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# The Nature of the Implied Treaty-Making Powers of International Organizations

## Abstract

The aim of this study is to present the nature of the treaty-making powers of international organizations, with particular emphasis on their implied treaty-making powers. While the attributed powers expressly granted in the constitutional instrument of a given international organization raise few doubts, implied powers – which are a special category of attributed powers – require a complex implication process, often based on uncertain foundations, and therefore attract far more criticism. Implication of powers nevertheless allows the interpretation of attributed powers to be more dynamic, which is especially important given the constantly developing activity of international organizations in areas that fall outside of the scope of their statutes. Given the special character of this category of treaty-making powers of international organizations – particularly the questions concerning their nature and the basis for the implication – the author examines this issue in the broader context of the capacities and powers of international organizations. This important topic has not yet been thoroughly addressed in the Polish literature of international law.

SŁOWA KLUCZOWE: organizacje międzynarodowe, zdolność traktatowa, kompetencje traktatowe, kompetencje przyznane, kompetencje przyrodzone, kompetencje dorozumiane

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# 1 Introduction

Any discussion of the nature of the treaty-making powers of international organizations is linked to the discussion on the capacity, competences and powers of international organizations.[1] Many commentators, particularly Jan Klabbers, emphasise the difference between the capacity to do something and the competence to engage in that activity.[2] While capacity is an abstract notion denoting a general capability, competence is more concrete and specific.[3] According to this doctrinal concept, capacity is an abstract notion derived from general international law. One may therefore advance the following two theses: firstly, the treaty-making capacity of international organizations flows from the general rules of customary international law; and, secondly, the treaty-making competences and powers of international organizations are more concrete and derive from various sources, which were described by Catherine Brölmann as the institutional make-up of the organization and which, in practice, signify the rules of the organization, including, in particular, its constituent instrument.[4] Klabbers, in his commentary of the debate on the treaty-making capacity, competences and powers of international organizations, emphasises that treaty practice

> walks the middle ground, more or less ignoring the doctrinal debate [...] moreover, with the help of the implied powers doctrine many treaties which the founders have never envisaged have been concluded by international organizations.[5]

Discussion of the treaty-making capacity, competences, and powers of international organizations must consider the context of the international personality that makes these organizations subjects of international

1 Viljam Engström, "Reasoning on Powers of Organizations," [in:] *Research Handbook of the Law of International Organizations,* eds. Jan Klabbers, Assa Wallendahl (Cheltenham: Edward Elgar Publishers, 2011), 56.

2 Jan Klabbers, *An Introduction to International Organizations* (Cambridge: Cambridge University Press, 2022), 268.

3 Andrzej Gadkowski, *Treaty-Making Powers of International Organizations* (Poznań: Wydawnictwo Naukowe UAM, 2018), 145.

4 Catherine Brölmann, *The Institutional Veil in Public International Law. International Organizations and the Law of Treaties* (Oxford and Portland: Oxford University Press, 2007), 93.

5 Klabbers, *An Introduction*, 269.

law with their own rights and duties.[6] According to a view frequently expressed in the literature, the initial legal and theoretical foundations, not only for the subjectivity of international organizations, but also for the doctrine of implied powers, were laid by the International Court of Justice (ICJ) in its widely cited 1949 Reparation for injuries suffered in the service of the United Nations Advisory Opinion (the Count Folke Bernadotte case).[7]

With regard to the United Nations' (UN) capacity to bring international claims, the Court stated that

> under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication, as being essential to the performance of its duties.[8]

The Court deemed these powers indispensable for the organization both to ensure the efficient and independent realisation of UN missions, and to provide effective support to its agents. The ICJ's view on the matter is reflected as follows:

> [u]pon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.[9]

While the ICJ, in this advisory opinion, accepted the international personality of the UN and explicitly affirmed that it is an international person, it also emphasized that this does not imply that the legal personality, rights and duties of the Organization are identical to those of a state.[10] International organizations today should clearly be viewed not only as a particularly important medium for various state actions but also as legal

6 Gadkowski, *Treaty-Making Powers*, 105.

7 *Reparation for injuries suffered in the service of the United Nations,* Advisory Opinion, ICJ Reports 1949, 174.

