

# *Sui Generis?* The European Union as an International Organization

Jan Klabbers

## Introduction

The precise status of the European Union in international law has never really been settled, and this applies to its predecessors (the European Economic Community (EEC) and European Community (EC) in particular) as well. What is clear, it seems, is that the Union is not a state as commonly conceived. It lacks its own territory and it lacks a population it can call its own, therewith failing to tick the two formal boxes when it comes to statehood.<sup>1</sup> Moreover, the European Union is not generally recognized as a state, even though its attitudes and legal order sometimes suggest that statehood might be a close and reasonably accurate analogy.

But if the European Union is not a state, then what is it? The most common classification is that it is an international organization, yet this is often accompanied by the caveat that it is an organization unlike any other. Traditionally, this has been captured in a variety of ways. Thus, for some, the European Union is the archetype of a supranational organization. It is held to be a species of the genus “international organization,” but one where decision making is more centralized than in others and actually takes place not so much between the member states but above them. This claim is then often accompanied by the statement that there is really only one example of such a supranational organization: the European Union.

Likewise, the European Union is sometimes said to be an international organization *sui generis*, in a class of its own. According to this line of reasoning, while it is an organization, it does not resemble other organizations in all respects and, if the *sui generis* label is taken seriously, may even not be an international organization at all. This label then reveals conceptual paucity: the European Union is placed in a category whose contours are undefined and within which it might not fit that well.

Sometimes the European Union is deemed to be an international organization but one that is of a higher nature than others. This presupposes that there are sliding scales of “organizationhood,” with some being more developed than others. Some might constitute merely rudimentary forms of interstate cooperation, but the European Union, so the argument goes, would be at the other end of the spectrum and can be seen as a model for other international organizations to emulate.

Neither of these labels is very satisfying: they each create a category of one, and if that is the case, then perhaps the category may not be all that well chosen.<sup>2</sup> In this chapter, I will explore a different route. Instead of trying to fit the European Union into an existing category I aim to rethink that category. While one of the brilliant aspects of the Union is that it allows observers to make their own classification (and here it is useful to remember that those versed in domestic law<sup>3</sup> or political science<sup>4</sup> may find yet other ways to characterize the European Union), it does cast some doubt on the wisdom of the enterprise. Maybe the problem is not only that the Union is uncategorizable, maybe it is also that the label “international organization” is not all that well considered to begin with. Maybe the European Union’s existence should force the community of international lawyers to rethink both the very concept of international organization and, related to this, the discipline’s main theory concerning international organizations: the theory of functionalism. In what follows, I will first address the standard definition of international organizations and the theory of functionalism before discussing why the status of international organization may be deemed attractive. Thereafter, the chapter focuses on the European Union.

## **Defining International Organizations**

There is no airtight definition of “international organization” available in international law, and the concept of international organization comprises an enormous variety of disparate entities. These range from military alliances, such as NATO, to public cartels (OPEC, and also, in their own way, the various commodity organizations) and from financial institutions, such as the various investment banks, to predominantly academic enterprises, such as the European Forest Institute. Likewise, in form these entities can be radically different. The UN, on the one hand, is highly structured, the Council of the Baltic Sea States, on the other hand, is a loose collection of cooperating states which, for want of a better label, is sometimes also considered as an international organization.<sup>5</sup> While lacking some degree of formalism, the various meetings of the parties or conferences of the parties set up under multilateral environmental agreements are sometimes seen as international organizations.<sup>6</sup> A case can be made that simply because some organizations are set up explicitly on the basis of an instrument considered to be nonlegal in nature (such as the Organization for Security and Co-operation in Europe (OSCE)) does not entail that for that reason alone, they ought not to be regarded as international organizations. In short, the concept of an international organization is a broad church accommodating a wide variety of rather different actors. This broad approach owes much to the absence of definition, beyond the purely formal. The literature is united in thinking that there are three, or perhaps four, main elements that are characteristic of international organizations. These elements stem, it seems, from an inductive analysis: scholars have looked at what they held to be international organizations, drawn comparisons, and singled out the elements those entities appear to have in common.<sup>7</sup>

The first of these common elements is that international organizations are created – typically but not invariably – by states. The second, that international organizations are typically set up on the basis of treaties. The third, that, although most will have more, international organizations are generally deemed to possess at least one organ. This serves to distinguish the organization from mere regular interstate meetings: if there is an institutional pattern, then it probably is an international organization.

