Resolutions of intergovernmental organizations: A legal appraisal

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1. Introduction

The present paper has a dual function. It first of all intends to clarify the legal nature of resolutions adopted by Intergovernmental Organizations (IGO), the latter understood as international organizations established through intergovernmental agreement (Grant & Barker 2009, 445). Difficulties often occur when appreciating the correct value to be attributed to different kind of documents that emanate from such IGOs. In order to assess this issue in its proper context, it appears essential to briefly recall why IGO's saw the light of day in the first place. This will explain why, especially in technical matters, the need was felt at a particular moment in time for states to cooperate with one another on a basis which not only superseded the primarily bilateral relations that had governed international relations for a long time, but also required more frequency and stamina than the convening of sporadic international conferences were able to provide on a cost-effective basis. This will serve as backdrop against which the legislative functions of such IGOs will be discussed and appreciated.

A previous contribution by the present author to these seminars on the naming of maritime features from an international law perspective, written together with colleagues at the *Vrije Universteit Brussel* and submitted to the 16th International Seminar on Sea Names, held in The Hague, The Netherlands, was presented on August 20, 2010 and came to the conclusion that mainly two bodies were bestowed with specific competences vis-à-vis geographical names on the international level, to wit the United Nations Group of Experts on Geographical Names (UNGEGN) and the International Hydrographic Organization (IHO) (Franckx et al. 2010). The second function will con-

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sist of applying the results of the first part to the two IGOs *in casu*, namely the United Nations (UN), through the Economic and Social Council (ECOSOC) of which UNGEGN forms one of three expert bodies composed of governmental experts, and the IHO.

2. Intergovernmental organizations and their legislative function

1) The establishment of intergovernmental organizations

One would be mistaken if one were to consider the establishment of IGOs as a logical consequence of a theoretical aspiration by the world community to establish some kind of world government. The origins of these developments should rather be sought in a mere practical necessity of states: As their mutual interactions started to increase, so did the need to establish practical bodies able to provide an efficient framework to make this possible in a more structured manner than before (Sands & Klein 2009, 1-18). So instead of trying to set up representative organs of the world community that would be able to fulfil a kind of legislative role to be compared with the legislative branch on the national level, what states had in mind was rather the setting up of a convenient forum in which they would be able to interact more efficiently. This is borne out by the fact that the first such IGOs were established in fields where states had to cooperate in technical and administrative matters, rather than in the political field. Instead of having to convene international conferences each and every time a particular supra-national matter needed regulation, with all the difficulties this normally entailed (who will host; who to invite; who will provide funding; how to do away with political statements by participants and the rule of unanimity based on the equality of states, ...), states opted to set up permanent IGOs to facilitate efficient cooperation and at the same time alleviate as much as possible the drawbacks of the old system.

In these early technical and/or administrative IGOs, many of which focussed on the broad field of communications (railways, navigable rivers, post and telegraphy, ...), established throughout the 19th and early 20th century, states sometimes went rather far in creating permanent structures having legislative organs working in tandem with either administrative organs or periodic conferences. The broad principles and directions were normally agreed upon by way of treaty, but the practical regulations governing the different forms of communications often required far less formalities to be adopted in

ways that departed more than once from the well-established unanimity rule.

In the political field, however, the failure of the League of Nations demonstrated that such farreaching cooperation was much more difficult to attain. States were simply not willing to give up their sovereign equality. The United Nations removed some of the flaws of the League of Nations, but it is still a far cry from the application of the *trias* theory on the international level. The executive in such a scheme appears to be the Security Council, but its representative character can appear rather problematic today, certainly when considering that not all its members are equal when it comes to decision-making. Certainly, we have today the International Court of Justice in The Hague, The Netherlands, as the "principal judicial organ" of the UN (UN Charter, Art. 92), but this court lacks, as a rule, the competence to hear cases unless the parties to the dispute grant it such competence. Finally, as far as the legislative branch is concerned, probably the General Assembly (GA) comes closest as a body representing the world community, where every member state has one vote (UN Charter, Art. 18(1)). Unfortunately, according to the Charter, this body only has the power to make non-legally binding recommendations, unless it is treating internal household matters, such as the budget or the admission of new members. As far as the maintenance of international peace and security is concerned, however, GA resolutions have no such legally binding effect (Öberg 2006, 884).

