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Limitations to the Implied Powers of International Organizations

Abstract: The aim of this article is to present the main aspects of limitations to the implied powers of international organizations. The author discusses the most important case law and the position on this topic presented, in particular, by the International Court of Justice. He points to the most salient categories in the catalogue of the limits of implied powers of international organizations.

Keywords: international organizations, implied powers, implication of powers, International Court of Justice, Court of Justice of the European Union.

Introduction

Previous editions of the Adam Mickiewicz University Law Review contained my articles on the doctrine of implied powers of international organizations and on the basis for the implication of such powers.[1] In both articles, a conclusion was formulated that the case law of the international courts and tribunals formed, and still forms, the intellectual basis for the analysis of issues concerning the implied powers of international organizations in contemporary inter-

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1 Andrzej Gadkowski, "The doctrine of implied powers of international organizations in the case law of international tribunals", *Adam Mickiewicz University Law Review* 6. 2016: 45–59; Andrzej Gadkowski, "The basis for the implication of powers of international organizations", *Adam Mickiewicz University Law Review* 11. 2020: 69–82.

national law. This article is the continuation of considerations on the topic of implied powers of international organizations, with a particular focus on the category of the limitation of such powers.

When addressing this topic, one should remember that the case law of the international courts and tribunals, especially that of the International Court of Justice[2] and the Court of Justice of the European Union,[3] which shaped the concept of the implied powers of international organizations, is not uniform. The positions of both courts underwent a noticeable evolution towards a more cautious approach regarding the implication of powers of international organizations in external relations. Quite clearly, however, the concept of implied powers has never allowed the scope of the powers of international organizations to be broadened indefinitely. As this concept aims at ensuring the effective performance of statutory functions by international organizations, it should be considered primarily in the light of this normative assertion. Every international organization requires its own powers in order to fulfil its functions. These powers, however, are limited. The limitations are imposed by the legal nature of international organizations. Indeed, no international organization has general jurisdiction over its members. As a consequence, only some powers may be conferred on this organization through implication, such as supplementary powers. This was directly confirmed by the ICJ in the 1962 Certain expenses advisory opinion. In this opinion the Court emphasised that even if an organization's statute provides a very broad definition of this organization's purposes, "neither they nor the powers conferred to effectuate them are unlimited."[4] The question thus arises as to what the limits of implied powers are. The catalogue of these limits is not easy to determine because the concept of implied powers was based on a teleological interpretation of the constituent instruments of international organizations. This teleological interpretation, al-

2 Hereinafter: ICJ.

3 Hereinafter: CJEU.

4 Certain expenses of the United Nations (Article 17, paragraph 2 of the UN Charter), Advisory Opinion of 20 July 1962, ICJ Reports 1962, 168.

though allowed under Article 31(1) of the 1969 Vienna Convention of the Law of Treaties, also has its limits, namely the objects and purposes of the treaty.[5] The wording of the objects and purposes of international organizations in their constituent instruments is often rather ambiguous; hence their scope of interpretation is easily exceeded. This, in turn, could result in adopting the principle of 'the ends justify the means', which clearly does not substantiate the doctrine of the implied powers of international organizations. Due to the obvious difficulty of creating a catalogue of the limits of implied powers, only the most salient categories will be presented: firstly, necessity or essentiality; secondly, existence of express powers of the international organization; and thirdly, compliance of the implied powers of the international organization with fundamental rules and the principles of international law.

When discussing the catalogue of the limits of the implied powers of international organizations, one should keep in mind the necessity of maintaining of the principle of distribution of functions within an international organization in the process of implication. This issue will be addressed in detail below.

Necessity or Essentiality

Every scientific discussion on the factors which define and limit the scope of implied powers in the law of international organizations must include essentiality and necessity.[6] While these factors are of great interest, they are also, however, extremely difficult to define. The difficulties arise from the fact that identifying what is necessary or essential for performing the tasks and functions of international organizations, or exercising their explicit powers, is inherently subjective. It remains crucial, however, because, if we accept necessity or essentiality as a *sine qua non* condition for implying powers, then their absence in a given situation may be an argument for denying an organization

5 1969 Vienna Convention of the Law of Treaties, 1153 UNTS 331.