8 Ibidem, 182.

9 Ibidem, 184.

10 Mielnik Barbara, „Zagadnienie podmiotowości w prawie międzynarodowym," [in:] *Podmiotowość prawnomiędzynarodowa i jej współczesne aspekty*, ed. Ewelina Cała-Wacinkiewicz, Jerzy Menkes, Joanna Nowakowska-Małusecka, Wojciech Sz., Staszewski (Warszawa, C.H. Beck, 2020), 45.

persons with their own law-making powers, both *pro foro interno* and *pro foro externo*. This role of modern international organizations was aptly described by José Alvarez when he said that:

> international organizations are not intended to be proto-states or governments in the making. They were and are established for limited purposes – primarily, to facilitate the making of some treaties, to focus debate and make recommendations to governments, and to serve as venues for settling disputes on closely circumscribed topics. They are institutions of limited and delegated powers, lacking the plenary rights of sovereigns under international law.[11]

For international organizations to have international personality means possessing not only rights and duties, but also competences, powers, and liabilities under international law. Indeed, it seems to be generally recognised that the international personality of international governmental organizations is limited to fields in which they have the competence to operate.[12] As a result, each international organization has specific capacities as its core rights, and they are arguably inherent in the nature of its international legal personality. While this theory raises no doubts, the answer to the question of what the catalogue of core rights is seems much less straightforward. In the above-cited Reparation for injuries advisory opinion, the ICJ pointed to the existence of at least two such rights: the right to enter into treaties and the right to bring claims.[13] In the literature, there is a strong view that a minimal catalogue of such inherent capacities includes a treaty-making capacity, active and passive legation, and the capacity to bring international claims.[14] These are fully inherent in the

11 Alvarez José, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005), 15.

12 Henry G. Schermers, "The International Organizations," [in:] *International Law: Achievements and Prospects*, ed. Mohammed Bedjaoui (Dordrecht: Martinus Nijhoff, 1991), 74.

13 *Reparation for injuries*, 180.

14 Christian Dominicé defines these inherent capacities as: "capacité de conclure des traités," "capacité d'établir des relations diplomatiques" and "capacité de participer aux mécanismes généraux de la responsabilité international"; see: Christian Dominicé, "La personnalité juridique dans le système de droit des gens," [in:] *Theory of International Law at the Threshold of the 21th Century. Essays in Honour of Krzysztof Skubiszewski*, ed. Jerzy Makarczyk (The Hague-London-Boston: Brill, 1996), 161. A similar catalogue of three inherent capacities is provided by Chittharanjan

organization, unless expressly prohibited by its constituent instrument. This view brings to mind Finn Seyersted's concept of inherent skeletal capacities of international organizations, that is, the treaty-making capacity and the capacity to bring international claims.[15] They are also fully inherent in an organization unless expressly prohibited in its constituent instrument, and are independent of an organization's purposes and functions.[16]

That the treaty-making capacity of international organizations determines their international personality is beyond doubt. In other words, the existence of the *ius contrahendi* is a necessary condition for the international personality of any given international organization to be acknowledged. Brölmann goes as far as to say that "legal personality would for example, always imply capacity to conclude treaties."[17] When an international organization exercises the *ius contrahendi* and enters into an international agreement, the potential international legal personality of this organization, in practice, becomes active.

The existence of a treaty-making capacity does not, however, mean that an international organization has the power to conclude any international agreement in any field of activity. As accentuated by James L. Brierly, "the inherent treaty-making capacity of international organizations, which thus exists, is confined to capacity to make treaties compatible with the letter and spirit of their several constitutions."[18] In practice, the treaty-making powers of international organizations are not the same for each international organization, but are instead related to their powers. This means that an international organization may conclude agreements only in those areas in which it is competent to act. Some of these agreements are particularly important because they concern the position of the organization itself and have a fundamental significance for its functioning. These are primarily agreements on privileges and immunities, as well as agreements on the status of an organization's headquarters.

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F. Amerasinghe, *Principles of the Institutional Law of the International Organizations* (Cambridge: Cambridge University Press, 2005), 98.

15 Andrzej Gadkowski, "Notes on the Inherent Powers of International Organizations," *Adam Mickiewicz University Law Review,* vol. 15 (2023), 261.

