and even a relatively clearly formulated treaty-making competence may need some changes and developments. This necessity has been foreseen by Art. 235 of the Treaty of Rome, under which "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". Such measures may concern, among others, an extension of the EEC treaty-making competence.

14. *Mixed Agreements*. Edited by David O'Keeffe and Henry G. Schermers. Deventer, 1983, p. IX.

15. *Ibid.*, p. X.

Apart from this, the treaty-making powers of the Community have been extended by the decisions of the ECJ. In case 22/70 (Commission v Council on the European Road Transport Agreement) the Court came to the conclusion, that the treaty-making powers of the Community were not confined to matters covered by Articles 113 and 238, but embraced in addition an implied power to conclude treaties with third countries, which may "flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions"¹⁶. A similar view was upheld by the Court in its Opinion "Re the European Laying-up Fund Agreement" (1976): "Authority to enter into international commitments may not only arise from an express arbitration by the Treaty, but equally may flow implicitly from its provisions", when it is necessary for the attainment of the Community's objectives¹⁷.

On the other hand, the ECJ in its Opinion 1/91 on the EEA Draft Agreement¹⁸ demonstrated that the EEC treaty-making competence can not extend beyond the limits of the "constitutional foundations". To quote David O'Keeffe, "the sovereignty of the treaty-makers has been curtailed in so far as they cannot make amendments which conflict with the 'very foundations' of the Community"¹⁹.

(b) Treaty-making competence outlined in general

16. ECR 1971, p. 263.

17. Common Market Law Reports 1977, N 2, p. 279-280.

18. See 31 I.L.M. 442 (1992).

19. David O'Keeffe. The Agreement on the European Economic Area. - In: Legal Issues of European Integration, 1992/1, p. 16.

The constituent instruments of many IEOs formulate their treaty-making competence only in general features. For example, the Agreement Establishing the EBRD contains only a brief reference to the treaty-making power of the Board of Governors to authorize the conclusion of general agreements for co-operation with other international organizations (Art. 24). The above mentioned Art. 5 of the OECD Convention defines its treaty-making competence not only widely, but also as a brief general formula on the possibility to enter into agreements with the Member States, non-members and other international organizations.

Such general wordings can not be considered perfect from the juridical technique viewpoint, since they keep open the questions of which organs are involved in drafting, negotiating and concluding treaties, what is the procedure of decision-making, and, finally, who are bound by such agreements: merely an organization or, as in the EEC case, the Member States as well²⁰.

(c) Implied treaty-making powers

Owing to the peculiarities of establishment of some IEOs, their constituent instruments lack clear indications of the treaty-making powers. For instance, the basic text of the GATT, which initially was not meant to become an international organization, contains only Art. XV:6 directly saying about the powers of the Contracting Parties to enter into special exchange agreements with any contracting

20. The question of whether the Member States are third parties to the treaties concluded by the organization, if the constituent instruments do not provide any special rules, was discussed in the ILC (see Yearbook of the ILC 1982, vol. 1, N.Y., 1983, 26+). To quote Francis, "in a strictly legal sense, the member States of an international organization were third States in relation to treaties concluded by the organization. However, they were third States of a unique kind: third States with a special interest" (p.51).

party which is not a Member of the IMF. In conformity with this provision, in 1950-1952 the Contracting Parties entered into special agreements with Ceylon, Haiti, Indonesia and the Federal Republic of Germany²¹. However, the GATT treaty-making practice extends over the framework of the Art. XV:6. In 1948 the GATT entered into arrangements on the cooperation, consultations, etc. with the IMF. In 1964 the GATT concluded the administrative agreement with the UNCTAD on joint operating the International Trade Center, and in 1977- the agreement with the GATT's host country, Switzerland. Taking into account this practice, some commentators deduce the GATT treaty-making competence by means of an extended interpretation of Art. XXV:1²², which reads: "Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of the Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering of the objectives of this Agreement".

There is also a number of IEOs, whose founding acts keep silence on their treaty-making competence (e.g. the OPEC, the PTA, the APPA, etc.). Up to 1974 the CMEA Charter also had no relevant provisions, and it was considered sufficient to deduce the CMEA treaty-making capacity from the Charter as a whole²³. However, in 1974 when the question of the framework agreement between the EEC and the CMEA appeared on the agenda, the CMEA Charter was supplemented by a general wide-ranging

21. See Joseph Gold. Membership and Nonmembership, p. 426-445.

22. See F. Roessler. The Competence of GATT. - In: JWTL, 1987, N 3, p. 80.

23. See E.T. Usenko. 25 years of the International Organization of the New Type. - In: Soviet Yearbook of international law 1974. -Moscow, 1975, p. 31 (in Russian).

formula of treaty-making powers similar to that of the OECD Convention²⁴.

Therefore, the existing practice of IEOs has seen numerous examples of extended interpretation of the IEOs' statutory acts in relation to their treaty-making competence. In general, such practice rests on the fundamental rule of interpretation, which was formulated by Judge Lauterpacht in his Separate Opinion in the South West Africa: Voting Procedure case (1955): "A proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the organization"²⁵. Normally, if an implied exceeding of the expressed competence of the organization is functionally necessary and well motivated, it should not be qualified as illegal (although, it may well cause a question of reasonable limits for such interpretation which must neither be ultra vires with regard to the powers of the organ giving the interpretation, nor go beyond the objectives and purposes of the organization as a whole²⁶).

24. Art. III:2 of the Charter stipulated: "The Council for Mutual Economic Assistance ... may enter into international agreements with the Member Countries of the Council, other Countries and international organizations". This provision was confirmed in Art. 2 of the Convention on the legal capacity, privileges and immunities of the CMEA of 1985, which also stated, that "conclusion by the Council of an international agreement creating the rights and obligations for the concerned Member-Countries of the Council requests for this purpose the powers (the consent expressed specially and explicitly) of the respective Countries". However, the CMEA Charter in its final edition did not define neither the types of treaties to be concluded by the Council, nor a clear procedure for their conclusion.

25. I.C.J. Reports 1955, p. 106.

26. Judge Spender in his Separate Opinion in the Certain Expenses of the United Nations case (1962) pointed out that the right to interpret the Charter does not give the power to alter it (see I.C.J. Reports 1962, p. 196-197).

In the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, 1990) the ICJ emphasized: " However elastic may be the test to be applied in determining the existence and extent of implied powers - and undue rigidity is surely to be avoided - it seems in any event clear that a constituent instrument cannot be read as implying the existence of powers

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On the one hand, it is undoubtedly preferable when the organization's powers to conclude treaties are explicitly formulated in its constituent documents in order to avoid unnecessary complications in interpretation. On the other hand, a cautious and well-grounded "implied powers" approach to the organizations competence may be justified in those cases, when the constituent provisions are either initially imperfect or have become out-of-date, and an adequate subsequent rule-making, amending the constituent instruments, for some reason, is unlikely.

2. Typology of International Agreements with the Participation of IEOs

During the recent decades IEOs have accumulated a valuable treaty-making experience, which covers hundreds of international agreements. However, the activities of various organizations in this respect are not equal, depending mostly on their functional needs. Some IEOs (for instance, the EEC, the UNIDO) have an intensive and diverse treaty-making practice²⁷, while others conclude a quite limited number of agreements.

(Footnote continued from previous page)

which contradict the essential nature of the organization which it creates to exercise them" (I.C.J. Reports, 1990, p. 42-43).

See also Krzysztof Skubiszewski. Implied Powers of International Organizations. - In: International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne. Ed. Yoram Dinstein. Dordrecht, 1989, p. 855-868.

27. For instance, only in 1988 the UNIDO concluded cooperation agreements with 15 Member Countries, and 14 agreements with other organizations (See Annual Report of UNIDO 1988, p. 137-139).

Compared to other international organizations, the agreements concluded by IEOs hardly have any peculiarities in procedural matters, that are regulated by the norms of the law of treaties. The contents and sometimes the form of the IEOs' agreements are of more interest.

Undoubtedly, the present writer can not pretend to make an exhaustive analysis of the numerous treaties concluded by IEOs. The task is more modest: to overview the main types of them with the illustration of some noteworthy examples. According to the character of vis-a-vis contracting parties, these types are:

- (1) co-operation agreements with non-member States;
- (2) agreements with Member States;
- (3) co-operation agreements with other international organizations²⁸.

2.1. Cooperation agreements with non-member States

The agreements of this type are often concluded by the integrational organizations establishing special economic regimes with non-member States. Such agreements vary in scope, methods and forms of cooperation. Some of them formulate the rights and obligations for both the IEO and its Member States. The practice of the CMEA and EEC suggests some typical examples.

(a) Agreements between the CMEA and non-member States

The agreements of the CMEA with its non-members (Finland, Iraq, Mexico, Nicaragua, Mozambique, Ethiopia, Angola, People's Democratic Republic of Yemen, Afghanistan) were framed according to a rather simple scheme. They proclaimed a

28. One can also meet the agreements with a simultaneous participation of IEOs, their Member States and non-members (e.g. the 1974 Agreement between the UNIDO, the OPEC and the Austrian Federal Government Regarding the Access of the Officials of the OPEC to the Commissary of the UNIDO (UNTS, vol. 952, p. 152-153).

general purpose of developing multilateral economic, scientific and technical cooperation, and provided for the establishment of the bilateral Commissions which made recommendations to the parties on the particular matters of such cooperation. The Commissions' recommendations were implemented through conclusion of the relevant agreements. The parties accepted the obligations to assist the Commissions in their activities submitting to them all necessary materials and information. All the problems arising in connection with the implementation of the agreements were to be settled by negotiations. In sum, the agreements between the CMEA and its non-members contained the guidelines for economic cooperation, rather than detailed contractual provisions.

(b) Agreements between the EEC and non-member States

Among the existing IEOs the EEC has the broadest network of agreements with non-member countries on the wide range of issues. Some of these structurally remind of the above mentioned CMEA agreements, thus outlining the purposes and directions of cooperation, rather than any precise mechanisms (e.g. the Cooperation Agreement between the EEC and the Member countries of ASEAN of 1980²⁹). At the same time, in the EEC treaty-making practice one can find the examples of comprehensive regulation of a large-scope cooperation between the EEC and its Member States, on the one part, and non-members, on the other part.

One of the most remarkable of them is the Lome Conventions between the EEC and the ACP (African, Caribbean and Pacific) States³⁰. Without going into details of

29. See Collection of the Agreements concluded by the European Communities 1980, vol. 10, p. 1365-1378.

30. The first, second and third Lome Conventions were concluded respectively in 1975, 1979, and 1984, each for five years. The fourth Convention, signed in 1989, will remain in force for a period

(Footnote continues on next page)

the EEC-ACP cooperation, which deserves to be an object of an individual study, it can be noted that the Lome Conventions have proved to be a working mechanism in spite of some vague verbosity of the texts and certain controversies among the parties. Certainly, the EEC is moved not by a philanthropy granting the ACP Countries some non-reciprocal concessions and financial aid. This special preferential treatment entails the deeper involvement of the ACP Countries into the sphere of the EEC economic influence. However, at the same time, those preferences work for the ACP Countries' development needs, thus, ensuring a sufficient balance

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of 10 years. It covers the EEC members and 68 ACP countries, and gives a detailed description of the forms and instruments of the cooperation in the areas of environment, agriculture, fisheries, industrial, mining and energy development, enterprise development, services, trade, cultural and social cooperation, regional cooperation, etc. The Convention fixes the principle of free access to the Community market for products originating in the ACP States, with special provisions for agricultural products and a safeguard clause. This principle does not comprise reciprocity for the ACP States which, in view of their development needs, accord to the Community the most-favoured-nation treatment.

The Convention establishes a special institutional mechanism for facilitating the cooperation between the parties. The Council of Ministers composed, on the one hand, of the members of the Council and the Commission of the European Communities and, on the other hand, of a member of the government of each of the ACP States, establishes the broad lines of the work to be undertaken in the context of the application of the Convention. It is assisted by the Committee of the Ambassadors consisting, on the one hand, of each Member States' Permanent Representative to the European Communities and one representative of the Commission and, on the other hand, of the head of each ACP State's mission to the European Communities. The Joint Assembly, a consultative body, is formed of equal numbers of members of European Parliament and members of parliament or, failing this, of representatives designated by the ACP States. The Convention also provides for setting up a number of special committees and other bodies.

The key economic instruments of the Lome Conventions are the STABEX and SISMIN systems aimed the stabilization of the ACP Countries' export earnings from agricultural commodities and mineral products. The overall amount of the EEC financial assistance to the ACP States for the first 5 years of the Convention is supposed to be 12 billion ECU.

of interests of all the parties to the Conventions³¹.

Another example of a voluminous treaty from the recent EEC practice is the Agreement on the European Economic Area³². The draft agreement between the EEC and the EFTA States was reached in October 1991 after two years of intense and complex negotiations. However, the Opinion of the Court of Justice of the European Communities of 14 December of 1991 declared that "the system of judicial supervision which the agreement proposes to set up is incompatible with the Treaty establishing the European Economic Community"³³. This postponed signing of the agreement and necessitated further negotiations on its judicial mechanism. The amended version of the Agreement was approved by the Court in Opinion of 10 April 1992 and signed by the parties on 2 May 1992³⁴.

The EEA Agreement in a number of ways resembles the EEC Treaty. It lays down the detailed provisions on the four freedoms: free movement of goods, persons, services and capital, thus creating a global free trade association. It also sets up a system ensuring that competition is not distorted, and establishes closer co-operation among the parties in such fields as research and development, the environment, education and social policy. In the meantime, the EEA Agreement has serious limitations compared to the EEC Treaty. For example, it does not cover the Common Agricultural Policy, and does not intend to create a customs or monetary union.

31. See more details on Lome Conventions in: M.K.Addo. A Critical Analysis of the Perennial International Economic Law Problems of the EEC-ACP Relationship.- In: GYIL 1990, Vol. 33, Berlin, 1991, p. 37-68.

32. The EEA Agreement consists of the basic Agreement with 129 Articles, 47 protocols, 22 annexes, 29 Joint Declarations, an Agreed Minute, 39 Declarations, and additional exchange of letters agreements.

33. See 31 ILM 465 (1992)

34. See Symposium: The EEA Agreement. - In: 3 EJIL/JEDI (1992), p. 285-353; David O'Keeffe. The Agreement on the European Economic Area, p. 1-27.

Though, formally, the Agreement on the EEA is concluded not between two IEOs, but between the EEC and its Member States, on the one part, and the EFTA States, on the other part, it suggests a unique institutional mechanism comprising the EEA institutions³⁵ and the interacting institutional structures of the EC and the EFTA³⁶. It is not clear, however, how viable this cumbersome institutional model and the whole Agreement will be in view of the possible accession of the most EFTA countries to the EEC. The most likely scenario, in case the ratification difficulties do not hinder it from the very beginning, is a temporal transitional character of the EEA Agreement as adapting the EFTA States to the EEC membership.

2.2. Agreements with Member States

The most typical kinds of agreements concluded by IEOs with their members are:

(a) agreements on technical assistance, (b) financial agreements, (c) agreements on headquarters³⁷.

35. These are: (1) the EEA Council responsible for giving the political impetus in the implementation of the Agreement, whose decisions shall be taken by agreement between the Community, on the one hand, and the EFTA States, on the other;

(2) the EEA Joint Committee which shall ensure the effective implementation and operation of the Agreement, whose decisions shall be taken by agreement between the Community, on the one hand, and the EFTA States speaking with one voice, on the other;

(3) the EEA Parliamentary Committee which shall contribute through dialogue and debate, to a better understanding between the parties, expressing its views in the form of reports or resolutions, and examine annual report of the EEA Joint Committee;

(4) the EEA Consultative Committee which shall promote co-operation between the parties in the social and economic fields expressing its views in the form of reports and resolutions.

36. The EEC Commission and the ECJ, on the one hand, and the EFTA Surveillance Authority and the EFTA Court, on the other hand, shall participate in the mechanism of administrative and judicial supervision provided by the EEA Agreement.

37. Apart from the above most typical kinds of treaties, the IEOs' treaty-making practice has seen some more specific agreements with the Member States (see e.g. the Exchange of Letters Constituting an Agreement between the USA and the OECD Relating to the Reimbursement of Income Taxes (UNTS, vol. 1072, p. 196-197).

(a) Agreements on technical assistance

This kind of agreements is typical for the IEOs of special competence, most of all for the UN economic institutions³⁸. Various in the contents of the assistance, these are aimed, as a rule, at the arrangement of seminars, teaching programmes, research work, experts' services, equipment supply, etc. Such agreements also determine the distribution of expenses among the IEOs granting the assistance and the beneficiary States. The IEOs practicing intensive treaty-making in the field of technical assistance apply standard agreements (e.g. the UNDP Standard Basic Assistance Agreement³⁹). Some IEOs conclude agreements with developed States⁴⁰ or other IEOs⁴¹ on joint technical assistance for the third developing countries.

In sum, the agreements on technical assistance, possibly quite complicated with regard to the contents of the technical projects, have a narrowly specialized

38. See e.g. the Agreement on technical assistance between the UN, the ILO, the FAO, the UNESCO, the ICAO, the WHO, the ITU, the WMO, the IAAE and Somali of 1961 (UNTS, vol. 387); the Agreement concerning assistance by the UNDP to the Government of the Republic of Vietnam of 1974 (UNTS, vol. 933/934); Standard Basic Agreement between the UN and the IADB concerning the UNDP technical co-operation activities for development of 1987 (UNTS, vol. 1106, p. 307-323).

39. See e.g. Agreement between the Government of Ghana and the UNDP of 1978. - In: UNTS, vol. 1119, p. 212-222.

40. For example, in 1978 the UNIDO and Czechoslovakia signed the Memorandum of understanding on a joint programme for international cooperation in the field of ceramics, building materials and non-metallic minerals based industries, under which the Czechoslovakian institute took an obligation to co-operate with the respective organizations in the developing countries in teaching engineers and technicians, testing raw materials, technological and geological researches, transfer of technology (UNTS, vol. 1106). A similar example is the 1976 Memorandum of Understanding in the Establishment by the Government of the People's Republic of Bulgaria and by UNIDO of a Joint Programme for International Cooperation in the Metalworking Machine Tool Industry for the Benefit of the Developing Countries (UNTS, vol. 1031, p. 196-199).

41. For example, the Agreement between the UNDP and the AfDB of 1977 provided for joint efforts and close working relationships between the parties in order to achieve the purposes of the UNDP (UNTS, vol. 1037, p. 370-383).

functional character and strongly differ from the above considered global association agreements with non-members, known to the practice of integrational organizations. The obligations of the parties to such agreements resemble short-term contractual provisions, rather than any long-term fundamentals for cooperation.

(b) Financial agreements

There are hundreds of loan, credit and guarantee agreements of various types and forms concluded between IEOs and their Member States⁴². International financial organizations often use the standard forms of agreement in order to simplify the process of treaty-making. In this connection, the General Conditions Applicable to Loan and Guarantee Agreements of the IBRD and the General Conditions Applicable to Development Credit Agreements of the IDA are worth mentioning. These documents are applied as general standard forms of dispositive character, i.e. the parties to the concrete agreement may specify their terms, concerning the loan (credit) account, charges, repayment, currency, withdrawal of proceeds of loan (credit), taxes, financial and economic information, etc. Another example of a standard loan

42. For instance, L.Nurick suggested the following classification of the main formal agreements used in the lending operations of the IBRD:

- (1) Loan Agreement (between the Bank and the borrower);
- (2) Guarantee Agreement (between the Bank and the Member State in case the borrower is not a Member State);
- (3) Project Agreement (between the Bank and the entity carrying out the project if such entity is not the borrower);
- (4) Supplementary Letters (exchanged between the parties amplifying, when necessary, the above agreements);
- (5) Additional contractual arrangements (e.g. security arrangements such as mortgages, etc.);
- (6) In certain cases, there may be a complex of agreements between a government and a private party, which the Bank, although not a party to the agreement, will rely on in making a loan (Lester Nurick. *Certain Aspects of the Law and Practice of the International Bank for Reconstruction and Development*. - In: *The Effectiveness of International Decisions*. Ed. by Stephen M. Schwebel. Leyden, A.W.Sichhoff, 1971, p. 104).

agreement is the Model Agreement for Balance of Payments Support Loans from the OPEC Special Fund⁴³.

Unlike the specialized financial organizations oriented to financial needs of their Member States, the EEC practices the agreements (protocols) on financial and technical co-operation with non-members. Within only 1992 the Community entered in such agreements with seven Arab countries: Algeria, Egypt, Jordan, Lebanon, Morocco, Syria, and Tunisia⁴⁴.

Some IEOs conclude both credit and borrowing agreements. For instance, the IMF adopted the General Arrangements to Borrow which are applied as standard agreement form in cases when the main industrial countries make loans to the Fund to forestall or cope with the impairment of the international monetary system (under Art. VII, Section 1 of the Articles of Agreement of the IMF).

Like agreements on technical assistance, most financial agreements have a narrowly specialized character. They normally contain merely functional contractual clauses and avoid any general standards which are not directly relevant to the particular subject-matter. For this reason, the standard forms are widely applicable for these types of agreements.

43. See 16 ILM 643-659 (1977).

44. These are of a standard, quite simple composition. The key provision fixes the amount of financial means which is to be rendered for specified purposes in the form of loans, grants, and contribution to risk capital formation. The country eligible for financial aid must fit some criteria, such as to carry out reform programmes approved by the Bretton Wood institutions, or implement programmes recognized as similar. The account is also taken of the following factors: the economic situation of the country, with particular reference to its level of indebtedness and debt service burden, balance of payment situation and the availability of foreign currency, budgetary situation, monetary situation, per capita GDP, social situation and, in particular, level of employment. The parties by mutual agreement draw up an indicative programme determining the specific objectives of financial and technical co-operation, the priority sectors for intervention and the action programmes envisaged. The parties also agree to examine the priority development objectives adopted at national level, the sectors on which the Community contribution will be focussed, measures and schemes best suited to achieving the objectives. The results of co-operation may be examined within the Co-operation Council (see OJ 1992. L 18, L 94, L 352).

(c) Agreements on headquarters

Since each international institution is supposed to establish relevant relationships with the host State (that is, most often, a Member State), it usually does this in the form of an agreement on headquarters. The headquarters agreements provide for the recognition of the IEO's international legal personality by the host State and enumerate the IEO's immunities and privileges (namely, the exemption from the host State's jurisdiction, the inviolability of property and archives, the liberty for communications, the immunities and privileges for the personnel, etc.)⁴⁵. Some agreements oblige the organizations not to use their headquarters as an asylum for the persons sheltering from arrest or subjected to extradition to the other State⁴⁶.

Normally, the headquarters agreements do not strongly vary from one IEO to another. Some formal peculiarities can be seen in the 1977 agreement between the GATT and Switzerland, concluded in the form of an exchange of letters⁴⁷. It had a reference character and granted to the GATT the privileges and immunities by analogy to the 1946 Agreement between the UN and Switzerland on the UN privileges and immunities.

45. The immunities and privileges of the IEOs were the subject-matter of numerous judicial cases: e.g. Porru v. FAO (1969). - 71 I.L.R. 240-241; FAO v. INPDAI (1982). - 87 I.L.R. 1-10; Bank Baniputra Malaysia Bhd. v. International Tin Council and Another (1987). - 80 I.L.R. 24-30; International Tin Council v. Amalgament Inc. (1988). - 80 I.L.R. 30-38; Maclaine Watson v. Department of Trade (1987). - 80 I.L.R. 39-180.

46. See e.g. Art. 2 of the Protocol of Privileges and Immunities for the AMF between the State of the United Arab Emirates and the AMF of 1977; Art. 3 of the Agreement between the UN and Iraq on the Headquarters of the UN Economic Commission for the West Africa of 1979.

47. Up to 1977 the legal status of the GATT had been regulated by a unilateral declaration by the Swiss authorities, under which the GATT, provisionally using the office of the Interim Commission of the International Trade Organization, enjoyed the same treatment as the European office of the UN. In 1977, when the GATT moved into its own headquarters, it signed an appropriate agreement with Switzerland (see F. Roessler. *The Competence of GATT*, p. 80-81).

Sometimes, a headquarters agreement is followed by a more particular agreement relating to the IEO's status in the host country. The Agreement between the Philippines and the AsDB regarding the AsDB Staff Housing Requirements of 1982 may serve as an example⁴⁸.

Unlike agreements on technical assistance and financial agreements, which basically serve for the needs of the Member States using the accumulated resources and facilities of the relevant "donor" IEOs, a headquarters agreement works primarily for the internal needs of an IEO itself, laying down the essential elements of its legal status. Accordingly, as an integral part of the IEO's constituent instruments, the headquarters agreement has an individual character and can be subject to standardization only in a sense of applying similar forms of agreement to comparable organizations.

2.3. Co-operation agreements with other international organizations

(a) Agreements between the UN and its Specialized Economic Agencies

48. According to this agreement, the Bank may acquire land for its Staff Housing facilities by purchase or otherwise. The Government of the Philippines provides to the Bank all necessary assistance to facilitate the importation of the materials and equipment which may be needed for the construction, furnishing, maintenance and operation of the Staff Housing facilities. All operations and transactions relating to the Staff Housing facilities are exempt from all taxes, custom duties and other charges and levies, as well as from all prohibitions and restrictions. The Government provides to the Bank necessary assistance in obtaining approvals, licenses and permits for public utility and other services connected with the operation of the Staff Housing facilities. The Agreement also regulates the conditions of termination and occupancy of the Staff Housing facilities (see 21 ILM 697-701 (1982)).

The agreements between the UN and its specialized economic agencies⁴⁹ are of a standard composition with some slight distinctions:

The UN recognizes the respective IEO as its Specialized Agency. The UN representatives are invited to the sessions and meetings of the Specialized Agency's organs, as well as the representatives of the Specialized Agency take part in the deliberations of the UN organs on the items of the agenda relating to the competence of the Specialized Agency. The UN and the Specialized Agency may propose the items for the agenda in the organs of each other. The Parties agree to cooperate in the fields of their common competence. The Specialized Agency agrees to take into account the UN recommendations in the shortest possible time and to consult the UN on the matters relating to such recommendations, as well as to report to the UN on the measures taken for their implementation. The Specialized Agency submits to the UN the annual reports on its activities. The parties exchange all necessary documents and information. They also strive to avoid duplications in statistics and to exchange statistic data. The parties take obligations on mutual technical assistance including transfer of technology in the relevant spheres. They agree to consult each other on the most effective use of the service means, to cooperate in exchange of personnel. The Specialized Agency participates in the UN Pension Fund.

The UN and the Specialized Agency express their willingness to establish close financial relations, including making financial arrangements. The Specialized Agency agrees to submit its draft budgets to the UN General Assembly for consideration. It also agrees to submit any information at the request of the ICJ. The UN General Assembly authorizes the Specialized Agency to request the ICJ for consultations on legal issues. In that case the Specialized Agency is to inform the ECOSOC of each such inquiry. It also informs the ECOSOC on any official arrangement which is

49. The agreements between the UN and its specialized economic agencies were concluded respectively: with the IMF, the World Bank, and the FAO in 1947; with the IFC in 1957; with the IDA in 1961; with the WIPO in 1974; with the IFAD in 1977; with the UNIDO in 1985.

planned to be made with the other UN system entities. In order to implement the agreement between the UN and the Specialized Agency the chief officials of the two organizations may enter into additional arrangements which they consider reasonable.

Some constituent instruments of the Specialized Agencies provide a special procedure of subsequent approval for the agreements with the UN. For instance, under Art. 6 (f) of the Convention Establishing the WIPO, "the approval of an agreement with the United Nations under Articles 57 and 63 of the Charter of the United Nations shall require a majority of nine-tenths of the votes cast". As P.I.B.Kohona states, "such a resolution of an organization might in this instance amount to a ratification"⁵⁰.

(b) Memorandums of understanding

The cooperation agreements between the IEOs and other international organizations, often called the "memorandums of understanding"⁵¹, also have some common features. Normally, they lay down the purposes and fields of co-operation, establishment of working relations, joint actions on assistance to the common Member States in the achievement of the organizations' objectives, the exchange of necessary information, documents, statistics, personnel, mutual representation, joint research and technical cooperation, working meetings and consultations, setting up joint functional units, etc. Some memorandums specify more complicated

50. P.I.B.Kohona. Op. cit., p. 27.

51. See e.g. the Memorandum of understanding concerning co-operation between the FAO and the UNEP of 1977 (UNTS, vol. 1126), the Memorandum of understanding between the IFAD and the UNDP of 1978 (UNTS, vol. 1080).

joint programmes⁵² and their co-financing⁵³. Among the measures of implementation provided by the memorandums of understanding one can meet institutional arrangements⁵⁴.

On the whole, the memorandums of understanding, seemingly simple as to the form⁵⁵ and contents, discharge an important function of the inter-IEOs coordination in the fields of their common competence. Such coordination, evolving from elementary to more elaborate forms, contributes to the improvement of the overall institutional framework for the world economy.

(c) Joint Declarations

52. For example, pursuant to the Memorandum of Understanding with Respect to Working Arrangements between the UNIDO, and the IBRD and IDA of 1973, the Joint IBRD/UNIDO Co-operative Program consisted of the following activities to be carried out in respect of developing countries of the common membership in the field of manufacturing industry:

- (a) industrial sector studies and assistance to Governments in formulating industrial policies and plans;
- (b) assistance to Governments in commissioning and supervising project feasibility studies;
- (c) identification, preparation and appraisal of projects under consideration for financing by the IBRD;
- (d) provision of technical advice in connection with projects financed by the IBRD;
- (e) other related activities as agreed between the IBRD and UNIDO (see UNTS, vol. 1031, p. 302).

53. See e.g. the Agreement between the IBRD and the IDA and the IFAD of 1978 (UNTS, vol. 1090, p. 310-314).

54. Thus, according to the Memorandum of understanding concerning cooperation between the ILO and the UNIDO of 1976, the Joint Working Party was set up to review all technical cooperation projects of mutual interest, and to consider, whenever necessary, issues of policy and make recommendations to the Executive Heads of the two organizations (UNTS, vol. 1031, p. 308-313).

55. In certain cases, the cooperation agreements between the IEOs are concluded in a simplified form of exchange of letters (see e.g. Exchange of Letters Constituting an Agreement between the UNIDO and the European Communities of 1976 (UNTS, vol. 1031, p. 330-333); Letter of Understanding Constituting an Agreement between the UNIDO and the Inter-American Bank for Coordination and Cooperation between the two institutions of 1971 (UNTS, vol. 1031, p. 296-297).

Life gives birth to the new forms of agreements between IEOs, one of which is the Joint Declaration on the establishment of the official relations between the EEC and the CMEA of 1988. Despite the fact that the CMEA does not any longer exist, this document is worth to be mentioned as an innovation, at least in a formal sense, to the IEOs' treaty-making practice⁵⁶. Judging from the title and form of the Declaration one might conclude that it belonged to the so-called "international understandings" (communiqués, declarations, etc.) which formulate the general guidelines when there is no reason or no chance for the parties to conclude an international agreement. However, more thorough examination of the document gives grounds to affirm that by legal nature it was analogous to an international treaty in a simplified form with all relevant consequences. There are at least two reasons for such conclusion: first, "the territorial clause" concerning West Berlin (item 5), which would have been hardly appeared in a non-legal document; and, second, the procedure of adopting the Declaration through two stages typical for international treaties - initialing and then full signature⁵⁷.

56. The Declaration was preceded by the lengthy negotiations started in 1973, when the CMEA offered to conclude a framework agreement between the two organizations which was responded by the EEC proposal of a standard agreement with separate Member States of the CMEA. Because of the initial differences in the parties' positions the first stage of the negotiations failed to give any practical effect. An abnormal state of mutual non-recognition caused some strange consequences in the regimes of multilateral treaties to which both the EEC and the CMEA Member States participated. Thus, up to 1986 the USSR used to make reservations to such agreements (e.g. the International Agreement on Tropical Timber of 1983, the International Sugar Agreement of 1984, the International Wheat Agreement of 1986), pointing out that it did not consider itself to be bound by those treaties' provisions with the EEC. In its turn, the EEC objected the USSR reservations.

Only in 1985 the previously suspended contacts between the two organizations were renewed. The parties agreed upon the principle of parallelism which meant the establishment of the official relations between the EEC and the CMEA with the subsequent opening of the CMEA Member States' diplomatic missions at the EEC. The first stage was marked by the 1988 Joint Declaration.

57. The conclusion that the Joint Declaration had a legally binding effect upon the parties can be found in: G.Lysen. The Joint Declaration by the EEC and the CMEA. - In: North Carolina Journal of International Law and Commercial Regulation, 1989, N 3, p. 388; S.Voitovich, Aleksandros Holevas. The Joint EEC-CMEA Declaration: international legal aspects. - In: Foreign Trade, Moscow, 1989, N 9.

The primary legal effect of the Joint Declaration consisted in the mutual official recognition of the two IEOs, which created a real premise for the more comprehensive realization of their international legal personality through participation in new agreements and other forms of international cooperation. The political and legal conditions created by the Declaration entailed the conclusion of the cooperation agreements between the EEC and individual members of the then CMEA.

One can also meet another type of joint declarations known to traditional treaty-making practice of States and international organizations. Such joint declarations of the contracting parties specify or interpret certain provisions of the basic treaty and may be attached to it as an annex. A number of joint declarations of this sort has been made by the contracting parties to the Agreement on the EEA of 1992.

* * *

It can be concluded that, nowadays, States, previously the only law-creating subjects, transfer some of their treaty-making powers to the IEOs, which possess better opportunities for the establishment of certain kinds of treaty regimes with other international legal persons. This concerns, primarily, the opportunities for collective technical and financial assistance, for the establishment of special economic regimes of multilateral cooperation. Other IEOs' agreements are concluded for the organizations' "internal" needs (the agreements on the status of the UN specialized agency, the headquarters agreements) and for more effective realization of their functions (the agreements between IEOs on cooperation in the matters of their common competence).

IEOs strongly vary in the scope and intensity of treaty-making. For some of them (e.g. financial organizations) international agreements occupy a central place among the legal means applied for achieving their purposes. Consequently, these IEOs have

a regular and voluminous treaty-making practice, normally using standard treaty forms. Many other IEOs, due to their functional peculiarities, treat international agreements as a secondary legal instrument, giving preference to binding decisions and recommendations. Hence, their participation in treaty-making is more fragmentary and sporadic.

**CHAPTER IV. MULTILATERAL CONVENTION-MAKING
UNDER THE AUSPICES
OF INTERNATIONAL ECONOMIC ORGANIZATIONS**

Along with the involvement in direct treaty-making with other subjects, many IEOs reasonably serve as the forums for negotiating multilateral economic agreements among the Member States. The elaboration of treaties under the auspices of IEOs is a form of preparatory law-making. In this case IEOs participate in producing international legal norms not directly, but as a prefatory institutional base possessing necessary technical facilities, competent experts, information from the Member States, etc. In principle, the relevant organs of IEOs may take part in the preparation, examination and adoption of multilateral conventions⁵⁸. However, a final decision on a convention's entering into force is a prerogative of the States which are supposed to become its contracting parties. Consequently, *stricto sensu* States are the primary law-makers in this case, while an IEO executes an important but auxiliary law-making function.

The 1985 UN publication entitled "Review of the Multilateral Treaty-Making Process" revealed a long list of stages and procedures of multilateral convention-making within international organizations⁵⁹. This description was based on the

58. See C.H.Alexandrowicz. *The Law-Making Functions of the Specialized Agencies of the United Nations*. Sydney, 1973, p. 20.

59. These are:

(A) Initiation of treaty-making, that includes:

(1) Proposals for new treaty instruments from Governments, subsidiary organs, expert groups, Secretariats, and other organizations;

(2) Pre-initiating studies on advisability and feasibility of convention-making prepared by Secretariats, committees of experts;

(3) Formal initiating of treaty-making by virtue of decisions of specified organs;

(Footnote continues on next page)

treaty-making experience of various international organizations, including some IEOs, and envisaged a generalized procedural scheme of convention-making on the institutional base.

Apparently, the existing IEOs strongly vary in their convention-making capacities and practice. Some of them have special provisions relating to convention-making in the constituent instruments (e.g. the UN, the FAO, the UNCTAD), while others are oriented to the arising practical needs without any preliminary formulated provisions (e.g. GATT). There are few permanent specialized draft-making bodies (e.g. the ILC, the UNCITRAL). In the meantime, most of IEOs recourse to ad hoc organs as far as a convention-making necessity emerges.

(Footnote continued from previous page)

(4) Decision as to the type of instrument to be elaborated: convention, recommendation or a combination of both types of instruments;

(B) Formulation of multilateral treaties, that includes:

(1) Initial draft prepared by a group of experts;

(2) Negotiating process embracing various stages of convention-making;

(3) Consultations with Governments;

(4) Setting up expert or representative drafting committees;

(5) Decision as to working languages and languages in which the treaty will be authentic;

(6) Standard final clauses prepared by some organizations that are active in treaty-making;

(7) Preparation of summary records and commentaries on the deliberations in the organs that consider a treaty;

(8) Identification of the possible conflicts between the existing legal instruments and proposed treaties;

(C) Adoption of multilateral treaties including the definition of the competent organ, setting up voting and special procedural rules;

(D) Post-adoption concerns with the non-ratification or slow ratification of treaties, attempts to improve the negotiating process with a view of arriving at texts most acceptable to the potential parties, to increase the flexibility of treaties;

(E) Supplementing and updating treaties by virtue of annexes, opt-out procedures, simplified procedures for amendments, etc. (See UN Legislative Series. Review of the Multilateral Treaty-Making Process. N.Y., 1985, p. 23-38).