6 Andrzej Gadkowski, *Treaty-making powers of international organizations*. Poznań, 2018, 135 et seq.

its implied powers. Chief Justice Marshall stated in the commonly quoted McCulloch case that "the word 'necessary' […] has not a fixed character peculiar to itself. It admits of all degrees of comparison."[7] One must bear in mind that in constitutional law, an organ has much greater freedom of choice of the means of executing expressly granted powers than is the case in the law of international organizations, where the powers of an organization and its organs derive from the will of sovereign states. State sovereignty in itself constitutes a limitation of implied powers, as subsequent sections of this study will show. One may therefore advance the theory that the definition of what is necessary or essential must remain within certain boundaries, and these boundaries depend on the specificity of the law of each international organization.[8] The criteria of necessity and essentiality were frequently referred to by the ICJ in the most famous cases. By way of example, the author will cite several of the most typical statements here. In the 1949 Reparation for injuries case, the Court speaks of powers arising by "necessary implication as being essential to the performance of its duties [duties of the organization]."[9] In another part of this advisory opinion, the Court speaks of powers "necessitated by the discharge of functions."[10] In the 1962 Certain expenses case, the Court talks of powers that are "appropriate for the fulfilment of one of the States' purposes of the United Nations."[11] Neither of these advisory opinions contains definitions of necessity or essentiality. In the dissenting opinions of some judges and also in the literature, one may find the personal views of commentators. E. Lauterpacht, on the basis of the 1954 Effect of awards case, states that "[e]ssential means

7 Samuel Willard Crompton, *Mc Culloch v. Maryland. Implied Powers of the Federal Government*. New York, 2007, 12.

8 Krzysztof Skubiszewski, "Implied powers of International Organizations" in *International Law at a Time of Perplexity. Essays in Honour of Shabatai Rosenne*, ed. Y. Dimstein. Dordrecht, 1989, 861.

9 Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, ICJ Reports 1949, 182–183.

10 Reparation for injuries, 180.

11 Certain expenses case, 168.

something more than important, but less than indispensably requisite."[12] Regarding necessity, Judge Gros, in his dissenting opinion in the 1971 Namibia case, states that "[t]o say that a power is necessary, that it logically results from a certain situation, is to admit the non-existence of any legal justification. Necessity knows no law, it is said; and intent to invoke necessity is to step outside the law."[13] Judge Hackworth, who limited the basis of implication to powers expressly granted, stated in his dissenting opinion in the Reparation for injuries case that "Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted. No necessity for the exercise of the powers here in question has been shown to exist."[14]

Apart from the evident problems in the practice of implying powers, caused by the different ways of understanding necessity and essentiality, one must bear in mind that both these terms constitute an important element of functional necessity. Thus the point made by V. Engström, whereby "[a]t the heart of the implied powers argument lies the finding of a functional necessity."[15] In the strict sense of the term, functional necessity means that for the effective functioning of an international organization it is possible to imply its powers from its statutory purposes and functions without the need for any other arguments. Naturally, this broad understanding of functional necessity is related to the doctrine of functionalism in the law of international organizations. This broad understanding of functional necessity has also met with widespread criticism in the literature. The criticism was prompted for the most part by the fact that a broad definition of the concept of functional necessity places very few

12 Elihu Lauterpacht, "The Development of the Law of International Organizations by the Decisions of International Tribunals", *Recueil des Cours de l'Académie de droit international de la Haye* 152/IV.1976: 431.

13 Legal consequences for States of the continued presence of South Africa in Namibia, ICJ Reports 1971, 339, para. 32.

14 Reparation for injuries, 198.

15 Viljam Engström, *Constructing the powers of international organizations*. The Hague, 2012, 90.

limitations on the implied powers of international organizations, as well as the fact that such powers may only be implied from the powers explicitly granted in the constituent instruments.[16]

Thus, in practice, those who take a more restrictive approach to increasing the powers of international organizations through the implication of powers from statutory objects and purposes will apply a narrower interpretation of necessity and essentiality. By the same token, those who are open to the idea of functional necessity will use these terms in a much broader sense.