16 Finn Seyersted, *Common Law of International Organizations* (Leiden, Boston: Martinus Nijhoff, 2008), 29.

17 Brölmann, *The Institutional Veil*, 69.

18 Yearbook of the International Law Commission 1950, vol. II, 230, para. 44.

Since the practice of the *ius contrahendi* of international organizations is extensive, certain problems may arise, for instance, when both the international organization and its member states are party to the same treaty, each in respect of its own area of competence. These so-called mixed agreements are often concluded by the European Union (EU) and its Member States, when the subject matter of the agreement falls partly under the competence of the EU and partly under that of Member States.[19]

The nature of the implied treaty-making powers of international organizations necessitates that this issue be discussed within the broader context of international personality, and, more specifically, in relation to the key attributes of such personality, particularly the treaty-making capacity. All powers of an international organization, regardless of their nature – and especially the implied treaty-making powers – must be examined in the context of the sovereignty of all states that undertake treaty obligations. These considerations determine the structure and content of this article.

## 2 Nature of the Treaty-Making Powers of International Organizations

Based on the above observations, the conclusion may be drawn that the treaty-making capacity of international organizations is an abstract notion, denoting a general capability to conclude treaties, and as such is derived from general international law. This capacity is an essential feature of international organizations as subjects of international law, and a particularly important attribute of their international legal personality. In this regard, some commentators note that the treaty-making capacity of international organizations is a "double safeguard under international law: as a rule of customary law and as an explicit or implicit rule of the constituent

19 Pieter J. Kuijper, *Of «Mixity» and «Double-hatting»: EU External Relations Law Explained* (Amsterdam: Amsterdam University Press, 2008), 5; Alan Dashwood, "Mixity in the Era of the Treaty of Lisbon," [in:] *Mixed Agreements Revisited. The European Union and its Member States in the World*, ed. Christophe Hillion, Panos Koutrakos (Oxford: Hart Publishing, 2010), 351.

instrument."[20] There is no doubt that, today, the conclusion of treaties by international organizations is the most typical form of their participation in international law-making.

The assumption made in this paper is that international organizations exercise the treaty-making capacity through their treaty-making powers, which, being more concrete, are derived from various sources. These sources are the constituent instrument and the rules of a given organization. As a result of the derivative character of the subjectivity of international organizations under international law, their treaty-making powers are limited. Even states, which are sovereign and primary subjects of international law, do not exercise absolute sovereignty when they perform acts within the framework of their international legal personality.[21] Such is also the case when they exercise their *ius tractatuum* in relations with other states or international organizations. One must nevertheless bear in mind that, as a rule, the power of states to conclude treaties in any given field may be presumed.

The sources of the treaty-making powers of international organizations are reflected in the provisions of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[22] The Convention does not clearly explain the general treaty-making capacity of international organizations. It is a considerable deviation from Article 6 of the 1969 Vienna Convention on the Law of Treaties, which clearly stipulates that "every State possesses capacity to conclude treaties."[23] In principle, this capacity, which is an attribute of state sovereignty, is not limited by international law. Any potential limitations of the treaty-making capacity of states may be included in the constitution; however, this is a matter for national law.

A general clause stipulating that every international organization has the capacity to conclude treaties was not included in the 1986 Vienna Convention, because the International Law Commission's position on the matter

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20 Kirsten Schmalenbach, "Article 6. Capacity of States to Conclude Treaties," [in:] *Vienna Convention on the Law of Treaties. A Commentary*, ed. Oliver Dörr, Kirsten Schmalenbach (Heidelberg: Springer Verlag, 2012), 116.

21 Henry G. Schermers, Niels M. Blokker, *International Institutional Law* (Leiden: Martinus Nijhoff Publishers, 2011), 1124.

22 Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. II (United Nations Publication, Sales No. E.94.V.5).

23 United Nations Treaty Series (UNTS), vol. 1155, 331.

was not unanimous.[24] The discussion in the Commission reflects two dominant trends of opinion on the treaty-making capacity of international organizations.[25] According to the first, international legal capacity may only be conferred by the states parties to a given constitutional instrument. It therefore follows that an organization's capacity to conclude treaties depends only on this organization's rules.[26] The second trend of opinion is that international organizations *per se* have the capacity to conclude treaties that are needed to exercise their functions.[27] Clearly, the point of departure for this discussion was the essence of the international legal personality of international organizations.[28] Furthermore, as already noted above, international organizations are neither sovereign, nor equal and, as a consequence, their treaty-making capacity is of a much more individual nature, that is, it may vary from organization to organization. It is often emphasised in the literature that each international organization has its "own distinctive legal image," which "is recognizable, in particular, in the individualised capacity of that organization to conclude treaties."[29]