This Chapter analyzes how IEOs contribute to the elaboration of: (1) codification conventions; (2) unification conventions; (3) special multilateral agreements among the Member States.

1. Codification Conventions

Codification and progressive development of international law are two closely interrelated processes of harmonization and improvement of the international normative legal system. According to Art. 15 of the Statute of the ILC, "codification" means "the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine", while the term "progressive development of international law" is used "for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". Virtually, these two processes can hardly be separated, since most codification conventions contain both elements.

One may reasonably ask, how IEOs contribute to the codification of IEL, which appears to be the largest branch of public international law as to the quantity of norms, but what is paradoxical, has one of the lowest levels of codification compared to other branches. There is no general multilateral treaty comprising the basic principles and norms of IEL. This gap is just partially filled by some quasi-codification treaties (e.g. the GATT, the constitutions of some global IEOs, some transport conventions) and pre-codifying recommendations of international organizations (e.g. the Charter of Economic Rights and Duties of States, non-binding codes of conduct). An acute necessity in a general economic convention laying down

the basic universally acceptable rules of interstate economic conduct⁶⁰ or, at least the World Trade Charter⁶¹ has been repeatedly stressed in economic and legal studies. However, the existing differences in positions of States that are potential parties to codification conventions remove the codification of the IEL to the subject-matter of lex ferenda.

IEOs are reasonably expected to make their contribution to the codification of IEL. The first preparatory steps have been already made within the UN. These are: the UNITAR analytical document on legal principles and norms of a New International Economic Order presented at the 39th General Assembly session⁶², and the draft convention on the most-favoured-nation clauses prepared by the ILC in 1978. But the future fate of these documents is still vague because of considerable divergence in the States' attitudes to the matters concerned.

Unfortunately, the ILC, which is supposed to occupy "a pivotal place in the United Nations law-making system"⁶³, does not pay an adequate attention to the problems of IEL, while some issues included to its agenda seem to be less important. The ILC's draft on the most-favoured-nation clauses, the only one directly relating to IEL, has rather weak chances to turn into convention. Neither has there been any

60. See, for example, J.Tinbergen. Reshaping the International Order. Moscow, 1980, p. 145; V.P.Shatrov. International Legal Problems of the Establishment of a New International Economic Order. - In: Sovetskoje gosudarstvo i pravo, 1986, N 8, p.96 (both in Russian).

61. See Meinhard Hilf. Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures. - In: The New GATT Round of Multilateral Trade Negotiations. Legal and Economic Problems. Second updated Edition. Ed. by E.-U.Petersmann, M.Hilf. Deventer/Boston, 1991, p. 322.

62. See UN doc. A/39/504/Add. 1.

63. M.El Baradei, T.M.Frank, R.Trachtenberg. The International Law Commission. The Need for a New Direction. N.Y., UNITAR, 1981, p.3. See also B.G.Ramcharan. The International Law Commission. Its Approach to the Codification and Progressive Development of International Law. The Hague, 1977; I.Sinclair. The International Law Commission. Cambridge, 1987. B.Graefrath. The International Law Commission: Improving its Organization and Methods of Work. - In: AJIL, 1991, vol.85, N 4, p. 595-612.

considerable impact on the IEL codification on the part of other IEOs' organs. At present, the only plausible expectation is a global trade agreement, which might appear in the case of successful outcome of the GATT Uruguay Round of Multilateral Trade Negotiations.

In the meantime, it must be admitted that unlike unsatisfactory codification of the IEL at the global level, successful examples of regional codification can be seen within some IEOs. Thus, the 1987 Quito Protocol incorporated an official codified text of the Cartagena Agreement, which introduced fundamental reforms into the Andean Group integrational process⁶⁴.

2. Unification Conventions

Unification may be defined as the process of creating uniform national laws on particular matters by virtue of international model law conventions. This process of law harmonization relates primarily to technical legal issues which need to be uniformly regulated by national laws of different States in order to avoid undesirable law collisions. A peculiarity of the model law conventions is that most of their rules are addressed not to the contracting States, but to their nationals, thus resembling the rules of national law. In the meantime, the contracting States take general obligations (which are basically fixed in the final clauses): to promote appropriate enforcement for the rules of such conventions on the national and international scales.

Commercial transactions between the nationals of different States is one of the areas in which unification is acutely needed and actively provided. In 1966 a special UN organ - the UNCITRAL - was set up on the proposal of Hungary by the General Assembly Resolution 2205/XXI. The Commission's objective is to promote progressive harmonization and unification of the law of international trade in forms

64. See: 28 I.L.M. 1165 (1989).

of international conventions, uniform laws, standard contract provisions, etc. Unlike the ILC, whose members act in their individual capacity, the UNCITRAL is composed of 36 States' representatives⁶⁵ elected by the General Assembly for a term of six years according to the principle of equitable geographical distribution of seats and adequate representation of the principal economic and legal systems of the world, and of developed and developing countries. The UNCITRAL allows participation of the observers from other interested UN Member States and international organizations, which may join all discussions without a voting right.

Normally, the UNCITRAL holds its annual sessions that last from two to four weeks. The initial task on convention-drafting is usually entrusted to a working group which uses for this purpose the materials on existing law and legal practice prepared by the secretariat and generated by its members. After completing the drafting and editorial work, the working group circulates the draft text together with the commentary to governments and interested international institutions. Then, the draft with the received comments is submitted to the Commission for detailed review during its session. Once the text has been approved by the UNCITRAL, it presents it to the General Assembly for consideration and recommendation to the Member States.

Among the conventions drafted by the UNCITRAL it is worth to mention: the Convention on the Limitation Period in the International Sale of Goods of 1974, the UN Convention on the Carriage of Goods by the Sea of 1978, the UN Convention on Contracts for the International Sale of Goods of 1980, and the UN Convention on International Bills of Exchange and International Promissory Notes of 1988⁶⁶.

65. See the UN General Assembly Resolution 28/3108 of 12 December 1973.

66. See, for instance, G.Herrmann. The Contribution of UNCITRAL to the Development of International Trade Law. - In: The Transnational Law of International Commercial Transactions. Ed. by N.Horn, C.M.Schmitthoff. Vol. 2, Deventer, 1982, p.35-50; A Guide to the UNCITRAL Model law on International Commercial Arbitration. By H.M.Holtzmann and J.E.Neuhaus. The Hague, 1989.

The unification acts of the CMEA⁶⁷ also deserve brief notice. Initially, these acts had been passed as the CMEA recommendations and afterwards incorporated into the legal systems of the concerned Member Countries by virtue of their national legal acts. Some writers treated the CMEA unification acts as international treaties sui generis arisen on the basis of the Council's recommendations⁶⁸. Unlike the UNCITRAL conventions, whose rules are of prevalingly optional character, the CMEA unification acts contained numerous imperative (peremptory) rules. After the CMEA dissolution, the former Member Countries agreed that, owing to the high quality of some CMEA unification acts (e.g. the CMEA General Conditions for Delivery of Goods), their provisions might be applied to the commercial contracts in case of relevant contractual references to them.

The UNIDROIT is another international institution specialized in unification relating, among others, to economic issues. Its treaty-making procedure is quite typical. Once a topic proposed by Member States, interested international organizations, Members of the Governing Council of the UNIDROIT or the Secretariat has been included in the Work Program of the Institute, either the Secretariat or a group of consultant experts prepares a preliminary study of the subject. The report on such study may be circulated among interested States and institutions with a view of receiving observations and comments. At the next stage, depending on the degree of governmental interest to the subject and its ripeness for convention-making, the Governing Council may either set up a Study Group of experts or immediately convene a Committee of Governmental Experts with the mandate to prepare draft uniform rules. Once the draft is approved by the Governing Council, it is submitted to the

67. The CMEA General Conditions for Delivery of Goods, General Conditions for Technical Maintenance, General Conditions for Erection, and General Conditions for Specialization and Cooperation are meant here.

68. See M.P.Bardina. CMEA Unification Acts in the Foreign Trade Regulation Field. - In: Soviet Yearbook of International Law 1987, Moscow, 1988, p. 247 (in Russian).

participating Governments and other interested institutions which make relevant proposals and suggestions to it. Then, the Governing Council considers the best way of convening a Diplomatic Conference to examine the draft. In some cases the drafts initially prepared by the UNIDROIT were transmitted to another international organization for its further adoption within the framework of the latter one (e.g. the UNIDROIT draft of a Law for the Unification of Certain Rules Relating to the Validity of Contracts of International Sale of Goods was transmitted to the UNCITRAL)⁶⁹.

Therefore, unlike codification, which is still expected to turn into a serious subject-matter of the IEOs' treaty-making, the unification work of some organizations, most of all in the area of international commerce, is known for its notable results. This once again proves the fact that a successful convention-making appears in those fields, where both the subject is ripe for an agreement and the treaty-makers strive for it.

3. Special Multilateral Agreements

The treaties of this type are negotiated within many IEOs, which, as a rule, do not have any special permanent treaty-making organs (like the ILC or the UNCITRAL), but recourse to ad hoc draft-making groups. Such approach is rational in view of a highly specialized character of the drafted agreements which require different categories of legal experts for each case. In other words, compact negotiating groups dealing with particular issues are preferable for drafting, while large conferences are supposed to be used only at the conclusive stage of the convention-

69. See Review of Multilateral Treaty-Making Process, p. 478-482.

making, when the final agreements based on the drafts are specified and approved⁷⁰.

3.1. FAO

The FAO appears to have the most detailed statutory provisions relating to convention-making⁷¹. Art. XIV of its Constitution lays down the following procedure. A technical meeting or conference comprising Member Nations makes a draft which is submitted through the Director-General after proper consultations with the Member States to the Conference or the Council. The Conference may, by a two-thirds majority of the votes cast, approve and submit to the Member States a draft of any convention or agreement relating to food and agriculture. The relevant competence of the Council is more limited and relates only to : (a) agreements of particular interest to the Member States of a specified geographical area; (b) supplementary conventions or agreements designed to implement a previously adopted convention or agreement. Any convention or agreement approved by the Conference or the Council for submission to the Member States comes into force in the order prescribed by this convention or agreement. There is a uniform procedure for amending conventions and agreements concluded under Article XIV of the FAO Constitution⁷².

The FAO may also approve conventions to which non-members of the Organization, but Members of the UN may participate. On the whole, 11 conventions and agreements had been concluded under Art. XIV of the FAO Constitution by 1990.

70. See R.Krishnamurti. UNCTAD as a Negotiating Institution. - In: JWTL, 1981, N 1, p. 23.

71. See more details in: Jean Pierre Dobbert. Decisions of International Organizations. - Effectiveness in Member States. Some Aspects of the Law and Practice of FAO. - In: The Effectiveness of International Decisions. Ed. by Stephen M. Schwebel. Leyden, A.W.Sijhoff, 1971, p. 206-276.

72. According to the document entitled "Principles and Procedures which should govern Conventions and Agreements concluded under Articles XIV and XV of the Constitution", such amendments, provided priorly approved by at least two-thirds majority of all contracting parties, require the Council's approval, unless the Council considers it desirable to refer these amendments to the Conference for approval. The amendments involving new obligations for the contracting parties shall come into force in respect of each contracting party only on acceptance by it.

3.2. UNCTAD

An active role in convention-making is played by the UNCTAD. Among its principal functions listed in the constituent Resolution 1995/XIX of the UN General Assembly one can read: "to initiate action, where appropriate, in cooperation with competent organs of the United Nations for the negotiation and adoption of multilateral legal instruments in the field of trade".

The first multilateral treaty negotiated under the auspices of the UNCTAD was the Convention on Transit Trade of Land-Locked Countries. At the initial stage, the Sub-Committee on Land-Locked Countries set up within the Fifth Committee of the UNCTAD-I considered several proposals, including a draft convention on transit trade sponsored by 11 Afro-Asian countries. Afterwards, pursuant to the UNCTAD recommendation, the UN Secretary-General established a Committee on the preparation of a Draft Convention relating to Transit Trade of Land-Locked Countries. The Committee's report was adopted for submission to the Conference of the Plenipotentiaries held at the UN Headquarters in 1965. In the result of deliberations within four working groups and Drafting Committee, the Convention was adopted by the Conference and opened for signature on 8 July 1965⁷³.

Since 1965 the UNCTAD Committee for Primary Commodities in cooperation with the specialized commodity organizations has considerably contributed to the negotiation of new commodity agreements on wheat, sugar, tin, olive oil, cocoa, natural rubber, and jute⁷⁴. The 1974 Convention on a Code of Conduct for Liner Conferences was also

73. See: Review of Multilateral Treaty-Making Process, p. 332-334.

74. See E. Ernst. International Commodity Agreements. The Hague, 1982, p. 104, 123; UNCTAD: Current Legislative Activities. Journal of World Trade Law Report. - In: Third World Attitudes Towards International Law. Ed. by F.E. Snyder and Surakiart Sathirathai. Dordrecht/Boston/Lancaster, 1987, p. 398.

a result of intensive efforts on the part of UNCTAD⁷⁵. The UNCTAD Secretariat assisted the Negotiation Conference to do preparatory work for the 1980 Agreement Establishing the Common Fund for Commodities. The adoption of the 1988 Agreement on the Global System of Trade Preferences among Developing Countries was preceded by the lengthy negotiations within the Group of 77 supported by the UNCTAD Secretariat⁷⁶.

3.3. GATT

Unlike the UNCTAD, the GATT was not initially intended to be a convention-making forum and the text of General Agreement does not contain any relevant provisions. But in the course of its evolution the GATT several times resorted to elaboration of special agreements which were incorporated into "the law of GATT"⁷⁷. These agreements were of two types: (1) the agreements specifying and modifying the basic text of the General Agreement, and (2) the so-called sectoral agreements⁷⁸. There

75. See: Lawrence Juda. *The UNCTAD Liner Code: United States Maritime Policy at the Crossroads*. Boulder, Colorado: Westview Press, 1983.

76. See the text in: 27 ILM 1204-1226 (1988).

77. See, for instance, J. Jackson, Mitsuo Matsushita. *Implementing the Tokyo Round*. National Constitutions and International Economic Rules. The University of Michigan, 1984.

78. The first Anti-Dumping Code negotiated during the Kennedy Round entered into force in 1968. It interpreted Art. VI of the General Agreement laying down the conditions under which anti-dumping duties may be imposed as a defence against dumped imports. The revised version of the Anti-Dumping Code appeared among six non-tariff barrier agreements of the Tokyo Round in 1979. The other five were: the Agreement on Technical Barriers to Trade (the "Standards Code"), the Agreement on Government Procurement, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII (the "Subsidies Code"), the Agreement on Implementation of Article VII (the "Customs Valuation Code") and the Agreement on Import Licensing Procedures. The four others agreements concluded within the framework of GATT related to certain sectors of international trade: the Arrangement Regarding International Trade in Textiles (the "Multifibre Agreement") of 1974, the Arrangement Regarding Bovine Meat, the International Dairy Arrangement and the Agreement on Trade in Civil Aircraft (the latter three reached in the Tokyo Round). Each of the above mentioned agreements has an overseeing committee or council which reports annually to the Contracting Parties on the course of implementation.

can be hardly observed any uniform negotiating procedure which differs from one agreement to another. Some of them were negotiated initially outside GATT (e.g. the Subsidies Code was a result of the compromise between the USA and the EEC), other were drafted by special working groups in the GATT (e.g. the Standards Code, the Customs Valuation Code).

The non-tariff barriers and sectoral agreements, on the one hand, demonstrate a flexibility of the GATT system modifying and adapting itself to the newly emerging conditions. On the other hand, they considerably complicate the "law of GATT", since each of these agreements covers different participants, both contracting parties and the third States, and, moreover, certain agreements (for example, the Multifibre Agreement) contain rules which are not completely compatible with the General Agreement⁷⁹. Another aspect of the problem is that some of these agreements (particularly the Subsidies Code) "contain very ambiguous language, which reflects the lack of real agreement among the negotiating partners in the Tokyo Round"⁸⁰.

At present, a voluminous global trade agreement of the Uruguay Round is expected to become the most ambitious treaty-making product of the GATT.

3.4. Customs Co-operation Council

One of the statutory purposes of the Customs Co-operation Council is "to prepare draft Conventions and amendments to Conventions and to recommend their adoption by interested Governments"⁸¹. Following this requirement, the CCC has drafted a number of multilateral conventions concerning questions of customs technique. In its work

79. See O.Long. Op. cit., p. 32-36.

80. J.H.Jackson. Op. cit., p. 37.

81. See Art. III of the 1950 Establishing Convention.

the CCC has applied the following procedure. The treaty-making initiative arrives either from Member States (e.g. the 1973 International Convention on Simplification and Harmonization of Customs Procedures) or from another international organization (e.g. the 1964 Customs Convention Concerning Welfare Material for Seafarers, which was elaborated in response to the ILO initiative; the 1968 Convention on the Temporary Importation of Scientific Equipment, which was worked out in close consultation with the UNESCO)⁸². The decision to elaborate a new multilateral instrument is taken at a Council meeting on a proposal by the Permanent Technical Committee composed of technical custom officials representing the Member States. Once the decision has been taken, the General Secretariat of the Council prepares a preliminary draft treaty, which is first submitted for comment to the Member States and interested institutions, and then examined by a Working Party, consisting of governmental experts, who finalize the text of the draft treaty. The final version of the treaty is produced by the Permanent Technical Committee, which may create, if necessary, a drafting group for the improvement of certain provisions. Finally, the Council adopts the text and submits it to Member States for signature or accession⁸³.

3.5. Other IEOs

Some illustrations from the practice of other IEOs deserve brief notice.

A notable convention-making work has been carried out by some UN Regional

82. The international legal practice has seen other examples of the convention-making initiatives directed by one organization to another. For instance, in 1990 the EEC tabled a draft General Agreement on Trade in Services in the Geneva GATT Uruguay Round negotiations (see Common Market Reporter, 5 July 1990, N 660, p. 9-10).

83. See Review of Multilateral Treaty-Making Process, p. 468-470.

Economic Commissions, especially the ECE⁸⁴ and the ESCAP⁸⁵.

International legal practice has seen the examples of joint convention-making by two IEOs. In 1988 the OECD and the Council of Europe drafted the Convention on Mutual Administrative Assistance in Tax Matters that is open for the Member States of these organizations⁸⁶. It should be noted that, unlike the Council of Europe that has accumulated an extensive convention-making practice, the OECD, despite a number of agreements concluded under its auspices, does not consider multilateral treaties the principal means by which it achieves its aims (it gives obvious preference to binding decisions and recommendations)⁸⁷.

The EEC-EFTA legal co-operation gives more examples of joint convention-making. These are: the 1985 Convention on the Simplification of Formalities in Trade in Goods that introduced a single administrative document for goods passing through

84. An example from the ECE practice might be a noteworthy illustration of how complicated and lengthy the treaty-making process can be. It took about seven years to draft the 1961 European Convention on International Commercial Arbitration, which was proposed by the ECE Member States. At the initial stage, the *ad hoc* Working Party of Experts on Arbitration, set up by the ECE Committee on the Development of Trade in 1954, collected information on the existing legal instruments for international commercial arbitration and examined problems relating to the arbitral settlement of the commercial disputes. In 1959, after two readings, the Working Party submitted the draft convention accompanied by the explanatory commentaries to the ECE Committee on the Development of Trade. The results of the Committee's deliberations on the draft were summarized in the Annual Report of the ECE to the ECOSOC in 1960. This was followed by a Special Meeting, which prepared an agreed text of Article IV of the draft convention that had caused some differences of opinion among governmental experts. Thereafter, in 1961 the Special Meeting of Plenipotentiaries for the purpose of negotiating and signing a European Convention on International Commercial Arbitration was held in Geneva under the auspices of the ECE, at which the Convention was opened for signature (see: *Review of the Multilateral Treaty-Making Process*, p. 260-263).

85. A number of multilateral treaties were elaborated with the involvement of the ESCAP. Among these are: the Agreement Establishing the AsDB of 1965, the Agreement Establishing the Asian Coconut Community of 1969, the Agreement Establishing the Asian Rice Trade Fund of 1973, the Agreement on Trade Negotiations among the Developing Countries of ESCAP of 1975, and some others.

86. See the text in: 27 I.L.M. 1160 (1988).

87. See a written comment by the OECD on the Report of the UN Secretary General entitled "Review of the Multilateral Treaty-Making Process (A/36/553, p. 49-50).

customs, the 1987 Convention on a Common Transit Procedure for the customs treatment of goods in transit between the EFTA and EEC countries, and Lugano Convention of 1988 concerning jurisdiction and enforcement of judgements in civil and commercial matters⁸⁸.

Among the non-European IEOs, the ASEAN strikes by its extensive experience in this field covering numerous agreements on economic, ecological, and other issues⁸⁹. Most of these agreements provide for the establishment of institutional bodies supervising their implementation⁹⁰.

* * *

Therefore, multilateral treaty-making is a lengthy and complicated process requesting thoroughness and patience on the part of participants. It can be expected, that convention-making within the framework of IEOs will be an intensifying trend in IEL. Since interstate economic relations are one of the most institutionalized fields of international life, it is logical that multilateral

88. See F. Weiss. EC-EFTA Relations: Towards a Treaty Creating a European Economic Space. - In: Yearbook of European Law 1989, vol. 9, Oxford, 1990, 347-350.

89. The most noteworthy agreements produced within the framework of this organization are: the Multilateral Agreement on Commercial Rights of Non-Scheduled Services among ASEAN of 1971, the Agreement on ASEAN Preferential Trading Arrangements of 1977, the Agreement on the ASEAN Food Security Reserve of 1979, the Basic Agreement on ASEAN Industrial Projects of 1980, the Basic Agreement on ASEAN Industrial Joint Ventures of 1983, the ASEAN Customs Code of Conduct of 1983, the Agreement on the Conservation of Nature and Natural Resources of 1985, the Agreement on ASEAN Energy Cooperation of 1986, the ASEAN Petroleum Security Agreement of 1986, etc. (See ASEAN Documents Series 1987-1988. Geneva, 1989).

90. For instance, under Art. 13 of the Agreement on ASEAN Preferential Trading Arrangements, "the ASEAN Committee on Trade and Tourism ... is hereby directed and authorized to conduct trade negotiations within the framework of this agreement and to review and supervise the implementation of this Agreement. In respect of all matters concerning the implementation of the Agreement, all decisions of the Committee shall be taken by the consensus".

treaty-making is developing on the institutional base of IEOs, which possess financial, expert and technical facilities necessary for this purpose.

One should admit, that, nowadays, convention-making process within IEOs has a sporadic, rather than a systematic character. Perhaps, for the nearest future the existing methods and procedures of convention-making, which do not strongly differ from one IEO to another, will still suffice the needs of Member States. But as far as global economic problems will, not to say prevail over, but obtain a comparable importance with individual, group and regional economic interests of the States, a need for the establishment of a convention-making center for codification and progressive development of IEL may arise. Even at present, codification and progressive development of IEL in such matters as the principles and norms of a New International Economic Order, the most-favoured-nation treatment, economic preferences for developing countries and some others, would be desirable. Of course, at any time the IEL will need such a combination of concentration and diversification in convention-making, which keeps the balance between the global, regional and individual economic interests of States and ensures an adequate legal response to them.

**CHAPTER V. NORMATIVE ACTS
OF INTERNATIONAL ECONOMIC ORGANIZATIONS
IN INTERNATIONAL LAW-MAKING**

The new tendencies and developments in the present-day international law-making are often connected with the norm-creating activities of international organizations. While the organizations' involvement in the treaty-making process basically falls within the framework of a traditional law-making with some new elements (new actors, contents, institutional base), the organizations' own normative acts are absolutely new, unknown to the old international law, "sources" of international standard-setting. The legal nature of organizations' decisions and recommendations, international "soft" law and internal law of an organization belong to the most controversial and disputable problems of the international legal theory and practice.

It may be supposed that in the nearest future the IEOs' regulations are unlikely to replace treaties which still carry the main regulatory burden in IEL. But due to their formal and functional peculiarities and some advantages, the IEOs' normative acts are being more and more actively involved in the rule-making process in IEL. By virtue of the IEOs' regulations, Member States get the opportunity of operative, competent and in many cases comparatively less costly multilateral ruling of the general and special issues of international economic relations. Normally, the IEOs' normative acts need less time than a treaty or a custom to be formulated⁹¹. Being issued by the competent specialized institutions, these acts are supposed to be enough well-grounded. Furthermore, they are less expensive than treaties passing

91. It has been noted in the legal literature, that the primary disadvantage of international law is the slowness of the decentralized law-making process (see M.Bothe. International Obligations, Means to Secure Performance. - In: Encyclopedia of Public International Law, 1981, vol. 1, p. 101-102).

through the lengthy procedure of drafting, negotiating and entering into force. Finally, the IEOs' regulations are extremely helpful in cases when a treaty on the particular matter has no chances to be concluded.

Of course, the organizations' normative acts must not be neither under-, nor overestimated. Their sometimes ambiguous legal nature, a great deal of rhetoric and shortcomings in wordings, as well as the lack of the authority of some organs issuing them, decrease the effectiveness of such IEOs' regulations.

1. Procedural Aspects of the IEOs' Decision-making

There is no need to give at length proof of the importance of procedure as regards the IEOs' decision-making. Figuratively speaking, substantive and procedural matters interrelate like train and railway. If the latter is out of order, the former could not move. Because of imperfect procedure, a substantive decision may be either blocked, or inefficient being contrary to the interests of certain Member States⁹². The task of the draftsmen of constituent instruments is to invent such a procedural mechanism, which would keep balance between operative decision-making and adequate protection of the Member States' interests.

1.1. Decision-making initiatives, draft-making bodies, negotiations

92. Compare: Stephen Zamora. Voting in International Economic Organizations, p. 566: "Moreover, the way in which these decisions are made - the formal procedures and informal practices followed by the organization's members - will have a direct and immediate effect on the members' observance of them. Even the generally accepted substantive rules of an organization are not likely to be observed if they are perceived as arbitrarily applied without proper voting safeguards".

Decision-making in IEOs usually passes through a number of stages. A starting point is an initiative of a Member State or of an IEO's organ to put the matter on the agenda. In general, such initiative is presumed in all IEOs, though their constituent documents provide various formulas for particular matters.

Normally, the Member States submit proposals on the agenda of the organs⁹³, on the convocation of special and extraordinary meetings⁹⁴, on the amendments to the constituent documents⁹⁵. One can also meet some other provisions relating to decision-making initiatives of a Member State. At the request of a Member State of the IMF its quota may be adjusted by the Board of Governors⁹⁶. On the application of a Member State the Commission of the EEC investigates any cases of discrimination concerning transport carriage within the Community and takes necessary decisions⁹⁷. In the urgent cases a constituent document may fix the term within which a decision must be taken on the matter raised by a Member State. Art. 5 (3) of the Convention Establishing the EFTA illustrates this: "If a deflection of trade of a particularly urgent nature occurs, any Member State may refer the matter to the Council. The Council shall take its decision as quickly as possible and, in general, within one month".

Quite often the organs of IEOs initiate decision-making. Such procedure is thoroughly regulated by the Treaty of Rome. Many of its Articles provide for the following formulas: "the Council on a proposal from the Commission shall adopt";

93. See, for instance, Art. 3 of the Rules of procedure of the Supreme Council of the CCASG.

94. See: Articles 12 and 18 of the Statute of the OPEC, Art. 14 of the Treaty for the Establishment of the ECCAS, Art. 7 of the Charter of the CCASG.

95. See: Art. XX of the FAO Constitution, Art. VIII of the Articles of Agreement of the IBRD, Art. IX of the Articles of Agreement of the IDA, Art. 22 of the Agreement Establishing the ITPA.

96. See Art. III, section 2 of the Articles of Agreement of the IMF.

97. See Art. 79 of the Treaty of Rome.

"the Council on a proposal from the Commission and after consulting the European Parliament decides"; "the Council at the request of the Court of Justice and after consulting the Commission and the European Parliament may amend", etc. In some cases a more comprehensive procedure is applicable. Art. 149 (2) of the Treaty dealing with the relationships among the European Parliament, the Council and the Commission in the process of decision-making, may be an illustration of this⁹⁸.

According to the most traditional scheme used in the constituent documents of IEOs, an executive organ makes proposals to a plenary organ, or an administrative organ submits recommendations and drafts to the executive organ⁹⁹.

Some IEOs consult other institutions of a similar competence on the matters of decision-making. In this respect, the relevant constitutional provisions of the

98. Emphasizing the lengthy and intricate nature of the EEC decision-making, F. Weiss enumerates the following procedural stages: "1. Preparation of the Commission proposals (contacts between the Commission, other Community institutions, governments of Member States, government experts, interest groups, lobbies); 2. Commission proposal to the Council; 3. First reading by the European Parliament; 4. Opinion by the Economic and Social Committee; 5. Amendments of the proposal by the Commission in the light of the opinions received from the EP and ECOSOC; 6. Revised proposal submitted to the Council... for adoption" (F. Weiss. *EC-EFTA Relations: Towards a Treaty Creating a European Economic Space*. - In: *Yearbook of European Law* 1989, vol. 9, Oxford, 1990, p. 355).

99. For instance, Art. XVIII, section 4(a) of the Articles of Agreement of the IMF reads: "Decisions... shall be made by the Board of Governors on the basis of proposals of the Managing Director concurred in by the Executive Board". The same Article requires the Managing Director, before making any proposals, to conduct such consultations as will enable him to assert that there is a broad support among participants for the proposal.

Under Art. 38 of the 1980 Montevideo Treaty, the Secretariat of the LAIA submits "proposals to the corresponding Association bodies, through the Committee, leading towards a better accomplishment of the objectives and duties of the Association".

Under Articles 12 and 15 of the Charter of the CCASG, the Ministerial Council makes arrangements to the Supreme Council's meetings and prepares its agenda, while the Secretariat General prepares reports and studies ordered by the Supreme Council or Ministerial Council, makes preparations for meetings and prepares agendas and draft resolutions for the Ministerial Council, and recommends to the chairman of the Ministerial Council the convocation of an extraordinary session of the Council whenever necessary.

IBRD¹⁰⁰, IFC¹⁰¹, and GATT¹⁰² are to be borne in mind.

In order to facilitate the elaboration of the decisions on the issues which need a special preparation, the permanent or ad hoc consultative and draft-making organs may be set up within the framework of IEOs (e.g. the specialized organs in the OPEC; examining committee in the EFTA; committees, working parties and panels of experts in the FAO; committees and working parties in GATT; the Consultative Commission in the ECCAS, the Consulting Committee in the Andean Group, etc.).

An interesting institutional phenomenon is the Consultative Group of Eighteen in GATT established on a temporary basis in 1965 and made permanent since 1979. It represents all major groups of the contracting parties at the level of the senior officials responsible for trade policy. This body has a consultative status. However, its recommendations made by consensus are likely to be repeated by the Council and the CONTRACTING PARTIES. As O.Long concludes, "legal rights and binding obligations can eventually result from positions taken in the Group"¹⁰³.

A special decision-making procedure is used in the UNCTAD. Under the UN General Assembly Resolution 1995/XIX, the Member States of the UNCTAD are distributed into

100. Art. V, section 8(b) of the Articles of Agreement of the IBRD stipulates that: "In making decisions of applications for loans or guarantees relating to matters directly within the competence of any international organization of the type specified in the preceding paragraph and participated in primarily by members of the Bank, the Bank will give considerations to the views and recommendations of such organization".

101. Art. III, section 7 of the Articles of Agreement of the IFC says: "Whenever it shall become necessary under this Agreement to value any currency in terms of the value of the other currency, such valuation shall be reasonably determined by the Corporation after consultation with the International Monetary Fund".

102. Article VII of the General Agreement states: "The Contracting Parties, in agreement with the International Monetary Fund, shall formulate rules governing the conversion by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of Agreement of the International Monetary Fund" (see also Art. XV).

103. O.Long. Law and its Limitations in the GATT Multilateral Trade System. Dordrecht, 1985, p. 51.

four groups on geographical and economic criteria for the purpose of elections of the members to the Trade and Development Board (group B - developed capitalist countries, group D - planned-economy countries, groups A and C united into the group of 77 - developing countries). Practically, not only elections, but all substantive matters are first discussed in the groups and then at the official meetings of the UNCTAD organs¹⁰⁴. As K.de Vey Mestadagh noted, "the group system method filters every issue through layers of deliberations, helps to harmonize the demands and reduce inconsistencies among many different countries"¹⁰⁵.

The stage of negotiations and consultations on the questions at issue in the IEOs' organs may be either open or secret¹⁰⁶. A requirement of confidentiality may relate to certain matters or bodies. For example, the CONTRACTING PARTIES of the GATT provide for the utmost secrecy on the conduct of any consultation under Art. XII on restrictions to safeguard the balance of payment¹⁰⁷. According to Section 9 of the Rules of Procedure of the EBRD Board of Directors, "the proceedings of the Board are confidential and shall not be published except when the Board decides to authorize the President to arrange for suitable publicity on any matter relating thereto". The groups' meetings at the UNCTAD and the meetings of the Council of Europe Committee of Ministers are also closed for a wide public.

In some IEOs preliminary informal consultations among the most powerful Member States may be of more importance for actual decision-making than official meetings

104. See Autar Krishan Koul. *The Legal Framework of UNCTAD in World Trade*, Leyden, 1977.

105. K.de Vey Mestadagh. *Op. cit.*, p. 294.

106. For instance, Art. 28 of the Rules of Procedure of the Ministerial Council of the CCASG states: "The Council shall decide whether the the meetings shall be open or secret".

107. See Notes and Supplementary Provisions Ad Article XII of GATT. - In: *International Economic Law. Basic Documents*. Ed. by Ph.Kunig, N.Lau, W.Meng. Berlin,1989, p. 479.

in organs. Thus, during the Tokyo Round the major decisions were first negotiated by the USA, the EEC and Japan. The other contracting parties of GATT could make little influence on the drafting of proposed decisions until near the end of the process when it was difficult to get changes made¹⁰⁸. The same happened during the Uruguay Round, whose fate was determined at the hard negotiations between the USA and EEC.

1.2. Voting

(a) Quorum

Once an IEO's act has been drafted and passed through negotiations, it must be voted in the competent body. Normally, the constituent instruments determine a quorum for decision-making. It varies from a simple majority (e.g. the Governing Board of the ITPA, the Assembly of the ANRPC) to three-quarters of the members (e.g. the Conference of the OPEC) or even to the presence of all Member Countries (e.g. the Council and the Conference in the LAIA). Most often, the quorum makes up two-thirds of the members of the organ (e.g. the Commission of the Andean Group, the Conference of the ATPC, the Supreme Council and the Ministerial Council of the CCASG). In the organizations using "weighted" voting, the quorum is counted of both the number of members and their voting power (e.g. for the meetings of the Boards of Governors of the IMF and the IBRD the quorum is a majority of Governors having not less than two-thirds of the total voting power). A special mechanism of attaining quorum is provided by Art. 6 (b,c) of the Convention Establishing the WIPO¹⁰⁹.

108. See J.H. Jackson. *Restructuring the GATT System*. L., 1990, p. 23.

109. A general rule for quorum is one half of the States members of the General Assembly. Even if this number is equal or more than one-third, the General Assembly may make decisions. But, with the exception of decisions concerning its own procedure, such decisions may take effect after the

(Footnote continues on next page)

(b) Unanimity, consensus and majority voting

Voting machinery in international organizations draws considerable attention of the scholars, primarily, within the context of the 'contradiction' between unanimity and consensus, on the one hand, and majoritarianism, on the other¹¹⁰. Actually, when looking at numerous IEOs established over a period of years, some trends in the ongoing struggle between these voting methods might be observed¹¹¹. Majority voting in various formulas dominated the global IEOs founded in the 1940s and 1950s when it was to the benefit of Western countries, the major initiators and participants of those organizations (the IMF, the IBRD, the FAO, the GATT)¹¹². But since the 1960s the shift towards unanimity and consensus has become apparent. This tendency was determined not only by the majority change in the international arena as a result of decolonization, though this reason was, undoubtedly, important. The first experience

(Footnote continued from previous page)

States members of the General Assembly which were not represented express in writing their vote or abstention within a period of three months. If the number of States having thus expressed their positions reaches the number of States which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that the required majority of the votes cast still obtains.

110. See *Change and Stability in International Law-Making*. Ed. by A. Cassese and J. Weiler. - Berlin, 1988.

111. See with regard to the correlation between unanimity and majority voting within the earlier period in: Stephen Zamora. *Voting in International Economic Organizations*, p. 571-576.

112. The majority voting domination was not absolute for the regional IEOs established at that period. A certain combination of unanimity and majority voting can be found in Art. 20 of the Statute of the Council of Europe: the Resolutions of the Council of Ministers relating to the enumerated important matters should be subject to a unanimous vote of the representatives casting a vote, while the Resolutions on other matters require a simple or qualified majority of the representatives entitled to sit on the Committee.

of majoritarianism in IEOs appeared to prove not only its advantages, but some drawbacks as well. The IEOs' Member States realized that decisions taken against the minority's will could cause problems of proper implementation. It is quite understandable that only mutually beneficial agreements can produce effective rules of conduct. As potential tools of protection of the minority's interests, unanimity and consensus became a counterweight to majoritarianism in decision-making to keep the balance of interests and opportunities of the IEOs' Member States. The Luxembourg compromise of 1966 in the EEC was a serious victory of unanimity even in the organization usually called "supranational"¹¹³.