The Existence of Express Powers

In the catalogue of the limits of implied powers of international organizations, an important place is given to the existence of express powers. It is clear that the implied powers of international organizations do not stand in opposition to their express powers flowing from their constituent instruments. As a rule, implied powers, as additional and subsidiary to express powers, in practice serve to supplement express powers, especially in the context of *effet utile*. As such, they are necessary or essential not only for the fulfilment of the tasks and purposes of the organization, or for the performance of its functions, but also for the exercise of the powers explicitly granted to it. As emphasised by Judge Hackworth in his dissenting opinion in the 1954 Effect of awards case, "[t]he doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers."[17] The relationship between implied powers and express powers should therefore be considered from the perspective of functional necessity, as discussed earlier. The key question that arises regarding the limitation of implied powers is the extent to which, if at all, the existing powers in a given area limit the possible implica-

16 James D. Fry, *Legal Resolutions of Nuclear Non-Proliferation Disputes*. Cambridge, 2013, 69.

17 Effects of awards of compensation made by the United Nations Administrative Tribunals, ICJ Reports 1954, 80.

tion of powers in this area.[18] In other words: does the existence of explicit powers limit the implication and the exercise implied powers? In addressing these questions, one must bear in mind that implied powers are additional and subsidiary to explicit powers, which are the original powers granted by the member states of an international organization in its constituent instrument.

These issues were raised in the above-mentioned case law of the ICJ and on an individual basis in the dissenting opinions of some judges. In particular, the Certain expenses case provides a rich source of information in this regard. In this case the ICJ, in defining the powers of the General Assembly, stated that "[t]he provisions of the Charter which distribute functions and powers to the Security Council and to the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security."[19] In his analysis of this view in a context relevant to the this discussion, White stresses that the ICJ not so much emphasised the implication of powers necessary for ensuring the effectiveness of express powers but the lack of any provisions in the UN Charter prohibiting the exercise of such powers.[20] Judge Moreno Quintana expressed an interesting view in his dissenting opinion. He concluded that "[t]he implied powers which may derive from the Charter so that the Organization may achieve all its purposes are not to be invoked when explicit powers provide expressly for the eventualities under consideration."[21]

Also A. Campbell reached an interesting conclusion on express powers as a limitation to the implication of powers of international organizations. He stated that "[i]t would appear, therefore, that the exercise of powers would have to be such as would not substantially encroach on, detract from, or nullify

18 A. I. L. Campbell, "The Limits of the Powers of International Organizations", *International and Comparative Law Quarterly* 32, iss. 2. 1983: 524 et seq.

19 Certain expenses case, 164.

20 Nigel D. White, *The Law of International Organizations*. Manchester, 2005, 86–87.

21 Certain expenses case, 245.

other powers."[22] On the other hand, the relationship between express powers and the powers implied from them should be approached with more flexibility, insofar as in a situation where the exercise of the explicitly enumerated powers of an international organization encounters serious difficulties, no party may prohibit this organization from using implied powers provided that, as a result of being unable to use any powers, it would not be able to perform its functions. According to views presented in the literature, any prohibition of this kind would be too restrictive.[23]

It is clear that implied powers are subsidiary to express powers and that these powers are necessary or essential for the exercise of powers explicitly granted. In its traditional form, therefore, the concept of implied powers is not entirely new or independent of the existing express powers. Some commentators describe this relationship as follows: "if there is no explicit power, there can be no implied power."[24] In this context, special attention should be drawn to article 352 of the TFEU (formerly article 308 of the TEC). This article served in practice, together with the principle of parallelism, as the second mechanism for implying the powers of the EC, particularly in its external relations. The new wording of this article, whose content invokes the principle of subsidiarity, is undoubtedly related to the application of a principle laid down in article 5(1) of the TEU, stipulating that the limits of Union competences are governed by the principle of conferral. Article 352 of the TFEU provides the flexibility clause as a subsidiary enabling clause or "lacuna filling clause."[25] It constitutes, however, no subsidiary norm of *Kompetenz-Kompetenz*, which may create new goals for the EU and add competences that are lacking.[26] The

22 Campbell, 528.

23 Henry G. Schermers, Niels M. Blokker, *International Institutional Law*. Fifth edition. Leiden, 2011, 185, para. 233A.