For this reason, any discussion of the treaty-making capacity of international organizations must refer to several provisions in the 1986 Vienna Convention. Firstly, the preamble to the Convention contains provisions which appear to support the thesis that the treaty-making capacity of international organizations flows from general international law.[30] These provisions stipulate that "international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions

24 Brölmann, *The Institutional Veil*, 141.

25 Nicolas Levrat, "Article 6 of the 1986 Vienna Convention: Capacity of International Organizations to Donclude Treaties," [in:] *The Vienna Conventions on the Law of Treaties. A Commentary (vol. I)*, eds. Olivier Corten, Pierre. Klein (Oxford: Oxford University Press, 2011) 117.

26 Yearbook of the International Law Commission 1950, vol. II, 299 et seq.

27 Ibidem, 288-289; Anna Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* (Warszawa: Wydawnictwo Prawo i Praktyka Gospodarcza, 2006) 106-107.

28 Olufemi Elias, "Who Can Make Treaties? International Organizations," [in:] *The Oxford Guide to Treaties*, ed. Duncan. B. Hollis (Oxford: Oxford University Press, 2012), 79.

29 For a discussion, see: Yearbook of the International Law Commission 1982, vol. II (2), 24.

30 Karl Zemanek, "The United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations: The Unrecorded History of its General Agreement," [in:] *Völkerrecht, Recht der internationalen Organisationen, Weltwirtschaftsrecht: Festschrift für Ignaz Seidl-Hohenveldern*, ed. Karl. H. Böckstiegel (Köln, Heymanns Verlag, 1988), 665.

and the fulfilment of their purposes." Secondly, Article 6 of the Convention contains the fundamental provisions determining the scope of the capacity of international organizations to conclude treaties. In the opinion of the Commission, this article cannot be interpreted broadly; that is to say, it does not specify the general status of these organizations within international law but determines the international legal basis of their treaty-making capacity.[31] It stipulates that: "[t]he capacity of an international organization to conclude treaties is governed by the rules of that organization." In a commentary the Commission concluded that Article 6 is:

> the result of compromise based essentially on the finding that this Article should in no way be regarded as having the purpose or effect of deciding the question of the status of international organizations in international law; that question remains open, and the proposed wording is compatible both with the concept of general international law as the basis of international organizations' capacity and with the opposite concept.[32]

It follows that, when this capacity derives from international law, it is governed by the specific rules of a given international organization. Thus, in practice, it may be extended or limited by these rules. Considering the provisions of the preamble on the one hand, and the provisions of Article 6 on the other, one may advance a thesis that international law provides for the capacity of international organizations to conclude international agreements, but the limits to which this capacity may be exercised are determined by the rules of every individual organization.[33] According to a definition provided in Article 2(1)(j), the rules of the organization include "in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization."[34] Thirdly, the provision of the preamble stipulating that "the practice of international organizations in concluding treaties with States or between themselves should be in accordance with their constituent instruments" permits the organization sufficient room to develop its practice by pursuing its statutory purposes. Finally, the provisions of the

31 Yearbook of the International Law Commission 1982, vol. II (Part Two), 24.
32 Ibidem.
33 Levrat, *Article 6 of the 1986 Vienna Convention*, 117.
34 Tadeusz Gadkowski, "«Rules of the organization» w kontekście zdolności traktatowej organizacji międzynarodowej" *Prawo i Więź*, No. 1 (2025): 73.

Convention stipulate that the scope of an organization's treaty-making capacity is determined by its constituent instrument and rules, but also suggest that its international personality derives from general international law. All in all, the provisions of the Convention seem an acceptable compromise between different doctrinal positions. As noted by Karl Zemanek concerning the 1986 Vienna Convention, the textual compromise reached lends itself to the interpretation "that international organizations possess treaty-making capacity by virtue of general (customary) law, if that capacity is necessary for the exercise of their functions and the fulfilment of their purposes."[35]

It would seem that the context of Article 6 of the 1986 Vienna Convention allows a broad interpretation of specific treaty-making powers of international organizations. This interpretation must take into account not only the powers expressly granted in constituent instruments, but also the powers to enter into specific kinds of agreements that are not explicitly granted, namely the implied powers.