If a glance is cast at the IEOs established between the 1960s and the 1990s, the proliferation of unanimity and consensus becomes obvious. The trend to strive for unanimity and consensus can be observed in the OECD, the EFTA¹¹⁴, the OPEC, the ITPA, the CARICOM, the ATPC, the CCASG, the PTA, the ECCAS, the APPA, the MERCOSUR, etc. The Council of GATT since its establishment in 1960 takes decisions by consensus. In most cases even the CONTRACTING PARTIES of GATT prefer consensus to voting, although, formally, consensus is not provided by the General Agreement. Many decisions of the IMF are also taken by consensus. Even

113. See K.Mason. European Community. - Luxembourg Compromise. - Council of the European Community Ignores British Attempt to Exercise Implied Veto Power of Luxembourg Compromise. - In: Georgia Journal of International and Comparative Law, 1983, vol. 13, p. 134-141.

114. Pursuant to Art. 32.5 of the Convention Establishing the EFTA, "decisions and recommendations of the Council shall be made by unanimous vote, except in so far as this Convention provides otherwise". Apart from this the Convention does not indicate any clear criteria distinguishing the issues that request unanimous and majority vote. Anyhow, during the first twenty five years of the EFTA existence, only on two occasions the Council decided unanimously to take decisions by majority vote in matters of substance (see: F.Weiss. The European Free Trade Area after Twenty-Five Years. - In: Yearbook of European Law 1985, vol. 5, Oxford, 1986, p. 306).

A similar rule can be seen in Art. 9 of the 1975 Agreement Establishing the AIOEC: "All decisions of the Conference of Ministers shall require unanimous agreement of the Representatives of Member Countries present. Each Member Country shall be entitled to one vote. The Conference may, however, determine from time to time, by unanimous agreement, the matters which may be decided otherwise and the manner of doing so".

within international commodity organizations, traditionally applying majority voting, a preference may be given to consensus¹¹⁵. However, it would be premature, not to say wrong, to consider unanimity and consensus as the dominant voting methods in present-day or even recently created IEOs. L. Condorelly seems to be too categorical saying, that majoritarianism is a dead duck¹¹⁶. P.I.B. Kohona tends to be more realistic: "There appears to be a tendency at present to adopt norms with the broad agreement of the vast majority (if not all) of the parties despite the existence of provisions in some agreements which require norms of conduct to be adopted by majority votes"¹¹⁷. Majority voting, in particular, is unlikely to be completely avoided, at least formally, in the global organizations where unanimity and consensus are not so easily attained.

According to the constituent instruments, the UNCTAD and the UNIDO established in the 1960s apply majority voting (though, in the UNCTAD practice many decisions are taken by consensus). Majority voting was also provided by the statutory acts of the CAEU formed in 1964¹¹⁸, the WTO established in 1970¹¹⁹, and the MIGA founded in 1985¹²⁰. In some IEOs set up in the recent decades the general voting rule is consensus, but if this fails, majority voting takes effect¹²¹.

115. See e.g. Art. 12 of the 1989 International Agreement on Jute and Jute Products.

116. See Change and Stability in International Law-Making, p. 118.

117. P.I.B. Kohona. Op.cit., p. 8-9.

118. See Art. 4.4 of the Agreement on Arab Economic Unity of 1957 (entered into force in 1964).

119. See Articles 28, 29 and 30 of the Statutes of the WTO.

120. See Articles 40, 42 of the Convention on the MIGA.

121. E.g. simple majority in the Governing Board of the ITPA, three-quarters majority - in the Council of the APPA, two-thirds of the votes cast in the Conference of Ministers and the Executive Committee of the ATPC, two-thirds majority of Member States in the Assembly and the Council of the AEC.

An interesting combination of unanimity and majority voting is applied in the Council of Ministers of the IBA: binding decisions are made by affirmative vote of all members, recommendations require a two-thirds majority, while a simple majority is sufficient for the decisions on internal matters¹²².

A real competition between majoritarianism and consensus takes place in the EEC. To some extent it reflects the contradiction between a "supranational" tendency within the Community and individual self-interests of the Member States. Thanks to the Single European Act that caused a considerable shift towards majoritarianism¹²³ in the up-to-date version of the EEC Treaty there is approximately a fifty-fifty correlation between unanimity and majority voting in the Council. This proportion is supposed to be changed in favour of majority voting after the Treaty on European Union enters into force. In any case, certain balance between majority voting and unanimity will be most likely preserved in future. The Community Member States will hardly agree to surrender their basic powers in the field of economic policy to the EEC institutions without having procedural instruments to protect their individual interests when they are threatened by the position of a majority. In practice, however, most decisions are taken by consensus. "But, - as Weiler rightly notes, - reaching consensus under the shadow of the vote is altogether different from reaching it under the shadow of the veto. The possibility of breaking deadlocks by voting drives the negotiators to break the deadlock without actually resorting to the vote"¹²⁴.

122. Art. IX of the Agreement Establishing the IBA.

123. However, as G.A.Bermann writes, the drafters of the Single Act "could not secure agreement to introduce majority voting in the area of fiscal harmonization, or in the Community's exercise of implied powers under Article 235 of the EEC Treaty" (G.A.Bermann. The Single European Act: A New Constitution for the Community? - In: Columbia Journal of Transnational Law, 1989, N 3, p. 573.)

124. J.H.H.Weiler. The Transformation of Europe. - In: The Yale Law Journal, 1991, vol. 100, p. 2461.

In general, both majoritarianism and unanimity have their advantages and shortcomings¹²⁵. On the one hand, majority voting is good for operative decision-making in order to avoid an obstructive approach by one or a few Member States, but it may cause the problems of protection of minority's interests and implementation of decisions taken. On the other hand, unanimity and consensus are the best methods of generating mutually beneficial rules of conduct. However, these are fraught with danger of obstructionism or, at least, of the lowest level of compromise and vague wordings of the adopted regulations. The effect of the acts passed by consensus may be also weakened by proceeding reservations of the Member States¹²⁶. Finally, unanimity and consensus can hardly work if a decision is to be taken against a Member State in the case of dispute settlement¹²⁷ or the use of sanctions¹²⁸.

This contradiction may seem like a vicious circle, but in practice, the IEOs, on the basis of acquired experience, seek for an optimal way-out. At present, the IEOs, at least, many of them, are not facing a pure dilemma: either majoritarianism, or unanimity. They are, instead, striving for the most reasonable combination of both methods, taking into account the subject-matter and the importance of the decisions, as well as the conditions under which those decisions are to be taken¹²⁹.

125. See O.G.Zaitseva. *International Organizations: decision-making.*, Moscow, 1989, pp. 71,78 (in Russian).

126. See A.Leroy Bennet. *International Organizations: principles and issues.* New Jersey, 1980, p. 93.

127. The GATT dispute settlement practice is a rare exception (see more details in Chapter VIII).

128. See an example of the CIS sanctional competence in Chapter IX.

129. The IEOs' voting practice is so much varied that even such a rare phenomenon as "minority voting" can be found. The Meeting of the Ministers of the LAEO, for instance, takes its decisions by the affirmative vote of at least one-third of the Member States (Art. 14 of the 1973 Agreement Establishing the LAEO). However, the LAEO constituent Agreement does not clarify whether this scheme works if the rest two-thirds of votes are negative and what are the consequences of a decision taken under such procedure for the dissentient and abstaining Member States.

There are some technical juridical means aimed at diminishing the possible negative effects of both majority voting and unanimity, namely, a combination of simple and qualified majority voting, "weighted" voting, "relative unanimity" and contracting-out procedures.

(c) Simple and qualified majority voting

In comparison with a simple majority (more than 50 percent), a qualified majority voting raises the degree of concordance of the Member States' positions and, under other equal conditions, is supposed to give a better regulatory effect. Consequently, it is widely applicable for the principal decision-making matters in the IEOs using the method of majoritarianism.

A qualified majority voting is provided for the most important decisions in the IMF (70, 75, 85% of the voting power) and the IBRD (two-thirds, three-fourths, four-fifths of the voting power), though formally, a simple majority voting is a general rule according to the constituent instruments of these organizations¹³⁰. In the Council of the EEC a qualified majority voting is also often required¹³¹. In such cases 54 votes in favour must be cast for the adoption of acts of the Council on a proposal from the Commission; and the same number of votes cast by at least eight Members in other cases, while the total number of votes is 76 (Art. 148 of the Treaty of Rome). Here a qualified majority voting is complicated by a request for a

130. Each Member of the Fund has 250 votes plus one additional vote for each part of its quota equivalent to 100000 special drawing rights (Art. XII, section 5 of the Articles of Agreement of the IMF); each Member of the Bank has 250 votes plus one additional vote for each share of stock held (Art. V, section 3 of the Articles of Agreement of the IBRD).

131. Under Art. 148 of the Treaty of Rome, where the Council is required to act by a qualified majority, the votes of its Members shall be weighted as follows: Belgium - 5; Denmark - 3; Germany - 10; Greece - 5; Spain - 8; France - 10; Ireland - 3; Italy - 10; Luxembourg - 2; Netherlands - 5; Portugal - 5; United Kingdom - 10.

minimal number of Members casting their votes in favour of the act to be adopted. This condition is also aimed at the fuller participation of the EEC Member States in decision-making, as the minimal number of the Council's Members potentially able to cast the required 54 votes is seven¹³². The International Coffee Council applies a special procedure of additional voting if a two-thirds majority required for a decision is not obtained in order to overcome the negative vote of three or less members¹³³. In some IEOs a qualified majority voting is required either when consensus fails to be achieved (e.g. the AEC, the ATPC, the APPA), or in a combination with a simple majority (e.g. the FAO, the IFC, the IDA, the GATT, the WTO, the UNIDO).

(d) "Weighted" voting

While most existing IEOs apply the rule "one State - one vote" (e.g. the OECD, the UNIDO, the OPEC), some others give preference to the so called "weighted"

132. In this part Art.148, paragraph 2 of the Treaty of Rome was amended by Art. 14 of the Act of Accession ESP/PORT.

133. Art. 15 of the International Coffee Agreement of 1983 reads:

"(2) The following procedure shall apply with respect to any decision by the Council which under the provisions of this Agreement requires a distributed two-thirds majority vote:

(a) if a distributed two-thirds majority vote is not obtained because of the negative vote of three or less exporting or three or less importing Members, the proposal shall, if the Council so decides by the majority of the Members present and by a distributed simple majority vote, be put to vote again within 48 hours;

(b) if a distributed two-thirds majority vote is again not obtained because of the negative vote of two or less exporting or two or less importing Members, the proposal shall, if the Council so decides by a majority of the Members present and by a distributed simple majority vote, be put to vote again within 24 hours;

(c) if a distributed two-thirds majority vote is not obtained in the third vote because of the negative vote of one exporting Member or one importing Member, the proposal shall be considered adopted, and

(d) if the Council fails to put a proposal to a further vote, it shall be considered rejected".

voting¹³⁴, when the voting quota of a Member State depends on its financial deposit to the budget of the organization or other economic indexes (e.g. international financial organizations, international commodity organizations). In some IEOs using the rule "one State - one vote" the economic indexes are also taken into account in decision-making¹³⁵. In sum, "weighted" voting is a notable procedural innovation of IEOs which can be hardly applicable to the international organizations operating in other fields.

A "weighted" voting procedure has been often criticized in legal studies as incompatible with the principle of sovereign equality¹³⁶. However, there is a vast practice of "weighted" voting, which gives grounds to suppose, that most States consider it as economically reasonable for some types of IEOs and a legitimate exception from the principle of sovereign equality. I. Seidl-Hohenveldern, commenting on the "weighted" voting in the IMF and the IBRD, wrote: "...as these institutions act like banks, it does not seem inequitable that they take their decisions according to the principle that decisions should be taken by those who take the

134. Some more details on "weighted" voting in: Stephen Zamora. Voting in International Economic Organizations, p. 590-594.

135. Thus, the Assembly of the ANRPC takes decisions by a majority voting of the Members, each having one vote. No decision, however, shall be effective unless the Members voting in the favour together represent not less than half of the total annual Members' production of natural rubber in the calendar year, two years preceding (Art. 13 of the Constitution).

The Governing Board of the ITPA takes decisions by a simple majority vote in the cases, when a consensus can not be reached. However, "should any Member of the Board or a group of the Members of the Board which represents at least one-tenth of the total volume of exports of all the Members consider that the decision so arrived at is of major importance affecting its interests, it shall have the right, during the same meeting of the Board, to request that a new decision be taken by a two-thirds majority vote and the vote shall be taken accordingly. For the purposes of this paragraph, the required two-thirds majority shall also account for at least two-thirds of the total volume of exports of all the Members" (Art. 9 of the Agreement of the ITPA of 1977).

136. See, for example, E. Osieke. Majority Voting Systems in the International Labour Organization and the International Monetary Fund. - In: ICLQ, 1984, Part 2, p. 404.

financial risks in proportion to their risks"¹³⁷. To put it another way, powerful industrial States, in the case they do not belong to majority, would be unlikely to follow decisions made by virtue of "one State - one vote" procedure. This could paralyze functioning of the overall system¹³⁸.

Obviously, "weighted" voting cannot apply without some reasonable limitations. In particular, it must not lead to a legalized domination of one or a few powerful Member States in decision-making. For example, the USA still possesses a de facto right of veto for certain decisions in the IMF. Potentially, such evident voting imbalance may be fraught with the danger of blocking the organization's decisions. However, in practice, the Member States of the IMF have strived to avoid voting conflicts by achieving a preliminary consensus on a decision to be taken¹³⁹. Here, a provision of the 1986 Seoul Declaration of the International Law Association relating to the principle of participatory equality is pertinent: "in international organizations this should lead to such schemes of decision-making, that an equitable balance is realized between all the interests present".

(e) "Relative unanimity"

The so-called "relative unanimity" voting in its prevailing variant means that abstentions do not prevent the adoption of the act which requires unanimity (e.g.

137. I.Seidl-Hohenveldern. Op. cit., p. 118.

138. See J.H.Jackson. Restructuring the GATT System, p. 96-97.

139. To quote J.Gold, "...maximum efforts are made to avoid voting and to reach a consensus on any important decision of the Fund. Even when the decision is of less importance, voting is avoided, and an executive director who feels that he cannot concur in the decision merely accords his abstention, but even these occasions are rare. The adoption of decisions by this process of general collaboration, involving as it does a reasonable give and take among all executive directors whatever their voting strength, is an important factor in the high degree of compliance by members with Fund decisions" (J.Gold. Certain Aspects of the Law and Practice of the International Monetary Fund. - In: The Effectiveness of International Decisions. Ed. by Stephen M. Schwebel. Leyden, A.W.Sijhoff, 1971, p. 85 (71-99).

the EEC, the Benelux Economic Union, the EFTA, the OECD)¹⁴⁰. A slightly different formula of "relative unanimity", namely, the unanimity of those present, is fixed in the statutory acts of the OPEC and the WARDA¹⁴¹.

A "relative unanimity" may be applied in a combination with a qualified majority voting as it is provided in Art. 11 of the Cartagena Agreement of 1969 establishing the Andean Group (in its codified version of 1988). As a general rule, the Andean Group Commission adopts its decisions with the affirmative vote of two-thirds of the Member Countries. Decisions on some matters require a two-thirds affirmative vote without a negative vote. A similar scheme is provided for the decisions taken in the LALA¹⁴² and at the CARICOM Conference¹⁴³. However, in the latter case it is specified that "abstentions shall not be construed as impairing the validity of decisions or recommendations of the Conference provided that not less than three-quarters of its members including at least two of the More Developed Countries¹⁴⁴ vote in favour of any decision or recommendation".

It is clear that this kind of unanimity may be achieved somewhat more easily than an absolute unanimity requiring all votes to be affirmative. Unless otherwise specified in the constituent instruments, a "relative unanimity" voting has the same

140. See Art. 148 of the Treaty of Rome, Art. 18 of the Treaty Establishing the Benelux Economic Union, Art. 32 of the Convention Establishing the EFTA, Art. 6 of the Convention on the OECD.

141. Art. 11 of the Statute of the OPEC and Art. IX of the WARDA Constitution.

142. Art. 43 of the 1980 Montevideo Treaty.

143. Art. 9 of the Treaty Establishing the CARICOM of 1973.

144. For the purpose of the Treaty Establishing the CARICOM, Barbados, Guyana, Jamaica, and Trinidad and Tobago shall be designated "More Developed Countries" until such time as the Conference otherwise determine by majority decision (Art. 3).

effect as consensus (approval without voting in its classical form¹⁴⁵), though they slightly differ from the viewpoint of procedural technique. A unanimity voting, even in its relative form, explicitly reveals the positions of the States (either affirmative, or abstentive) on the act which is to be adopted, while consensus merely states the absence of a negative attitude.

(f) Contracting-out procedures

The most logical compromise between majoritarianism and unanimity seems to be found in the contracting-out procedures. The term "contracting-out" in its traditional sense means: a Member State is allowed to declare within a specified term its not being bound by a majority decision. In this connection, references are usually made to the constituent instruments of the ICAO, the WHO, the WMO¹⁴⁶. It would appear more reasonable to use "contracting-out" (or "opt-out") in a broader sense: for all cases where a Member State is permitted to avoid being bound by the organization's decision. Various formulas of such contracting-out were provided by constituent instruments of the OECD, the CCASG, and the CMEA.

Under Art. 6 of the OECD Convention, its decision or recommendation requiring relative unanimity shall not be applicable to the abstaining Member.

The Rules of Procedures of the Supreme Council of the CCASG reveal a somewhat more complicated scheme: "Its resolutions in substantive matters shall be carried out by unanimous agreement of the Member States present and participating in the vote, while resolutions in procedural matters shall be carried by majority vote. Any

145. With regard to consensus see: K.Zemanek. Majority Rule and Consensus Technique in Law-Making Diplomacy. -In: The Structure and Process of International Law, p. 857-887; A.Cassese. International Law in a Divided World., Oxford, 1986, p. 196-198; G.J.H.van Hoof. Rethinking the Sources of International Law. Deventer: Kluwer, 1983, p. 226-234.

146. See K. Skubiszewski. Enactment of Law by International Organizations. - In: BYIL 1965-1966, Oxford, 1968, p. 210-220.

member abstaining shall document his being not bound by the resolution" (Art. 5). However, the time, within which an abstaining Member is authorized to document his being not bound by the resolution, is not specified.

The principle of "being interested" in the Charter of the CMEA suggested another variant of contracting-out¹⁴⁷. The acts adopted by the Council were of consensual nature binding only upon those Member Countries which stated their interest in the question at issue and had a positive attitude to it. If a Member Country interested in the matter opposed the act, the latter could not be adopted. This was a kind of veto¹⁴⁸. And finally, if a Member Country declared that it had no interest in the question at issue, the act could be adopted, but it was not applicable to this Member Country.

It is remarkable that the CMEA decision-making procedure has been basically reproduced in the 1993 Charter of the CIS (Art. 23). In this connection, the potential shortcomings of this model should be reminded. As some commentators pointed out with regard to the CMEA, the absence of any criteria for the definition of "the interested member" can cause an abuse of the veto right. It is also preferable to combine the principle of "being interested" with an absolute unanimity rule on some fundamental issues and majority voting on the less important matters¹⁴⁹.

147. Art. IV of the Charter stated: "All recommendations and decisions of the Council shall be adopted only with the consent of the interested Member Countries of the Council, each Country being entitled to state its interest in any question under consideration of the Council. Recommendations and decisions shall not apply to Countries which state that they have no interest in the question at issue. Nevertheless, each such Country may subsequently associate itself with the recommendations and decisions adopted by the remaining Member Countries of the Council".

148. See *Socialist Economic Integration and State Sovereignty*. Moscow, 1987, p. 15 (in Russian).

149. *Ibid*, p. 15-17.

What is the general attitude to the contracting-out procedures? Undoubtedly, its main advantage is the consensual character of the adopted acts, which at any rate gives them a better chance of being implemented. No Member State which is either not interested in the issue, or does not want to participate in its regulation, can be forced by the other Member States to comply with the organization's act. At the same time, and this is also very important, the abstentions of one or a few Member States can not invalidate the act as the whole. However, the contracting-out method, being a clever invention, is hardly able to be universally applicable to IEOs. On the one hand, the IEO's Member States may face problems which need a uniform decision only, and the contracting-out of one or a few Members would thwart this decision. For instance, contracting-out is unlikely to be used by the Members of a customs union with regard to a principal decision concerning the elimination of customs duties between them and setting up a common customs tariff. On the other hand, unlimited application of contracting-out, especially in the IEOs with a large number of Member States, will inevitably lead to the establishment of a multitude of complicated regimes among various combinations of the Member States on the basis of adopted acts. Finally, the consensual rule can hardly work if a decision is to be taken against a Member State in the cases of dispute settlement or the use of sanctions (as it is provided for in the CIS Charter). In general, contracting-out must be treated by analogy with reservations to the multilateral treaties: in some cases they are permissible, in others - prohibited.

1.3. Procedures for amending constituent instruments

A special, more complicated, procedure is provided for amendments to the IEOs' constituent instruments. An amendment may be proposed by either a Member State or an organ of the IEO. Such a proposal is to be submitted to a competent organ which transmits it to the Member States for examination. A decision on amendment is taken

either by a supreme organ of the IEO or by the Member States after the approval by a relevant IEO's organ.

In the first case, an amendment becomes effective if adopted by a supreme organ (1) unanimously¹⁵⁰, (2) by consensus with the further ratification by all Member States¹⁵¹, (3) by consensus or, failing that, by a two-thirds majority with the further ratification by all Member States¹⁵², or (4) by a qualified majority¹⁵³. Some constituent documents stipulate that an amendment adopted by a qualified majority shall take effect only for the Member States accepting the amendment¹⁵⁴. In the WIPO the latter rule acts only in regard to the amendments increasing the financial obligations of the Member States. Any other amendment accepted by three-fourths of the Member States after its approval by the Conference is binding upon all the Member States.

Some constituent instruments lay down additional requirements concerning time-limits and/or amendment-making initiatives. For example, an amendment of the Agreement of the OAPEC may be considered every ten years or upon the request of the half of the members (Art. Thirty Six).

Taking into account the importance of the issue, most IEOs' charters do not authorize their organs to take decisions on amendments, but reserve this power for the Member States. In this case the IEOs' organs only examine and recommend the

150. E.g. Art. 20 of the Charter of the CCASG.

151. E.g. Art. 90 of the Treaty for the Establishment of the ECCAS.

152. E.g. Art. 103 of the Treaty Establishing the AEC.

153. For example, Art. XX of the Constitution of the FAO; Art. 17 of the Convention Establishing the WIPO, Art. 28 of the Agreement Establishing the ATPC, Art. 10 of the Agreement Establishing the OPEC Fund for International Development of 1980, Articles 59,60 of the Convention on the MIGA, Art. Thirty Six of the Agreement of the OAPEC.

154. Art.XX of the Constitution of the FAO.

proposed amendments to the Member States which take a final decision either unanimously¹⁵⁵, or by a qualified majority, both "pure"¹⁵⁶ and combined with a unanimity rule provided for amendments to certain constituent provisions¹⁵⁷.

A somewhat different voting procedure for amendments is laid down by Art. 23 of the UNIDO Constitution. An amendment comes into force and is binding on all Members when it is recommended by the Board of the Conference, approved by the Conference by a two-thirds majority of all Members, and two-thirds of the Members have deposited instruments of ratification, acceptance or approval of the amendment. Amendments relating to certain Articles of the Constitution require three-fourths of the Members deposited their instruments of ratification, acceptance or approval.

1.4. Procedures for enforcing the IEOs' normative acts

Voting or consensual approval of an IEO's act does not necessarily mean that the final step has been taken in decision-making. Some additional procedural requirements may be provided by the constituent instruments for an act to come into effect. Such requirements include either a period of time after which the act becomes enforceable, or passing through the constitutional procedures of the Member States.

For instance, the decisions of the AEC Assembly and the regulations of the AEC Council are automatically enforceable 30 days after the date of their signature by the Chairmen of the respective bodies¹⁵⁸. The decisions of the Conference and the

155. E.g. Art. 236 of the Treaty of Rome, Art. 44 of the Convention Establishing the EFTA.

156. E.g. Art. 41 of the Statute of the Council of Europe, Art. 22 of the Agreement Establishing the ITPA.

157. E.g. Art. XXVIII of the Articles of Agreement of the IMF.

158. See Articles 10 and 13 of the Treaty Establishing the AEC.

regulations of the Council of the ECCAS come into effect 30 days after their publication in the official bulletin of the Community¹⁵⁹. The resolutions of the Conference of the OPEC become effective after 30 days from the conclusion of the meeting or after such period as the Conference may decide unless, within the said period the Secretariat receives notification from Member Countries to the contrary¹⁶⁰.

The OECD decisions become enforceable only having met with the requirements of the Member States' constitutional provisions. Pursuant to Art. 6.3 of the OECD Convention, "no decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures. The other Members may agree that such a decision shall apply provisionally to them". A similar rule derives from the Agreement of the OAPEC: "Statutes or resolutions of a binding nature which are issued by the Council shall be subject to the ratification by the competent authorities in the member countries according to the legal rules in force" (Article Twelve).

* * *

The above survey gives every reason to conclude that the overall arsenal of procedural means amassed by the IEOs suffices the most strict requirements for effective decision-making. The reasonable combinations of procedural instruments, with the account of the IEO's subject-matter and functional needs, make it possible to shape such decision-making models, which can minimize the negative effects of reaching compromises among diverse and numerous interacting subjects.

159. See Articles 11 and 15 of the Treaty for the Establishment of the ECCAS.

160. See Art. 11 of the OPEC Statute.

It can be also observed that certain procedural mechanisms provided by the IEOs' founding acts often have a potentially protective and stimulating character (e.g. majority voting, "weighted" voting), i.e. Member States prefer to use them rather as a shadow under which the consensual decisions can be reached easier.

Another important consideration for the IEOs' decision-making is the fact that formal procedures may be viable only if they account the actual correlation of economic powers of the interacting Member States and other economic factors affecting the efficiency of possible decisions. The formal sovereign equality of the decision-making States must be necessarily collated with the strong variables in their economic positions in order to generate workable decisions.

2. The Impact of the IEO's Acts on International Law

Regardless of the various terms used in constituent documents (decisions, resolutions, recommendations, rules, regulations, directives, statutes, etc.), most of the IEOs' acts may be subdivided into two major types: (1) binding decisions; and (2) recommendations¹⁶¹.

2.1. Binding decisions

(a) Legal nature of a binding decision

No IEO is able to operate without taking binding decisions at least on procedural, administrative and budgetary issues which make up part of the so-called

161. Some other IEOs' acts, normally entitled "communiqué", "understanding", etc., which state the intentions, conclusions or non-legal agreements of the Member States (e.g. the IEA Governing Board Communiqué Concerning Energy Requirements and Security of 1983. - In: 22 ILM 918-929 (1983) are left out of consideration in the present study.

'internal' law of an organization. These decisions produce secondary international rules for their internal needs and do not make any considerable impact on the regulation of international economic relations.

More important are decisions in substantive matters, which nowadays may be taken in the majority of IEOs. In this connection at least two general problems arise: (a) are the IEOs' binding decisions compatible with the sovereignty of Member States and the consensual nature of international law; and (b) are they sources of international legal norms or merely acts of application of law.

At first sight, it may seem that decisions binding even the disagreeing minority of the Member States contradict to traditional consensual international law-making in treaty and custom form. In fact, all the IEOs' decisions have, in the end, consensual character, either directly (taken by unanimity or consensus), or indirectly (taken by majority vote but on the basis of the Member States' consent priorly expressed in the relevant constituent provisions). As J.Weiler states, and he seems to be right, consent "is fundamental even in supranational organizations. Supranational organizations differ from the world order in a lot of ways, but not so much by virtue of the way law is formed. What we have there is also rule of consent, even in the EEC which is locus classicus of a supranational organization"¹⁶². It is absolutely natural and normal that sovereign States delegate some of their decision-making powers to international institutions formed through their participation. By this way they simply use a special method of producing the rules of conduct by virtue of institutional procedures. And such method alone being a result of States' voluntary consent has nothing to do with any 'limitations' of sovereignty. It 'restricts' the sovereignty of Member States in the same manner as any other international agreement voluntarily restricts the freedom of actions of States. This is not a limitation of sovereignty, but its normal realization to the benefit of the

162. Change and Stability in International Law-Making, p. 122.

Member States. The other point is that the founders of the organization have to elaborate such decision-making procedures (see the previous paragraph), which minimize the possibility of negative effects injuring the interests of the Member States.

The second question raised in connection with binding decisions has more a theoretical than practical significance. In fact, if a decision of the organization is binding and must be complied with by Member States, there is not much difference in either to consider it as a new source of international law, or merely as an act of application of law. The distinction between sources of law and acts of application of law derives from the municipal legal approach distinguishing the legal norms of generalized action (designated for numerous similar situations) and ad hoc acts of application of law issued by administrative or judicial organs for a concrete situation¹⁶³. This approach can hardly be automatically applicable to international law, many of whose norms have an individualized and ad hoc character (e.g. a bilateral agreement on exchange of prisoners of war). Therefore, if a decision of an IEO in substantive issues contains obligatory rules of conduct for the Member States, such rules may differ from classical norms of treaties and customs in many details, but in the end have the same regulatory effect on interstate economic relations¹⁶⁴.

163. For example, K. Skubiszewski divided the binding resolutions of international organizations "into those which create law and those which are executive in character and pertain to international administration sensu stricto rather than to legislation". The latter acts "do not lay down rules of conduct to be applied in an unlimited number of situations covered by the resolution. They concern exclusively specific addressees (in contrast with the unlimited number of those falling under a legislative enactment) and situations occurring at a specific place and time (in contrast with the abstractly defined circumstances in the legislative act)" (K. Skubiszewski. Op. cit., p. 202).

164. It should be borne in mind, that not all IEOs' acts entitled "decision" contain only binding rules. Some of them are framed as a mixture of binding and recommendatory norms (e.g. Decision of the OECD Council Concerning the Minimum Pre-Marketing Set of Data in the Assessment of Chemicals of 1982. - In: 22 ILM 909-913 (1983).

International legal rules can be found in binding decisions of many IEOs. For example, the Andean Group Commission's Decisions 184 of 1983¹⁶⁵ and 220 of 1987¹⁶⁶ are composed in a manner typical of international agreements, and furthermore, its decision 236 of 1988 provides the codification of the Cartagena Agreement and its instruments of modification¹⁶⁷.

*Another decision reminding of a treaty, but with regard to the procedure of entering into force, is the Andean Group Commission Decision on Andean Multinational Enterprises N 169 of 1982. Under Art. 35, it "shall enter into force when two Member Countries have deposited in the Secretariat of the Junta the instruments whereby they have put it into effect in their respective territories. For the remaining countries, the date of entry into force shall be the date of the deposit of their corresponding instruments"*¹⁶⁸.

An interesting example of a decision that is practically identical to a traditional international agreement as regards the form and composition is the OECD Council Decision of 1977 establishing a Multilateral Consultation and Surveillance Mechanism for sea dumping of radioactive waste¹⁶⁹. Its text contains the preamble and 10 Articles framed in a manner typical for an international treaty. The OECD countries that accepted this Decision¹⁷⁰ are termed "participating parties". Any participating party may cease to apply the Decision by giving a 6 months' notice to

165. See 23 ILM 425-441 (1984).

166. See 27 ILM 974-988 (1988).

167. See 28 ILM 1165-1211 (1989).

168. See 21 ILM 546 (1982).

169. See 17 ILM 445-452 (1978).

170. Australia, Austria, Japan and New Zealand abstained.

the General Secretary. The annex to the decision suggests the interpretation of its certain provisions. In 1979 the Secretariat of the Nuclear Energy Agency (the body within the framework of the OECD) composed the Note on practical measures on the implementation of this Decision¹⁷¹.

The OECD Code of Liberalization of Current Invisible Operations of 1961 is an example of a legally binding decision laying down a withdrawal procedure comparable with a treaty denouncement: "Any Member may withdraw from the Code by transmitting a notice in writing to the Secretary-General of the Organization. The withdrawal shall become effective twelve months from the date on which such a notice is received".¹⁷² In order to make the Code available for most of the OECD Members, taking into account their individual interests, Article 26 of the Code authorizes a Member to lodge reservations relating to certain obligations resulting from the Code. These examples explain why the OECD binding decisions are sometimes qualified as "quasi-treaties"¹⁷³

A special law-making effect is produced by the IEOs' decisions on the amendments to their constituent instruments which are not required to be approved by the Member States¹⁷⁴. Here we face a unique phenomenon when an organization's decision changes the contents of the founding treaty previously concluded by the Member States. Is such a decision a source of international law? The answer should be in the affirmative.

171. See 18 ILM 862-866 (1979).

172. See: Code of Liberalization of Current Invisible Operations. P., OECD, 1990.

173. See H.A.H. Audretsch. Supervision within the Organization for Economic Cooperation and Development. - In: Supervisory Mechanisms in International Economic Organizations, p. 526.

174. E.g. Art. 20 of the Charter of the CCASG, Art. 28 of the Agreement Establishing the ATPC (see more details in Chapter V 1.3).

Another noteworthy example is the Decision of the CONTRACTING PARTIES of GATT "Action by the Contracting Parties on the Multilateral Trade Negotiations" (27 November 1979)¹⁷⁵. This decision determines the relationship between the General Agreement and the non-tariff agreements concluded during the Tokyo Round in order "to preserve, in the operation and functioning of GATT instruments, the unity and consistency of the GATT system". The main rule of the decision provides that "existing rights and benefits under the GATT of contracting parties to these agreements, including those derived from Article 1 are not affected by these agreements". In other words, the decision of the GATT plenary organ produced a norm which sanctioned a free choice for the GATT contracting parties whether or not to participate in the non-tariff agreements concluded within the framework of GATT and regarded as an inherent component of the entire GATT system. If this norm had been included in a formal international treaty it would have undoubtedly been treated as a legal rule. But being formulated in a binding decision of the GATT organ it has the same legal effect. Moreover, in this particular case a binding decision was an optimum legal form, since the non-tariff agreements were obligatory only for the signatories, which were not all contracting parties of the GATT. Hence, it was not reasonable neither to include this rule in the texts of these agreements, nor to amend the General Agreement. In sum, the above-mentioned decision inherently belongs to the so-called "law of GATT". A similar juridical maneuver was applied while adopting the "enabling clause" which made an exception to the most-favoured-nation clause (Art. 1 of the General Agreement) for preferences in favour of developing countries. To avoid a complicated procedure of amending the General Agreement the

175. See O.Long. Op. cit., p. 27-28.

CONTRACTING PARTIES took a special binding decision¹⁷⁶.

Another example of a decision keeping away from a lengthy and/or procedurally complicated process of treaty-making is the OECD Trade Pledge of 1974 - a sort of "gentlemen agreement" between the OECD Member countries declaring their determination to refrain from import restrictions and export stimulating for a period of one year¹⁷⁷. Roessler termed such decisions as de facto agreements¹⁷⁸.

Finally, such a specific form of a decision as the IMF stand-by arrangements deserves mentioning. Under Art. XXX (b) of the Articles of Agreement of the IMF, a stand-by arrangement is defined as "a decision of the Fund by which a member is assured that it will be able to make purchases from the General Resources Account in accordance with the terms of the decision during a specified period and up to a specified amount". In practice, a stand-by arrangement is taken by the Executive Directors of the IMF as a response to a letter of intent in which the monetary authorities of the member describe the economic and monetary policy which will be followed during the term of such arrangement and request to make drawings from the Fund for this period¹⁷⁹. A combination of a letter of intent and a stand-by arrangement reminds of an international agreement in a form of exchange of

176. It should be admitted, however, that it is not always possible to use a decision form in order to avoid complicated parliamentary procedures requested for international agreements. In some cases, the national delegations insist on putting the matter under consideration before the national parliaments. This normally requests a relevant treaty form. See an interesting illustration from the OECD practice suggested by Mr. Elkin in: *The Effectiveness of International Decisions*. Ed. by Stephen M. Schwebel. Leyden, 1971, p. 369.

177. See the OECD Declaration on a Code of Conduct for International Economic Relations of 1974. - In: 13 I.L.M. 998 (1974).

178. See F. Roessler. *Law, De Facto Agreements and Declarations of Principle in International Economic Relations*. - In: GYIL 1978, vol. 21, p. 27-59.

179. See J. Gold. *Certain Aspects of the Law and Practice of the International Monetary Fund*. - In: *The Effectiveness of International Decisions*, p. 76-83; R. Barents. *Supervision within International Monetary Fund*. - In: *Supervisory Mechanisms in International Economic Organizations*, p. 388-391.

documents. However, stricto sensu the Fund does not equate its stand-by arrangements to international agreements. The stand-by arrangements are neither published by the Fund nor registered at the U.N. Secretariat. Hence, this is a specific form of an IEO decision of an individual character (unlike general decisions) which gives birth to certain reciprocal rights and obligations of the Fund and the member. The avoidance of the constitutional approval procedure by virtue of the stand-by arrangements technique has been also stressed as an advantage compared to formal international agreements¹⁸⁰.