2) Implications for the present study

If we make abstraction of the European Union, it should be realized that today not many IGOs have real legislative powers in areas other than internal household matters, certainly not in the political realm. Or as concluded by Klabbers "it is still relatively rare that binding instruments are adopted; it is rarer still that binding instruments are adopted against the wishes of member states" (Klabbers 2009, 187).

At the same time, in technical and administrative matters, it is not inconceivable that states delegate powers to an IGO to make binding decisions in particular, well-delimited areas. The rule of thumb when in doubt is always to rely on the founding documents of the IGO to find out whether its drafters had a delegation of decision-making powers in mind, or whether they only wanted to create a convenient forum for discussion and retain the unanimity rule as before. Alongside these attributed powers,

mention should be made of the so-called implied powers. The latter are competences which, although absent from the founding documents, are related to the explicitly conferred powers and are essential for the IGO to carry out its functions (Blokker 2009). Their existence was confirmed early on in the case law of the ICJ with respect to the UN and has since been accepted by other courts and tribunals (Reparation Advisory Opinion 1949).

A good present-day example may be found in some regional fisheries management organizations. If we take the Northwest Atlantic Fisheries Organization (NAFO) as an example, it is clear, as amply demonstrated by the *Estai* incident of 1995 (Fisheries Jurisdiction Case 1998), that even though the constitutive document of this organization was able to rely on a rather progressive majority voting system, the stumbling block proved to be the opting-out provision, which made it possible for all member states not to be bound by decisions taken by the majority (NAFO Convention 1978, Art. XII). Other regional fisheries management organizations, such as the North East Atlantic Fisheries Commission, the International Commission for the Conservation of Atlantic Tuna, and the Commission for the Conservation of Antarctic Marine Living Resources follow similar procedures (König 2006, para. 15). Recent developments in international fisheries law, however, have placed greater emphasis on RFMOs in the fight against overfishing on the high seas. These IGOs have received more competences, but at the same time they needed to become more responsible and transparent (UN Fish Stocks Agreement 1995). As a consequence, NAFO has gone through an amendment procedure in order to adapt to new circumstances (NAFO Amendment 2008). And even though this amendment has not yet entered into force, it is clear that even though the opting-out provision still exists (id., Art. XIV (2)) the discretionary power of the objecting state has been very much curtailed by the introduction of a new obligation to justify its objection (id., Art. XIV (5)). The latter can subsequently be submitted to an *ad hoc* panel for review, which is not legally binding (id., Art. XIV (7 and 10)). Moreover, an elaborate dispute settlement provision has been incorporated in the amended convention to which parties may also turn in order to obtain a legally binding decision (id., Art. XV). In that sense, a careful reading of the 2008 amendment will show that, despite the presence of the opting-out procedure as in the past, the IGO in question has nevertheless received much more effective legislative powers than those held in the past.

3. Application to the United Nations Group of Experts on Geographical Names and the International Hydrographic Organization

1) United Nations Group of Experts on Geographical Names

As stated above, UNGEGN is one of three expert bodies composed of governmental experts of the ECOSOC. When established, the Secretary-General was instructed to "set up a small group of consultants chosen, with due regard to equitable geographic distribution and to the different linguistic systems of the world, from those countries having widest experience of the problems of geographical names: 1) To consider the technical problems of domestic standardization of geographical names, including the preparation of a statement of the general and regional problems involved, and to prepare draft recommendations for the procedures, principally linguistic, that might be followed in the standardization of their own names by individual countries; 2) To report to the Council at an appropriate session, in the light of its discussion on the above points, on the desirability of holding an international conference on this subject and of the sponsoring of working groups based on common linguistic systems" (ECOSOC resolution 715A (XXVII) (1955)). Its founding document, in other words, does not give this body of experts any decision-making power, nor has UNGEGN asserted such by resorting to the implied powers doctrine.