## 3 Nature of the Implied Treaty-Making Powers of International Organizations

It would be difficult today to agree with the restrictive view of the doctrine, that the treaty-making powers of international organizations must be expressly conferred on them in their constituent instruments.[36] Such a restrictive and formalistic approach may have been justified in the past, when states were extremely cautious about conferring different competences on international organizations, and when the functional interpretation of the powers of these organizations was *in statu nascendi*. Since then, however, the intensive development of international organizations and the growing scope of competences transferred to them by states has required

35 Zemanek, *The United Nations Conference*, 665.

36 Andrzej Gadkowski, "The doctrine of implied powers of international organizations in the case law of international tribunals" *Adam Mickiewicz University Law Review*, Vol. VI (2016): 45.

a more dynamic interpretation of their treaty-making powers.[37] This interpretation has developed into the functional interpretation, according to which the powers of international organizations are implied from their statutory purposes and functions. The practice of various international organizations, especially the UN, clearly indicates that only some of their treaty activities are based on powers expressly granted in their constituent instruments. This is understandable, particularly as the UN Charter, like the statutes of other international organizations, contains no general provisions on the organization's treaty-making powers, and the few detailed provisions found in it merely provide for the possibility of concluding certain types of agreements and limit the group of potential parties to these agreements. Clearly, however, despite international organizations evidently needing to imply their treaty-making powers, these powers are inextricably connected with express treaty-making powers and serve to supplement or even reinforce them in the process of concluding agreements. Understandably, implied treaty-making powers cannot be viewed as the most important powers of an international organization, enabling it to conclude international agreements. States, as the founders and members of an international organization, provide it with limited powers, in order to avoid its status overlapping with that of a sovereign subject of international law. The statutes of some international organizations, however, define their competences and powers broadly. Sometimes, finding and decoding specific powers, including treaty-making powers, in the statute of an organization proves difficult, as is illustrated by European Union Treaties. Analysis of the treaty-making powers of the European Union (EU) is not easy, because the matter is regulated by different parts of both the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), and is the subject of extensive Court of Justice of the European Union (CJEU) case law, especially regarding implied treaty-making powers.[38]

According to the currently prevailing view in the literature, the additional treaty-making powers of international organizations are implied as essential to the performance of their duties.[39] A broad application of

37 Krzysztof Skubiszewski, "Implied Powers of International Organizations," [in:] *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, ed. Yoran Dinstein, Mala Tabory (Dordrecht: Martinus Nijhof Publishers,1989), 855.

38 Gadkowski, *Treaty-making powers*, 168.

39 Nigel D. White, *The Law of International Organizations* (Manchester: Manchester University Press, 2017), 121.

the doctrine of implied powers, and particularly implied treaty-making powers, in the practice of international organizations, has helped achieve their status as important creators of modern international law, a claim made by Klabbers, who states that "it may be hypothesized that a change in our ideas on the implied powers doctrine reflects a change in the way we think of organizations generally."[40] In practice, the consequences of international organizations exercising implied treaty-making powers are wholly positive. International organizations may enter into international agreements concerning many different areas of external activity, particularly those related to the performance of their statutory purposes and functions, but not explicitly specified in their constituent instruments.

Klabbers emphasises that these are largely treaties the founders of the organizations never envisaged. It would clearly be difficult to assume that the founders of an organization are visionaries, able to determine in its constituent instrument universal provisions applicable to all potential situations that might occur in the course of the organization's functioning.[41] After all, international organizations function in a dynamic international environment, and they themselves influence these dynamics. Every once in a while, this new environment will require a thorough review of the statute of an international organization, which in practice may be difficult to achieve. Implying treaty-making powers from statutory provisions, which are often very general, is therefore a necessity that enables the organization to fulfil its purposes and tasks. Practice shows that, even in the case of international organizations whose constituent instruments were frequently reviewed and changed (e.g. EU Treaties), their treaty activity is for the most part implied. As far as the EU is concerned, this implication is based not only on the statutory provisions that expressly provide this organization with attributed powers (the principle of conferral) and specify its purposes and functions, but also on special provisions stipulating possible directions of expanding its powers, including its treaty-making powers (the flexibility clause, Article 352 of the TFEU).