Of course, each rule may have exceptions, but in principle there do not appear any serious reasons preventing from treating the binding decisions of IEOs in substantive matters which formulate the rights and duties for the Member States as a source of international law¹⁸¹. Furthermore, once created, an IEO that attempts to play a regulatory role and is not merely a deliberative forum, should be trusted by the Member States. Its binding decisions should be recognized as a fully-fledged source of international law covered by the principle pacta sunt servanda. This approach is in line with the wording of the 1986 Seoul Declaration (the 62nd Conference of the International Law Association) with regard to the above principle: "Treaties and binding decisions, taken by international economic organizations have to be fulfilled in good faith by the parties concerned".

Analyzing the binding decisions of IEOs one should bear in mind that, along with formal binding acts, there is a number of informal decisions which may in many ways influence the organization's activities and have certain legal consequences. The

180. R.Barents. Op. cit., p. 390.

181. See some earlier conclusions relating to a decision of an international organization as a source of international law in: A.J.P.Tammes. Decisions of International Organs as a Source of International Law. - In: *Recueil des Cours*, 1958-II, vol. 94, p. 261-364; Maarten Bos. The Recognized Manifestations of International Law. A New Theory of "Sources". - In: *GYIL* 1977, vol. 20, p. 24-25.

difference between formal and informal decisions in respect of international financial organizations was stressed by Lester Nurick, who pointed out that these organizations take a host of de facto decisions on loans, credits, etc., which not being shaped in any legal form, result in such formal legal acts as a bilateral agreement or a contract¹⁸². Undoubtedly, the informal decisions of this sort by no means can be classified as a source of international law in the meaning of the form of the legal rules' existence. Nonetheless, their virtual impact on the subsequent legal acts may be quite notable.

(b) Addressees of decisions

Decisions of IEOs have various addressees: (1) the Member States; (2) the institutions; (3) national persons of the Member States, and (4) other IEOs.

Some constituent instruments more or less definitely indicate the addressees of the IEO's acts. Under Art. 11 of the Treaty for the Establishment of the ECCAS, the Conference acts by decisions binding on the Member States and institutions of the Community except for the Court of Justice, and directives binding on the institutions concerned except for the Court of Justice¹⁸³. Under Articles 5 and 6 of the Treaty of the ECOWAS, the Authority takes decisions binding on all institutions of the Community, while the Council of Ministers makes recommendations to the Authority and gives decisions to all subordinate institutions of the Community.

182. The Effectiveness of International Decisions. Ed. by Stephen M. Schwebel. Leyden, 1971, p. 366-367.

183. The first part of this formula is also used in Art. 15 of the Treaty in respect to the regulations of the Council.

The Treaty of Rome (Art. 189) enumerates three types of binding acts of the Council and the Commission, namely, regulations which have general application and are directly applicable in all Member States; directives binding upon each Member State to which they are addressed (but the choice of forms and methods of their realization is left to the national authorities); decisions which are binding in their entirety upon those to whom they are addressed. Art. 192 adds that "decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States shall be enforceable". Therefore, a striking peculiarity of the EEC, compared to other IEOs, is that its binding acts may be addressed not only to the Member States, but also directly applicable to their nationals. For example, Art. 3 of the Council Regulation 2641/84 says: "Any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers that it has suffered injury as a result of illicit commercial practices may lodge a written complaint"¹⁸⁴. Art. 4 of the Commission Decision 83/671 definitely states: "The Decision shall apply to the oil companies to which it is addressed"¹⁸⁵.

Some other IEOs also take decisions which address the rules of conduct to the national persons of the Member States. However, unlike the EEC, these rules are applied to national persons not directly, but are to be enforced by the competent authorities of the Member State concerned (e.g. the Andean Group¹⁸⁶).

184. See 23 ILM 1420 (1984).

185. See 28 ILM 465 (1984).

186. For example, Art. 28 of the Andean Group Commission Decision 292 entitled "Unified Code on Andean Multinational Enterprises" provides: "In the event of a violation of this Code by an Andean Multinational Enterprise in the Member Country of the principal domicile or at the branches, the national competent entity of the Member Country where the violation has occurred shall apply in

(Footnote continues on next page)

A new phenomenon in IEOs' decision-making as regards addressees has been provided by the 1991 Treaty Establishing the AEC. The Assembly of the Community is empowered to take decisions that are binding not only upon the Member States and the organs of the AEC, but also upon regional economic communities (such as the ECCAS, the ECOWAS, the PTA), which do not formally belong to the AEC members (Art. 10). Therefore, not being a supranational IEO, the AEC pretends to become a sort of a supra-regional "umbrella" institution affecting other less capacious regional communities through the common Member States. It is not clear, however, how viable this model will be. From a formal legal standpoint, the AEC Treaty may establish the rights and/or obligations for the third international legal persons (which are in this case the regional economic communities) only with their consent. The common State membership of the AEC and the regional economic communities facilitates obtaining such a consent in principle. But the procedural vulnerability of the whole "supra-nationality" model lies in the Assembly's power to take binding decisions by a two-thirds majority of the Member States (if a consensus fails to be achieved) against a one-third minority, which might potentially consist of the Member States of the regional economic communities - the addressees of such decisions. Obviously, a proper implementation of such binding acts might be very problematic.

2.2. Recommendations

(Footnote continued from previous page)

accordance with its internal provisions, the corresponding sanctions or measures, including to annul the classification as an Andean Multinational Enterprise or as a branch thereof. Any such action shall be notified to the Board, which shall inform the other Member Countries" (30 ILM 1301-1302 (1991)).

It may appear strange, but the recommendations of IEOs used to draw more attention from commentators than binding decisions. Two reasons for this may be observed. Firstly, for a long time there has been a widely shared view, that recommendations are the primary product of an organization's rule-making activities, while binding decisions mainly concern procedural matters, and therefore, are of less importance (an exception was usually reserved for the EEC). Nowadays, this argument does not work any more at least for IEOs, most of which are authorized to take binding decisions in substantive matters. Secondly, and this reason still remains important, unlike decisions taken mainly on more concrete and less controversial issues concerning a limited number of Member States, many recommendations, especially those of the universal organizations, relate to a wide spectrum of matters of general importance and in many ways influence the state and developments of general international law¹⁸⁷. Consequently, the main debates revolve around (1) the so-called 'soft' law; (2) the legal nature of the UN General Assembly resolutions; and (3) the impact of recommendations on creation of customary rules.

(a) Recommendations as a "source" of "soft" economic law

A concept of 'soft' economic law in its modern version is a kind of reaction, on the one hand, to the difficulties in the formulation of universal IEL, and on the other, to a considerable growth in the recent years of the number and legal significance of the IEOs' recommendations. One of the authors of the 'soft' economic law concept, I.Seidl-Hohenveldern writes: "At present chances are dim for

187. Meanwhile, Kohona's remark on some initial drawbacks of the resolutions deserves to be quoted: "It is very likely that they are not the result of detailed and scholarly examination and they may have been prompted by purely political or emotive factors. There is also no guarantee of the timeliness or the practicability of such resolutions" (P.I.B.Kohona. Op cit., p. 9).

establishing firm rules susceptible of worldwide acceptance"¹⁸⁸. That is why he pins his hopes on the rules of 'soft' law, most of which are or will be formulated by acts of international organizations¹⁸⁹. I.Seidl-Hohenveldern also writes about 'soft definitions' and 'soft procedure' for the rules concerned, which in his opinion, have allowed solutions impossible under 'strict' law¹⁹⁰.

Some ideas on 'soft' law were suggested by the contributors to "Change and Stability in International Law-Making" (ed. by A.Cassese & J.Weiler). The discussion on its pages shows once more that far from being groundless, the concept of 'soft' law is still vague and does not have general acceptance¹⁹¹. One of the obstacles for a uniform approach to the 'soft' law instruments is their strong variety in form, language, subject matter, participants, addressees, purposes, follow-up and

188. I.Seidl-Hohenveldern. International Economic 'Soft' Law. - In: Recueil des Cours, 1979-II, vol. 163, Alphen aan den Rijn, 1980, p. 225.

189. Op. cit., p. 205.

190. Op. cit., p. 209.

191. "Is it ('soft' law - S.V.) a theoretical aberration which is contrary to meaningful legal discourse, or is it part of the norm setting process as an intermediate category between lex lata and lex ferenda", - asks J.Weiler. And he is answered in both optimistic and more pessimistic ways:

"...between the world of hard law on the one hand (made up of binding rules specifically requiring or forbidding a particular conduct, or authorizing it, thereby obliging the other addressees of the same rule to tolerate such authorized behaviour) and the world of non-law on the other, there is a transitional zone in which the elements characterizing these two worlds are mixed in very variable proportions... But we have to admit that at present this transitional zone is becoming steadily wider than it was in the past. The term soft law has become fashionable for precisely that reason; the phenomenon has no doubt always existed but it has today taken on such gigantic dimensions that it could no longer go unnoticed by even the most distracted observer" (L.Condorelli);

"...there are cases where the adoption of soft law may represent a first step towards the possible adoption - through further adequate steps - of hard law, or just law without any adjective. This does not, however, justify recourse to soft law devices on the part of States in order to cover up unwillingness to achieve more substantial law-making results, presenting peoples or other States with a poor substitute for what is needed. Nor does it justify attitudes of complacency on the part of those scholars who seem at time too anxious to applaud as achievements soft law solutions which are only illusory" (G.Arangio-Ruiz) (Change and Stability in International Law-Making, p. 63, 80, 82, 83).

monitoring procedures¹⁹².

In the meantime, what is called "soft" economic law (though its frameworks are not definitely outlined) appears to reflect some real phenomena in international rule-making. At present, the resolutions of the UN General Assembly, the UNCTAD, the recommendations of the OECD, etc. make up to some extent for the lack of universally binding norms of IEL badly needed by the international community but unlikely to be immediately created. Some of these recommendatory acts, though not necessarily all of them, as G.Arangio-Ruiz rightly noted¹⁹³, sooner or later take the shape of real law (e.g. numerous acts on permanent sovereignty over natural resources); others first make pre-legal regulatory effect¹⁹⁴ and then partially penetrate into international and municipal laws. The best illustration of the latter point is the way in which the Generalized System of Preferences (GSP) was transformed from a recommendatory idea into a new institute of IEL¹⁹⁵.

The first UNCTAD recommendations on the GSP in favour of developing countries appeared in the 1960s¹⁹⁶, and within a short period of time (a little more than ten years) they were adhered to by nearly all developed industrial countries, which

192. See C.M. Chinkin. The Challenge of Soft Law: Development and Change in International Law. - In: ICLQ, 1989, Part 4, p. 850.

193. Op. cit., p.83.

194. See I.I.Lukashuk. Mechanism of International Legal Regulation. Kiev, 1980, p. 140 (in Russian); I.I.Lukashuk. International Organizations and the Functioning of International Law. - In: Indian Journal of International Law, 1984, N 1, p. 74.

195. See S.A.Voitovich. The Legal Regulation of the Generalized System of Preferences. - In: Foreign Trade, 1988, N6.

196. Resolution 21 (II) "Preferential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries" (1968) is of primary importance in this connection.

issued national preferential tariff schemes¹⁹⁷. In 1971 the Contracting Parties of the GATT made temporary exemption for preferences from Art.1 on the most-favoured-nation treatment, which in 1979 took the shape of the so-called "enabling clause". Certainly, the existing preferential schemes are not free from shortcomings. They vary in beneficiaries, goods nomenclature, scopes of preferences, regimes for the least developed countries, and rules of goods origin; some schemes have discriminatory restrictions. Nevertheless, the fact that the majority of developed industrial countries reacted positively to the UNCTAD recommendations is sufficient proof of their regulatory effect which is even more visible than in some binding legal norms. These recommendations influenced both municipal laws (national preferential schemes) and international treaties (the GATT provisions relating to developing countries, preferential rules in the Lome Conventions, some agreements on regional economic cooperation, etc.), as well as have become a starting point for the creation of new customary norms (e.g. a customary rule under which preferences in favour of developing countries must not be qualified as an illegal discrimination of developed countries).

Another example of "soft" economic law is the so-called "codes of conduct" adopted by various IEOs¹⁹⁸. Strictly speaking, many of such IEOs' acts contain recommended rules of conduct addressed to the Member States and their nationals¹⁹⁹. But even should they never be transformed into traditional IEL, the codes of conduct may generate a considerable regulatory effect influencing developments in the

197. The preferential schemes were adopted by the USSR (1965), Australia (1966), EEC, Japan, Norway (1971), Austria, Bulgaria, Czechoslovakia, Finland, Hungary, New Zealand, Sweden, Switzerland (1972), Canada (1974), Poland, the USA (1976).

198. See e.g. R.Schwartz. Are the OECD and UNCTAD Codes Legally Binding? - *International Lawyer*, 1977, vol. 11, p. 529-536.

199. In the meantime, some other codes are framed as legally binding acts (e.g. the Code of Liberalization of Capital Movements adopted by the OECD Council in 1961, the Code of Conduct for Liner Conferences of 1974, the Andean Foreign Investment Code of 1976).

corresponding branches of the Member States' national laws. As R.J. Waldmann notes, "perhaps the most important potential benefit of a code is the harmonization of national laws and regulations"²⁰⁰. For instance, to take the International Code of Conduct on the Distribution and Use of Pesticides adopted by the FAO Conference (Resolution 10/85) in 1985, it is voluntary in nature but serves as a guideline for the Member States, especially if they have not established adequate national legal instruments. Art. 11 of the Code states: "The objectives of this Code are to set forth responsibilities and establish voluntary standards of conduct for all public and private entities engaged in or affecting the distribution and use of pesticides, particularly where there is no or inadequate national law to regulate pesticides". Under Art. 12.3, "all parties addressed by this Code should observe this Code and should promote the principles and ethics expressed by the Code". It is noteworthy that the German Plant Protection Act of 1987 is considered an example for "direct but soft implementation" of the above FAO Code²⁰¹.

The Recommendation of the OECD Council Concerning Restrictive Business Practices Affecting International Trade of 1986²⁰² is also framed as a code of conduct. Its principal part is preceded by the following words of the preamble: "The Council recommends... to the Governments of Member countries that insofar as their laws permit" they "should" (this term is frequently used in the text) comply with the enumerated rules. The Recommendation provides for a special implementation procedure. The other examples of voluntary codes of conduct in this field are the

200. R.J. Waldmann. *Regulating International Business through Codes of Conduct*. Wash., D.C., 1980, p. 23.

201. Ph. Kunig. *The Relevance of Resolutions and Declarations of International Organizations for Municipal Law*. - In: *International Law and Municipal Law. Proceedings of the German-Soviet Colloquy on International Law at the Institut für Internationales Recht an der Universität Kiel, 4 to 8 May 1987*. Berlin, 1988, p. 65-66.

202. See the text in 25 ILM 1629-1636 (1986).

OECD Guidelines for Multinational Enterprises of 1976, the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Conduct of Restrictive Business Practice of 1980.

If we take the recommendations of the CARICOM Conference, many of them also appear to belong to "soft" economic law. Art. 9 of the Treaty Establishing the CARICOM distinguishes binding decisions and recommendations of the Conference. The latter (though, formally non-binding) are to be observed by the Member States. A Member State which failed to observe a recommendation, not later than six months thereafter shall submit a report to the Conference, giving reasons for its non-compliance.

It can be concluded, that the term "soft" economic law (though linguistically not perfect) is used for indicating formally non-binding acts of IEOs which possess at least one of the following features: (1) contain rules which are expected to be transformed under favorable conditions into the norms of international or municipal laws; (2) perform pre-legal regulation in the certain fields of relationships between the Member States, where the adequate legal instruments have not been established yet²⁰³. From a strict positivist viewpoint, what is called "soft" law does not belong to a real international law as a system of consensual legally binding norms. At the extreme, the "soft" law may be considered as some kind of

203. To quote Chinkin, "Even the expectation that instruments of soft law will be ignored is an important indicator of future behaviour. Those States that reject any particular resolution or code do not generally distance themselves from the negotiating process and do not subsequently ignore its existence. Instead they make it public that they feel no obligation to comply, allowing other States to react as they think appropriate" (C.M. Chinkin. *The Challenge of Soft Law: Development and Change in International Law*. - In: *ICLQ*, 1989, Part 4, p. 866).

"pre-law"²⁰⁴. An opposite approach dividing international law into "hard" and "soft" is fraught with a methodological error, namely, the erosion of the border between legal and non-juridical norms, when, using L.Lazar's expression, the wheat of law can not be separated from the chaff of pseudo-law²⁰⁵. I agree with those who think, that "soft" law is better than nothing. But it must not be overestimated and the attempts to produce legally binding norms of IEL, where it is necessary, must not be discouraged.

(b) UN General Assembly Resolutions

Another subject of intensive discussion are the UN General Assembly resolutions²⁰⁶. Some authoritative conclusions summarizing their legal meaning were made in a special Resolution of the Institute of International Law adopted in 1987²⁰⁷.

The first point, practically unchallenged now, is that there are resolutions and resolutions, notwithstanding their equally non-binding character under the UN Charter provisions. It is clear without special analysis that, for instance, the

204. An interesting theoretical question is how do 'soft' law and lex ferenda correlate? Without pretending to give an exhaustive answer, it may be observed that these phenomena only partly coincide. When a 'soft' law rule is expected to be transformed into lex lata and has the real chances for this, it can be equated to what is called lex ferenda. However, the latter term may apply to the instruments which are not normally termed as 'soft' law (e.g. a non-ratified convention which is supposed to be ratified in a visible future), or to the ideas about the future development of law, which do not have any 'soft' law form (e.g. a legal definition of economic aggression).

205. L.Lazar. *Transnational Economic and Monetary Law. Transactions & Contracts. Introduction.* N.Y., 1977, p. 207.

206. See e.g. J.Hagashi. *The Role of Resolutions of the United Nations General Assembly in the Formative Process of International Customary Law.* - In: *The Japanese Annual of International law* 1982. Tokyo. 1982, p. 11-25.

207. See *Annuaire de l'Institut de Droit International* 1987. Paris, 1988, p. 274-289.

Charter of Economic Rights and Duties of States and a resolution on a narrow technical matter, being formally equal, can not be equated by their actual significance. Nonetheless, it does not appear very convincing when, due to their subject-matter, the UN General Assembly resolutions are classified into recommendations and law-making resolutions²⁰⁸. According to the UN Charter, all of them are recommendations, and even the highest doctrinal appreciations can not change this status²⁰⁹. The other thing is that different recommendations may have zero, insignificant and more considerable law-declaring or law-developing effects.

The Resolution of the Institute of International Law entitled "Resolutions of the General Assembly of the United Nations" (Conclusion 6) puts forward a number of elements which help to identify law-declaratory and law-developing resolutions, as well as those relevant to the application or interpretation of law:

- (a) the intent and expectations of States;
- (b) respect for procedural standards and requirements;
- (c) the text of the resolution;
- (d) the extent of support for the resolution;
- (e) the context in which the resolution was elaborated and adopted, including relevant political factors;
- (f) any implementing procedures provided by the resolution.

Undoubtedly, one of the most disputable resolutions of the UN General Assembly

208. See T.O.Elias. The Rulemaking Process and the Future of International law. - In: American Society of International Law. Proceedings of the 75th Anniversary Convocation. April 23-25, 1981. Wash., 1983, p. 29-30.

209. The recommendatory character of the General Assembly Resolutions was repeatedly stressed by the ICJ (see e.g. the South West Africa (Second Phase) case (1966) (I.C.J. Reports, 1966, 50-51), the Advisory Opinion on Namibia (1971) (I.C.J. Reports, 1971, 50).

is the Charter of Economic Rights and Duties of States of 1974²¹⁰. The estimates of its legal value varied from reserved pessimism²¹¹ to excessive optimism²¹². The Charter was adopted in the period when the efforts aimed at the establishment of the New International Economic Order achieved their culmination. However, the Western countries unwilling to assume far-reaching obligations of a general character in the economic field practically boycotted this document. It is remarkable, that only a half a year earlier another General Assembly Resolution, the Declaration on the Establishment of a New International Economic Order, which dealt with approximately the same scope of issues but was formulated in a more declaratory and less legal language, was passed by consensus.

Although, the practical impact of the Charter has not met the initial expectations, it can not be said that the Charter had zero effect²¹³. Certainly, not all the provisions of the Charter were realistic. Some of them, though just, were unlikely to be ever implemented²¹⁴. But still the Charter remains the only document which:

- (1) formulates in detail the normative contents of the principles of IEL and

210. It was adopted on 12 December 1974 by 118 votes to 6, with 10 abstentions.

211. See e.g. M.Akehurst. Custom as a Source of International Law. - In: BYIL 1974-1975, Oxford, 1977, p. 6; Texaco Oversea Petroleum Company/ California Asiatic Oil Company v. Government of the Libyan Arab Republic (1977). - 17 I.L.M. (1978) 29-31; J.S.Stanford. International Law and Foreign Investment. - In: The International law and Policy of Human Welfare, p. 489-490.

212. See T.O.Elias. Op. cit., p. 29-30.

213. See American Society of International Law. Proceedings of the 75-th Anniversary Convocation, p. 122.

214. For example, the provision of Art. 16 declaring that all States practicing colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination "are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and deflection of, and damages to, the natural and all other resources of those countries, territories and peoples".

may be used for their interpretation²¹⁵;

(2) constitutes evidence of some basic customary rules of IEL (e.g. the right to nationalize foreign property, the principle of economic non-discrimination, etc.), though, this evidence is weakened by the negative votes and abstentions of the Western States;

(3) suggests authoritative recommendations on the development of existing, and formulation of new norms of IEL (e.g. the rules concerning regulation and supervision of the activities of transnational corporations; transfer of technology, tariff preferences to developing countries, non-use of economic coercion);

(4) is the first step in a badly needed codification of IEL which has, however, a non-binding character and yields to the conventional codifications typical for many other branches of public international law²¹⁶.

(c) Recommendations and customary international law

Nowadays, the contribution of recommendations to customary international law becomes apparent. B.Sloan rightly explains why customary rules need recommendations as an auxiliary means for their formulation and interpretation: "Custom by its very nature, being derived from diffuse practice, may lack the precision of a text. Resolutions will define, formulate, reformulate, clarify, specify and authenticate a

215. A broad recognition of the basic principles of IEL was confirmed by the fact, that Chapter 1 of the Charter, apart from the point "peaceful coexistence", was adopted with no negative votes. The Charter's role in formulation and interpretation of the principles is well seen in the analytical research of the principles and norms of international law relating to the New International Economic Order made by the UNITAR (See UN doc. A/39/504/Add. 1).

216. See some more details on the Charter evaluation in: S.K.Chatterjee. The Charter of Economic Rights and Duties of States: An Evaluation after 15 years. - In: ICLQ, 1991, Vol. 40, Part 3, p. 669-684.

text and corroborate the rule contained therein"²¹⁷.

Recommendations not only "decipher" existing customary law, but also serve as an element of opinio juris²¹⁸. Certainly, the fact of voting in favour of a resolution taken alone does not make convincing proof of opinio juris. What must be taken into account is that sometimes States vote solely on political grounds, not having an intent to produce any legal effect²¹⁹. But together with other evidences of opinio juris (official statements, judicial judgements, national laws, etc.) recommendations may be sufficient proof that a customary legal rule exists and is binding upon the State concerned.

A classical example of how recommendations influence international customary law is the UN General Assembly Resolution 1803/XVIII/1962 on permanent sovereignty over natural resources. The fact that it reflects existing customary law concerning nationalization was admitted by professor R-J.Dupuy, the sole arbitrator in the dispute on nationalization between Libya and American oil companies²²⁰. Some authors noted also "a destructive effect" of this Resolution²²¹, which denied the formula of "prompt, adequate and effective compensation" in favour of 'appropriate

217. B.Sloan. General Assembly Resolutions Revisited (Forty years after). - In: BYIL 1987. L., 1988, p. 69.

218. In the Nicaragua case (1986) the ICJ stated that opinio juris in respect to the customary principle of non-use of force "may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly Resolutions..." (I.C.J. Reports, 1986, 13).

219. See O.Schachter. International Law in Theory and Practice. General Course in Public International Law. - In: Recueil des cours, 1982-V, p. 115.

220. See Texaco Oversea Petroleum Company/ California Asiatic Oil Company v. Government of the Libyan Arab Republic (1977). - 17 I.L.M. (1978) 21; D.Johnson. The New International Economic Order. - In: Yearbook of World Affairs 1984, vol. 38, L., 1984, p. 222-223; S.Zamora. Is There Customary International Economic Law? -In: GYIL 1989, B., 1990, p. 23-25.

221. See Change and Stability in International Law-Making, p. 50.

compensation". However, what is "appropriate compensation" still remains disputable²²².

Recommendations are not only declarations of existing customary law already crystallized in States' practice, but may also be a focal point for a further development of a customary rule²²³, i.e. both proceed and precede States' custom-making practice. An example of the latter variant, the UNCTAD resolutions on preferences, has been already mentioned. In this case international community, and the developed countries in particular, appeared to be receptive to the new ideas suggested by the UNCTAD. Those UNCTAD resolutions were timely and, therefore, successful. This is an example, though still comparatively rare, when, using the expression by L. Condorelli, the resolutions "have penetrated from the world of words into the world of reality"²²⁴.

At present, there is another problem, much more complicated than the problem of preferences, which urgently needs its adequate international legal regulation and as a starting point the relevant recommendations of IEOs. That is the problem of the legitimacy of use of economic force in international relations.

The economic security of individual States, as well as global international economic security on the whole, are unimaginable without a clear legal definition of what legitimate conditions, forms and limits of use of economic coercion are, and when the use of economic force becomes unlawful, especially in such an extreme and dangerous form as economic aggression²²⁵. It is unrealistic to expect a universal

222. See UN doc. A/39/504/ Add. 1, p. 16-17.

223. See J. de Arechaga. International Law in the Past Third of a Century. - In: Recueil des cours, 1978-I, vol. 159, p. 31.

224. Change and Stability in International Law-Making, p. 42.

225. See S.A. Voitovich. Legitimacy of the Use of Economic Force in International Relations: Conditions and Limits. - In: World Competition, 1992, Vol. 15, No 4, p. 27-36.

treaty to regulate this problem in the visible future, but the recommendations of such organizations as the UN, UNCTAD and some others are a plausible consideration. They could produce a legal effect similar to that of a well-known General Assembly Resolution 3314/XXIX/1974 on the definition of armed aggression. The ground for this has been already prepared by a number of acts condemning economic coercion aimed against sovereignty and economic security of other States²²⁶. To quote Dr. Omer Yousif Elagab, "...although these Resolutions have not as yet evolved into clearly defined rules proscribing economic coercion, there are signs that they are gradually narrowing-down the permissible character of that concept"²²⁷.

* * *

It can be concluded, that the IEOs' regulatory acts have become an essential factor of norm-making in IEL and of the movement to what is called a law-oriented international economic society. Some of them (binding decisions) are the sources of international law, others (recommendations) perform law-interpreting, law-declaring and law-developing functions. The efficiency of IEOs' acts perceptibly depends on such a choice of decision-making procedures which makes it possible to combine the operative regulation with the adequate protection of the interests of the Member

226. See, for example, the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (Resolution 2131 (XX)), Art. 32 of the Charter of Economic Rights and Duties of States, the 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (Resolution 36/103); the UNCTAD Resolution "Rejection of Coercive Economic Measures" (Resolution 152/VI/1983); the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations (Resolution 42/22); the 1989 UN General Assembly Resolution "Economic Measures as a Means of Political and Economic Coercion Against Developing Countries" (Resolution 44/215).

227. Omer Yousif Elagab. *The Legality of Non-Forcible Counter-Measures in International Law*, Oxford, 1988, p. 212.

States concerned. One can hardly find an IEO with an ideal decision-making model. But their common experience suggests useful data for the draftsmen of new constituent documents, as well as for those IEOs whose decision-making mechanisms need improvement.

CONCLUDING REMARKS TO THE SECOND PART

During a relatively short period of their existence, IEOs have accumulated a rich arsenal of law-making techniques, some of which can be considered as an important contribution to the overall international legal practice.

A striking peculiarity of IEOs, compared to many other international organizations, is that most of them are authorized to take binding decisions not only in procedural but also in substantive matters. A highly specialized character of the issues IEOs deal with and their vital importance for the Member States require more strict legal instruments than mere recommendations, which were traditionally considered as the main product of the organizations' rule-making. It should be stressed that a binding decision in substantive matters formulating the rights and obligations of the Member States differs from a treaty and custom as traditional sources of international law in many ways, but in the end has the same regulatory effect on international economic relations. Such binding decisions must be recognized as a full-fledged source of international law covered by the principle pacta sunt servanda.

The integrational IEOs gave birth to such new decision-making phenomena as: (1) "supranationality", when the organization's normative acts are directly applied to the nationals of the Member States without resort to national legal procedures (the EEC, to some extent the Andean Group), and (2) "supra-regionality", when an "umbrella" organization may issue decisions binding upon the regional economic institutions which do not formally belong to the "umbrella" organization's membership (the AEC). These innovations to the international law-making experience witness that the more homogeneous an IEO is, the more Member States trust it and, therefore, invent the most far-reaching decision-making models. In practice, the "supranationality" concept, at least within the European Communities, has already

proved its feasibility, while the recently suggested pattern of "supra-regionality" within the AEC has not yet got enough time to demonstrate how it works.

The emphasis on binding decisions must not shadow the IEOs' recommendations, some of which discharge law-interpreting, law-declaring and law-developing functions. The concept of "soft" economic law, albeit linguistically not perfect, is a noteworthy contribution to the theory of law of IEOs, denoting formally non-binding acts of organizations with a notable regulatory and law-developing potential. The instruments of "soft" economic law, being diverse in many parameters, possess at least one of the following features: (1) contain rules which are expected to be transformed under favourable conditions into the norms of international or national laws; (2) perform pre-legal regulation in the certain fields of relationships between the Member States, where the adequate legal instruments have not been yet established. However, those who support this concept should avoid a methodological error of confusing lex lata as a system of consensual legally binding norms and lex desirata as a sort of "pre-law" rules which can be only expected to become a full-fledged law.

In sum, the impact of the IEOs' non-binding recommendations on the process of law-making may be many-fold:

- (1) serving as the auxiliary means for interpretation of the existing legal acts;
- (2) constituting an evidence of customary law;
- (3) stimulating the emergence and evolution of legal rules in customary, treaty and decision forms;
- (4) preparatory codification;
- (5) pre-legal regulation.

The existing IEOs have also amassed a valuable experience of the application of sophisticated decision-making procedures, which might be helpful for other international institutions. The only relevant test for decision-making techniques is whether substantive decisions are taken both operatively and with an adequate

protection of the Member States' interests. In this respect, IEOs have elaborated the models of reasonable combination of majority voting, unanimity and consensus, taking into account the subject-matter and the importance of the decisions, as well as the conditions under which those decisions are to be taken. Along with other international organizations, IEOs have applied diverse technical means aimed at diminishing the possible negative effects of both majority voting and unanimity, namely, a combination of simple and special majority voting, "weighted" voting, "relative unanimity", and contracting-out procedures. Remarkably, certain procedural mechanisms provided by the IEOs' founding acts often have a potentially protective and stimulating character (e.g. majority voting, "weighted" voting), i.e. Member States prefer to use them rather as a shadow under which the consensual decisions can be reached easier. Finally, the experience of existing IEOs shows that formal procedures may be viable only if they account the actual correlation of economic powers of the interacting Member States and other economic factors affecting the efficiency of possible decisions.

As regards the IEOs' treaty-making, both direct and preparatory, it does not considerably differ from that of other international organizations in view of applied drafting and procedural techniques. More variety can be seen in the contents of concluded agreements.

By analogy to the relationship between international legal personality and international legal status of an IEO considered in the First Part, the Second Part deals with an IEO's treaty-making capacity and treaty-making competence. The term "treaty-making capacity" denotes in general outline that a particular IEO possesses a functionally determined legal right to enter into international agreements with other subjects, while "treaty-making competence" is a measurable category which specifies the types of treaties to be concluded, the distribution of treaty-making powers among the bodies, and the procedures applied within them.

The treaty-making competence of IEOs, as it is shaped in constituent instruments, differs from one organization to another due to the peculiarities of their creation, subject-matter and functions, as well as the skills of the drafters of those documents. It is presumed that even a broadly shaped treaty-making competence of an IEO is limited by its subject-matter and functional peculiarities, and cannot be equated to that of a State.

From a pragmatic viewpoint, the optimal, though rarely seen in practice, formula might be a precisely defined wide-ranging treaty-making competence, provided that the "wide range" lies within the limits of the IEO's subject-matter and functional needs. This variant, first, saves from a resort to the concept of "implied powers", and, second, does not leave an undesirable ambiguity as to the treaty-making procedure and distribution of powers among the IEO's bodies.

As many other international organizations, IEOs enter into agreements with Member-States, non-members and other international organizations. Some of these agreements suggest better opportunities, compared to those of individual States, for collective technical and financial assistance (agreements on technical assistance, financial agreements), for the establishment of special regimes of multilateral co-operation (e.g. the EEC agreements on association). Others are concluded for the IEOs' "internal" needs (e.g. the headquarters agreements, the agreements on the status of the UN specialized agency) or for more effective realization of their functions in the matters of common competence (e.g. Memorandums of understanding). Obviously, there is a large difference from one IEO to another both as to the intensity of treaty-making and the importance of concluded treaties.

A logic trend in the standard-setting process within IEL is the development of multilateral treaty-making on the institutional base of IEOs, which possess appropriate financial, technical and expert facilities. Being involved in drafting and adoption of multilateral conventions, IEOs discharge an important but auxiliary

law-making function, since the primary law-makers in this case are the States expected to become the contracting parties to the relevant conventions.

Admittedly, the convention-making process within IEOs is spontaneous, rather than systematic. IEOs strongly vary in their convention-making capacities and practice. Few of them have special statutory provisions relating to convention-making, while most IEOs are oriented to the arising practical needs. Ad hoc drafting bodies using similar methods and techniques prevail over few permanent convention-making organs.

The most successful convention-making within IEOs has been seen in the specialized matters of mostly technical character, where the consent of vast majority of Member States can be reached more easily. On the contrary, general codification conventions less attainable for a broad agreement are still the matter of lex ferenda, if not lex desirata.

THIRD PART: THE LAW-IMPLEMENTING FUNCTIONS OF INTERNATIONAL ECONOMIC ORGANIZATIONS

How efficiently a legal system works is best seen in the manner in which its normative provisions are transformed into practice. In this sense, one can not be completely satisfied with the state of the international legal rules' implementation¹ in the economic field.

On the one hand, there are certain factors encouraging the proper realization of the norms of IEL. First, this is a high degree of reciprocity in economic cooperation, when one party's non-compliance with its obligations deprives it of the corresponding benefits promised by another party. Hence, reciprocity and mutual benefit are rightly considered the best guarantees for the proper observance of international obligations. Among the other positive factors of effective implementation are the clear and detailed manner in which many norms of IEL are formulated; the quick renovation of the rules in accordance with rapidly changing practical needs; and the recourse to special institutional means of law enforcement.

Yet, the state of the IEL rules' implementation should not be overestimated. Breaches of law occur all too often. Dozens of claims and disputes relating to the non-compliance with legal obligations are considered each year. These negative experiences of the international economic order are primarily caused by certain socio-economic factors, firstly, by the conflicts of economic interests of the

1. Without going into the details of the terminological dispute on the use of terms "implementation", "realization", "execution", "enforcement", "application", etc., in this paper implementation is considered in a broad sense, as the stage of international legal process at which the subjects apply the whole complex of institutional, norm-making, supervisory, norm-executing and law-enforcing means in order to ensure the proper and timely realization of international legal rules. (See more details on the concept of implementation in: A.S.Gavardovskij. The Implementation of International Legal Norms. Kiev, 1980, p. 47-62 (in Russian).

interacting States, which seem, unfortunately, inevitable in the present-day international economic life. (Even in a rather homogeneous integration system, like the EEC, the disputes are not a rarity). Secondly, breaches of law may occur when economic benefits are sacrificed to political pressure. (This was quite a typical practice during the Cold War period). And finally, the shortcomings of legal technique in both law-making and law enforcement should also be borne in mind.

Therefore, the problem of implementation in IEL has numerous facets. In this Part only one of them shall be tackled - what the law-implementing facilities of IEOs are and in what manner these are applied². The analysis covers the main law-implementing functions discharged by IEOs. These are: (1) interpretation; (2) subsequent rule-making; (3) supervision; (4) operative norm-execution; (5) dispute resolution; (6) sanctions.

CHAPTER VI. INTERPRETATION AND SUBSEQUENT RULE-MAKING

1. Interpretation

Obviously, interpretation, i.e. finding the proper meaning of a norm, is an indispensable stage of its implementation. Even the rules, which are well formulated, are to be uniformly understood by their addressees, since the drafters cannot foresee all the possible de facto situations covered by the norms they produce. Moreover, the norms with unclear wordings (either because of the lack of a

2. To quote Lukashuk, "the capacity of international organizations is aimed largely not at creating new norms but at the realization of the already existing ones" (I.I. Lukashuk. *International Organizations and the Functioning of International Law*. - In: *Indian Journal of International Law*, 1984, N 1, p. 74).

clear agreement between the parties, or due to the fault of the drafters), are unable to function without official interpretation. In the latter case interpretation may generate both norm-making and norm-executing effects.

Which rules may be interpreted by the IEOs? Apparently, the provisions of the constituent instruments, the treaties with their participation, as well as their own normative acts fall into this category. This is likely to be presumed in all IEOs, although only few of their statutory acts contain explicit provisions on interpretation.