These three elements are purely formal in nature, and can be verified with relative ease. If two or three states meet, decide to create a common organ, and do so by means of a treaty, the resulting entity will be regarded as an international organization, regardless of what the

organization is supposed to be doing or how it will perform its tasks. For this reason, perhaps, some have advocated a fourth element, introducing a more substantive consideration: the organization should possess a will of its own, separate from the will of the member states (a *volonté distincte*). While to some extent this is captured in the element of there being at least one organ, it is nonetheless not quite identical: the idea behind the *volonté distincte* is to make sure that the “proper” organization is differentiated from the state vehicle.

Yet, this is also highly problematic: once thought through it would entail that the only proper organizations are those which can tell member states what to do, even if those member states are unwilling to comply. In other words: it presupposes an organization which is, first, capable of taking decisions binding on the member states, and second, capable of taking such decisions by majority vote (or any other mechanism which does not give each and every member state a veto: hence, unanimity and consensus are disqualifying factors). Thus seen, very few organizations will actually qualify as “proper” organizations: the European Union, part of the UN (the Security Council in particular), perhaps the International Civil Aviation Organization, and maybe a small handful of others. As a result, this fourth element is usually not taken all that literally and functions more as a reminder that organizations are different from regular meetings of states.

Be that as it may, once an international organization exists, it is deemed to operate along functional lines. The powerful theory of functionalism<sup>8</sup> explains that international organizations (lacking territory, after all) are not set up along territorial lines but in order to fulfill certain functions that are delegated to them by their member states. The functions, and the powers necessary to give effect to them, are deemed to be conferred on the organization, and both member states and nonmember states are expected not to interfere with the exercise of these functions and powers.

This finds its normative justification in the thought that the functions of international organizations are generally considered to comprise the global common good. It is this contribution to the common good that justifies, for example, the proposition that international organizations are usually immune from suit and exempt from taxation and that their officers enjoy privileges and immunities as well. In short, the functioning of the organization should not be impeded. Much the same justification applies to the implied powers of organizations: following the International Court of Justice (ICJ) in the classic *Reparation for Injuries* opinion,<sup>9</sup> these have been held justifiable precisely in order to enable the organization to exercise its functions. The theory also comes with limits to what organizations can do. As Bekker put it with brilliant brevity, an international organization “shall be entitled to (no more than) what is strictly necessary for the exercise of its functions in the fulfillment of its purposes.”<sup>10</sup>

This is problematic because, if indiscriminately applied, this would mean that even organizations with a nasty purpose should be given free hands.<sup>11</sup> Yet, functionalism has never been able to distinguish properly between “good” and “bad” organizations, as organizations are by its definition meant to contribute to the global good. Where this contribution is substantively doubtful, functionalism can resort to a higher level of abstraction: all organizations embody cooperation between states, and since cooperation between states is generally a good thing, it follows that international organizations are generally a good thing too, no matter how nefarious their purposes may be.