24 Schermers, Blokker, 187, para. 235.

25 Gadkowski, *Treaty-making*, 138.

26 Carl Lebeck, "Implied Powers Beyond Functional Integration? The Flexibility Clause in Revised EU Treaties", *Journal of Transnational Law and Policy* 17, no. 2. 2008: 317 et seq.; Ivo E. Schwarz, "Article 235 and the Law Making Powers in the European Community", *International and Comparative Law Quarterly* 27, no. 3. 1978: 614 et seq.

essence of the flexibility clause is completed by two Declarations concerning Article 352. Declaration No 41 specifies the EU objectives referred to in Article 352(1), and Declaration No 42 emphasises that, in accordance with the settled case law of the CJEU, article 352 of the TFEU constitutes an integral part of an institutional system based on the principle of conferral. It follows that article 352 cannot serve as a basis for extending the scope of EU powers beyond the general framework created by the provisions of the Treaties as a whole. Thus the flexibility clause may not be used as a basis for the adoption of provisions whose effect would be to amend the Treaties.

Article 352 of the TFEU allows the creation of new independent powers, but only those indispensable for the EU's attainment of treaty objectives. It also underlines the differences between the powers of the EU and its objectives. Its importance lies in the fact that these differences are not always clear, especially in reference to the doctrine of implied powers.[27]

Compliance of Implied Powers with Fundamental Rules and the Principles of International Law

As emphasized above, the implied powers of international organizations are created and used in order to supplement the organizations' 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 the basis on which, and to what extent, such powers may be implied. One of the significant limita-

27 Engström, 87 et seq.

tions 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. This 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.[28] At the same time, it must be emphasised that 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 that all the 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 inter-

28 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* 30. 1953: 62.

national organizations, these agreements thus draw certain legal consequences that are independent of whether the organization uses its express or implied treaty-making powers. 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 foundations of the entire international order.

Authors studying this issue usually cite the ICJ's view expressed in the 1971 *Namibia* case.[29] Although the ICJ held in this advisory opinion that, under Security Council resolution 276 (1970), member states are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia, it considered that exceptions to this rule are certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia.[30] The Court thus concluded that "[i]t will be for the competent international organs to take specific measures in this respect."[31] If interpreted broadly, the ICJ's view could lead to the conclusion that the fundamental principles of international law, such as the obligation to respect human rights and the obligation to implement the provisions of international agreements in good faith, among others, impose natural limits on the implied powers of international organizations.

29 T. D. Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter", *Nordic Journal of International Law* 26. 1995: 71.

30 Legal consequences, 55, para. 122.

31 Legal consequences, 55, para. 122.

One must also bear in mind the highly significant role the interpretation of international agreements plays in the process of the implication of powers. The constituent instruments of international organizations usually, though by no means always, take the form of international agreements. The special character of these agreements derives from the fact that they create a new international legal person and grant a specific tranche of their own powers to it. As statutes of international organizations, these agreements are subject to strict rules of interpretation. Teleological interpretation is of particular importance for the implication of the powers of international organizations and refers to the purposes and functions of these organizations. Much like the notion of a principle of international law, the two terms have not been clearly defined, which does not help in specifying the limits of the implication of the powers of international organizations.