An elaborate interpretation procedure is laid down by the Articles of Agreement of the IMF. Under Art. XXIX, "any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any member of the Fund shall be submitted to the Executive Board for its decision". Within three months from the date of such a decision, any member may require that the question be referred to the Board of Governors, whose decision shall be final. The Board of Governors establishes the Committee on Interpretation, whose decision shall be the decision of the Board, unless the latter decides otherwise. Pending the result of the reference to the Board of Governors, the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Board. Apart from this, Art. XXX gives an explanation of some terms used in the Agreement. It is important to note that the Fund has an exclusive power to interpret its own Articles of Agreement. Such interpretations given by the Fund have been recognized in the courts of the Member States³.

A similar scheme of interpretation follows from the statutory acts of other international financial organizations, such as the IBRD, the IFC, the IDA, the EBRD,

3. See P.I.B.Kohona. Op. cit., p. 200.

the IADB, the AMF⁴. The main difference, in comparison to the Fund, is the absence of provisions on a special committee on interpretation⁵.

A notable example of the IBRD and IMF interpretation was seen in the matter of IBRD and IMF v. All America Cables & Radio, Inc., and Other Cable Companies, considered by the United States Federal Communications Commission in 1953⁶. The Commission concluded that the United States Government was obliged to act in conformity with the interpretations issued by the Executive Directors of the Bank and Fund in accordance with the provisions of their constituent instruments. Thus, the binding and final character of the IBRD and IMF interpretations was confirmed at the national judicial level.

In some regional integration organizations the interpretative function is endowed to the permanent courts (the Court of Justice of the European Communities⁷, the Court of Justice of the Cartagena Agreement⁸, the Court of

4. Articles IX, VIII, X, 57, XIII, and Fifty-one of the constituent instruments respectively.

5. For more details on the interpretation in international financial organizations see in: E.P.Hexner. Interpretation by Public International Organizations of Their Basic Instruments.- In: AJIL, 1959,N 2, p. 341-370; F.A.Mann. The 'Interpretation' of the Constitutions of International Financial Organizations. - BYIL 1968-1969. Oxford, 1970, p. 1-19.

6. See ILR 1955, London, 1958, p. 705-712.

7. Under Art. 177 of the Treaty of Rome, "the Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community; (c) the interpretation of the statutes of bodies established by an act of the Council, whose statutes so provide". On judicial interpretation in the EEC law see: Anna Bredimas. Methods of Interpretation and Community Law. Amsterdam/New York/Oxford, 1978.

8. Art. 2 of the Statute of the Court of Justice of the Cartagena Agreement defines the Court as "the jurisdictional body created to assure respect for law in the application and interpretation of the juridical order over the Agreement".

Justice of the AEC⁹, the Tribunal in the ECOWAS¹⁰, the Court of Justice of the ECCAS¹¹, the Tribunal of the PTA¹², the Arbitration Commission of the CEPGL¹³).

The statutory acts of some other IEOs provide that the questions of interpretation are within the competence of either supreme (e.g. the ITPA¹⁴), or both supreme and executive organs (e.g. the OPEC Fund for International Development¹⁵). A special subsidiary organ dealing with interpretation may be also set up (e.g. the FAO Committee on Constitutional and Legal Matters¹⁶).

9. Under Art. 18 of the Treaty Establishing the AEC, "the Court of Justice shall ensure the adherence to law in interpretation and application of this Treaty and shall decide on disputes submitted thereto pursuant to this Treaty".

10. Art. 11 of the Treaty of the ECOWAS states: "There shall be established a Tribunal of the Community which shall ensure the observance of law and justice in the interpretation of the provisions of this Treaty".

11. According to Art. 16 of the Treaty for the Establishment of the ECCAS, "the Court of Justice shall be responsible for observance of the law in the interpretation and application of this Treaty".

12. Art. 10 of the Treaty for the Establishment of the PTA stipulates that the Tribunal "shall insure the proper application or interpretation of the provisions of this Treaty".

13. Under Art. 25 of the Convention Establishing the CEPGL, "the Arbitration Commission shall ensure compliance with the law in interpreting and applying this Convention".

14. Under Art. 16 of the Agreement Establishing the ITPA, "in the event of any question of interpretation of any clause of this Agreement arising, the matter shall be referred to the Governing Board of the Association whose decisions shall be final and binding on all parties".

15. Art. 12 of the Agreement Establishing the Fund says: "Any question of interpretation of the provisions of this Agreement, or any dispute between the Members of the Fund or between an Executing National Agency and the Fund shall be settled by the Governing Board and failing this by the Ministerial Council".

16. Under Rule XXXIV of the General Rules of the Organization, this Committee "shall consider specific items referred to it by the Council or the Director-General which may arise out of: (a) application or interpretation of the Constitution, these Rules and the Financial Regulations or amendments thereto; (b) the formulation, adoption, entry into force and interpretation of

(Footnote continues on next page)

Is an interpretation by a policy-making organ or a specialized judicial body preferable? The answer depends on the subject-matter and the parties concerned with such interpretation. A policy-making organ being less formalized, more operative, and, what is of utmost importance, more receptive to the changing circumstances, may be more useful for the interpretation of the provisions relating to the current activities of the IEO. In disputes over interpretation between an IEO and a Member State a more independent judicial body is, undoubtedly, more appropriate¹⁷. However, the existing IEOs can hardly demonstrate an example of a distribution of interpretative powers among the policy-making and the judicial organ in one organization.

Another question is: which organ possesses the interpretative power in the event the constituent instruments keep silence on this? Normally, such situation occurs in the IEO, whose founding acts do not provide for a specialized judicial organ within its institutional structure. In this case, it is logical to assume that the concept of implied powers may be reasonably applied in favour of a supreme (policy-making) organ which is in charge for the implementation of the objectives of the IEO and its proper operation.

In some cases, the drafters of the IEOs' documents strive to explain the meaning of certain applicable terms in advance, in order to prevent the interpretation

(Footnote continued from previous page)

multilateral conventions and agreements concluded under Article XIV of the Constitution; (c) the formulation, adoption, entry into force and interpretation of agreements to which the Organization is a party under Articles XIII and XV of the Constitution...". For some examples of the interpretative work of the Committee see UN Juridical Yearbook 1985, N.Y., 1992, p. 81-85.

17. See H.G.Schermers. *International Institutional Law*, 1980, p. 671.

disputes¹⁸. Much interpretative work of this kind is carried out in GATT¹⁹, though the text of the General Agreement has no special provisions on this matter. Taking into account the flexibility of many GATT rules, the interpretation of a number of terms and expressions is given in the Annex 1 to the General Agreement. Serious attention is paid to interpretation in the Tokyo Round Agreements. Some of them contain comprehensive interpreting annexes (e.g. the Standards Code, the Customs Valuation Code), others separate explanatory articles and notes (e.g. the Agreement on Government Procurement, the Subsidies Code, the Agreement on Import Licensing Procedures, the Anti-Dumping Code). However, as J.H.Jackson writes, "whether those codes can influence the GATT interpretation for Contracting Parties, which do not accept the codes is not yet clear"²⁰. Moreover, the complexity of the GATT law, the original elasticity of many its rules, as well as dynamically changing economic scenarios covered by these rules, make the interpretation problem within GATT not an easy one²¹.

A noteworthy example from the GATT practice demonstrates that an interpretation suggested by the IEO's organ, which is not formally authorized to do this, may be accepted by the Member States. During the second session of the CONTRACTING PARTIES,

18. See e.g. the Convention Establishing the EFTA, the OECD Rules of Procedure, the Appendix to the Decision of the OECD Council Establishing a Multilateral Consultation and Surveillance Mechanism for Sea Dumping of Radioactive Waste of 1977, the OECD Council Decision-Recommendation on Exports of Hazardous Wastes from the OECD Area of 1986, the FAO Conference Resolution 4/89 "Agreed Interpretation of the International Undertaking", etc.

19. See some examples in: R.E.Hudec. *The GATT Legal System and World Trade Diplomacy*. N.Y., Wash., L., 1975, p. 100-143.

20. J.H.Jackson. *Restructuring the GATT System*, p. 57.

21. See e.g. Brigid Gavin. A 'Super-Rule' Proposal for Liberalization of Agriculture in GATT - Implications for the EEC. - In: *The New GATT Round of Multilateral Trade Negotiations. Legal and Economic Problems*. Second updated Edition. Ed. by E.-U. Petersmann, M.Hilf. Deventer/Boston, 1991, p. 279-280

the Chairman was requested by the Dutch delegation to give an interpretation concerning Art.1 of the General Agreement. Owing to the Chairman's personal prestige, his interpretation was accepted without discussion. At the third session the Chairman suggested a more far-reaching interpretation of Art. XXV as implicitly enabling the CONTRACTING PARTIES to interpret the General Agreement whenever the need arises, which was also accepted by the CONTRACTING PARTIES²². This example witnesses that the interpretative competence of an IEO may be specified on the basis of the "implied powers" doctrine if the Member States do not object it.

Therefore, the normative acts of some IEOs provide for both pre-interpretation of the applicable terms and subsequent interpretative procedures in the course of the rules' implementation. This is typical mainly for the IEOs focussing upon intensive rule-making. In such IEOs it is preferable to establish special judicial or quasi-judicial organs dealing with interpretation. In the other organizations with a limited scope and intensity of law-making, it may be sufficient to outline the interpreting competence of the supreme or executive organs consulted by the legal experts.

2. Subsequent Rule-Making

In a broad sense, all the IEOs' norm-making activities have certain implementing effects promoting the achievement of the purposes fixed in the statutory acts. But here the scope of the inquiry is limited to the subsequent (secondary) rule-making, i.e. the creation of special rules facilitating the proper implementation of the previously adopted acts. I.I.Lukashuk used the term "implementational international

22. See I.H.Courage-van Lier. Supervision within the General Agreement on Tariffs and Trade. - In: Supervisory Mechanisms in International Economic Organizations, p. 75.

legal norms"²³ for this purpose. J.P.Dobbert called this phenomenon in a more general way: "follow-up", which means that "some procedural and possibly institutional arrangements are often indispensable to ascertain the effects of decisions and to amplify or modify them as the needs arises: this often leads to new decisions"²⁴. In other words, subsequent rule-making is an attribute of the ongoing process of law-implementation which may be compared with a living organism self-adapting to the changing environment.

Subsequent rule-making may be necessary for several reasons: (1) to concretize and specify the general norms in order to ensure their adequate application; (2) to adapt the previously created norms to the newly emerging circumstances either developing or amending them; (3) to revise obsolete rules.

When the IEOs' normative acts are formulated as the guidelines or general principles for co-operation, they can not be executed otherwise, than through the elaboration of concrete methods and forms of interaction²⁵. A typical example was the Joint EEC-CMEA Declaration of 1988 which presumed and prompted the conclusion of some more specified agreements between the EEC and individual Member States of the CMEA. A number of IEOs' normative acts explicitly provide the ensuing norm-making for their implementation. Thus, the OECD Council in one of its acts "recommends that, to implement this Decision, member countries should...seek to conclude bilateral and multilateral agreements with non-member countries to which frequent exports of hazardous wastes are taken place or are foreseen to take

23. I.I.Lukashuk. International Organizations and the Functioning of the International Law. - In: Indian Journal of International Law, 1984, N 1, p. 76.

24. Jean Pierre Dobbert. Op. cit., p. 276.

25. See V.I.Suvorova. Concretization as the Means of Ensuring the Efficient Realization of International Legal Norms. - In: The Problems of Universality and Efficiency of International Law. - Sverdlovsk, 1981 (in Russian).

place"²⁶. Art. 9 of the Agreement between the FAO and the UNIDO of 1989 states: "The Directors-General of FAO and UNIDO may enter into such arrangements for the implementation of this Agreement as may be found desirable in the light of the operating experience of the two Organizations"²⁷.

From the standpoint of the legal technique of implementation, the most interesting acts are those determining the special implementation mechanisms for previously created norms. Such are those agreements of Tokyo-Round, which were concluded with the purpose of interpretation, specification and implementation of certain provisions of the General Agreement. How the strengthening of the norm-executing effect is achieved may be found in the example of the Anti-Dumping Code. Art. VI of the General Agreement provides a definition of dumping, by which products of one country are introduced into the commerce of another country at less than its normal value²⁸. In order to offset and/or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such products (i.e. the price difference).

As follows from the preamble of the Anti-Dumping Code, one of its purposes is "to interpret the provisions of Article VI of the General Agreement... and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation". In connection with this, the Code gives a detailed explanation of the terms "like product", "comparable price", "domestic

26. 25 ILM 1011 (1986).

27. See Report of the Conference of FAO. Twenty-fifth Session. Rome, 1-29 November 1989. Appendix H.

28. "For the purpose of this Article, a product is to be considered as being introduced into the commerce of any importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or, (b) in the absence of such domestic price, is less than either (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit".

industry" used in Art. VI; and defines determination of injury, the order of investigation of any alleged dumping, price undertakings, imposition and duration of anti-dumping duties, provisional measures, etc.

It is normal for the IEOs' legal practice to take subsequent decisions improving the basic texts of the constituent instruments. For example, within the first ten years of the ECOWAS existence the whole set of such decisions, rendering the previously created documents more operational and detailed, were worked out and adopted²⁹.

In the meantime, the idea of improving the basic texts of the constituent instruments by virtue of subsequent rule-making must not undermine their key provisions which had been a precondition for the Member States' adherence to the constituent agreement. A conflict of this sort was seen in the practice of International Coffee Council in the Quota case of 1965. The Advisory Panel convened by the International Coffee Council under the provisions of the 1962 International Coffee Agreement was requested to give a legal opinion whether the adoption of a selective system of quota adjustment by means of a Resolution of the Council was compatible with the International Coffee Agreement of 1962, which laid down a pro rata system of quotas³⁰. The Panel agreed that the answer must be in the negative, presenting the following motivation: "The pro rata system for the establishment and adjustment of quotas is the heart of the Agreement. There can be no question that for many exporting countries, the protections and guarantees that this system provides for shares of the market, formed a major consideration for adherence to the Agreement. ... To permit the exception thus to eat up the rule would be unfaithful

29. See Ten Years of ECOWAS 1975-1985. Lagos, 1985, p. 16-21. (109).

30. A pro rata system of quotas meant that basic export quotas were fixed at the same percentage for all exporters. On the other hand, a selective system would have allowed the Council to vary the individual quotas due to the changed market conditions.

to the security of expectations that must underlie a viable Agreement and a regime of treaty law"³¹. In result, the problem was settled in a compromise way³².

A widely spread form of the implementing rule-making is the adoption of a normative act amending or revising a previous obsolete decision of the organization. For example, the Commission of the Andean Group is explicitly empowered to "evaluate every three years the integration process and, whenever it may be necessary, modify the terms contemplated in the distinct mechanisms of this Agreement as well as revise or update the norms with respect to which it has competent jurisdiction" (Art. 7 of the Cartagena Agreement). In 1987 the Commission took the Decision N 220 on the Common Foreign Investment and Technology Licensing Code revising its foreign investment code which was introduced by the Decision N 24 (1971). The Decision 220 accepted the de facto situation that the Member Countries were not observing the provisions of the common policy established by Decision 24, because it was not deemed to be in their respective national interests³³.

Subsequent revisory rule-making may have the most far-reaching consequences if the Member States conclude that the IEO does not cope with its statutory tasks. In that case a decision on the radical revision of its statute, right up to its reorganization, may be taken. The latter happened with the WACU which was established in 1966. In 1970 the heads of the Member States, having recognized its unsatisfactory functioning, adopted a protocol substituting the WACU for a new organization - the West African Economic Community (the CEAO). Here, the Member States' decision had more than norm-executing purpose, though it was caused by the

31. 62 I.L.R. 422-427.

32. See P.I.B.Kohona. Op. cit., p. 120-121.

33. See ILM, 1988, vol. 27, p. 974-988; J.L.Esquirol. Foreign Investment: Revision of the Andean Foreign Investment Code. - In: Harvard International Law Journal, 1988, vol. 29, p. 169-177; E.E.Murphy. The Andean Decisions on Foreign Investments: An International Matrix of National Law. In: International Lawyer, 1990, vol.24, N 3, p. 643-654.

failure in the implementation of the constituent instruments. This decision revised the overall institutional basis of the organization which was proven to be ineffective.

On the other hand, in the case of an IEO dissolution the normative acts of the IEO-successor can keep alive some acts of the IEO-predecessor. A noteworthy illustration is the replacement of the OEEC by the OECD in 1960. Pursuant to Article 15 of the OECD Convention, decisions, recommendations and resolutions of the OEEC shall require approval of the OECD Council to be effective. The Member States of the OECD then adopted the Memorandum of Understanding on the Application of Article 15 of the OECD Convention, which specified a "rule of selection" for the OEEC acts which were to remain in force.

It is apparent, that under otherwise equal circumstances, the better the IEOs' normative acts are framed, the lesser the need in the subsidiary rule-making for their proper implementation. Within this context, an essential precondition for implementation is the maximum possible avoidance of the conflicts between the Member States' international obligations within an IEO and their national legal acts. Taking into account the divergence in the Member States' municipal law approaches to the relationship between international and municipal laws, the constituent documents of some IEOs explicitly determine a priority of the legal acts passed within the IEO over the national laws of the Member States³⁴. On the contrary, a predominance of national law over an IEO's decision-making may be a serious factor undermining the latter's efficiency. This follows from the unsuccessful lesson of the EAC where the

34. See for instance Art. 27 of the Unified Economic Agreement between the Countries of the Gulf Cooperation Council: "In case of conflict with local laws and regulations of Member States execution of the provisions of this Agreement shall prevail".

national legislation had priority over the regional one³⁵.

No less important, with a view of proper execution of the IEO's normative acts, is the conformity between "the law of an IEO" and international agreements of the Member States with the third parties. The constituent instruments of some IEOs definitely request for such conformity³⁶.

* * *

The above analysis leads to the conclusion that both interpretation and subsequent rule-making are such intermediary stages of international legal process, in which law-making and law-implementation interlace. Interpretation is indispensable for implementing any rule of law, while subsequent rule-making is applied only in cases of specification, adaptation or revision of the priorly created rules.

Interpretation and subsequent rule-making within IEOs often go side by side. It means that in many cases (although not always) interpretation is provided by virtue of subsequent rule-making. However, subsequent rule-making does not necessarily deal with solely interpretation issues.

35. See J.Ravenhill. Regional Integration and Development in Africa: Lessons from the East African Community. - In: Commonwealth & Comparative Politics, 1979, N 3, p. 229. The 1970 Judgement of the Court of Appeal for East Africa on conflict of Kenya Constitution and East African Community Act stated: "... it is clear that the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or of any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict" (see 9 ILM 565-566 (1970)).

36. For example, Art. 93 of the Treaty Establishing the AEC reads: "In the event of incompatibility of agreements concluded, prior to the entry into force of this Treaty among Member States and Third States, sub-regional or regional organizations or any other international organization, with the provisions of this treaty, the Member State or Member States concerned shall take the appropriate steps to eliminate such incompatibility".

Neither interpretation nor subsequent rule-making, taken alone, is sufficient for complete law-implementation. Both serve as preparatory steps for the direct execution of legal rules.

CHAPTER VII. SUPERVISORY AND NORM-EXECUTING FUNCTIONS OF IEOs

1. Supervision

The more sophisticated the legal mechanisms within IEOs are, the more is the need in adequate supervision³⁷ over how they operate. The main aim of supervision³⁸ is to evaluate and control in what manner the addressees of the legal rules comply with their obligations. In many cases, when no deviation from a norm is fixed, routine supervision is practically invisible for the outside observation. Only in the event, the fact of improper behaviour is established in the course of supervision, this gives an impetus for subsequent corrective measures, which may vary from a request to follow a legal prescription more strictly to the use of sanctions.

As H.A.H. Audretsch points out, "supervision has two aspects: review and correction"³⁹. The former "is directed to behaviour, an act, or an omission, a fact or a factual situation...", while the latter "is relevant only when an unlawful act has been recorded"⁴⁰. However, what is called "correction" sometimes goes beyond the scope of proper supervision in the narrow meaning (in this paper, for instance, dispute-settlement and sanctions, which may follow supervision, are treated as relatively independent phases of implementation). Although, the mere results of the

37. See more details on the supervision in IEOs in: *Supervisory Mechanisms in International Economic Organizations*. P.van Dijk: General Editor. Deventer, 1984; *Restructuring the International Economic Order: The Role of Law and Lawyers*, p. 135-182.

38. See on supervision in international law: A.Cassese. *Il Controllo Internazionale*. Milano, 1971.

39. H.A.H.Audretsch. *Supervision in European Community Law*. Amsterdam, 1986, p. 7.

40. H.A.H. Audretsch. *Op. cit.*, p. 7-8.

review are often used for the "mobilization of shame"⁴¹ purposes, i.e. a resort to public opinion, which may have a corrective effect. Along with review and correction, some writers distinguish the creative function of supervision⁴² which approximately coincides with what is considered in the present study as interpretation and subsequent rule-making.

1.1. International Financial Organizations

IEOs dealing with monetary, credit and financial issues badly need elaborate system of supervision in order to ensure effective operation of monetary mechanisms and proper use of financial means. The IBRD and IMF deserve consideration in this respect.

The IBRD supervision system consists of two stages: prior examination and subsequent control. At the first stage, the examination covers the general economic situation and balance of payments of the requesting country, its attitude towards debt(s), and the project which is proposed for financing. A competent loan committee, including an expert selected by a requesting Member State and one or more members of the technical staff of the Bank, is appointed for this purpose. The committee submits a written report recommending the project after a careful study of the merits of the proposal⁴³. At the second stage, the Bank supervises over the use

41. See the discussion on "mobilization of shame" in: *The Effectiveness of International Decisions*. Leyden, 1971, p. 353-517.

42. See G.J.H. van Hoof & K de Vey Mestadagh. *Mechanisms of International Supervision*. - In: *Supervisory Mechanisms in International Economic Organizations*, p. 11-14.

43. See Art. III, sec. 4 and Art. V, sec. 7 of the Articles of Agreement of the IBRD.

of the loans granted and the progress of the financed project⁴⁴. The Articles of Agreement of the IBRD stipulate that "the Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations".

The IBRD system of supervision has proved to be quite effective due not only to its elaborate technique, but also to sensible sanctions, such as the suspension or cancellation of a loan, which are at the Bank's disposal. To quote van Hoof, "the World Bank offers something its recipient Member States badly want or even need,... and they can therefore be expected to be prepared to conform with the requirements of the World Bank's supervisory system to a considerable extent"⁴⁵.

Supervisory techniques applied by the IMF somewhat differ from those of the IBRD, owing to a two-fold nature of the Fund which does not finance particular projects, but regulates the operation of the international monetary system and renders financial assistance for the general balance-of-payments purposes⁴⁶. Hence, the Fund exercises firm surveillance over the exchange rate policies of Members and adopts specific principles for the guidance of all Members with respect to those policies (Art. IV. sec. 3 of the Articles of Agreement of the IMF). The Fund also supervises the use of its general resources by the Members. Whenever the Fund considers that such use is contrary to its purposes, it shall present to the Member a report setting forth the views of the Fund and prescribing a suitable time for reply. Afterwards, the Fund may limit the use of its general resources by the

44. See N.M. Poulantzas. *International Financing and Supervision: The Example of the World Bank*. - In: *Revue de Droit International*, Geneve, 1982, N 4, p. 283-287; G.J.H. van Hoof. *Supervision within the World Bank*. - In: *Supervisory Mechanisms in International Economic Organizations*, p. 397-485.

45. G.J.H. van Hoof. *Op. cit.*, p. 452.

46. See *The Effectiveness of International Decisions*, p. 467.

Member. If no reply to the report (or unsatisfactory one) is received within the prescribed time, the Fund may continue to limit the Member's use of the general resources, or may, after giving reasonable notice to a Member, declare it ineligible to use such resources of the Fund (Art. V sec. 5). The Fund may also require the Members to furnish it with such information which it deems necessary for its activities. Art. VIII, sec. 5 of the Articles of Agreement specifies the list of the matters such information may relate to. However, the Members are not obliged to furnish information in such detail that the affairs of individuals or corporations are disclosed.

1.2. Regional Integrational Organizations

The regional integrational organizations belong to the most active IEOs as regards both the scope and intensity of operation. Their effective work strongly depends on comprehensive supervisory mechanisms. The lead of the EEC in view of experience and efficiency of supervision is unchallenged now⁴⁷, although other integrational IEOs are gradually accumulating their own supervisory practice.

Supervisory procedure in the EEC and African economic communities (constructed under strong influence of the EEC) consists of non-judicial (administrative) phase, including a preliminary investigation, a conciliation, and taking a reasoned decision or opinion; and judicial phase, including the written and oral parts⁴⁸.

Non-judicial supervision is within the competence of prevaillingly either

47. Supervision in the EEC has been thoroughly examined in: H.A.H.Audretsch. Supervision in European Community Law. Amsterdam, 1986.

48. See H.A.H.Audretsch. Op. cit., p. 21-22.

executive body (e.g. the Commission in the EEC⁴⁹), or policy-making and executive organs (e.g. the AEC, the ECCAS⁵⁰), or executive and administrative bodies (e.g. the ECOWAS⁵¹). Certain supervisory powers may be endowed to the parliamentary (e.g. the European Parliament⁵²) and subsidiary bodies (e.g. the specialized technical

49. The main supervisory functions of the Commission are the following:

(a) it examines the Member States' action on the fulfillment of their obligations; arranges consultations; makes necessary recommendations; and prepares reports;

(b) it informs the Council on the progress in carrying out the Community's purposes;

(c) if it finds that there has been an infringement of the Community law, the Commission may decide that the State concerned shall abolish or alter its measures; if the State concerned does not comply with this decision within the prescribed time, the Commission may refer the matter to the Court of Justice;

(d) it consults the Member States whose national law regulations are incompatible with the Community Law.

According to the Treaty on European Union, the important supervisory powers will be assigned to the Council. For example, on the basis of reports submitted by the Commission it will monitor economic developments in each of the Member States and in the Community as well as the consistency of economic policies with the broad guidelines formulated by the Council (Article G (103)).

50. The Assembly of the AEC and the Conference of the ECCAS have similar supervisory powers: (1) to oversee the operation of the communities' institutions and the follow-up of the implementation of the communities' objectives; (2) to refer to the respective court of the Community any matter concerning the non-compliance with the Community law. On the other hand, the Councils of Ministers of these IEOs keep under regular review particular matters, e.g. the operation of any quantitative or similar restrictions or prohibitions imposed by a Member State encountering the balance-of-payments difficulties (see Articles 8 and 35 of the Treaty Establishing the AEC, Articles 9 and 34 of the Treaty for the Establishment of the ECCAS). Vast supervisory powers belong to the Economic and Social Commission of the AEC, which supervises and follows-up the activities of Secretariat, committees and subsidiary bodies; examines the reports and recommendations of the committees; supervises the preparation of international negotiations (see Article 16 of the Treaty Establishing the AEC).

51. The Council of Ministers of the ECOWAS keeps under review the functioning and development of the Community, *inter alia* the reductions or eliminations of the customs duties (see Article 13 of the Treaty of the ECOWAS), the method of application of safeguard measures by the Member States (Art. 26), the question of deflection of trade (Art. 32) etc., while the Executive Secretary keeps under continuous examination the operating of the Community and reports on the results to the Council of Ministers and the Authority (Art. 8).

52. The role of the European Parliament in the supervision procedure has been comprehensively analyzed by H.A.H. Audretsch, who pointed out that up to the early 1980s the supervisory function of the European Parliament was confined to asking oral and written questions of the Commission and

(Footnote continues on next page)

committees of the AEC ensuring the supervision, follow-up and evaluation of the implementation of decisions taken by the AEC organs⁵³, the Committee of West African Central Banks overseeing the system of payments within the ECOWAS⁵⁴, the Court of Auditors examining the EEC financial activities⁵⁵).

The advantages of the administrative supervision were commented by H.A.H.Audretsch on the example of the EEC: "the administrative phase is useful because a good many infringements by States are not committed 'willfully'. In many cases they are to be attributed to insufficient understanding of the treaty obligation, a misinterpretation, an 'error of communication' on a national and/or a Community level. Thus, by means of preliminary negotiations most 'errors' can be eliminated without the necessity of recourse to the Court, which is often considered embarrassing"⁵⁶.

(Footnote continued from previous page)

the Council. A principal turn was taken by the SIEGLERSCHMIDT Resolution (1983), which suggested the Commission annual reporting to the European Parliament on the state of affairs with respect to treaty infringements (see H.A.H.Audretsch. Op. cit., p. 247-272). In the case the Treaty on the European Union enters into force, the supervisory powers of the European Parliament would be considerably expanded. In particular, at the request of a quarter of its members, the European Parliament will be authorized to set up a temporary Committee of Inquiry to investigate alleged contraventions or maladministration in the implementation of the Community law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings. The temporary Committee of Inquiry shall cease to exist on the submission of its report (Art. 138 c of the Treaty on the European Union).

53. See Art. 26 of the Treaty Establishing the AEC.

54. See Art. 38 of the Treaty of the ECOWAS.

55. See Art. 206a of the Treaty of Rome.

56. H.A.H. Audretsch. Op. cit., p.23.

Judicial supervision is a prerogative of the permanent courts of economic communities, which are responsible for observance of law in the interpretation and application of the constituent treaties. The courts: (a) review the legality of the communities' binding acts, which, if the action is well-founded, may be declared void; (b) decide on the appeals lodged on the grounds of lack of competence, abuse of powers or infringement by the Member States or institutions. Normally, most of the regular supervisory work in economic communities is carried out by non-judicial means. Judicial supervision applies in specific situations, when there are complaints or doubts about the legality of certain actions on the part of the Member States and/or institutions. Moreover, unlike some non-judicial supervisory bodies, courts lack the power to initiate the procedure themselves. The dependence on appeals and petitions is another limiting factor for judicial supervision⁵⁷. On the whole, judicial supervision is likely to be avoided if non-judicial means allow to dispel existing doubts and suspicions. In the words of one of the most authoritative legal writings on supervision, "judicial supervision is a more developed form of international surveillance, reflecting a high degree of integration where it functions in practice. Yet, it cannot be denied that non-judicial supervision is better suited to the requirements, or rather shortcomings, of international society as it is at present"⁵⁸.

The Agreement on the EEA of 1992 provides a new pattern of joint supervision by the EEC Commission and the EFTA Surveillance Authority, which "shall cooperate, exchange information and consult each other on surveillance policy issues and individual cases". Each of the bodies shall examine all complaints falling within its competence and shall pass to other body any complaints which fall within the

57. See G.J.H. van Hoof & K.de Vey Mestadagh. Mechanisms of International Supervision. - In: Supervisory Mechanisms in International Economic Organizations, p. 35.

58. Ibid.

competence of that body. In the case of disagreement between these two bodies with regard to the action to be taken in relation to a complaint or with regard to the result of the examination, either of the bodies may refer the matter to the EEA Joint Committee⁵⁹.

Supervisory systems within the Latin-American integrational IEOs somewhat differ from those of the EEC and African communities. Only the Cartagena Agreement provides for both non-judicial and judicial supervision similar to that of the above mentioned communities. The main supervisory powers are entrusted to the Commission (the highest body of the Andean Group)⁶⁰ and the Board (the technical body)⁶¹. The Andean Parliament evaluates the progress of the subregional integration process through the annual reports of the bodies of the Andean Group and through other information requested from them⁶². In turn, the Court of Justice of the Cartagena Agreement has responsibility to assure respect of law in the application and interpretation of the juridical order of the Agreement. Therefore, owing to the decisive modifications in the Andean Pact introduced by the Quito Protocol of 1987, the supervisory mechanism of this subregional IEO goes more in line with the EEC

59. Art. 109 of the Agreement on the EEA; Protocol 23 Concerning the Cooperation between the Surveillance Authorities (Article 58).

60. The Commission, in particular, is empowered to monitor the harmonious fulfillment of the obligations deriving from the Cartagena Agreement and to evaluate every three years the integration process and, whenever it may be necessary, to modify the terms contemplated in the distinct mechanisms of this Agreement (Art. 7).

61. The Board: (1) monitors the application of the Cartagena Agreement and the fulfillment of the Decisions of the Commission and its own Resolutions; (2) annually evaluates the results of the application of the Cartagena Agreement and the achievement of its objectives, giving particular attention to the fulfillment of the principle of the equitable distribution of the benefits of integration, and proposing to the Commission corrective measures of a positive nature (Art. 15). These general supervisory functions of the Board are specified in other Articles of the Cartagena Agreement (e.g. Articles 67, 73, 75, 79, 79A, 80, 85, 101).

62. See Art. 13 of the 1979 Treaty Establishing the Andean Parliament.

pattern, being based on a quite reasonable separation of supervisory powers among the principal bodies.

Other Latin-American integrational IEOs practice only non-judicial supervision.

A rational distribution of supervisory powers among the principal bodies can be observed in the LAIA. According to the 1980 Montevideo Treaty, the Council (the supreme body of the LAIA) examines the results of the tasks carried out by the Association, reviews and updates basic rules governing convergence and cooperation agreements with other developing countries in the respective areas of economic integration (Art. 30). The Conference (the sessional body) examines the operation of the integration process in all its aspects; periodically reviews the implementation of differential treatments and evaluates the results of the preferential systems in favour of less-developed countries (Art. 33). In turn, the Committee of Representatives (the permanent body) evaluates the operation of the integration process, analyses measures to attain more advanced mechanisms of integration and declares the compatibility of partial-scope agreements with other developing countries (Art. 35). Finally, the Secretariat carries out the studies entrusted to it by the superior bodies (Art. 38).

In the CARICOM the overall amount of supervisory work is carried out by one of the principal organs - the Common Market Council, which:

(1) keeps under constant review the execution of the constituent instruments;
(2) receives and considers references alleging breaches of any obligations arising under the constituent instruments, and

(3) considers what further action should be taken by the Member States and the Common Market⁶³.

63. See Art. 7 of the Annex to the Treaty Establishing the CARICOM. These general supervisory powers of the Council are specified in other Articles of the Treaty (e.g. Articles 13.6, 14.11, 18.5, 28.2, 29.3, 30.3, 32.5, 33.3, 35.4, 37, 42.2, 49.5, 62).

Unlike the constituent instruments of the above mentioned IEOs, the 1991 Treaty Establishing the MERCOSUR does not pay much attention to supervision, which is confined to a generally-framed power of the Common Market Group (the executive organ) "to monitor compliance with the Treaty" (Art. 13). Of course, such laconic treaty formula, however less perfect from the legal technique viewpoint it might be, does not necessarily mean that the supervisory mechanism in fact works badly. Too short time of the MERCOSUR existence and the lack of necessary data do not make it so far possible to reach any conclusion on this matter⁶⁴.

1.3. Other IEOs

The entire spectrum of supervisory organs operates within the framework of GATT⁶⁵. The general supervisory functions are discharged by the CONTRACTING PARTIES and the Council which are assisted by technical bodies. Along with this, separate agreements are supervised by special bodies: the Textiles Surveillance Body and the Committees (Councils) overseeing the agreements of the Tokyo Round. These organs examine how the contracting parties observe their obligations and render services on conciliation and dispute settlement. The Council of GATT may also establish ad hoc bodies with supervisory functions. For example, in 1987 it formed

64. See more details on MERCOSUR in: Ch.Chatterjee. The Treaty of Asuncion: An Ananalysis. - In: 26 J.W.T. 1 (1991), p. 63-71; E.V. de Davidson. The Treaty of Asuncion and a Common Market for the Southern Cone. - In: Virginia J. of International Law, 1991, Vol. 32, No1, p. 265-283; Emilio J. Cardenas. The Treaty of Asuncion: A Southern Cone Common Market (Mercosur) Begins To Take Shape. - In: World Competition. Law and Economics Review, Vol. 15, No 4, p. 65-77.

65. See the detailed analysis of the GATT supervision in: I.H.Courage-van Lier. Supervision within the General Agreement on Tariffs and Trade. -In: Supervisory Mechanisms in International Economic Organizations, p. 47-223; Richard Blackhurst. Strengthening GATT Surveillance of Trade-Related Policies. In: The New GATT Round of Multilateral Trade Negotiations. Legal and Economic Problems. Second Updated Edition. Ed. by E.-U.Petersmann, M.Hilf. Deventer/Boston, 1991, p. 123-155.

the working group to examine the Third Lome Convention in the light of the relevant provisions of the General Agreement. In its report the working party stated that the purposes and content of the Convention were in line with those embodied in the General Agreement, including its Part IV⁶⁶.

The 1986 Ministerial Declaration on the Uruguay Round provided for the multilateral surveillance so as to ensure the proper implementation of the standstill and rollback commitments⁶⁷. The Trade Negotiations Committee was empowered to decide on the appropriate surveillance mechanisms, including periodic reviews and evaluations. The participant's notifications of the alleged omissions should be addressed to the GATT Secretariat which may also provide further relevant information. On the whole, to quote Courage-van Lier, "under GATT a sophisticated system of supervision is established which certainly could be improved, but which at the same time might be the best attainable given the current relations between States"⁶⁸.