The law and theory relating to international organizations, then, conspire to create a very broad concept of international organization. Some observers denied the organizationhood of the Warsaw Pact and Comecon for largely political (substantive, value-based) reasons, but since an overt political argument is not available, this had to be dressed up: Comecon and the Warsaw Pact were thus sometimes regarded as nonentities because they were dominated by a single member state.<sup>12</sup> Likewise, most works on international organizations have difficulties

accommodating the Organization of the Islamic Conference (OIC), set up in 1969 among a number of Muslim countries (currently numbering 57 member states) and dedicated to safeguarding and protecting the interests of the Muslim world.<sup>13</sup>

### Functionalism in International Institutional Law

On the explanatory level, functionalism used to pack (and still packs) a powerful punch. Functionalism appears highly plausible when it suggests why international organizations are set up since, obviously, a single state will be unable to guarantee the accurate delivery of mail abroad or provide for collective security. Functionalism appears plausible when it holds that international organizations can only act on the basis of the powers conferred upon them, and it appears plausible when suggesting that organizations are not allowed to act *ultra vires*. And functionalism continues to look plausible when one realizes that the two main global crises of the early twenty-first century (the financial meltdown and the environmental meltdown) concern issue areas in which no comprehensive international organization is active: the environmental regime is characterized by dispersion and fragmentation, and financial regulation is almost entirely left to highly informal gatherings of a limited number of powerful actors, for example, the Basel Committee.<sup>14</sup> Hence, the committed functionalist can easily point to the utility of functionalism: if the WHO has been able to eradicate polio, should not a global financial institution be expected to contribute to global financial health?

Yet, the explanatory force of functionalism also has its limits. As noted above, the very definition of international organization creates problems: to the (considerable) extent that functionalism is based on a principal–agent model (member states create an organization as their agent), the *volonté distincte* of international organizations is more fictitious than real. If an entity truly can give orders to its member states, then it can no longer be said with full conviction that this entity exercises functions delegated by its member states. It is for this reason that functionalism has traditionally had problems incorporating the European Union, since the claim that the Union exercises functions delegated to it by its member states only holds true at an unhelpfully high level of abstraction.

For all its explanatory power, functionalism does have a few black holes, and one of these is the issue of accountability or control. This stems from the fact that functionalism is limited to addressing the relationship between the organization and its member states and has little to say about two other relevant types of relationships: it remains silent on “internal” relations (between organization and staff or between organs of the organization) and it remains silent on “external” relations (the relations the organization may have with the outside world).<sup>15</sup> As a result, the theory does not recognize that organizations can engage in wrongful acts. Organizations, as suggested above, are seen as being created for the common good or, in Singh’s famous phrase, the “salvation of mankind”;<sup>16</sup> in this light, even their *ultra vires* activities must be considered as beneficial to the world at large. And where organizations do wrong it must be the fault of the member states, for these should have exercised greater control.

### The Rules of Attraction

All this raises the question of why entities would desire to be considered international organizations. What makes it attractive (if anything does) to be considered an international organization? The answer consists of various layers. First, there are few if any attractive

alternatives. Organizations, obviously, are not states, but neither do they wish to be regarded as anything else. While international law does not offer a systematic legal framework with regard to entities, it does recognize some other classes of actors in one way or another. Thus, there is room in international law for national liberation movements, indigenous peoples, national minorities, and companies, but none of these labels apply with conviction to entities usually considered international organizations. The closest analogy, then, is with the NGO sector and entities such as Greenpeace or Amnesty International, but here, too, awkwardness sets in rapidly. Indeed, the very term “NGO” points to the absence of governmental representation; hence, international organizations by definition cannot be thus classified. For all practical purposes, therefore, this leaves the label “international organization” as the only practically available possibility. Whatever the European Union is, or the WHO, or the Nordic Investment Bank, they are closer to being international organizations than anything else.

But more than this, the legal and political status attached to the label “international organization,” with its association with the global good, makes it politically attractive. International organizations are *ex hypothesi* legitimate actors, and legitimacy is a scarce yet highly attractive good.

With this comes the possibility of legal advantages. There is general agreement that international organizations and their staff are entitled to taxation privileges and jurisdictional immunities. While there is no guarantee concerning the precise level of privileges and immunities (these are typically subject to negotiations with the member states, and perhaps the host state in particular), it is generally considered necessary for international organizations to possess at least certain privileges and immunities. This follows from functionalist logic: in order to work for the common good, the organization’s work should not be interfered with by petty or obstructive governments, because if that happens, the organization cannot perform its functions. This is a strong incentive: several entities have refashioned themselves into international organizations precisely so as to be able to receive privileges and immunities.