One of the most important characteristics of implied treaty-making powers is the above-mentioned relation to attributed treaty-making powers. The latter, as powers expressly granted by the constituent instrument, may be specified in several different ways. They may take the form of general

40 Klabbers, *An Introduction*, 72-73.

41 Jarosław Sozański „Podmiotowość organizacji i konferencji międzynarodowych (międzyrządowych)" *Roczniki Administracji i Prawa*, No. 13 (2013): 73.

treaty-making powers, although in statutes, these clauses are rare, or special treaty-making powers, such as in the UN Charter. At this point, it should be noted that implied treaty-making powers may be inferred from general and other powers conferred on an international organization by the constituent instrument. This position is justified both from the perspective of the 1949 advisory opinion and other advisory opinions of the ICJ, as well as from prevailing perspectives in the literature.[42] This thesis is also supported by Article 6 of the 1986 Vienna Convention, as cited above, which stipulates that the general capacity of an international organization to conclude treaties is governed by the rules of this organization, and that these rules were defined very broadly. Bearing all the above in mind, it may be concluded that the implication of the treaty-making powers of international organizations rests on broad foundations, which include both the powers expressly granted in the statutory provisions and the statutory purposes, and functions of these organizations. These broad foundations, nevertheless, may not form the basis for implying unrestricted treaty-making powers. No international organization may, after all, conclude agreements concerning areas outside its purposes and functions. Therefore, the implication of the treaty-making powers of an organization must ultimately be limited "by the letter and by the spirit of its constitution and its other relevant acts."[43]

Even despite the fact that a large proportion of international agreements were, and continue to be, concluded by international organizations without explicit statutory authorisation, the use of such implied powers in the treaty practice of these organizations raises concerns. The first two ICJ advisory opinions, in which the Court adopted the doctrine of implied powers and developed its treaty basis, had prompted Seyersted to claim that, in these opinions, the ICJ merely modified the doctrine of delegated powers to arrive at implied powers.[44] In another advisory opinion, the 1962 Certain expenses of the United Nations, the Court exhaustively discussed the doctrine of implied powers, but eventually diverted towards the concept

42 Gadkowski, *Treaty-making powers*, 169.

43 Vladimir D. Degan, *Sources of International Law* (The Hague: Martinus Nijhoff Publishers 1997), 373.

44 1949 *Reparation for injuries* advisory opinion and 1954 *Effect of awards of compensation made by the UN Administrative Tribunal,* Advisory Opinion, ICJ Reports 1954, p. 47; Seyersted, *Common Law*, 30.

of inherent powers.[45] The Court finally and definitively reversed its initial view on the doctrine of implied powers in the 1996 Legality of Use by a State of Nuclear Weapons in Armed Conflict opinion, in which it unequivocally supported the concept of attributed powers.[46]

As a prominent supporter of inherent treaty-making powers, it was Seyersted who criticised, in the strongest terms, the notion of implied treaty-making powers of international organizations. In his opinion, international organizations *ipso facto* possess treaty-making powers that derive from general, customary international law. According to Seyersted, in the notion of implied powers, the only criteria for implication are the fictitious intentions of the authors of constituent instruments, which is the reason he refers to these powers as a fiction and to their use as a fictitious escape.[47] The conclusion that may be drawn from Seyersted's position is that the concept of inherent treaty-making powers is based on the solid assumption that these powers are assigned to an international organization, whereas the concept of implied treaty-making powers rests on the belief that these powers are to be sought by means of implication from sources that are not always of equal value. While remaining impartial on this issue, it must be noted that implied treaty-making powers are not merely the subject of theoretical discussion, but are commonly used in the treaty practice of international organizations. It therefore seems difficult to talk of them as a fiction, but at the same time, it is important to realise that implying treaty-making powers, like implying any of the other powers of international organizations, is not a simple process. For this reason, it must be ensured that any implication of powers rests on a sound basis and that the process itself transgresses no limits, limits that are in practice difficult to delineate.

45 1962 *Certain expenses of the United Nations (Articles 17, paragraph 2 of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151; White, *The Law of International Organizations*, 131.

46 1996 *Legality of Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66; Klabbers, *An Introduction*, 63.