A great deal of regular supervisory work is executed by international commodity organizations. An example of the well-distributed supervisory powers among the organs is the International Cocoa Organization. On the basis of a detailed annual report presented by the Executive Director, the Council (the highest authority) reviews the general situation regarding cocoa production and consumption,

66. See BISD. Thirty-fifth Supplement. 1987-1988, Geneva, 1989, p. 321-330.

67. The standstill commitments prescribed each participant within the term of Uruguay Round not to take any trade restrictive or distorting measure both inconsistent with the provisions of the law of GATT and those in the legitimate exercise of the participant's GATT rights, that would go beyond that which is necessary to remedy specific situations, as provided for in the law of GATT; and not to take any trade measures in such a manner as to improve its negotiating positions.

The rollback rule stipulated that all trade restrictive or distorting measures inconsistent with the law of GATT shall be phased out or brought into conformity with the above provisions not later than by the date of the formal completion of the negotiations.

68. I.H.Courage-van Lier. Op. cit., p. 204.

evaluating, particularly, the development of global supply and demand. The Council may make recommendations to the members based on this evaluation⁶⁹. The Council also keeps under permanent control the buffer stock operations⁷⁰, periodically reviews the commercial transaction of the members with non-members⁷¹. In turn, the Executive Director maintains a record of the members' exports and imports of cocoa on the basis of their monthly reports⁷². Each exporting and importing member is required to submit an authorized Council control document before permitting the export or import of any cocoa from/into its customs territory⁷³. Along with this, the International Cocoa Organization is obliged to collect and keep up-to-date the available information on the world's current and potential production and consumption capacity⁷⁴.

Supervision in the EFTA is within the competence of the supreme organ. The Council oversees the application of the constituent Convention and considers whether further action should be taken by the Member States in order to promote the attainment of the objectives of the Association (Art. 32). The Member States notify to the Council on their implementing measures, having examined which, the Council takes appropriate decisions and recommendations. The Council also may authorize any Member State to suspend in certain cases its obligations under the Convention (Art. 13, 31).

69. Articles 49, 51 of the 1986 International Cocoa Agreement.

70. *Ibid.*, Articles 34-44.

71. *Ibid.*, Art. 55.

72. *Ibid.*, Art. 46.

73. *Ibid.*, Art. 47.

74. *Ibid.*, Art. 48.

Some IEOs practice special procedures for control over the compatibility and application of the decisions taken by their organs. For instance, the FAO Constitution explicitly provides that the supreme organ (the Conference) may review any decision taken by the executive organ (the Council) and other bodies (Art. IV). The review over the application of the acts of the supreme and executive organs may be kept by the administrative body (e.g. Art. 15 of the Charter of the CCASG).

Obviously, even the most elaborate supervisory mechanisms are unable to ensure a one hundred per cent efficiency of supervision within complicated individual legal systems created by IEOs. The weaknesses of the "intergovernmental" supervisory procedure, on the example of the EEC, have been revealed by Weiler⁷⁵.

2. Operative Norm-Execution

For the purpose of the present study the term "operative norm-execution" denotes a wide spectrum of preparatory, organizational and executive measures taken by the IEOs' organs in order to ensure the proper and timely fulfillment of the IEOs' legal provisions. This is the central phase of law-implementation. In a broad sense, to describe how an IEO operates in order to execute its constituent and subsequent (secondary) rules would mean to expose its every-day work. Obviously, some typical

75. "(1) The procedure is political in nature: the Commission (appropriately) may have nonlegal reasons not to initiate a prosecution;

(2) a centralized agency with limited human resources is unable adequately to identify, process, and monitor all possible Member State violations and infringements;

(3) Article 169 may be inappropriate to apply to small violations; even if small violations are properly identified, dedicating Commission resources to infringements that do not raise an important principle or create a major economic impact is wasteful; and finally, and most importantly;

(4) no real enforcement exists: proceedings conclude with a "declaratory" judgement of the European Court without enforcement sanctions" (J.H.H. Weiler. The Transformation of Europe. - In: The Yale Law Journal, 1991, Vol. 100, p. 2420).

examples might give only a general idea of how IEOs approach this problem, which inevitably arises before each of them.

2.1. Regional Integrational Organizations

For the same reason as in the case of supervision, the most comprehensive norm-executing mechanisms have been elaborated within the regional integrational organizations. The examples of the EEC and the AEC deserve consideration.

In the EEC the main burden of the operative executive work is bestowed upon the Commission which, among others, ensures "that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied" (Art. 155). For this purpose the Commission performs a number of functions which may be summarized as follows:

- it issues directives establishing the procedure and timetable in accordance with which the Member States carry out their obligations; takes organizational measures;
- it submits proposals to the Council for working out and implementing the common policy of the Community;
- it may authorize any Member State encountering special difficulties to postpone the fulfillment of certain obligations, to take in certain cases protective measures;
- it takes implementing initiatives;
- it implements the EEC budget under the European Parliament and Council supervision.

The Council performs norm-executing functions mainly by virtue of the decisions taken in the Commission's proposals, when the Commission's own competence is insufficient. However, under Art. 145 of the Treaty of Rome, the Council may also

reserve the right, in specific cases, to directly exercise implementing powers itself.

A clear enough separation of norm-executing powers among the supreme, executive and administrative organs can be observed in the constituent Treaty of the AEC. The AEC Assembly (supreme organ) is responsible for implementing the objectives of the Community. To this end it determines the general policy of the Community; coordinates the economic, scientific, technical, cultural and social policies of Member States; takes any action under the constituent Treaty to attain the objectives of the Community; takes decisions and gives directives concerning the regional economic communities; approves the Community's programme of activity and budget, etc. (Art. 8).

Furthermore, The Council of Ministers is responsible for functioning and development of the Community. It makes recommendations to the Assembly on any action aimed at attaining the objectives of the Community; guides the activity of subordinate organs; submits to the Assembly proposals concerning the programmes of activity, the budget of the Community, the Member States' annual contributions, etc. (Art. 11).

In turn, the Economic and Social Commission prepares the programmes, policies and strategies for cooperation and makes appropriate recommendations, through the Council, to the Assembly; coordinates the activities of the Secretariat, of the Committees and of the subsidiary bodies, etc. (Art. 16).

Finally, the General Secretary ensures the implementation of the decisions of the Assembly and the application of the regulations of the Council, prepares the proposals concerning the programme of activity and the budget of the Community; submits reports on the Community's activities; carries out studies with a view to attaining the objectives of the Community and makes relevant proposals, etc. (Art. 22).

2.2. International commodity organizations

In certain cases the whole IEOs are formed with the main purpose to promote the functioning of complicated multilateral economic agreements. Such are international commodity organizations⁷⁶. A standard formula applied in a number of international commodity agreements reads: "The Council (the supreme organ - S.V.) shall exercise all such powers and perform or arrange for the performance of all such functions as are necessary to carry out the provisions of this Agreement". Thus, the Councils of the International Cocoa Organization and International Natural Rubber Organizations, which operate under similar rules, discharge inter alia such norm-executive functions as redistribution of the votes in the Council, review and revision of prices, undertaking supplementary measures necessary for the price stabilization, relieving a member of obligations on account of exceptional or emergency circumstances, approval of administrative budget and assessment of the members' contributions, etc. In turn, the operative executive work is carried out by the Executive Committees, while the Buffer Stock Managers are responsible for the buffer stock operations, including purchase and sale of the relevant commodity.

However, in practice not all international commodity organizations have proved their feasibility. In 1985 the International Tin Council was unable to meet its financial commitments, owing several hundred million pounds to its creditors. The attempts of the Member States to get out of the crisis failed and some main creditors initiated legal action before the High Court in London and some other courts. Although the High Court refused to liquidate the Council, regarding this as

76. See P.I.B.Kohona. Some Legal Problems Relating to the Implementation of International Commodity Agreements. - In: Indian Journal of International Law, 1981, N 4, p. 546-562.

incompatible with its immunities and privileges⁷⁷, the operations with the buffer stock were suspended⁷⁸. This negative experience of the International Tin Council moved some other international commodity organizations to narrow their financial and contractual competence⁷⁹.

2.3. Other IEOs

Fragmentary provisions relating to norm-execution can be found in the normative acts of many other IEOs. Some of them suggest a very general formula: the supreme organ generates the organization's policy and determines appropriate ways and means of its realization, while the executive organ directs and supervises the current operation of the organization and ensures the implementation of the decisions of the

77. It is worth to quote one of the Court's conclusions on this matter: "The failure of an international organization to meet its obligations is without precedent. The possibility was obviously not foreseen when the treaties which established or continued the I.T.C. were concluded. The responsible course now would be for the member states, by diplomatic means, to negotiate suitable arrangements to meet the shortfall. Failing this, there is much to be said for the view that an unprecedented situation calls for an unprecedented solution. But under our constitution it is for Parliament to decide whether the United Kingdom, as the host State, should intervene and, contrary to the terms of the treaties and without the consent of the other member states, claim the right to subject the affairs of an insolvent international organization to its own domestic jurisdiction and wind it up. All I decide is that by the general words of existing legislation Parliament has not already demonstrated any such intention" (In re International Tin Council (1987). - 77 I.L.R. 40-41).

78. See more details in: M.Herdegen. *The Insolvency of International Organizations and the Legal Position of Creditors: Some Observations in the Light of the International Tin Council Crisis.* - In: NILR, 1988, N 2, p. 133-144; I.Seidl-Hohenveldern. *Piercing the Corporate Veil of International Organizations: The International Tin Council Case in the English Court of Appeals.* - In: GYIL 1989, Berlin, 1990, p. 43-54.

79. Thus, under Art. 7.2 of the 1986 International Cocoa Agreement, "The Council shall not have power, and shall not be taken to have been authorized by the members, to incur any obligation outside the scope of this Agreement: in particular it shall not have the capacity to borrow money, without however limiting the application of Article 33 (concerning relationships with the Common Fund for Commodities - S.V.), nor shall it enter into any trading contract for cocoa except as provided for specifically in this Agreement". A similar provision can be seen in Art. 7 of the 1987 International Natural Rubber Agreement.

supreme organ⁸⁰. Others vest the most important norm-executing powers to the IEO's principal body (e.g. the ITPA⁸¹) or provide the establishment of subsidiary bodies with limited norm-executing functions (e.g. the FAO⁸², the OECD⁸³, the ASEAN⁸⁴).

However elaborate norm-executing techniques may be stipulated by the constituent instruments of an IEO, taken alone, these cannot guarantee a high rate of compliance with the organization's decisions. Much depends on the direct executives in the Member States. For instance, some normative acts of the ECOWAS had not been simply presented for ratification in the Member countries. This came about not because these documents had been found unacceptable by the legislative bodies of the Member States, but due to either the lack of political will on the part of some political leaders or to the position of the officials not being enough responsible for timely presentation of the relevant documents for ratification⁸⁵.

80. See e.g. Articles 15, 20 of the Statute of the OPEC.

81. Under Art. 7 of the Agreement Establishing the ITPA, "(1) The Governing Board shall exercise such powers and perform or arrange for the performance of such functions as are necessary to carry out the objectives of the Association". (2) The Governing Board may establish such subsidiary organs and adopt such rules and regulations as are necessary to carry out the objectives of the Association".

82. Under Art. VI of the FAO Constitution, the Conference or Council may establish commissions "to advise on the formulation and implementation of policy and to coordinate the implementation of policy".

83. The OECD Committee on Capital Movements and Invisible Transactions considers all questions concerning interpretation and implementation of the provisions of the OECD Code of Liberalization of Current Invisible Operations (Articles 18, 19, and 20 of the Code).

84. For example, the ASEAN Food Security Reserve, the Committee on Industry Minerals and Energy, the ASEAN Committee on Trade and Tourism (see ASEAN Documents Series 1987-1988, Geneva, 1989, p. 321-330).

85. See: Ten Years of ECOWAS 1975-1985. Lagos, 1985, p. 93.

* * *

Therefore, the supervisory and norm-executing functions pierce through the entire IEOs activities. This is quite natural, since the main IEOs designation - to coordinate the Member States economic policies - presupposes the existence of a certain system of institutional techniques, procedures and mechanisms for the proper implementation of their normative acts. How elaborate such a system is depends upon the scope and intensity of the IEO's activities. The most developed supervisory and norm-executing mechanisms can be found in the integrational, financial and commodity organizations.

Summarizing the practice and experience of the existing IEOs, it is possible to formulate their most typical supervisory and norm-executing functions the following way:

- requesting and examining the information from the Member States on the fulfillment of their obligations within the framework of the organization;
- supervision over the progress in the attainment of the organization's purposes;
- administrative and judicial supervision over legality of the acts adopted by the institutions and the Member States;
- arranging negotiations and consultations among the Member States as regards to the application of the organization's normative acts;
- making decisions and recommendations for the Member States on the procedure, timetable and other issues concerning the due implementation of their relevant normative provisions;
- authorizing the Member States to take safeguard measures, suspend in certain cases the execution of their obligations;
- making studies and appropriate proposals on the necessary implementing measures;

- taking measures provided by the constituent instruments in case of a Member State's non-compliance with its obligations;
- implementing the budget of the organization and overseeing its financial activities.

CHAPTER VIII. DISPUTE RESOLUTION

The normal course of law-implementation does not necessarily include the discharge of dispute-resolving function by IEOs. In many cases, the IEOs' interpreting, norm-making, executive and supervisory efforts prove to be sufficient for the proper application of their normative acts. The dispute-resolving powers start to be applied in the anomalous, though not rare, situations connected with disagreements and breaches of law. However, as long as international law exists, the process of its implementation inevitably covers such a corrective phase as dispute settlement⁸⁶.

What kinds of disputes can retard the regular pace of implementation? Kohona gives the following answer: "Disputes may arise between the member states of an organization and the organization, among members themselves and among the various organs. They could relate to the implementation of the agreement, the interpretation of its provisions or of subsequent norms set by the organization, the internal working of the organization and a host of other matters"⁸⁷.

1. Negotiations and Consultations

Normally, the IEOs' Member States attempt to avoid administrative or judicial means of dispute settlement, preferring at least during the initial stage of the

86. The idea that the dispute-resolving process may be considered a certain stage of law implementation is shared by some authors (see e.g. M.Sorensen. *Autonomous Legal Orders: Some Considerations Relating to a System Analysis of International Organizations in the World Legal Order.* - In: *ICLQ*, 1983, Part 3, p. 566; J.H.Jackson. *Restructuring the GATT System*, p. 56).

87. See P.I.B.Kohona. *The Regulation of International Economic Relations Through Law*, p. 150.

dispute evolution the more amicable procedures of negotiations and consultations⁸⁸. As Kohona wrote, "multilateral economic agreements rely extensively on consultations, negotiations and investigations for the purpose of resolving disputes"⁸⁹. A similar view was held by Ostrihansky: "Most likely, the dominant role of consultations would be retained, not because the subject-matter of a case is not suitable for adjudication, but because the consultations are the natural initial attempt to settle any controversy, and they are the cheapest, the least adversary and the most confidential means of settling a dispute"⁹⁰. It should be also borne in mind that some States, like Japan, by tradition dislike any formal dispute settlement procedures and, correspondingly, give preference to negotiations without publicity⁹¹.

The constituent instruments of some IEOs place a special emphasis on consultations and negotiations (e.g. the OECD⁹², GATT⁹³, AMF⁹⁴, MIGA⁹⁵) in both

88. The terms "negotiations" and "consultations" are very close in the meaning. However, a slight difference has been pointed out by Kohona: "...consultations, being an ongoing process could occur even before a dispute arises. They could be used to anticipate problems and even to avert potential disputes. While on the other hand negotiations, in this context, could occur only after the parties have recognized the existence of a dispute" (P.I.B.Kohona. Op. cit., p. 158).

89. P.I.B.Kohona. Op. cit., p. 166.

90. R.Ostrihansky. Settlement of Interstate Trade Disputes - The Role of Law and Legal Procedures. - In: NYIL 1991, vol. XXII, The Hague, 1992, p. 175.

91. See Meinhard Hilf. Op. cit., p. 297.

92. For example, pursuant to Art. 3 of the OECD Convention, "the Members agree that they will: (a) keep each other informed and furnish the Organization with the information necessary for the accomplishment of its tasks; (b) consult together on a continuing basis, carry out studies and participate in agreed projects; and (c) co-operate closely and where appropriate take coordinated action".

(Footnote continues on next page)

dispute-preventing and dispute-resolution.

It may be presumed, that negotiations and consultations are the most natural, accessible and, therefore, widely utilized means of dispute settlement in any international relationships, including those within IEOs. Unlike more formalized administrative, arbitral, or judicial procedures, negotiations and consultations are often hidden from an outside observer, who is able to get only fragmentary information on them. Because of confidentiality, it is hardly possible to evaluate their real efficiency in each particular case. Nonetheless, due to the consensual nature of international legal obligations, negotiations and consultations are supposed to be the most logical and helpful means for preventing and resolving international economic disagreements.

2. Good Offices, Mediation, Conciliation

(Footnote continued from previous page)

93. Article XXII of GATT entitled "Consultations" says:

"1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The Contracting Parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1".

Remarkably, about half of the disputes which were formally brought under the procedures within GATT were settled by negotiation (see Meinhard Hilf. Op. cit., p. 302).

94. Among the means employed by the AMF for the accomplishment of its goals, there is: "...holding periodic consultations with member States on their economic conditions and the policies they pursue in support of the realization of the goals of the Fund and the States concerned" (Article Five (h) of the AMF Agreement).

95. Along with the above quoted general provisions, one can also meet more specific procedural requirements to negotiations and consultations. Thus, the MIGA Convention definitely stipulates: "Negotiations shall be deemed to have been exhausted if the parties fail to reach a settlement within a period of one hundred and twenty days from the date of the request to enter into negotiation" (Art. 2 of the Annex II to the Convention).

Past experience has shown that quite often an economic dispute can hardly be settled bilaterally, without a recourse to a third body. Meanwhile, the disputants strive to avoid or at least delay adjudicative intervention, often giving preference to good offices, mediation or conciliation⁹⁶. As commonly used quite informal dispute-resolving means, good offices, mediation and conciliation do not, normally, need any special procedure to be laid down in the IEOs' constituent instruments. It is presumed that the disputant Member States of an IEO may undertake them voluntarily upon their mutual agreement.

However, sometimes special procedural requirements are fixed in the IEOs' normative acts⁹⁷. Most attention is paid to conciliation⁹⁸, which is somewhat more

96. Merrills suggested the following correlation among good offices, mediation and conciliation: "The third party may simply encourage the disputing states to resume negotiations or do nothing more than provide them with an additional channel of communication. In these situations he is said to be contributing his 'good offices'. On the other hand, his job may be to investigate the dispute and to present the parties with the set of formal proposals for its solution... this form of intervention is called 'conciliation'. Between good offices and conciliation lies the form of third party activity known as 'mediation'.

Like good offices, mediation is essentially an adjunct of negotiations, but with the mediator as an active participant, authorized, and indeed expected, to advance his own proposals and to interpret, as well as to transmit, each party's proposals to the other. What distinguishes this kind of assistance from conciliation is that a mediator generally makes his proposals informally and on the basis of information supplied by the parties, rather than his own investigations, although in practice such distinctions tend to be blurred" (J.G.Merrills. *International Dispute Settlement*. Cambridge, 1991, p. 27).

97. Thus, pursuant to the 1989 Decision of the Contracting Parties "Improvements to the GATT Dispute Settlement Rules and Procedures", good offices, conciliation and mediation may be requested at any time by any party to a dispute. They may begin at any time and terminated at any time. If the parties to the dispute agree, procedures for good offices, conciliation or mediation may continue while the panel or working party process proceeds. It is specially provided that the Director-General may offer his good offices, conciliation or mediation, acting in an *ex officio* capacity.

98. It is worth to mention here the UN Draft rules for the conciliation of disputes between States of 1990 which were recommended to the Member States for examination as a part of the UN Decade of International Law program (see 30 ILM 229-244 (1991)).

formalized compared to good offices and mediation (e.g. the MIGA⁹⁹, the OECD¹⁰⁰, the International Cocoa Organization¹⁰¹).

Many lawyers persuasively expose the advantages of conciliation, usually stressing the two major points:

- (1) Conciliation does not aim at imposing binding solutions upon the disputants, thus leaving for them a freedom of maneuver;
- (2) Keeping the dispute under the parties' control, conciliation suggests them a

99. According to Article 3 of Annex II to the MIGA Convention, if the dispute is not resolved through negotiation, prior to arbitration, the parties by mutual consent may resort to conciliation procedure. The agreement for recourse to conciliation shall specify the matter in dispute, the claims of the parties and, if available, the name of the conciliator. In the absence of agreement on the conciliator, the parties may jointly request either the Secretary General of the ISCID or the President of the ICJ to appoint a conciliator. The disputants provide conciliator with all necessary information and documentation and shall give their most serious consideration to his recommendations. Unless otherwise agreed upon by the parties, the conciliator shall within a period not exceeding 180 days from the date of his appointment, submit to the parties a report recording the results of his efforts and setting out the controversial issues and his proposals for their settlement. Each party shall, within 60 days from the date of the receipt of the report, express in writing its views on the report to the other party. Only if the conciliation process fails, the disputants are entitled to recourse to arbitration.

100. For example, pursuant to the Revised Recommendation of the Council concerning cooperation between Member Countries on restrictive business practices affecting international trade of 1986, the Member Countries agree to use the good services of the Committee of Experts on the Restrictive Business Practices for the purpose of conciliation. In such case they inform the Chairman of the Committee, who determines in agreement with the Member countries concerned the procedure for conciliation. The Secretariat compiles the list of persons willing to act as conciliators. Any conclusions drawn as a result of the conciliation do not have a binding force and are kept confidential unless the member countries concerned agree otherwise (see 25 ILM 1634-1635 (1986)).

101. A step-by-step dispute-resolving procedure with the use of conciliation is also stipulated by the 1986 International Cocoa Agreement. It includes: (1) consultations on the matters of interpretation or application of the Agreement; (2) in the course of such consultations, on the request of either party and with the consent of the other, the Executive Director shall establish an appropriate conciliation procedure; (3) if no solution is made, the matter may, at the request of either party, be referred to the Council (Art. 61).

thoroughly motivated realistic platform for settlement¹⁰².

On the whole, the procedures of good offices, mediation and conciliation are a natural and logical addition to negotiations and consultations. The present writer is likely to support those lawyers who advise IEOs not to underestimate these reliable means of dispute-resolving. To quote P.van Dijk, "negotiations and consultations often turn out to be more successful if they are combined with good offices, mediation and conciliation. This still leaves the ultimate solution in the hands of the disputants but may bring into their discussions certain abstractions, impartial third-party views, solutions not yet taken into consideration, and persuasive force of authority and reasonableness"¹⁰³.

3. Dispute-Resolving Organs in IEOs

The analysis of the IEOs' constituent instruments reveals the following main types of organs involved in dispute settlement: (1) supreme and executive organs;

102. See Tiyanjana Maluwa. *The Peaceful Settlement of Disputes Among African States, 1963-1983: Some Conceptual Issues and Practical Trends*. - In: *ICLQ*, 1989, vol. 38, Part 2, p. 310-311.

Linda C. Reif adds to this: "Conciliation is less costly than the adjudicative methods, as it is a relatively informal and expeditious process. ...like arbitration, party autonomy is emphasized and the disputants usually have considerable freedom to design the conciliation process, including the choice of location and conciliators with expertise in the relevant subject-matter. If a disputant is of a type that warrants a wide-ranging or creative solution, then conciliation, with its ability to design such proposals, would be more appropriate than litigation with the restrictions involved in rendering judgements. Further, the information and statements generated by conciliation remain confidential unless the parties agree otherwise." (Linda C. Reif. *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*. - In: *Fordham International Law Journal* 1990-1991, No 3, p. 634-635).

103. P.Van Dijk. *A Comparative Analysis in the Perspective of Changing Structures of the International Economic Order*. - In: *Supervisory Mechanisms in International Economic Organizations*, p. 781.

(2) special quasi-arbitral organs; (3) arbitral tribunals; (4) permanent courts¹⁰⁴.

The frequency of disputes arising in IEOs varies considerably from one organization to another. The rates are higher within the actively operating organizations with a large volume of powers. This factor influences the drafters of the statutory acts when they make their choice as to the type of dispute-resolving organ to be used, or their combination.

It is quite difficult to follow any clear dependence between the subject and the intensity of activities, on the one hand, and the character of the dispute-resolving organ, on the other, in the existing IEOs. The only easily observed trend is that most integrational organizations resort to the permanent courts, at least in their constituent instruments, if not so actively in practice. To some extent this is determined by the influence of the EEC, whose experience undoubtedly has a strong impact on the other regional IEOs. But more important are: (1) a comparatively high degree of the Member States' trust to the regional integrational institutions¹⁰⁵ and their judicial capacity to take effective decisions, and (2) a large intensity of activities within integrational IEOs, that, despite a high level of their homogeneity, may cause a large number of disputes¹⁰⁶.

104. International administrative tribunals dealing with disputes between an organization and its officials, as well as the ICSID, involved in resolving investment disputes between States and the nationals of other States, are intentionally left beyond the scope of this study, since these kinds of dispute settlement do not directly relate to the implementation of the international legal rules of interstate nature.

105. The problem of the Member States' trust to their institutional creation has been seen in the early period of the CIS evolution. Apparently, the CIS States had too much experience of an excessive "supranationalism" within the former USSR to be willing to reanimate it again. Hence some of them (Moldova, Turkmenistan, Ukraine) viewed the Commonwealth as a minimally institutionalized coordinating association with a limited number of powers of its own. On the contrary, the attempts to create a strong Commonwealth were considered as endangering the sovereignty of the newly emerged independent States.

106. See some considerations on this point in: *Judicial Settlement of International Disputes*. An International Symposium. N.Y., Heidelberg, Berlin, 1974, pp. 381, 397, 404-405.

At the same time, the absence of explicit provisions relating to the dispute settlement mechanisms can be found in the constituent documents of both some actively operating IEOs (e.g. the OPEC), and the organizations of mainly deliberative character (e.g. the UNCTAD).

In rare cases, it is provided that legal action against the IEO may be brought in the outside judicial body, such as a competent national court of the State where the headquarters of the IEO are located (e.g. Article Fifty-three of the AMF Agreement).

3.1. Dispute Settlement in Supreme and Executive Organs

Unlike States, many IEOs do not follow the principle of separation of powers in its classical version and in certain cases their supreme or executive organs may be endowed with quasi-judicial powers¹⁰⁷. In this connection the following typical schemes may be observed.

(1) The supreme organ takes the final binding decision on the dispute without recourse to any other bodies. Such a brief formula without going into procedural details is provided, for example, in some financial organizations and the organizations of producers and exporters¹⁰⁸.

(2) The supreme or executive organ resolves disputes with the assistance of a specially established body consisting of legal and other experts (e.g. examining committee in the EFTA¹⁰⁹, advisory panels in some international commodity

107. P.I.B.Kohona. Op. cit., p. 149.

108. See e.g. Art. 18 of the Agreement Establishing the OWPEAC, Art. VIII of the Agreement Establishing the IBA, and Art. 21 of the Agreement Establishing the ATPC, Art. 29 of the International Timber Agreement of 1983.

109. See Articles 31 and 33 of the EFTA Convention.

organizations¹¹⁰, ad hoc tribunal in the CARICOM¹¹¹, panels of experts and groups of specialists in the MERCOSUR¹¹², Commission for Settlement of Disputes in the CCASG¹¹³, panels in GATT). In this case, the final arbitrator is also a supreme or executive organ, while the special body establishes the facts relating to the disputable matter and makes recommendations to the decision-making organ.

(3) The final dispute-resolving decisions are taken for some disputes by the supreme or executive organ, for the others by the ad hoc tribunals (e.g. the MIGA, the OPEC Fund for International Development)¹¹⁴.

3.2. Special Quasi-Arbitral Organs

As it has been above noted, in some IEOs special quasi-arbitral organs may be set up with a view of assisting a supreme or executive organ in resolving disputes. Such working technique possesses certain incontestable advantages: (1) a thorough and qualified expertise of the disputable matter; (2) disposing supreme or executive organ of time-taking preparatory work; (3) a flexible procedure that opens a door for compromises between the parties in dispute before the final decision is taken.

110. An example from the practice of such panel within International Coffee Agreement see in: 62 I.L.R. 422-428.

111. See Articles 11, 12 of the Annex to the Treaty Establishing the CARICOM.

112. According to Annex III to the Treaty Establishing the MERCOSUR, if no dispute solution can be found by means of direct negotiations, the dispute is referred "to the Common Market Group which, after evaluating the situation, shall within a period of 60 days make the relevant recommendations to the Parties for settling the dispute. To that end, the Common Market Group may establish or convene panels of experts or groups of specialists in order to obtain the necessary technical advice".

113. See Art. 10 of the Charter of the CCASG.

114. See Articles 56, 57 of the Annex II of the MIGA Convention, Articles 12, 13 of the Agreement Establishing the OPEC Fund for International Development.

Pursuant to Art. 31 of the EFTA Convention, if a disputable matter is referred to the Council, it shall promptly, by majority vote, make arrangements for examining the matter. Such arrangements may include a reference to an examining committee, which, in accordance with Art. 33 of the Convention, is composed by the Council of persons selected for their competence and integrity and appointed in personal capacity. The report of examining committee is taken into consideration by the Council when it makes recommendations to any Member State concerned. This procedure, however, has been rarely applied to the practical cases. Only six matters have come before the Council, the last in 1967¹¹⁵. Normally, the EFTA Member States prefer a political compromise to a legal settlement¹¹⁶.

Some international commodity organizations strongly rely on advisory panels in resolving disputes concerning interpretation and application of the relevant commodity agreements. Normally, the panel consists of two persons nominated by the exporting countries, two persons nominated by the importing countries, and a chairman selected unanimously by the above mentioned four persons or, if they fail to agree, by the Chairman of the Council. The motivated opinion of the panel is submitted to the Council, which after considering all relevant information, shall decide the dispute¹¹⁷.

Under Art. 10 of the Charter of the CCASG, the Commission for Settlement of Disputes is attached to the Supreme Council. If a dispute arises over interpretation or implementation of the Charter and it is not resolved within the Ministerial Council or the Supreme Council, the latter may refer such dispute to the Commission,

115. See: The European Free Trade Area. Geneva, 1987, p. 37-40.

116. See A.Szokoloczy-Syllaba. EFTA: The Settlement of Disputes. - In: ICLQ, 1971, Part 4, p. 519-534.

117. See: Art. 58 of the 1983 International Coffee Agreement; Art. 62 of the 1986 International Cocoa Agreement; Art. 39 of the 1987 International Sugar Agreement; Art. 55 of the 1987 International Natural Rubber Agreement.

which is formed for every case separately based on the nature of the dispute. The Commission submits its recommendation or opinion to the Supreme Council for the appropriate action. Unfortunately, there is no available information on the practical work of the Commission.

The Treaty Establishing the CARICOM makes reference to an ad hoc tribunal constituted by the Council for examining disputable issues. Despite the use of the term "tribunal" to denote this subsidiary body¹¹⁸, it does not possess full arbitral powers (for example, it cannot take binding decisions upon the parties to the dispute). The competence of an ad hoc tribunal is confined to making recommendations and opinions for the Council. However, the procedure, applied for the establishment and composition of an ad hoc tribunal resembles that of arbitral bodies¹¹⁹. It is important to note, that the CARICOM Member States took an obligation to refrain from any method of dispute settlement other than provided by Articles 11 and 12 of the Annex to the founding Treaty.

A unique dispute-resolving machinery has been invented within GATT¹²⁰. If a

118. Articles 11 and 12 of the Annex to the CARICOM Treaty.

119. Every Member State is invited to nominate two qualified jurists to the list of arbitrators. The term of an arbitrator is five years and may be renewed. Each party to the dispute appoints one arbitrator to an ad hoc tribunal. Then the two arbitrators chosen by the parties appoint a third arbitrator who shall be the chairman. If they fail to do this within 15 days following the date of their own appointment, the Secretary-General of the CARICOM fills the vacancy. Where more than two Member States are parties to a dispute and these fail to appoint two arbitrators from the list, the Secretary-General appoints a sole arbitrator. An ad hoc tribunal makes up its own procedure and may, with the consent of the parties to the dispute, invite any party to submit its views orally or in writing.

120. There is a voluminous legal literature on the GATT dispute settlement. See e.g. I. Van Bael. The GATT Dispute Settlement Procedure. - In: JWTL, 1988, N 4, p. 67-77; R.P. Parker. Dispute Settlement in the GATT and the Canada-US Free Trade Agreement. - In: JWT, 1989, N 3, p. 83-93; J.M. Waincymer. GATT Dispute Settlement: An Agenda for Evaluation and Reform. - In: North Carolina Journal of International Law and Commercial Regulation, 1989, N 1; E.-U. Petersmann. Mid-Term Review Agreements

dispute is not resolved through consultations (under Art. XXII of the General Agreement), a disputable matter may be referred to the CONTRACTING PARTIES which "shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate" (Art. XXIII of the General Agreement). Nothing is said in the basic text about panels or working parties which started to be formed in the course of the GATT evolution, first, as a customary practice, later codified in the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" adopted in 1979, and modified in the 1989 Decision "Improvements to the GATT Dispute Settlement Rules and Procedures".

At present, the work of a GATT panel covers the following stages:

Composition of a panel

A panel is established upon the written request of a contracting party indicating whether consultations were held, and providing a brief summary of the factual and legal basis of the complaint. It is composed of the well-qualified governmental and/or non-governmental individuals by the agreement of the concerned parties, or if such agreement fails to be reached within twenty days from the establishment of the panel, at the request of either party, by the Director-General who appoints the panelists in consultation with the Chairman of the Council and after consulting both parties. Normally, a panel consists of 3-5 members acting in

(Footnote continued from previous page)

of the Uruguay Round and the 1989 Improvements to the GATT Dispute Settlement Procedures. - In: GYIL 1989, vol.32, Berlin, 1990, p. 280-322; J.H.Bello, A.F.Holmer. Settling Disputes in the GATT: The Past, Present, and Future. - In: International Lawyer, 1990, vol. 24, N 2, p. 519-533; E.P.Eichmann. Procedural Aspects of GATT Dispute Settlement: Moving Towards Legalism. - In: International Tax & Business Lawyer, 1990, vol. 8, N 1, p. 38-77.

their personal capacity and representing the countries which are not directly interested in the dispute outcome. When more than one contracting party requests for the establishment of a panel related to the same matter, a single panel may be established to examine these complaints.

Working procedure

Normally, a panel arranges 2 or 3 meetings with the participation of the parties to the dispute, which present their views both in the written form and orally at the meetings. The members of the panel may request the parties concerned to submit any relevant information, as well as consult competent bodies or experts on legal, procedural and technical matters. Any third contracting party having a substantial interest in the matter before a panel has an opportunity to be heard by the panel.

Panel reports

The work of a panel results in a written report submitted for adoption to the Council which acts by consensus¹²¹. Panel reports are discussed and drafted confidentially, provided that personal views of the members are not disclosed. If the parties arrive to a compromise within the period of the matter consideration, the report is confined to a brief description of the disputable matter and the reached solution. If a compromise fails to be achieved, the panel suggests its

121. In accordance with the normal GATT practice, the Council is empowered to act for the CONTRACTING PARTIES with regard to the adoption of panel reports. It should be kept in mind that under the existing GATT rules each party may request a majority voting on the adoption of a panel report (Art. XXV:4). Hence, the proposals of the "consensus minus one" and "consensus minus two" rules could not be considered as cardinal innovations to the current procedure. To quote Petersmann, "the regular adoption of GATT dispute settlement reports by all GATT Contracting Parties increases not only the legal significance of panel findings as 'subsequent treaty practice' which has to be taken into account in the future interpretation of GATT rules, but also their 'political weight' because participation of the 'losing party' in the consensus decision is likely to enhance its political willingness to actually implement the panel findings" (E.-U.Petersmann. The Uruguay Round Negotiations 1986-1991, p. 554-555).

conclusions and recommendations on the matter¹²². As a general rule, the period within which the panel drafts its report should not exceed six months from the time of the panel composition. The overall period from the request for a panel until the Council decision is taken shall not exceed, unless agreed by the parties, fifteen months. The adopted panel report becomes a part of the GATT practice¹²³ which is taken into account in the further interpretation and application of the GATT rules.

A vast dispute-resolving experience within GATT proves that the recourse to subsidiary quasi-arbitral organs may be quite efficient, if these retain the confidence of the Member States and the latter treat them rather as a co-adjudicator in finding compromises among the disputing parties, than an arbitrator imposing binding decisions. Perhaps, for this reason, most of the panel reports were adopted by the CONTRACTING PARTIES and followed by the countries concerned. According to Jackson, among 117 disputes on which there was available information, only in 8-10 cases the panels' reports have not been fulfilled¹²⁴.

However, in the recent years the dispute-resolving situation within GATT has been somewhat worsened. In the regular report on this subject in the Council meeting (November 1991), the Director-General of GATT, Mr. Arthur Dunkel pointed out a remarkable rise of the number of dispute-settlement cases during a year (95% of all the disputes were with participation of the USA, EEC and Japan). He observed that

122. To quote Pierre Pescatore, "Unlike judgements, panel reports are persuasive, not decisive documents. Their objective is to convey the opinion of the Council, not to decide directly the issue, and this influences deeply the style and the choice of arguments. Panels do their best to avoid controversial issues and try to present their arguments as being the expression of the obvious" (Pierre Pescatore. *The GATT Dispute Settlement Mechanism - Its Present Situation and its Prospects*. - 27J.W.T.1 (1993), p.13).