Likewise, as noted above, international law has had a hard time developing rules on the responsibility or accountability of international organizations. Where organizations are hardly controlled by their member states, and hardly deemed subject to a general accountability regime, the result is wide discretionary power. Organizations can do much as they please because there are few or no mechanisms to hold them accountable. To the extent that mechanisms do exist, they may not be the strictest possible: the World Bank, for example, is sometimes considered to be accountable to its major shareholder states but is rarely seen to be accountable to the people living in the states where the bank’s projects take place.<sup>17</sup> This is undergoing some change, and perhaps the most eye-catching development is that quite a few organizations have invented mechanisms of self-control, for example, appointing compliance officers or creating internal audit mechanisms. These developments notwithstanding, the point is that control remains limited and self-administered. While this need not necessarily be a cynical ploy, it does remedy the normative gap in functionalism.<sup>18</sup>

## The European Union

Now where does this leave the European Union? It is quite uncontested that the European Union can be regarded as possessing international legal personality. The European Communities were all individually granted legal personality, and this was construed as including personality under international law.<sup>19</sup> The Maastricht Treaty, however, contained no separate clause concerning the international legal personality of the new Union. Hence, the theory

arose that the drafters had intentionally withheld international personality. But this theory, surely, is untenable. A grant of personality cannot solely depend on the intentions of the creators of an organization (the legal system also might claim a stake) and, surely, it was never plausible to create an entity with treaty-making powers, and even a foreign and security policy, without this entity being a legal person.<sup>20</sup> While legal personality may not be a threshold condition for engaging in legal acts<sup>21</sup> (many legal acts are performed by entities whose personality may be controversial), nonetheless, with respect to the post-Maastricht European Union, its personality should never have been doubted.

But even then, to possess international legal personality is not the same as being an international organization, as other entities too can possess such personality. What makes many think of the European Union as an international organization, then, is that it is endowed with a number of specific powers. Article 5 of the Treaty of the European Union (TEU) holds that the European Union is based on conferred powers (to be governed by the principles of proportionality and subsidiarity), to which Article 4 TEU adds that powers not conferred on the Union remain with the member states.

This is a curious construction, which perhaps ought not be taken too literally: a strict reading would eventually suggest that the European Union is merely the vehicle for its member states, and such a reading would seriously underestimate the independent policy role of the Commission, the relevance of its many agencies and committees, the co-legislative role of the European Parliament, and the possibility of majority voting within the Council – not to mention the important role of the judiciary.<sup>22</sup> Nonetheless, the basic idea is clear enough: the competences of the European Union are not unlimited.

Another implication of a strict reading of the principle of conferred powers would hold that the implied powers doctrine holds little sway within the European Union. It is generally accepted that international organizations may have implied powers: powers that have not been granted expressly but may be necessary to give effect to the tasks of the organization. There is some doubt whether this actually applies to the European Union: while some have explained the Court of Justice of the European Union's (CJEU) finding of external transport powers as an emanation of the implied powers doctrine, others have argued that the Court found the Union to possess such powers not so much to enable it to exercise its functions as to protect "internal" EU law against circumvention by member states. After all, if member states could conclude their own agreements with third states in a field where the European Union has "internal powers" then such separate agreements could depart from EU law, and therewith place its integrity at risk, as such separate agreements would have to be considered binding under public international law and thus, potentially, overrule EU law.<sup>23</sup>