47 Seyersted, *Common Law*, 65.

# 4 Conclusions

The author has previously highlighted that the implied powers of international organizations are created and exercised to complement their express powers. The basis for implied powers is formed by the statutory objects and functions of international organizations, as well as their express powers. Even if some statutes include an extended version of the flexibility clause, such as Article 352 of the TFEU, it does not mean that the organization has *carte blanche* to imply its powers without limitations. In principle, the creators of the powers of international organizations are states, and these powers include not only powers expressly provided for in the statute. States also indirectly decide the scope of implied powers by specifying, in the constituent instrument, on what basis and to what extent such powers may be implied. One of the significant limitations to implied powers is thus the will of states, flowing from their sovereignty. States may confer a specific scope of their own powers onto an international organization on the basis of an international agreement; however, they are able to do so mainly due to their status as sovereign subjects of international law. Even the statutes of international organizations that are supranational in character, for example the EU, underline the fact that the principle of conferral governs the limits of the organizations' competences. Implying the powers of an international organization and, subsequently, exercising them in practice may result in significant consequences, not only *pro foro interno*, but also *pro foro externo*. Clearly, the internal sphere of international organizations offers more freedom in implying additional powers. The implication of new powers may, to a greater extent, have its basis in the purposes and functions of these international organizations, and the new powers need not be closely connected with existing powers. In external relations, however, such an extensive implication of new powers, an implication that would threaten the rights and obligations of member states, would amount to a conflict with the fundamental objectives of the international organization as an entity consisting of sovereign states. This may be the reason behind the ICJ's cautious approach to such an extensive implication of new powers of international organizations, on the basis of their statutory purposes and functions.[48] At the same time, it must be emphasised that

48 Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951–1954: General Principles and Sources of Law" *British Yearbook of International Law*, Vol. XX (1953): 62.

the purposes and functions of an international organization *per se* in no way limit member states in exercising their sovereign rights. Nevertheless, this potential danger may arise from those powers of the organizations that are used in practice. At this point, however, it should be noted that powers that limit the exercise of state sovereignty cannot be presumed, and all powers of an international organization, regardless of their nature, must be considered in the context of state sovereignty. For instance, if an international organization exercises its treaty-making powers in relations with third states or other international organizations, these agreements thus draw certain legal consequences that are independent of whether the organization uses its express or implied treaty-making powers. The author had previously highlighted that these consequences follow primarily from the *pacta sunt servanda* principle, according to which every treaty in force is binding upon those party to it and must be performed by them in good faith. In this context, it would be difficult to accept a situation where an international organization violates the fundamental rules and principles of international law when implying powers. These rules and principles are, after all, binding not only on states but also for international organizations, as subjects of international law with their own international legal personality. As norms of *ius cogens,* they form the foundation of the entire international order.[49]

## Bibliography

Alvarez José, *International Organizations as Law-Makers*. Oxford: Oxford University Press, 2005.

Amerasinghe Chittharanjan Felix, *Principles of the Institutional Law of the International Organizations*. Cambridge: Cambridge University Press, 2005.

Bekker Peter H.F., *The Legal Position of Intergovernmental Organizations: A Functional Necessity. Analysis of Their Legal Status and Immunities*. The Hague: Martinus Nijhoff, 1994.

49 Andrzej Gadkowski, "Limitations to the Implied Powers of International Organizations" *Adam Mickiewicz University Law* Review, Vol. XIV (2022): 112-113.

Brölmann Catherine, *The Institutional Veil in Public International Law. International Organizations and the Law of Treaties*. Oxford-Portland: Oxford University Press, 2007.

Chiu Hungdah, *The Capacity of International Organizations to Conclude Treaties and the Special Legal Aspects of the Treaties so Concluded.* The Hague: Martinus Nijhoff, 1966.

Dashwood Alan, "Mixity in the Era of the Treaty of Lisbon", [in:] *Mixed Agreements Revisited. The European Union and its Member States in the World*, ed. Christophe Hillion, Panos Koutrakos. 351-367. Oxford: Hart Publishing, 2010.

Degan Vladimir D., *Sources of International Law.* The Hague: Martinus Nijhoff Publishers, 1997.

Dominicé Christian, "La personnalité juridique dans le système de droit des gens", [in:] *Theory of International Law at the Threshold of the 21 Century. Essays in Honour of Krzysztof Skubiszewski*, ed. Jerzy Makarczyk. 147-171. The Hague-London-Boston: Brill, 1996.