123. See J.H.Jackson. *Op. cit.*, p. 68.

124. J.H.Jackson. *Restructuring the GATT System*, p. 67. For more detailed factual data on the GATT dispute settlement system see: E.-U.Petersmann. *Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT*. - In: *The New Round of Multilateral Trade Negotiations. Legal and Economic Problems*, p. 323-343.

the GATT faced an "increasing problem of conditional and incomplete implementation of panel reports"¹²⁵.

3.3. Arbitral Tribunals

In some IEOs arbitration procedure is provided for the disputes which fail to be resolved by virtue of pre-adjudicative means. The comparative study of statutory provisions highlights the following characteristics of the IEOs' arbitral tribunals.

Composition and procedure

Unlike permanent courts, arbitral tribunals are, as a rule, set up for each particular case in accordance with a traditional arbitral procedure. In the meantime, purely ad hoc arbitral tribunals, typical for a number of IEOs (e.g. the IMF, the MIGA, the WARDA, the OPEC Fund for International Development), differ from the permanent arbitral organs, within which the tribunals for particular cases may be set up (e.g. the Benelux College of Arbitrators, the IEA Dispute Settlement Center).

In most cases, tribunals are composed of three arbitrators, although, any other odd number of arbitrators or even a sole arbitrator are possible (e.g. the IEA). Normally, each party to the dispute appoints one arbitrator, while the third arbitrator (often endowed with the chairman's powers) is chosen by their mutual agreement. In the case such agreement fails to be reached, the third arbitrator may be nominated, at the request of the parties, by a highly authoritative official, like the President of the ICJ or the Secretary General of the ICSID. In the AMF the third arbitrator, in such event, is selected among Arab jurists by the Secretary-

125. GATT Activities 1991, Geneva, 1992, p. 49.

General of the League of Arab States¹²⁶. In some tribunals arbitrators may be appointed from the special panel, unless the parties agree to an outside person (e.g. the IEA Dispute Settlement Center), or from a list established by a supreme organ (e.g. the Benelux College of Arbitrators)¹²⁷.

As a general rule, the IEOs' constituent instruments do not specify the place of arbitration¹²⁸ and applicable law. Few exceptions can be observed.

Thus, under the Charter of the IEA Dispute Settlement Center, the principal place of arbitration is Paris. The parties may, however, agree to any other place, which should be approved by the Tribunal after consultation with the Director of the Center (Art. VII,i). The rules of applicable law are, in principle, those agreed to between the parties. In the absence of such agreement, these rules of law are determined by the Tribunal. In that case, if the transaction giving rise to the dispute involves a supplier of oil based in an IEA country, the Tribunal shall apply the law of that IEA country where the supplier of oil maintains its principal executive offices, but not including the conflict of law rules (Art. VII,c). The College of Arbitrators of the Benelux, with the consent of the parties to the dispute, may pronounce judgement ex aequo et bono, i.e. on the basis of general principles of law, in case of the lack of the relevant particular rules of law.

Most tribunals are authorized to determine their own working procedures. However, in some cases the constituent instruments stipulate that special procedures

126. Article Fifty-two of the AMF Agreement.

127. To quote Schwarzenberger, "the only difference between arbitration and judicial settlement lies in the method of selecting the members of these judicial organs. While, in arbitration proceedings, this is done by agreement between the parties, judicial settlement presupposes the existence of of a standing tribunal with its own bench of judges and its own rules of procedure which parties to a dispute must accept" (George Schwarzenberger. A Manual of International Law. Sixth edition, p. 195).

128. Kohona commented in this regard, that "it might be due to the assumption that the place would be the seat of the relevant organization" (P.I.B.Kohona. Op. cit., p. 175).

for arbitration will be adopted by a principal body of the IEO¹²⁹.

Jurisdiction

The jurisdiction of arbitral tribunals is most often limited to a relatively narrow circle of disputes arising within IEOs. Such limitations relate either to the disputes unresolved by the supreme or executive organ (e.g. the WARDA¹³⁰, the Benelux Economic Union¹³¹), or to the disputes on specified matters between different categories of the parties (e.g. the ITPA¹³², the MIGA¹³³, the IEA¹³⁴), or to the combination of both above mentioned criteria (the OPEC Fund for International Development¹³⁵).

In some IEOs a resort to arbitration is provided in a mandatory manner (e.g. the

129. For example, under Article I,g of the Charter of the IEA Dispute Settlement Center, the Governing Board of the IEA will adopt such Procedures for Arbitration as soon as practicable. In accordance with Art. 53 of the Treaty Establishing the Benelux Economic Union, in 1960 the Statutory Rules of the College of Arbitrators were adopted by the Committee of Ministers.

130. Under Art.XVI of the WARDA Constitution, if the Governing Council cannot reach a conclusion on the question in dispute concerning interpretation or application of the Constitution, or if the conclusion of the Governing Council is not accepted by the parties concerned, either party to the dispute may request that the matter be submitted to arbitration.

131. Art. 44 of the Treaty Establishing the Benelux Economic Union stipulates that "A dispute which cannot be settled in the Committee of Ministers shall be submitted to the College of Arbitrators either at the joint request of the parties to the dispute or at the request of either of these".

132. According to Art. 17 of the Agreement Establishing the ITPA, arbitration is applied merely to the disputes between the Association and a Member.

133. Under Art. 57 of the MIGA Convention, arbitration procedure shall be applied to the disputes between the Agency and a Member, or a country that has ceased to be a Member.

134. The jurisdiction of tribunals set up within the IEA Dispute Settlement Center concerns the disputes between sellers and buyers of oil and between parties to an exchange of oil (Art. II of the Charter of the IEA Dispute Settlement Center).

135. Pursuant to Art. 13 of the Agreement Establishing the OPEC Fund for International Development, in case no settlement is reached by the Ministerial Council, a dispute between the Fund and the State that ceased to be a Member, or between the Fund and any Member upon the termination of the operations of the Fund shall be submitted to arbitration.

IMF, EBRD)¹³⁶, while other IEOs refer it to a discretion of the disputant parties. In the latter case, a disputable matter may be submitted to arbitration either by a mutual consent of the disputants (e.g. the IEA¹³⁷), or by a unilateral request of any of them (e.g. the WARDA¹³⁸).

Awards and advisory opinions

The tribunals' decisions, mostly taken by majority vote, are, as a rule, final and binding upon the parties concerned. However, in rare cases the award may be requested for the revision or annulment. For example, Art. IX of the Charter of the IEA Dispute Settlement Center states that, if after the award was rendered, a party discovers a fact, ignorance of which was not due to negligence, and of such nature as decisively to affect the award, this party can apply to the Director of the Center for the revision of the award¹³⁹.

Some arbitral tribunals, apart from binding awards, are competent to give advisory opinions regarding the questions of law on the request of other organ of

136. In such cases the constituent instruments use the word "shall" for the matters to be submitted to arbitration. For example, under Art. 58 of the Agreement Establishing the EBRD, "if a disagreement should arise between the Bank and a member which has ceased to be a member, or between the Bank and any member after adoption of a decision to terminate the operations of the Bank, such disagreement shall be submitted to arbitration..."

137. Pursuant to Art. II,b of the Charter of the IEA Dispute Settlement Center, in order for the Tribunal to have jurisdiction, the parties must have given their consent in writing, indicating that they exclude any other means of dispute settlement, and that the award shall be final and binding as between them.

138. Art. XVI of the WARDA Constitution.

139. Within 30 days after the award was rendered any party may request the annulment of the award by applying in writing to the Director of the Center, on the following grounds: (1) that the tribunal has manifestly exceeded its powers; (2) that there was corruption on the part of a member of the tribunal; (3) that there was a serious departure from a fundamental rule of procedure; or (4) that the award has failed to state the reasons on which it was based. On receipt of the application, the Director appoints from the Panel an ad hoc Committee of three persons, independent from the tribunal, for investigation. If the award is annulled, the dispute shall be submitted, at the request of a party, to a new tribunal.

the IEO¹⁴⁰. It makes them in this respect similar to the permanent courts of integrational IEOs.

3.4. Permanent Courts

An important contribution to the dispute-resolving practice within international organizations is the idea of "judicial supranationality" constitutionally provided in some IEOs, mostly in regional economic communities (the Court of Justice of the European Communities, the Court of Justice of the Cartagena Agreement, the Court of Justice of the AEC, the Tribunal in the ECOWAS, the Court of Justice of the ECCAS, the Tribunal of the PTA, the Arbitration Commission of the CEPGL). Pursuant to Article 108.2 of the Agreement on the EEA, the EFTA countries shall establish the EFTA Court in accordance with a separate agreement between them. A specialized Economic Court is expected to be set up within the CIS¹⁴¹.

Normally, States resort to litigation at the final stage of the dispute evolution, after all other less painful means have been exhausted. This is quite understandable, since having resorted to a court, the parties to a dispute lose an

140. For example, under Art. 52 of the Treaty Establishing the Benelux Economic Union, "The Committee of Ministers may request the College of Arbitrators to supply advisory opinions regarding questions of law in respect of the provisions of the present Treaty and of conventions related to the aims of this Treaty".

141. Art. 32 of the CIS Charter stipulates that the Economic Court can interpret the agreements and other Commonwealth acts on economic issues, and resolve the disputes arising while executing economic obligations, as well as other disputes referred to the Court's competence by the agreements among the Member States. However, these brief provisions do not bring to the fore the status and competence of the Economic Court, which are expected to be defined more precisely in the Agreement on the Status of the Economic Court and the Regulation on it, which are to be passed by the Council of Heads of State. In particular, it is not clear from the CIS Charter if resort to the Economic Court in the event of an economic dispute is mandatory or depends on the discretion of the disputant parties. In the latter case, which is more likely, it will have to be specified whether a litigation in the Court can be initiated by a unilateral request of any of disputants or only by their mutual consent. Finally, who are considered potential disputants - only the Member States or also their nationals directly involved in economic interactions?

opportunity of the direct influence on the dispute-resolving, entrusting it to an independent tribunal. Being in general very reticent about this way of dispute settlement, the Member States of the IEOs having permanent courts refer to them quite rarely. Apart from the ECJ, whose extensive judicial practice has been an object of thorough examination¹⁴², and to much less extent the CJCA¹⁴³, the other IEOs' courts have not yet got any noteworthy experience in dispute-resolution, thus remaining rather a potential, than a practical tool. A certain dependence apparently exists between the level and intensity of integration, on the one hand, and the volume of work of the judicial organs within the economic communities, on the other.

Unfortunately, the present writer has failed to find either any traces of a practical judicial work or even any detailed statutory provisions of the permanent courts of African economic communities¹⁴⁴, apart from the brief references in

142. See, for example, G.Slynn. The Court of Justice of the European Communities. - In: ICLQ, 1984, Part 2, p. 409-429; K.P.E.Lasok. The European Court of Justice. Practice and Procedure. L., 1984; Hailtre Rasmussen. On Law and Policy in the European Court of Justice. Dordrecht, 1986; C.Gray. Judicial Remedies in International Law. Oxford, 1987, p. 120-149.

Remarkably, only two interstate disputes, from the total number of more than five thousand cases, were brought before the ECJ during the first three decades of its existence. Hence, to quote Hilf, "the mere existence of this Court has helped Member States in nearly all cases under dispute among themselves to find solutions to their conflicts through negotiation and consent" (see Meinhard Hilf. Op. cit., p. 289).

143. A noteworthy phenomenon has been observed within the Andean Group, where the Member States' non-compliance with their commitments was a general situation in the early 1980s, caused by grave economic difficulties of the Member States. If they had begun litigation against each other in the Court of Justice of the Cartagena Agreement it could have accelerated the disintegration in this subregion (see 23 ILM 424-425 (1984)).

144. Some comments on the judicial structure of the former EAC see in: M.A.Ajomo. Regional Economic Organizations. The African Experience. - In: ICLQ, 1976, vol. 25, Part 1, p. 79-82. See also Klaas van Walraven. Some Aspects of Regional Economic Integration in Africa. - In: Hague Yearbook of International Law 1991. Vol. 4 Hague, 1992, p. 106-126.

constituent instruments. For this reason, the ECJ¹⁴⁵ and the CJCA¹⁴⁶ are the only two of the above mentioned permanent courts, whose statutory provisions are available for consideration.

The trend to follow the EEC integrational pattern, that has been definitely observed within the Andean Group evolution of the last years, apparently covers the judicial system of the Cartagena Agreement, built under strong influence of the ECJ. This can be easily proved by a brief comparative analysis of the ECJ and CJCA.

Composition and Procedure

Both courts have much in common in relation to composition and procedure.

The ECJ consists of thirteen Judges and six Advocates-General¹⁴⁷ appointed by the common accord of the Governments of the Member States for a term of six years. The CJCA is composed of five justices designated for a term of six years by the unanimous vote of the plenipotentiaries accredited for this purpose. The position of the Attorney-General may be also created by the Commission of the Cartagena Agreement upon the unanimous proposal of the Court.

Both courts normally sit in plenary session. However, the ECJ may form chambers, consisting of three or five judges, either to undertake certain preparatory inquiries or to adjudicate on particular categories of cases. Similarly, for the matters to which a plenary session is not required, the CJCA may meet with a quorum of three justices.

145. See Part 5, section 4 of the Treaty of Rome; Statute of the Court of Justice.

146. See The Treaty Creating the Court of Justice of the Cartagena Agreement of 1979 (18 ILM 1203-1210 (1979) and the 1983 Decision 184 of the Commission of the Cartagena Agreement "Statute of the Court of Justice of the Cartagena Agreement" (23 ILM 422-441 (1984).

147. Pursuant to Art. 166 of the Treaty of Rome, "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions of cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it in Article 164".

The procedure before the courts consists of the written and oral parts. Deliberations in both courts are secret, while the hearings are public, unless a court for serious motives decides otherwise.

Jurisdiction

Both courts are constituted to ensure the respect of law in the interpretation and application of the constituent treaties of the EEC and Andean Group, and are endowed for this purpose with a wide jurisdiction. It basically covers:

(1) The acts of noncompliance by the Member States with their obligations under the constituent treaties. Such matters may be brought to both courts on the initiative of either an executive body or a Member State concerned. In the latter case, before a Member State brings an action against another Member State for an alleged infringement of an obligation under a constituent treaty, it must present a matter before a relevant executive body. This way, the Member States are given an opportunity to avoid a judicial procedure if an adequate solution is reached at the administrative phase of the dispute settlement. Moreover, according to Article 27 of the Treaty Creating the CJCA, "natural and juridical persons shall have the right to bring causes of action in the competent national courts, in accordance with the provisions of domestic law, when the member countries do not comply with that provided in Article 5 of this Treaty¹⁴⁸ and the rights of such persons are affected by such noncompliance".

(2) The review of legality of binding acts of the relevant IEOs' policy-making and executive organs. Such action may be brought to the court by a Member State,

148. This Article stipulates: "The member countries are committed to adopt the measures necessary to assure the fulfillment of the norms which comprise the juridical structure of the Cartagena Agreement.

Likewise, they are committed not to adopt or apply any measure which may be contrary to such norms, or which may prejudice their application".

policy-making or executive organ, or a natural or juridical person¹⁴⁹. Furthermore, it is specified that the member countries of the Cartagena Agreement may only bring an action of nullification against the decisions approved without their affirmative vote¹⁵⁰. If the action is well founded, the courts nullify the acts concerned. According to Art. 175 of the Treaty of Rome, the Member States and other institutions of the Community, as well as any natural or legal person, may bring an action before the ECJ if the Council or the Commission, in infringement of this Treaty, fail to act.

(3) Interpretation of the constituent instruments and acts of the institutions of the relevant IEOs by virtue of preliminary rulings (ECJ) or prior advisory opinions (CJCA). Apart from this, the ECJ has jurisdiction in some other matters specified in Articles 172, 177, 178, 179, 180, 181 and 182 of the Treaty of Rome.

Judgements

Both the judgements of the ECJ and the rulings of the CJCA are binding upon the parties concerned and enforceable in the Member States. In the case of discovery of a fact, which could have decisively influenced the outcome of the proceedings, provided that it was unknown to the applying party when the judgement (ruling) was given, such judgement (ruling) may be applied for revision (review) in each court.

The statutory documents of the CJCA provide for a special procedure of sanctions for nonfulfillment of a judgement. If the judgement is of noncompliance and the corresponding member country does not adopt the necessary measures for compliance with it within three months following notification, the CJCA having received the opinion of the executive body, shall apply sanctions to the above member country. In particular, the Court determines the limits within which the complainant country, or

149. In the latter case, a natural or juridical person may institute proceedings against those decisions that are of direct and individual concern to them (ECJ) or which are applicable to them and cause them harm (CJCA).

150. Art. 18 of the Treaty Creating the CJCA.

any other member country, may restrict or suspend, totally or partially, the advantages deriving from the Cartagena Agreement which benefit the noncomplying member country. Said limits must be in relation to the gravity of the noncompliance. A similar procedure of imposing financial penalties by the ECJ on a Member State failing to take necessary measures to comply with the judgement of the Court has been accepted by the Treaty on the European Union¹⁵¹.

Permanent judicial bodies are not an exclusive attribute of the integrational IEOs. They can be also found in the IEOs of special competence. The Judicial Board of the OAPEC, for example, consists of the judges appointed by the Council "from the persons whose impartiality is not in doubt and who fulfill the necessary conditions for holding the highest judicial positions in their countries, or are jurists of international repute"¹⁵². The Board is competent to consider some types of disputes on the request of either a party to the dispute or the Council¹⁵³, while other categories of disputes may be referred to the Board only subject to the approval of the disputant parties¹⁵⁴. The judgements of the Board are final and binding upon the

151. See the revised Article 171 of the EEC Treaty.

152. Art. Twenty Two of the Agreement of the OAPEC.

153. These are:

(a) disputes relating to interpretation and application of the constituent Agreement and the implementation of the obligation arising from it;

(b) disputes which arise between two or more members of the Organization in the field of petroleum operations;

(c) disputes which the Council decides that the Board is competent to consider (Article Twenty Three, paragraph 1 of the Agreement of the OAPEC).

154. These are:

(a) disputes arising between any member and a petroleum company operating in the territory of the said member;

(b) disputes arising between any member and a petroleum company belonging to any other member;

(c) disputes arising between two or more members of the Organization, other than what is provided in paragraph 1 of Article Twenty Three of the Agreement of the OAPEC (Article Twenty Three, paragraph 2 of the Agreement of the OAPEC).

parties concerned and shall be enforceable per se in the territories of the members¹⁵⁵.

* * *

The above analysis of dispute settlement within IEOs leads to the following conclusions:

(1) The dominant trend in dispute-resolving process is a gradual move in the course of a dispute evolution from more flexible pre-adjudicative means of settlement (negotiations, consultations, good offices, mediation, conciliation, quasi-arbitral bodies) to more strict and formalized arbitral and judicial procedures.

(2) There is every reason to suppose that a considerable part of the disputes arising within IEOs is prevented or resolved by virtue of direct negotiations and consultations among the disputants (although, a precise information on this can be hardly available to an outside observer). With regard to the disputes that fail to be resolved by pre-administrative and pre-adjudicative means, the general trend within most IEOs is to refer such disputes to the supreme and executive organs of IEOs, which are often assisted by subsidiary, specialized examining bodies. Most IEOs consider such choice of dispute-resolving bodies as the most suitable and efficient for the disputant parties and the IEO, within which the dispute arises.

(3) Arbitral and judicial means of dispute settlement, although provided for in the constituent instruments of some IEOs, remain rather a potential, than a practical tool, to which the disputant parties resort in rare cases.

155. Articles Twenty Three, Twenty Four of the Agreement of the OAPEC. See some examples from the practice of the Board in: Organization of Arab Petroleum Exporting Countries. Secretary General's Fifteenth Annual Report AH 1408/AD 1988, Kuwait, 1989, p. 138-139.

CHAPTER IX. SANCTIONS

One can hardly disagree with E.Fukatsu calling for the move of the law-enforcement process "from coercion to persuasion, from military to diplomatic, economic and psychological sanctions and, as far as possible, from maximal to minimum forms of pressure"¹⁵⁶. However, the realities of international life still often dictate the use of sanctions¹⁵⁷ as an ultimum remedium when the peaceful means of settlement are exhausted or infeasible.

In order to avoid an abuse of force in international relations, sanctions, as the extreme measures of coercion, are admissible only under certain conditions: (1) as a reaction to a breach of a legal obligation; (2) if a delinquent subject refuses to stop its illegal actions and compensate for its negative consequences, and amicable means of settlement do not help; (3) strictly within the margins of the sanctional competence of the subject taking such measures; (4) proportionally to the negative consequences of such a breach of law¹⁵⁸.

For what reason the use of sanctions can be considered a specific phase of law-implementation¹⁵⁹? Obviously, not all sanctions, even being in line with the above four criteria, necessarily ensure the proper or even partial realization of a broken rule. A breach of law itself is an anomalous situation, which means that for this

156. E.Fukatsu. Coercion and the Theory of Sanctions in International Law. - In: The Structure and Process of International Law. Ed. by R.McDonald and D.Johnston. Hague, 1983, p. 1203-1204.

157. See V.A.Vasilenko. International Legal Sanctions. Kiev, 1982; V.A.Vadapalas. The Realization of International Legal Sanctions. - In: Soviet Yearbook of International Law 1988. Moscow, 1989, p.71-86 (both in Russian); Ebere Osieke. Sanctions in International Law: The Contributions of the International Organizations. - In: NILR, 1984, N 2, p. 183-198.

158. See more details in V.A.Vasilenko. Op. cit.

159. There is a broad agreement among the lawyers that sanctions belong to the law-enforcing means in public international law (see e.g. E.Klein. Sanctions by International Organizations and Economic Communities. - In: Archiv des Volkerrechts, 1992, 30 Band, 1 Heft, p. 101-102).

particular case there is nothing to say about a proper and timely law implementation. But sanctions help to prevent some breaches of law from occurring and, what happens more seldom, to stop the continuation of the unlawful actions.

Unlike counter-measures taken by individual States, the IEOs' sanctions are of the centralized collective character, thus being more weighty from political and moral points of view, and, in some cases, causing more serious economic consequences on the target State. Apart from this, when a sanction is imposed by a collective decision, it is expected to be more thoroughly motivated and used when the breach of law is unchallengeable, while individual States sometimes abuse the term "sanctions" for the coercive measures on political reasons. Though, it should be admitted that economically powerful States often rely more on unilateral reprisals than multilateral sanctions¹⁶⁰.

Certain non-legal restraints for the use of sanctions by IEOs should prevent their being idealized: (1) sanctions against a powerful Member State may be considered either infeasible or even harmful for the organization, and for this reason, may not be imposed¹⁶¹; (2) political considerations of the organization's majority may shield a delinquent State from a penalty; (3) sanctions may impel a target Member State to withdraw from the organization or make other destructive steps de facto worsening the negative consequences of the breach of law for the relationships amongst the parties concerned (to use Audretsch's expression, "the remedy will be worse than the disease"¹⁶²).

160. See M. Doxey. *International Sanctions in Recent State Practice: Trends and Problems*. - In: *Contemporary Problems of International Law: Essays in honour of Georg Schwarzenberger on his eightieth birthday*. Bin Cheng and E.D. Brown (Eds.). L., 1988, p. 53-69.

161. The examples of such a cautious approach see in P.I.B. Kohona. *The Regulation of International Economic Relations Through Law*, p.253-254.

162. H.A.H. Audretsch. *Supervision in European Community Law*, p. 140.

If the need for sanctions arises, the most delicate legal problem is the sanctional competence of an IEO. The drafters of some IEOs' constituent instruments seem to underestimate this point, and that can lead under certain circumstances to a vicious circle. For example, the Statute of the OPEC contains no special provisions on the use of sanctions to a Member State not complying with its obligations. In the case of such non-compliance, the Organization should either resort to the concept of implied powers or make appropriate amendments to the constituent documents. The concept of implied powers is hardly available for the determination of an IEO's sanctional competence in this case, since from a strict legal viewpoint, the rights of a Member State may be curtailed only in the manner expressly laid down in the Statute¹⁶³. On the other hand, the method of amendments would be practically infeasible for the OPEC where unanimous agreement of all Members is required for such matters¹⁶⁴.

Another case is the sanctional competence of the CIS laid down by Article 10 of the CIS Charter as follows: "The breaches by a Member State of the present Charter, the systematic non-compliance with a State's obligations following from the agreements reached within the Commonwealth or decisions of the Commonwealth organs shall be considered by the Council of Heads of State.

In relation to such a State the measures allowed by international law can be applied".

Such wide-ranging formula of the Council's sanctional competence can cause serious troubles in interpretation and application most of all due to the consensual

163. This argument was given in the advice of the U.N. Legal Counsel to the General Assembly, when in 1968 it faced the question whether its right to create subsidiary organs with limited membership enabled it to exclude South Africa from the UNCTAD - an organ with general membership (see F. Morgenstern. *Legality in International Organizations*. - In: *BYIL* 1976-1977. Oxford, 1978, p. 242-243).

164. See more details on the OPEC in: L. Stoehr. *OPEC as a Legal Entity*. - In: *Fordham International Law Forum*, 1979-1980, vol. 3, N 1, p. 91-105.

nature of the Council's decisions which can be vetoed by the target States. Hence, in order to be able to apply collective Commonwealth's sanctions, the Member States could be expected to make an appropriate amendment to the rule of consensus in the Council of Heads of State (it might be a "consensus minus one" rule).

Some more considerations on the sanctional competence of an IEO with regard to non-members are suggested in the final sub-section of this Chapter.

* * *

The analysis of the IEOs' constituent instruments and practice reveals a quite substantial arsenal of sanctions ranging from the functional restrictions relating to membership, which are typical for international organizations in general, to more specific economic remedies.

1. Suspension of Rights and Privileges of Membership

1.1. Suspension of Voting Rights

This form of sanction is provided by the statutory acts of some IEOs (e.g. the FAO, UNIDO, AEC, ATPC, AIOEC, OWPEAC) for a Member State failing to pay its contributions to the organization's budget. The voting rights of a Member State may be suspended either in a supreme organ or in the organization as a whole, either when the amounts of arrears and terms within which such sanction is imposed are

fixed or where there is no such indication¹⁶⁵. One of the recent relevant precedents was the suspension of the voting rights of Democratic Kampuchea for the non-payment of its arrears to the FAO budget in 1989.

Some international commodity agreements provide for not only a general formula, but a more detailed procedure in respect of voting rights suspension. For example, if a member of the International Sugar Organization has not paid its full contribution to the administrative budget at the end of four months following the date on which its contribution is due to be paid, the Executive Director shall request the member to make payment as quickly as possible. If, at the expiration of two months after such request, the member has still not paid its contribution, its voting rights in the Council and in the Executive Committee shall be suspended until the full payment is made¹⁶⁶.

1.2. Suspension of Other Functional Rights and Privileges of Membership

Along with suspension of voting rights, IEOs may have at their disposal other restrictive measures affecting the membership status of a delinquent State. What is common for such measures - their purely administrative character, i.e. they coercively suspend the addressee's functional capacities of membership and, as a rule, can be applied by any institution to its "undisciplined" members. Some typical examples are worth brief consideration.

165. Two Articles may be compared in this connection:

"A Member Nation which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the Conference if the amount of its arrears equals or exceeds the amount of the contributions due from it for the two preceding calendar years" (Art. III.4 of the FAO Constitution);

"If any Member country fails to pay its full contribution to the budget as assessed, within sixty days of the date of which the contribution is due, the voting rights of that Member shall be suspended until the contribution has been paid" (Art. 16.2 of the Agreement Establishing the ATPC).

166. Art. 25 of the 1987 International Sugar Agreement.

Upon the recommendation of the AEC Council, the Assembly may apply sanctions, including the suspension of the rights and privileges of membership, to any Member State which persistently fails to honour its general undertakings under the constituent Treaty or fails to abide by the decisions or regulations of the Community¹⁶⁷. It is also specified that a Member State having arrears in the payment of its contribution to the Community budget, apart from being suspended in its voting rights, shall cease to enjoy other benefits of membership, including the right to address meetings, the right to present candidates for vacant posts within the Community, and shall not be eligible for office in the deliberative organs of the Community. The Assembly may, where necessary, impose other sanctions on a Member State for non-payment of contributions¹⁶⁸.

Some IEOs are authorized to suspend the right of representation of their Members in the IEO organs. The Committee of Ministers of the Council of Europe is empowered to "suspend the right of representation on the Committee and on the Consultative Assembly of a Member which has failed to fulfill its financial obligation during such period as the obligation remained unfulfilled" (Art. 9 of the Statute).

A method of automatic suspension of rights and privileges is provided by the charters of some U.N. specialized agencies. For example, Art. 5 of the UNIDO Constitution stipulates that "any Member of the Organization that is suspended from the exercise of the rights and privileges of membership of the United Nations shall automatically be suspended from the exercise of the rights and privileges of membership of the Organization".

A specific form of sanctions determined by the peculiarities of the activities may be imposed by the Council of the International Coffee Organization on the

167. See Art. 5.3 of the Treaty Establishing the AEC.

168. See Art. 84 of the Treaty Establishing the AEC.

exporting Member exceeding its quarterly export quota. In such case the Council deducts from a subsequent quota of that Member a quantity equal to 110 percent of the excess. If such exceeding occurs for a third time, the voting rights of the Member shall be suspended until such time as the Council decides whether to exclude the said Member from the Organization (Art. 42 of 1983 International Coffee Agreement).

1.3. Suspension of Obligations vis-a-vis a Member State

Unlike suspension of individual rights and privileges of membership, this measure does not immediately affect the Member State non-complying with its obligations, but rather authorizes other Member(s) to suspend their obligations in relation to this Member State, i.e. to make reciprocal prohibitions, restrictions or withdrawal of concessions. Another point is whether the Member(s) concerned follow such authorization or not. Here not merely administrative, but mostly economic considerations obtain primary importance. The experience of the GATT with regard to "nullification and impairment" is noteworthy.

If the CONTRACTING PARTIES of GATT "consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances" (Art. XXIII.2 of the General Agreement). This right, however, has been invoked only once: in 1952 the Netherlands were authorized to impose a quota on the U.S. wheat in response to the U.S. quotas on dairy products¹⁶⁹. However, the Netherlands have never enforced that measure. This case is

169. See GATT Analytical Index, Notes on the drafting, interpretation and application of the Articles of the General Agreement. - GATT/LEG/2, 1989, p. XXIII-77.

considered by some commentators as showing the practical inconveniences of such a sanction. R.Ostrihansky states in connection with this: "The economic hardship of restrictions mostly affected not the American exporters, who could easily sell the wheat flour on other markets, but Dutch farmers, who had to buy more expensive flour. As it turned out it was in the interest of the complaining party not to resort to retaliation"¹⁷⁰.

The EFTA Council may impose a similar sanction authorizing any Member State to suspend the application of certain obligations under the constituent Convention vis-a-vis the Member State which is using government aid in trade (Art. 13 of the EFTA Convention), or is unable to comply with the recommendation of a Council on the fulfillment of its obligations (Art. 31). In practice, however, the Council has never resorted to this ultimate remedy.

Therefore, the suspension of obligations vis-a-vis a Member State non-complying with its obligations is not purely a sanction of an IEO, but rather a combined sanction which is supposed to be applied by the organization and the Member State(s) concerned together. The organization issues the authorization which may be either followed or not by the relevant Member State(s) acting with the account of economic consequences of such measures. Logically, this mechanism is aimed at ensuring the reciprocity standard within complicated multilateral economic regimes. However, formal reciprocity in economic relationships is often collated with the real unequal economic opportunities of the counter-acting parties. Here lies a serious practical limitation for retaliation.

1.4. Financial Restrictions

170. R.Ostrihansky. Op. cit., p. 177.

Normally, the existing IEOs are not constitutionally empowered to resort to financial penalties in relation to the Member States non-complying with their obligations. This might be explained by the fact that the matters of financial compensation are a presumed prerogative of arbitral and/or judicial organs and, hence, should not be specified in the constituent instruments as an IEO's sanction. In 1965 Brazil and Uruguay made a proposal to introduce financial compensation within the GATT in cases where removal of the restrictions, or alternative trade concessions were not possible¹⁷¹, but it was rejected by the CONTRACTING PARTIES.

A rare case when the idea of financial penalty has been constitutionally accepted is the Treaty on European Union in the revised Art. 171 of the EEC Treaty. It is provided that if a Member State fails to take necessary measures to comply with the judgement of the Court of Justice within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In doing so the Commission shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. A final decision is to be taken by the Court, which, if finds that the Member State concerned has not complied with its judgement, may impose a lump sum or penalty payment on it.

More often the restrictive measures of IEOs having financial effect are provided not in the form of financial compensation or penalties, but by means of limiting the access to the financial resources of the IEO for a target Member State. Thus, a typical sanction in the arsenal of international financial organizations is to declare a Member, using the organization's resources in a manner contrary to its

171. See R.E. Hudec. *The GATT Legal System and World Trade Diplomacy*. N.Y., Wash., L., 1975, p. 222.

purposes, ineligible to use its resources¹⁷². Finally, a very effective remedy of an international financial organization is its right to suspend or cancel a loan fully or partly if a borrower does not comply with its obligations.

1.5. Suspension of Membership

In its maximal form the suspension of rights and privileges coincides with what is termed in some constituent instruments as "suspension of membership". This sanction may be imposed either if a Member persists in a policy that is contrary to the fundamental aim of the IEO¹⁷³, or fails to fulfill any of its obligations¹⁷⁴, or for the non-compliance with its financial obligations to the IEO¹⁷⁵. In the latter case, it may be formulated as suspension from taking part in the activities of the IEO¹⁷⁶ or ceasing "to enjoy privileges of membership until arrears and contributions for the current year have been paid"¹⁷⁷, that appears to be the same as suspension

172. For example, the IMF may declare a Member ineligible to use the Fund's general resources if the Member uses them in a manner contrary to the purposes of the Fund or fails to fulfill any of its obligations under the Agreement (Articles V.sec.5; VI.sec.1; XXVI.sec.2 of the Articles of the Agreement of the IMF). The Fund may also suspend the right to use its special drawing rights if a participant fails to fulfill any obligation with respect to special drawing rights (Art. XXIII.sec.2). See more details in: J.Gold. The "Sanctions" of the International Monetary Fund.-In: AJIL, 1972, N 5, p. 737-762; J.Gold. Membership and Nonmembership in the International Monetary Fund. Washington, 1974, p. 334-337.

173. See e.g. Art. 34 of the Statutes of the WTO.

174. See Art. VI.sec.2 of the Articles of Agreement of the IBRD; Art. V.sec.2 of the Articles of the Agreement of the IFC; Art. VII.sec.2 of the Articles of Agreement of the IDA; Art. 52 of the MIGA Convention; Art. 13.03 of the Agreement Establishing the OPEC Fund for International Development, Art. 38 of the Agreement Establishing the EBRD; Article Thirty-Seven of the AMF Agreement.

175. See Art. 80 of the Treaty for the Establishment of the ECCAS.

176. E.g. Art. 54 of the Treaty of the ECOWAS.

177. Art. 6 of the Constitution of the ANRPC.

of membership. Some IEOs apply a special precise procedure for suspension of membership¹⁷⁸.

What is meant by suspension of membership can be constitutionally specified. For example, the organizations of the World Bank Group use the following formula: "The member so suspended shall automatically cease to be a member one year from the date of its suspension unless the decision is taken by the same majority to restore the membership to good standing. While under suspension, a member shall not be entitled to exercise any rights under this Agreement, except the right of withdrawal, but shall remain subject to all obligations". Here one can see a definite distinction between suspension of membership and expulsion. The former means that the Member preserves only one right of withdrawal being subject to all obligations, while in the latter case the State is coercively deprived of the rights and obligations relating to the IEO membership, apart from the unfulfilled financial obligations¹⁷⁹. It should be noted that the existing IEOs' practice can hardly give an example of actual suspension of membership.

What is known to the IEOs' practice is the suspension of rights following from the observer status. This occurred, for example, in 1963 when the FAO Conference took a decision not to admit the Republic of South Africa, that had an observer status, "to participate in any capacity of in FAO conferences, meetings, training

178. For example, Section 15 of the By-Laws of the EBRD stipulates: "Before any member is suspended from membership of the Bank, the matter shall be considered by the Board of Directors, inter alia after a proposal by the President. The President shall inform the member sufficiently in advance of the complaint against it, and shall give the member reasonable time to explain its case orally and in writing. The Board of Directors shall recommend to the Board of Governors whatever action it considers appropriate. The member shall be notified of the recommendation and of the date on which the matter is to be considered by the Board of Governors, and it shall be given reasonable time in which to present its case orally and in writing before the Board of Governors. Any member may waive this right".

179. For more details concerning the differences between suspension of membership and expulsion see: J.Makarczyk. *Legal Basis for Suspension and Expulsion of a State from International Organization*. - In: *GYIL* 1982, vol. 25, Berlin, 1983, p.476-489.

centers or other activities in the African region, until the Conference decides otherwise"¹⁸⁰.

2. Expulsion

This is the most severe sanction that may be taken by an IEO against its Member in the case of a serious breach of its obligations. The experience of the last decades shows that IEOs resort to this exceptional measure in extremely rare cases¹⁸¹, since as H.G.Schermers noted, "it may harm the organization as much as it harms the expelled member"¹⁸². Moreover, only few IEOs' charters contain the explicit provisions on expulsion from membership. There is an understanding among lawyers that expulsion is not legally allowed if there is no clear constitutional provision to that effect, and the concept of implied powers can be hardly applicable in this case¹⁸³.