Moreover, being a subsidiary organ of the ECOSOC, which itself is subjected to the GA, a hierarchical order exists with the GA at the top and with one level below it, the ECOSOC, followed by its subsidiary bodies (Conforti & Focarelli 2010, 141). And if the GA, as demonstrated above, lacks decision-making power unrelated to its internal household, it logically follows that bodies below it will not have such power either. That was also the result of our previous contribution to the 16th Sea Naming Seminar, as later published in a specialized legal journal, where we concluded that the UNGEGN had not been created to decide on names, but rather to promote the consistent worldwide use of accurate place names (Franckx et al. 2011, 21). This is achieved through recommendations addressed to the Conferences on the Standardization of Geographical Names, of which the last one was held in New York during the summer of 2012. But the resolutions adopted at those conferences have a non-binding and recommendatory character only.

2) International Hydrographic Organization

The predecessor of the IHO, the International Hydrographic Bureau established in the early 1920s, is a good example of an administrative and technical IGO that tried to overcome the lack of permanent structure for states to cooperate more closely in this domain. But as already demonstrated in an earlier study of the founding documents, neither the International Hydrographic Bureau nor the IHO can engage in questions of international policy. They both are characterized by their status as mere consultative agencies with no authority over national hydrographic offices of the member governments (Franckx et al. 2011, 32). Also the IHO works with international conferences that adopt resolutions, but also in this respect the study concluded that the resolutions emanating from those conferences are non-legally binding documents.

4. Conclusions

IGOs were created to meet a need born out of the growing interaction between states ever since the 17th century. Some early examples exist of such IGOs with very novel features trying to do away with some deficiencies that hampered the conduct of interstate cooperation in the past. By creating a permanent body, with decision-making powers no longer based on unanimity to bind its members, some of these IGOs proved to be rather successful. The Rhine Commission established in 1815 is a good example of such a progressive organization.

These early successes have rather become the exception than the rule during later developments. The consent of states still reigns supreme in many of them, especially in the political sphere. The only notable exception so far really is the European Union. But even in technical and administrative IGOs, an area where these early progressive IGOs flourished, it is today rather hard to find clear examples of IGOs being able to twist the arm of recalcitrant states not willing to join the majority. Today, in the field of RFMOs a tendency can be witnessed where the discretionary power of such states is nevertheless being curtailed. Not by taking away their right to object, but in a more subtle manner that requires these states to justify their objection and to appear before dispute settlement bodies some of which can reach binding decisions.

Neither the UNGEGN, nor the IHO are however IGOs of this type. The results of a

recent questionnaire analyzed by a Working Group on Evaluation and Implementation clearly indicate that the most important goals of UNGEGEN were identified by its members as its nature as a forum for discussion and the provision of updates on the standardization of geographical names around the world (United Nations Economic and Social Council (#4), 5; United Nations Group of Experts on Geographical Names 2012, 3). This seems to fairly reflect the competences of this organization.

What should nevertheless be noted is that the UNGEGN as well as the IHO work with international conferences adopting resolutions. In as far as these resolutions interpret that body's own founding documents, it is true, they may carry a special weight. With respect to the GA, the ICJ for instance stated in 1996 that GA resolutions "even if they are not binding, may sometimes have normative value". This also applies to IGOs that work with conferences of the parties, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Franckx 2011, 17-20). But this of course only covers the hypothesis that these resolutions clarify textual ambiguities of the founding documents of these IGOs.

Nothing however prevents IGOs from adapting to new circumstances, and it will therefore be interesting to see how both the UNGEGN and IHO will follow up on the debates recently held in both organizations on the East Sea issue (United Nations Economic and Social Council (# 1-3)).

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