Engström Viljam, *Constructing the powers of international organizations*. The Hague: Martinus Nijhoff Publisher, 2012.

Engström Viljam, "Reasoning on Powers of Organizations," [in:] *Research Handbook of the Law of International Organizations*, eds. Jan Klabbers, Assa Wallendahl. 56-84. Cheltenham: Edward Elgar Publishers, 2011.

Elias Olufemi, "Who Can Make Treaties? International Organizations," [in:] *The Oxford Guide to Treaties*, ed. Duncan B. Hollis. 73-91. Oxford: Oxford University Press, 2012.

Gadkowski Andrzej, "Limitations to the Implied Powers of International Organizations" *Adam Mickiewicz University Law Review*, Vol. XIV (2022): 103-118.

Gadkowski Andrzej, "Notes on the Inherent Powers of International Organizations" *Adam Mickiewicz University Law Review*, Vol. XV (2023): 261-272.

Gadkowski Andrzej, "The doctrine of implied powers of international organizations in the case law of international tribunals" *Adam Mickiewicz University Law Review*, Vol. VI (2016): 45-60.

Gadkowski Andrzej, *Treaty-Making Powers of International Organizations*. Poznań: Adam Mickiewicz University Press, 2018.

Gadkowski Tadeusz, "«Rules of the organization» w kontekście zdolności traktatowej organizacji międzynarodowej" *Prawo i Więź*, Vol. I (2025): 73-90.

Klabbers Jan, *An Introduction to International Institutional Law*. Cambridge: Cambridge University Press, 2022.

Kuijper Pieter Jan, *Of «Mixity» and «Double-hatting»: EU External Relations Law Explained*. Amsterdam: Amsterdam University Press, 2008.

Levrat Nicolas, "Article 6 of the 1986 Vienna Convention: Capacity of International Organizations to Conclude Treaties", [in:] *The Vienna Conventions on the Law of Treaties. A Commentary (vol. I)*, ed. Olivier Corten, Pierre Klein. 117-124. Oxford: Oxford University Press, 2011.

Mielnik Barbara, „Zagadnienie podmiotowości w prawie międzynarodowym," [in:] *Podmiotowość prawnomiędzynarodowa i jej współczesne aspekty*, ed. Ewelina Cała-Wacinkiewicz, Jerzy Menkes, Joanna Nowakowska-Małusecka, Wojciech Sz., Staszewski. 41-56. Warszawa: C.H. Beck, 2020.

Peters Anne, "Constitutional Theories of International Organisations: Beyond the West" *Chinese Journal of International Law*, Vol. XX (2021): 649-698.

Seyersted Finn, *Common Law of International Organizations*. Leiden, Boston: Martinus Nijhoff, 2008.

Schermers Henry G., "The International Organizations," [in:] *International Law: Achievements and Prospects*, ed. Mohammed Bedjaoui. 73-91. Dordrecht: Martinus Nijhoff, 1991.

Schermers Henry G., Niels M. Blokker, *International Institutional Law*. Leiden: Martinus Nijhoff Publishers, 2011.

Schmalenbach Kirsten, "Article 6. Capacity of States to Conclude Treaties," [in:] *Vienna Convention on the Law of Treaties. A Commentary*, ed. Oliver Dörr, Kirsten Schmalenbach. 105-117. Heidelberg: Springer Verlag, 2012.

Sozański Jarosław, „Podmiotowość organizacji i konferencji międzynarodowych (międzyrządowych)" *Roczniki Administracji i Prawa*, No. 13 (2013): 65-88.

Skubiszewski Krzysztof, "Implied Powers of International Organizations," [in:] *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, ed. Yoran Dinstein, Mala Tabory. 855-868. Dordrecht: Martinus Nijhof Publishers,1989.

White Nigel D., *The Law of International Organizations*. Manchester: Manchester University Press, 2017.

Wyrozumska Anna, *Umowy międzynarodowe. Teoria i praktyka*. Warszawa: Wydawnictwo Prawo i Praktyka Gospodarcza, 2006.

Zemanek Karl, "The United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations: The Unrecorded History of its General Agreement," [in:] *Völkerrecht, Recht der internationalen Organisationen, Weltwirtschaftsrecht: Festschrift für Ignaz Seidl-Hohenveldern*, ed. Karl. H. Böckstiegel. 665-679. Köln: Heymanns Verlag, 1988.