A rigid procedure of exclusion is provided by Art. 24 of the Agreement Establishing the ITPA: "If the Governing Board finds that any Member is in breach of its obligations under any Article of this Agreement and decides further that such breach significantly impairs the operation of this Agreement, it may by a two-thirds vote of all those voting other than the Member concerned accounting for at least

180. See FAO Conference. Res. 38/63.

181. In 1954 Czechoslovakia was subjected to compulsory withdrawal from the IMF for the non-compliance with its obligations to submit information about the official holdings of gold and foreign exchange, total exports and imports of merchandise, balance of payments and other matters. See more details in: J.Gold. Membership and Nonmembership in the International Monetary Fund, p. 360-372.

182. H.G.Schermers. International Institutional Law, vol. 1, p.55.

183. See: J.Makarczyk. Op.cit.,p. 488-489; H.G.Schermers. The International Organizations, p. 84-85.

two-thirds of the total volume of exports of all Members other than the Member concerned, resolve that such Member shall cease to be a Member of the Association and the Executive Director shall notify the depositary accordingly. The exclusion shall become effective 30 days after receipt by the depositary of the notification". A similar provision can be found in Art. 66 of the 1983 International Coffee Agreement, Art. 40 of the 1983 International Timber Agreement, Art. 58 of the 1986 International Agreement on Olive Oil and Table Olives.

The expulsion from the AMF membership may take place only as a next step following the suspension of membership if the latter measure appears to be ineffective. Under Article Thirty-nine of the AMF Agreement, "a Member shall be definitely divested of membership by decision of the Board of Governors, should it continue to fail to fulfill its obligations to the Fund for a period of two years from the date of temporary suspension of its membership".

A slightly different scheme follows from Art. XXVI.sec.2(b) of the Articles of Agreement of the IMF called "Compulsory withdrawal": "If, after the expiration of a reasonable period the member persists in its failure to fulfill any of its obligations under this Agreement, that Member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the Governors having eighty five percent of the total voting power". Before such a decision is taken, the matter shall be considered by the Executive Directors who shall inform the Member in reasonable time of the complaint against it and recommend to the Board of Governors the appropriate action. The Member concerned shall be given a reasonable time to present its case to the Board both orally and in writing¹⁸⁴.

Another procedure of compulsory withdrawal applies in the Council of Europe. A Member State, which has seriously violated the principles of collaboration fixed in

184. See Section 22 of the IMF By-Laws.

Art. 3 of the Statute, may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw. If this request is not complied with, the Committee may decide that such State has ceased to be a Member of the Council (Art. 8 of the Statute). J.Makarczyk calls such suspension "a polite invitation to withdraw, which, if not complied with, could result in expulsion"¹⁸⁵. In 1969 Greece, after a military coup in this country, was accused of the violation of Art.3 and withdrew from the Council before a decision on compulsory withdrawal was taken¹⁸⁶ (after the restoration of democracy in Greece, it renewed its membership to this organization).

A slight difference between expulsion and compulsory withdrawal relates to a double-stage procedure of withdrawal in the latter case (first, the request to withdraw, followed, if it is not complied with, by the compulsory withdrawal), but does not affect the identical consequences of these measures.

Compulsory withdrawal provided by the constituent instruments should be differed from a de facto forced withdrawal, when a Member State ceases to be a member after a breach of the organization's obligations, but on the grounds other than compulsory withdrawal. Three examples will clarify this point.

In 1962 the CMEA ceased to issue invitations to Albania motivated by Albania's non-payment of its contributions. Formally, Albania neither withdrew, nor was expelled from the CMEA.

In 1968 the U.N. General Assembly could not obtain a required two-thirds majority in order to exclude South Africa from the UNCTAD. However, South Africa did not accept the invitations to take part in the UNCTAD meetings, and on this ground after 1977 it was no longer considered a Member of this organization.

185. J.Makarczyk. Op. cit., p. 486.

186. See Council of Europe. Committee of Ministers Resolution (69) 51. Adopted on 12 December 1969. - In: 9 ILM 414-416 (1970).

In 1976 Chile was compelled to withdraw from the Andean Group because of the economic clash with the other Members, which occurred after the Chile's refusal to implement the Andean Foreign Investment Code of 1971.

Expulsion from one IEO may automatically cause the cessation of the membership in another. As it has been already mentioned, the Articles of Agreement of the IBRD provide for an automatic cessation of the membership in the Bank for any Member which ceases to be a Member of the IMF (Art.VI.sec.3). The analogous provisions as regards the cessation of the membership in the IBRD can be found in the constituent instruments of the IFC and IDA¹⁸⁷.

3. Restricting or Disrupting Economic Ties With a Delinquent State

This type of sanction has various forms¹⁸⁸ and normally may be imposed by an organization of general competence (e.g. U.N.) on a State committing an international crime. By its negative consequences collective disruption of economic ties, especially in the form of an economic blockade, may be even more harmful for a target State than an expulsion from the organization's membership.

There is an extensive U.N. practice on restricting and disrupting economic ties with South Africa, South Rhodesia, Portugal, and Israel¹⁸⁹. The recent examples are the U.N. economic blockade of Iraq in response to its act of aggression against Kuwait in August 1990, and the UN economic embargo of the Republics of Serbia and Montenegro in 1992 as a sanction against their intervention into the internal affairs of the Republic of Bosnia-Herzegovina. One can argue about the end result of

187. See Art. V.sec.3 of the Articles of Agreement of the IFC; Art. VII.sec.3 of the Articles of Agreement of the IDA.

188. See more details in V.A.Vasilenko. Op. cit., p. 107-120.

189. See Ibid.

those measures, which depends greatly upon the concrete situation, including the economic position of the target State and the correlation of forces among the Member States actively supporting and opposing such measures. The experience of the recent U.N. economic sanctions indicates that they may have a sufficient potential for effectiveness.

More problematic is the legality of restrictive economic measures taken by a regional economic organization against a non-member. This question arose, in particular, during the Falklands crisis of 1982¹⁹⁰, when the EEC suspended imports of the Argentine products by the Council Regulations 877/82, 1176/82, and 1254/82. These coercive measures were apparently taken for political reasons in order to support the United Kingdom, although, references were made to Articles 113 and 224 of the Treaty of Rome¹⁹¹. Doubts about the legality of the EEC import restrictions in that case were strengthened by Ireland and Italy refusing to follow them, as well as by the position of Denmark which declared that its trade restrictions would be based on the national legislation.

In its turn, Argentina complained to the GATT Council on the violation of the GATT rules by the Community and qualified its measures as inconsistent with the law and practice of GATT¹⁹². Argentina also argued that the EEC Members, not directly involved in the conflict, had no business taking these measures.

190. See P.J.Kuyper. Community Sanctions Against Argentina: Lawfulness under Community and International law. - In: Essays in European Law and Integration. Ed. by D.O'Keefe and H.G.Schermers. Kluwer-Deventer, 1982, p. 141-166; J.Mayall. The Sanctions Problem in International Economic Relations: reflections in the light of recent experience. - In: International Affairs, 1984, N 4, p. 636-637.

191. See more details in: P.J.Kuyper. Op. cit.

192. See GATT Activities in 1982. Geneva, 1983, p. 72-73. The EEC said that the restrictions on import from Argentina were imposed by the Community and its Member States on the basis of their inherent rights, of which Art. XXI of the General Agreement (Security Exceptions to the General Agreement) was a reflection. In June 1982 the EEC decided to suspend the economic restrictions against Argentina.

Without going into explicit detail in this particular dispute, which was thoroughly examined in the referred Kuyper's article, two general questions might be posed: (1) do the regional economic organizations or the organizations of special competence possess a right to impose economic sanctions on the non-member which committed a serious international crime, in view of Articles 41 and 42 of the UN Charter?; (2) if such a right is, in principle, compatible with the UN Charter, can it be executed on the grounds of implied competence of an organization?

The first question should be answered in the affirmative, since neither the UN Charter, nor general international law contain any provisions prohibiting other than the UN, subjects of international law to impose sanctions on those, who violate norms of jus cogens and commit international crimes dangerous for the entire international community. To use Kuyper's words, "even in theory, the Security Council does not have a monopoly over economic sanctions as it does in theory over the use of force"¹⁹³. This conclusion was authoritatively confirmed by the ECSC decision 92/285 prohibiting trade between the Community and the Republics of Serbia and Montenegro¹⁹⁴, which was in line with the UN Security Council Resolution 757 (1992) establishing economic embargo of the Republics of Serbia and Montenegro in response to their intervention in the internal affairs of the Republic of Bosnia-Herzegovina.

The answer to the second question might be a suggestion, rather than a statement. The concept of implied powers could be cautiously used in this case, since no drafters of the IEOs' constituent instruments can foresee all possible situations with regard to international crimes. There is no rule of general international law prohibiting the Member States of an IEO to reach additional agreements, either

193. P.J.Kuyper. *International Legal Aspects of Economic Sanctions*, p. 155.

194. OJ 1992. L 151/20-21.

formal or informal, filling lacunas in the IEO's constituent instruments. An extended interpretation by the Member States of the statutory rules on the IEO's sanctional powers is in the end a sort of such agreement. However, if sanctions are imposed by virtue of implied powers, no disagreeing Member State should be forced to follow them. Such approach appears to be logical in view of a consensual, in the end, nature of any international legal rule, especially, if the rule lays down additional obligations on the Member State in relation to which it did not have any opportunity to express its attitude before. In other words, if the interpretation of the constituent instruments suggested by an IEO organ extends beyond the expressed sanctional powers, the dissentient minority of Member States should be duly protected from the undesirable consequences of such interpretation.

* * *

Since IEL relies much more on reciprocity and mutual consent, rather than coercion, sanctions of IEOs play a relatively limited role in law enforcement. Both IEOs and the Member States strive to resort to coercive measures in rare cases, after less painful remedies have been attempted. Although many IEOs' statutes determine their sanctional powers, practice reveals only a few examples of the application of sanctions. This may be considered as a reflection of a more general trend towards the use of prevalingly non-coercive means of dispute settlement in the law-oriented international economic society.

Moreover, from the viewpoint of law-implementation, sanctions rarely lead to a proper realization of a violated legal rule. A delinquent State often resists obeying the rule it has once broken. In such cases, sanctions tend to have more punitive, than law-enforcing effect, fixing a certain negative reciprocity between an IEO and a delinquent State.

All the above scenarios cannot challenge the fact that sanctions still are and, apparently, will remain an essential attribute of any law, including IEL, since law is inconceivable without coercion. Compared with individual States, which are more determined by self-interests, IEOs as collective institutions possess better opportunities for the use of sanctions in a more well-balanced and legally motivated way. The experience of recent decades provides grounds to suggest that a potential use of sanctions, especially if they have a thorough constitutional foundation, may be a serious factor preventing the Member States from non-observance of their obligations. To put it another way, the threat of sanctions prevents breaches of law from occurring, more than the use of sanctions remedies such breaches, once they have already taken place.

CONCLUDING REMARKS TO THE THIRD PART

For the purpose of this study, the law-implementation is considered in a broad sense, as the stage of international legal process at which the subjects apply the whole complex of institutional, norm-making, supervisory, norm-executing and law-enforcing means in order to ensure the proper and timely realization of international legal rules. In the Third Part the analysis is focused on the basic law-implementing functions of IEOs: (1) interpretation; (2) subsequent (secondary) rule-making; (3) supervision; (4) operative norm-execution; (5) dispute resolution; (6) the use of sanctions.

From a legal technique viewpoint, the law-implementing facilities of existing IEOs are quite impressive (although, these do not strikingly differ from other international organizations). In the technical sense, the common law-implementing potential of IEOs can be hardly supplemented by something principally new. On the other hand, individual IEOs strongly vary as regards both the applied law-implementing means and their efficiency. Evidently, for all the meaningfulness of the law-implementing techniques which are at the IEO's disposal, taken alone, these cannot guarantee a high rate of compliance with the legal provisions. Much depends on the changing socio-economic and political environment, relationships among the Member States and, finally, on the skills and responsibility of the direct executives of the relevant normative acts both in the IEO and the Member States.

As in the case of law-making, certain elements of the IEOs' law-implementing practice contribute to the overall experience of international organizations. This is true, in particular, for the interpretation by the IBRD and IMF of their constituent instruments which was recognized as legally binding and final at the national judicial level, as well as for the elaborate mechanisms of supervision applied in international financial, integrational and commodity organizations. Even the unsuccessful experience of the International Tin Council, which failed to meet

its financial obligations in 1985, posed an important general legal question on the liability of the Member States for the non-fulfilled obligations of the international organization.

Perhaps, the strongest impact has been made by IEOs on the dispute settlement techniques. Along with improving the traditional means of negotiations and consultations, conciliation and arbitration, IEOs have amassed a vast experience of the use of quasi-arbitral expert bodies and innovated a specific pattern of permanent courts within the regional economic communities, which somewhat differs from the earlier models of permanent tribunals known to international law.

As many other international organizations, IEOs reserve the potential of sanctions as an ultimate remedy applied mostly against Member States or, more rarely, non-members, which impede the normal course of law-implementation by the breaches of legal prescriptions. The existing IEOs do not strongly differ from other international organizations in respect of the sanctional arsenal and the manner in which it is applied. (However, the IEOs' sanctions go beyond purely administrative restrictions relating to the status of membership. They may also take a shape of more specific economic remedies). A general trend is that a resort to sanctions is quite a rare case for the IEOs' practice. The threat of sanctions prevents breaches of law from occurring more, than the use of sanctions remedies such breaches, once they have already taken place.

The two perspective directions in the evolution of the IEOs' law-implementing facilities might be observed:

- (1) The examination and use by individual organizations of the law-implementing experience of comparable IEOs, especially those playing a leading role with regard to the diversity of applied instruments and volume of amassed practice. The lessons taken from the unsuccessful experience of some IEOs can be also helpful.

(2) The consolidation of the law-implementing efforts of the IEOs operating in the common or partly coinciding spheres. Thus, the pioneer experience of the joint EEC-EFTA law-implementation might be an incentive for the other regional and functional "blocks" of IEOs.

The efficiency of law-implementing efforts within an IEO strongly depends on the compatibility and coordination between:

- (a) the legal system of an IEO and the national legal systems of the Member States;
- (b) the law of an IEO and the Member States' agreements with other States (members and non-members) and international organizations;
- (c) the legal systems of individual IEOs with a comparable or partly coinciding competence and common members.

In the case of collisions within any of the above combinations, complicated legal problems can arise. For example, what is preferable: to specify a priority of the IEO's constituent provisions (subsequent rules?) over the national laws of the Member States or to keep silence on this (as most statutory acts do)? This is a double-edged question. On the one hand, an IEO as a relatively autonomous legal and functional entity would operate more predictably, not being under the shadow of inconsistent domestic legal acts, which could paralyze its work. On the other hand, individual Member States would not easily agree to allow the IEO to intervene into their national legal orders with the dissenting regulations avoiding parliamentary control. Hence, the supranational organizations take the first option, while the constituent instruments of traditional intergovernmental IEOs, as a rule, keep silence on the issue of correlation between the IEO's legal system and those of the Member States, thus, probably, giving more chances for a coordination between them (which is the best), but leaving open the question of potential conflicts.

As to possible conflicts between the law of an IEO and the Member States' agreements with the other States and organizations, it is definitely preferable, from a standpoint of the IEO, to provide constitutionally a requirement for the

consistency of the Member States' obligations under other international agreements, both priorly and subsequently concluded, with their obligations under the constituent rules of the IEO. Having such constitutional statement, the IEO: (1) readdresses the major troubles on maintaining the compatibility of the above obligations to the Member States; (2) claims to obtain a priority of its constitutional rules over the other rules of international law binding upon the Member States in the case of a conflict between them (provided that a special position of peremptory rules (jus cogens) and the lawful rights of the third subjects are not affected). However, such a constitutional provision alone does not help to resolve a potential conflict between the legal rules of two individual IEOs with coinciding competence and common members (if the statutory acts of both organizations contain the requirements of consistency). In this case, the general principles lex specialis and lex posteriori might be of more use.

FOURTH PART: CONCLUSIONS

The basic conclusions of the present study can be summarized as follows:

1. Evolving System of International Economic Organizations

Nowadays, international economic relations appear to be the most institutionalized sphere of international life, where dozens of various IEOs actively operate. The process of institutionalization, whatever sporadic it may seem, is a consequence of the objective changes and developments in the international economic environment and has an internal logic of building an adequate institutional framework for a well-organized world economic order. This ongoing process results in both a striking growth of individual IEOs and a gradual strengthening of inter-IEOs links, the formation of relatively compact functional and regional groups of IEOs.

A diverse structure of inter-IEOs relationships by virtue of various cooperation techniques gives grounds to treat the existing IEOs as an evolving system, whose major structural units are: the U.N. family of economic institutions, the OECD, the GATT, the organizations of producers and exporters, international commodity organizations, and some regional groups of IEOs.

In the meantime, more weight should be given to the improvement of coordinating contacts among various IEOs and their groups, which are still fragmentary and not enough tight. It is evident that a properly structured overall institutional system entails a more effective work of individual IEOs by means of exchange of experience, avoiding unnecessary duplication, compensating shortcomings in territorial scope and limits of membership of individual IEOs, joint efforts in solving the issues of common interest, etc.

A more systematic vision of existing IEOs through the prism of legally essential criteria can be envisaged by virtue of the classification suggested in this study. It demonstrates a dialectical combination of the IEOs' common, particular and individual features, and helps to establish their points of contact.

2. Emerging Law of International Economic Organizations

A structural analysis applied to the IEOs' constitutional texts and the subsequent legal rules gives grounds to suggest the concept of law of IEOs as a large, rather heterogeneous body of law dealing with IEOs and comprising:

- (1) numerous legal systems of individual IEOs;
- (2) rules of inter-IEOs agreements;
- (3) few general customary rules applicable to all IEOs.

Obviously, the individual legal systems of IEOs are likely to remain of primary importance compared to general and inter-IEOs rules, which are created in the end for a more effective operation of individual IEOs. Hence, unlike many traditional bodies of public international law, the law of IEOs, due to its very nature, does not need any large-scale codification. Any codification attempts within this legal discipline might be taken only in some narrow limits (by analogy with the 1986 Vienna Convention).

The law of IEOs occupies a specific inter-branch structural position being simultaneously a part of international institutional law and IEL (as a segment of the two intersecting circles). It cannot be isolated from the more traditional subdivisions of IEL, such as international trade law, international financial law, international investment law, international transport law, etc., since IEOs operate in all spheres of international economic life. In other words, the above subdivisions do not have strict margins and inevitably interpenetrate due to the close links between the substantive and institutional issues they deal with, thus

reflecting the complicated structure of the existing international economic relations.

The concept of the law of IEOs is not merely a result of theoretical systematization. It responds to the functional need to distinguish within IEL a voluminous body of legal rules setting up the institutional framework for the world economic order. These rules, however diverse they may be from one IEO to another, have much in common as regards their mode of creation, addressees, contents and law-implementing peculiarities. This justifies to treat them as a relatively autonomous body of law.

Moreover, such phenomena as: (1) the commonality of individual legal systems of comparable IEOs (e.g. international commodity organizations, regional economic communities, the organizations of producers and exporters), which is taken into account in the process of law-making and law-implementation, and (2) the problem of compatibility and potential conflicts between the legal systems of individual IEOs with coinciding competence and common members (e.g. between regional and subregional economic communities) give more weight to the complex approach towards the law of IEOs.

3. IEOs in the International Law-Making and Law-Implementation:

Main Contributions

International legal regulation in any field, including economic relationships, appears as the two interpenetrating facets: (1) the system of three principal components: the subjects, object and mechanism of legal regulation (a static or institutional aspect); (2) the process comprising the two basic phases: law-making and law-implementation, which functionally link the subjects, object and mechanism of legal regulation into an operating system (a dynamic or functional aspect). The primary objective of this study, mirrored in its title, was to reveal in a

comparative and generalizing way the role of IEOs in the international legal process, i.e. how do IEOs as the subjects of international law participate in law-making and law-implementing, and, hence, how do they influence the changes and developments in the mechanism and object of international legal regulation in the economic field.

The major parameters of the IEOs' involvement into the legal process have their roots in the international economic environment, which is a wide spectrum of trade, monetary, investment, communication, etc. relations based on the international division of labour among various countries, regions and economic agents. The legal techniques, procedures, methods, as well as institutional models applied within IEOs are strongly determined by such characteristics of international economic relations as: (1) sensibility to the vital interests of the interacting subjects; (2) complexity and interpenetration of commercial, financial, transport and other economic issues; (3) high intensity and dynamics of economic developments; (4) increasing trend for integration on the regional and global levels; (5) conflicting economic self-interests of interacting States and economic agents which can hardly be completely harmonized; (6) quantitative parameters indispensable for economic exchange, etc.

On the other hand, there is no sharp line separating international economic relations from other varieties of international ties. In this sense, IEOs as a functional group has much in common with the organizations focusing on political, military, cultural, ecological and other specific matters. This commonality rests, among others, on the same interacting subjects behind these organizations - States - which invent similar "rules of the game" for their institutional creations operating in various fields.

Therefore, the analyzed law-making and law-implementing facilities of IEOs combine certain common experience of intergovernmental organizations as a whole, and some innovations determined by the specifics of the IEOs' subject-matter.

3.1. International Law-Making

Economic relationships are one of the most dynamic spheres of interstate cooperation, where rapidly changing practical needs require operative and adequate reactions from interacting subjects. This factor is paramount for the character of law-making in IEL, whose increasing intensity makes States to have recourse to institutional norm-making mechanisms. Therefore, a certain part of law-making activities in this branch is transferred to IEOs, which possess the necessary expert, technical and financial facilities.

IEOs are involved in three main forms of international norm-making: (1) conclusion of treaties with other subjects of international law; (2) multilateral convention-making among the Member States under the auspices of IEOs; (3) adoption of normative acts with law-interpreting, law-declaring and law-developing effects.

There are certain grounds to suppose that direct IEOs' rule-making by virtue of binding decisions is obtaining primary importance for the law-making process in IEL. Of course, traditional treaty and custom have not exhausted their capacities and at present carry out the bulk of regulatory work in IEL. But by virtue of the IEOs' acts States obtain the opportunity of quick, competent and in many cases comparatively less costly multilateral ruling of their economic relationships. In certain cases, a binding decision may be more convenient for the Member States than a formal treaty.

Once it is created, an IEO is supposed to become something more than merely a deliberative forum. It should be a working collective organ of the Member States, which they trust and whose binding decisions they treat like an international treaty. Binding decisions of IEOs in substantive matters formulating the rights and obligations of the Member States must be recognized as a source of international law of full value covered by the principle pacta sunt servanda. The fact that most IEOs are authorized to take binding decisions in substantive matters proves that the

highly specialized nature of the problems these organizations deal with requires stricter legal instruments than mere recommendations. This is a striking peculiarity of IEOs compared with many other international organizations relying prevalingly on non-binding recommendations.

However, it is understandable, that the binding force of IEOs' decisions taken alone is not a full guarantee of their efficiency. The latter perceptibly depends on such a choice of decision-making procedures, which makes it possible to combine operative regulation with the adequate protection of the individual Member States' interests. Along with other intergovernmental organizations, IEOs have amassed a noteworthy collective experience of the use of elaborate procedural models which enable the Member States to minimize the outlay of decision-making. Certain procedural mechanisms provided by the IEOs' founding acts (e.g. majority voting, "weighted" voting) may have a potentially protective and stimulating character, i.e. they are rather used as a shadow under which the consensual decisions can be reached easier. Another important point is that formal procedures may be viable only if they account the actual correlation of economic powers of the interacting Member States and other economic factors affecting the efficiency of possible decisions (this consideration, in particular, gave birth to a specifically IEOs' procedural model of "weighted" voting).

The emphasis on binding decisions does not mean any underestimation of the IEOs' recommendations for international law. At present, some of them make up a part of the so-called "soft" economic law, and in this capacity: (1) serve as the auxiliary means for interpretation of the existing legal acts; (2) constitute an evidence of customary law; (3) stimulate the emergence and evolution of legal rules in customary, treaty and decision forms; (4) promote a preparatory codification; (5) perform a pre-legal regulation in the fields where adequate legal rules are still absent.

As economic cooperation becomes more complicated and acquires new forms, IEOs are supposed to be actively involved in international treaty-making, both directly and as a preparatory base for multilateral convention-making among the Member States. In many cases IEOs possess better facilities than individual States for collective technical and financial assistance, for establishing special economic regimes of multilateral cooperation. The regular and voluminous treaty-making practice of financial, integrational, and some other IEOs convincingly bears out this view. However, the existing IEOs strongly vary in scope and intensity of treaty-making. Due to their functional peculiarities, many IEOs participate in treaty-making quite sporadically. This is not a reproach at their address, but rather a matter of the IEOs' natural variety.

It is logical, that the IEOs' facilities are broadly used for drafting and negotiating multilateral conventions among the Member States. In this capacity IEOs discharge the function of preparatory law-making, which is quite typical for many other international institutions. One can hardly find any remarkable innovations in the convention-making techniques on the part of IEOs. As to the end results, the most successful convention-making has been seen in the matters of prevailingly technical character, where both the subject was ripe for an agreement and the treaty-makers strived for it. On the contrary, in the matters of considerable divergence in the Member States' positions (e.g. the codification of IEL) no appreciable results have been so far achieved.

3.2. International Law-Implementation

For all the meaningfulness of law-making efforts, taken alone, these can not guarantee that the newly created rules will be embodied in the real life. In order to ensure a proper and timely realization of their normative acts IEOs exercise a number of law-implementing functions: (1) interpretation; (2) subsequent (secondary)

rule-making; (3) supervision; (4) operative norm-execution; (5) dispute-resolving; (6) use of sanctions. The first four procedures are applied in the normal course of implementation, while the last two are used in the anomalous situations when a regular norm-executing is hindered by disputes or breaches of law.

Interpretation and subsequent rule-making are such intermediary stages of international legal process, in which law-making and law-implementation interlace.

The constituent instruments of only few IEOs, mainly those oriented to intensive rule-making, pay serious attention to interpretation. These may provide for both preliminary and subsequent interpretation, as well as the establishment of special judicial and quasi-judicial organs dealing with interpretation of the organization's normative acts.

IEOs often have recourse to such implementing procedure as subsequent (secondary) rule-making, i.e. creating special rules in order to facilitate the proper implementation of the previously adopted acts. This may be necessary for several reasons: (1) to concretize and specify the general norms for their adequate application; (2) to adapt the previously created norms to the newly emerging circumstances either developing them or amending; (3) to revise obsolete rules.

Interpretation and subsequent rule-making within IEOs often go side by side. It means that in many cases (although not always) interpretation is provided by virtue of subsequent rule-making. However, subsequent rule-making does not necessarily deal solely with interpretation issues.

The existing IEOs show variable forms and methods of supervision and operative norm-execution, which are the key phases of implementation typical for all IEOs, but mostly elaborate in the integrational, financial and commodity organizations. Supervision and norm-execution cover a wide spectrum of preparatory, evaluating, control, organizational, administrative and executive measures taken by the IEOs' organs in order to ensure the proper and timely fulfillment of the IEOs' legal provisions. The EEC is an example of the organization where the most well-balanced

distribution of supervisory and norm-executing powers among the organs has been reached. The recent practice has seen a pioneer attempt to set up a joint supervisory mechanism by two organizations (the EEC and EFTA) which might be a notable incentive for other functional and regional groups of IEOs.

Another phase of implementation in IEOs - dispute settlement - passes either through the more flexible dispute-resolving means such as consultations, negotiations, good offices, mediation and conciliation, or through the more formalized administrative, arbitral and judicial procedures in the competent organs. The experience shows that more elastic pre-adjudicative means are preferable, at least at the initial stage of the dispute evolution. There is every reason to suppose that a considerable part of the arising disputes is prevented or resolved by virtue of direct negotiations and consultations among the disputants.

Many constituent documents of IEOs provide for more or less elaborate institutional schemes of dispute-resolving with resort to policy-making, special quasi-arbitral, arbitral and judicial organs, including permanent tribunals. In most of such organizations the preference is given to administrative procedures. Arbitration and litigation, although provided for in the constituent instruments of some IEOs, remain a potential, rather than a practical tool, to which the delinquent parties have resort quite rarely.

Only a few actively operating IEOs have amassed a vast experience of dispute settlement (the EEC and GATT are unrivaled in this regard). Other IEOs have either fragmentary, or hardly accessible for the outside observer dispute-resolving practice.

A certain role in law-enforcement is played by the IEOs' sanctions, i.e. coercive counter-measures imposed on a delinquent State, when non-coercive means of settlement do not help. In other words, implementation of mainly voluntarily-consensual character may be supplemented, if necessary, by legitimate coercive procedures. As extreme measures of lawful coercion, sanctions are admissible only

under certain conditions: (1) as a reaction to a breach of a legal obligation; (2) if a delinquent subject refuses to stop its illegal actions and compensate for its negative consequences, and amicable means of settlement do not help; (3) strictly within the margins of the IEOs' sanctional competence; (4) proportionally to the negative consequences of such a breach of law.

Compared to individual States which are more determined by their self-interests, IEOs as collective institutions, possess better opportunities for the use of sanctions in a more well-balanced and legally motivated way. Notwithstanding the fact that sanctions are used by IEOs in rare cases and not always prove to be effective, the threat of their use remains a serious factor preventing certain breaches of law from occurring.

The efficiency of law-implementing efforts within an IEO strongly depends on the compatibility and coordination between:

- (a) the legal system of an IEO and the national legal systems of the Member States;
- (b) the law of an IEO and the Member States' agreements with other States (members and non-members) and international organizations;
- (c) the legal systems of individual IEOs with a comparable or partly coinciding competence and common members.

3.3 The Concept of "Implied Powers"

In their every-day work some IEOs run into what is called the problem of "implied powers"¹⁹⁵. In this respect, the basic legal question is: what are the

195. To quote Skubiszewski, "In international organizations the doctrine of implied powers means that the organization is deemed to have certain powers which are additional to those expressly stipulated in the constituent instrument. These additional powers are necessary or essential for the fulfillment of the tasks or purposes of the organization, or for the performance of its

(Footnote continues on next page)

conditions and limits for extended interpretation of the IEOs' constituent instruments as regards their treaty-making, decision-making, interpretative, and sanctional powers, which goes beyond the formally expressed competence, but is necessary for a proper functioning of the organization.

On the one hand, it is undoubtedly preferable when the organization's powers are explicitly formulated in the constituent instruments in order to avoid unnecessary complications in interpreting. On the other hand, a cautious and reasonable approach to the organization's implied powers may be justified in the situations when the relevant provisions of the constituent instruments are either initially imperfect or have become out-of-date, and an adequate subsequent rule-making amending the constituent instruments, for some reason, appears to be impossible. The practice of IEOs has seen many examples of such implication in relation to the treaty-making, interpretative and sanctional competence (the latter with regard to the non-members).

It might be also suggested that if any decision is taken by virtue of implied powers, no disagreeing Member State should be forced to follow it. Such approach seems to be logical in view of the ultimately consensual nature of any international legal rule, especially, if the rule lays down the additional obligations on the Member State in relation to which it did not have any opportunity to express its attitude before. This is also an argument to explain why implied powers can be

(Footnote continued from previous page)

functions, or for the exercise of the powers explicitly granted" (Krzysztof Skubiszewski. *Implied Powers of International Organizations*. - In: *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*. Ed. Yoram Dinstein. Dordrecht, 1989, p. 856).

Schwarzenberger suggested "the presumption in favour of granting to international institutions such implied powers as are indispensable to the fulfillment of their functions" (Georg Schwarzenberger. *A Manual of International Law*. Sixth edition, p. 194).

hardly applicable to the sanctional competence of an IEO in relation to its members: the rights of a Member State may be curtailed only in the manner expressly laid down in the constituent documents. This is an important consideration of a potential member when it takes a decision on the adherence to the organization.

However, as many other issues of the IEOs' activities, the problem of implied powers remains, first, an individual matter oriented to the arising needs of a particular IEO, and only then, a general problem relating to all organizations. Hence, it is difficult to give any general recommendations on: (1) which organ may take a decision on implied powers; (2) what are the legal consequences of a protest made by a limited number of Member States with regard to the alleged abuse of right in the application of the "implied powers" concept. These questions can be answered only within the context of the purposes, functions and expressed powers of a particular IEO.

3.4. The Shift from Bilateralism to Multilateralism in IEL

Perhaps, the most easily visible contribution of IEOs to the present-day international law-making and law-implementation has been the shift from bilateralism to multilateralism in IEL. For centuries IEL has been evolving as a body of predominantly bilateral rules. The first fragmentary attempts of multilateral regulation in the economic field made in the 19th century and the first decades of the 20th century (e.g. the first international commodity agreements) did not basically change the character of IEL of that time, which remained prevalingly a set of numerous bilateral inter-State trade agreements. Only in the second half of the 20th century did IEL see a decisive shift from bilateralism to multilateralism, primarily connected with the intensive rise of IEOs. It should be borne in mind that in other branches of international law (e.g. the law of treaties, diplomatic law, humanitarian law, ecological law) the trend towards multilateralism, also apparent

during last decades, was not necessarily so tightly linked with international organizations as in IEL .

Multilateral legal rules and IEOs may interrelate in many ways:

- (1) normally, a constituent act of an IEO is a multilateral treaty;
- (2) in the case of GATT, a multilateral economic agreement initially not intended to set up an IEO, in fact, gave an impetus to a new international institution;
- (3) IEOs themselves participate in multilateral rule-making in the treaty, decision, and customary forms.
- (4) IEOs supplement individual law-executing efforts of the Member States with collective multilateral measures.

In sum, multilateralism reasonably combined with bilateralism brings such obvious advantages as: (a) concentration of the Member States efforts, and (b) avoidance of the unnecessary duplication in both law-making and law-implementation. To quote Meinhard Hilf, "the evolutionary trend towards more effective international institutions is irreversible. Bilateralism can be no substitute for effective multilateral rules and institutions"¹⁹⁶ .

4. Coordination of the Decentralized International Legal Process

The above analysis would be incomplete without answering a general question: does the shift from bilateralism to multilateralism, and increasing institutionalization of international economic life mean that international legal regulation is getting more centralized in this field? Two different approaches were taken in writings on international economic order:(1) the proposal of reshaping the existing economic order for a more centralized one by virtue of new worldwide

196. Meinhard Hilf. Op. cit., p. 321.

IEOs¹⁹⁷; (2) the search for alternative decentralized coordination and steering of international economic activities through market competition and through private and public national laws, that "are likely to remain of far greater importance than public international economic law which, due to the necessary respect for national economic sovereignty, will have to confine itself in many areas to general framework rules, procedures and institutions with decentralized decision-making"¹⁹⁸.

Actually, international economic activities within the market economy conditions are likely to remain more decentralized than not, both (1) on the level of enterprises and individuals moved by their economic self-interests; and (2) on the level of more than 180 sovereign States with their individual economic demands. Moreover, the existing system of IEOs itself is neither centralized nor strongly cohesive. This cannot deny, of course, the fact that the process of intensifying institutionalization giving birth to dozens of IEOs makes international legal regulation in the economic area more coordinated in general, and even regionally more centralized in particular cases (e.g. the EEC).

It means that, as a general rule, the nature of international decision-making based on the consent of the parties has not been basically changed within IEOs. It remains decentralized, and any global international center taking legal decisions on economic issues in a legislative manner is unlikely to appear in a visible future. This does not challenge the fact that the decision-making within IEOs, compared to the decision-making among non-members, is more systematic, regulated and predictable.

The process of international law-implementation within IEOs also remains decentralized. The major burden of law-execution is carried by individual Member States which are obliged to fulfill their international obligations arising from the

197. See: J. Tinbergen. *Reshaping International Order*, Moscow, 1980.

198. E. U. Petersmann. *Constitutional Functions and Constitutional Problems of International Economic Law*, p. 20-21.

membership of IEOs in a proper and timely manner. In addition to this, IEOs coordinate and facilitate the law-implementing efforts of the Member States by virtue of the wide spectrum of sophisticated implementing techniques.

In a properly organized world economic order the coordination of the intra-IEOs law-making and law-implementing efforts should be supplemented by appropriate inter-IEOs coordination (the exchange of information, examination of experience, combination of various legal techniques aprobated by the "family" organizations, establishment of the purpose-oriented joint institutional structures, coordination of multilateral convention-making programmes, coordination of the use of sanctions, etc.). So far, only the first steps have been made in this direction, which could be expected to give a new impetus to the process of institutionalization in the international economic field.

* * *

In short, the main trends induced by IEOs into international legal process in the economic area may be summarized as follows:

- (1) a gradual shift from previously prevailing bilateralism to its combination with multilateralism in IEL;
- (2) an increasing co-ordination of predominantly decentralized rule-making and rule-implementation by virtue of institutional means;
- (3) an interpolation of new forms, techniques, procedures and methods in law-making and law-executing in IEL.

Obviously, there is a striking difference from one IEO to another as regards their impact on the economic environment and international legal practice. But on the whole, the existing IEOs, not being ideal institutional models, possess a sufficient arsenal of law-making and law-implementing instruments to make a considerable impact on the international legal regulation in the economic field. How

this potential is realized depends on the economic and political climate in the world, on the wills and intentions of their Member States. Nowadays, at the time of decisive positive changes in international life, one feels more optimistic about the IEOs' creative impact on the legal order in international economic relations.

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