The Implication of Powers of International Organizations and the Principle of Distribution of Functions within an International Organization

In the process of the implication of powers of international organizations, the rules pertaining to the distribution of functions within an organization must be taken into consideration. One may assume that implied powers cannot change the distribution of functions. The constituent instruments of various international organizations include provisions, often based on a careful balance, specifying the distribution of functions. This is the case with the UN Charter. The final form of the Charter provides evidence of the political will of its founders and, in particular, the five great powers. As a result, the ICJ repeatedly gave its opinion on the division of powers, especially between the General Assembly and the Security Council. Examples of the most important advisory opinions on this matter have been provided above. Nevertheless, it is worth citing the most interesting positions of ICJ judges expressed in these cases.

Judge Moreno Quintana, for example, expressed in his dissenting opinion in the 1962 Certain expenses case, that as regards implied powers "nothing stands in the way of an appropriate distribution of responsibilities, obligations and powers […] Each organ has its due function."[32] The above view should be understood as meaning that it is insufficient that an organization as a whole is granted powers implied from its purposes and functions. Indeed, it is even more important that the adoption of an implied power by a given organ of this organization does not interfere with the powers of its other organs.[33] In his dissenting opinion, Judge and President Winiarski stressed the need for maintaining within the UN the balance of carefully established fields of competences, and stated that "[t]he fact that an organ of the United Nations is seeking to achieve one of the UN's purposes does not suffice to render its action lawful. The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action."[34] A. Campbell, who interprets the positions of both judges, believes that they wish to emphasise that the exercise of powers must be consistent with the relevant scope of competences of the UN organs.[35] The division of competences of the UN organs was also the subject of the 1950 Competence for the admission case. This advisory opinion concerned the powers of the UN organs in the process of admitting new members. In it, the ICJ rejected an interpretation that was potentially advantageous for the General Assembly because it would almost nullify the role of the Security Council in the exercise of one of the essential functions of the Organization.[36]

It is worth bearing in mind that the balance of powers between the organs of international organizations is reflected by Article 13(2) of the TEU, which explains the principle of institutional balance, widely accepted as forming part

32 Judge L. M. Moreno Quintana dissenting opinion, Certain expenses case, 245.
33 Campbell, 529.
34 President Winiarski dissenting opinion, Certain expenses case, 230.
35 Campbell, 529.
36 Competence of Assembly regarding admission to the United Nations case, Advisory Opinion, ICJ Reports 1950, 9.

of the institutional system of the EU. It stipulates that "[e]ach institution shall act within the limits of the powers conferred on it in the Treaty, and in conformity with the procedures, conditions and objectives set out in them". M. de Visser even claims that the principle of institutional balance is "the EU version of Montesquieu's classic notion of the separation of powers."[37]

It is generally believed that the principle of institutional balance applies to different categories of the powers of EU institutions. The most important aspect of the EU's institutional balance involves mutual respect between the powers of its institutions. Each EU institution must respect the powers of the other institutions and may neither replace nor omit them at any cost.[38] References to the principle of institutional balance may be found in the case law of the CJEU, although rather than using the term "principle" it restricts itself to statements referring to institutional balance.[39]

Concluding Remarks

While the attributed powers that are expressly granted in the constitutional instrument of a given international organization raise few doubts, implied powers, which are a special category of attributed powers but require a complex implication process often resting on uncertain foundations, attract far more criticism. The 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 particular character of this category of powers of international organizations, especially important questions relate to the nature and the basis for the implication of powers, as well

37 Maartje de Visser, *Constitutional Review in Europe. A Comparative Analysis*. Oxford, 2014, 200.

38 Paul Craig, "Institutions, Powers and Institutional Balance" in *The Evolution of EU Law*, eds. P. Craig, and G. de Burca. Oxford, 2011, 41.

39 A. Gadkowski, *Treaty-making*, 143.

as to the possible and necessary limits of this process, with particular attention being given to the conditions of necessity and essentiality that have been so thoroughly discussed in the doctrine and case law. Without a doubt, the case law, particularly that of the ICJ and – in relation to the system of the European Union that of the CJEU – formed and still forms the main intellectual basis for the analysis of different issues concerning the implied powers of international organizations in the doctrine of international law.

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