Either way, the powers of the European Union come in various shapes and forms. On some issues (e.g., commercial policy, including investment), it nowadays has exclusive powers. In other fields, powers are shared between the European Union and its member states. In yet other fields, powers are parallel. And on some topics, its powers are merely thought to supplement those of the member states. This is a far cry from the regular situation with respect to international organizations, whose powers typically remain in parallel with those of their member states: while the WHO may have the mandate to eradicate diseases, nothing hinders its member states from doing the same. And while the World Bank can lend money to poor nations, so too can the Bank's individual member states. It is no surprise, therefore, that many observers have held that the European Union is "analytically more similar to the U.S. political system than to other international organizations," in Pollack's words.<sup>24</sup>

Hence, whether the European Union qualifies as an international organization remains an open question. It meets the requirements of international law, but these are so broad as to



encompass a wide variety of entities. The possession of international legal personality may well be of relevance, but it does not in and of itself suggest that the European Union is an international organization: such personality is also possessed by, for example, the Holy See. And while the European Union is based on conferred powers, the possibility of member states being preempted from acting makes it different from other organizations as does, arguably, the way the implied powers doctrine is applied by and in the Union.

In this light, it is perhaps interesting to ask how the European Union has characterized itself. The answer cannot but be complicated, if only because the Union does not always speak with one voice. The TEU and the Treaty on the Functioning of the European Union (TFEU) provide some indications that the European Union considers itself a regular international organization; indeed, one of the intergovernmental kind, shedding all ambitions of supranationalism. The claim that the Union is based on conferred powers and the related claim that powers not conferred upon it remain vested in the member states both suggest, if taken literally, firm member state control, and therewith suggest that the European Union is best seen as an international organization of the intergovernmental kind.

On the other hand, the European Union has made it clear within discussions concerning the drafting of a regime on the responsibility of international organizations that it regards itself as “special.” Commenting on drafts prepared within the International Law Commission, the EU Commission remarked that

the International Law Commission should carefully consider the large diversity among international organizations when adapting the articles on State responsibility to the topic of responsibility of international organizations. The European Union and the European Community are themselves testimony to this diversity. In particular, the European Community is an international organization with special features as envisaged in the founding treaties.<sup>25</sup>

And a moment later it explained that “there is a need to address the special situation of the Community within the framework of the draft articles.”<sup>26</sup> The main concern, or so it seems, was that the regime on international responsibility should ensure that responsibility and attribution would go hand in hand: the European Union should be held responsible for the behavior of its member states acting *qua* organs of the European Union. Otherwise, the entire EU edifice might start to crumble.<sup>27</sup> In the end, the Commission kept tapping into the special nature of the Union: “there are significant differences between traditional international organizations on the one hand, and organizations such as the European Union.”<sup>28</sup>

The CJEU, however, has been less insistent on highlighting the differences with other organizations. In *Van Gend en Loos*, it held that the EEC Treaty “is more than an agreement which merely creates mutual obligations between the contracting states,” as was “confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.”<sup>29</sup> Without using the term “international organization,” it seems plausible enough that the Court’s conception of the EEC went in that general direction: a treaty beyond the mere contractual, creating an entity endowed with institutions.

On one occasion the Court was asked to dig a little deeper into the concept of “international organization,” and its reasoning was instructive. The case initially arose before a Belgian court, with a German airline company (SAT) complaining about charges payable to Eurocontrol, an international organization in the field of aviation safety. SAT suggested that Eurocontrol was guilty of abusing a dominant position, which gave rise to the question of whether Eurocontrol should be seen as an “undertaking” within the meaning of EU competition law.<sup>30</sup>

The Court answered in the negative. It argued that though Eurocontrol had as one of its tasks the collection of route charges levied on users of air space it was not in a position to itself decide on these charges: the power, in other words, was delegated, and limited, with the individual member states deciding individually on the appropriate charges. In addition, Eurocontrol played a small role in the operational exercise of air navigation control, but only at the request of some of its member states. Finally, the Court observed that Eurocontrol's expenses are borne by its member states; it does not make a profit. This allowed the Court to hold that "Eurocontrol thus carries out, on behalf of the Contracting States, tasks in the public interest aimed at contributing to the maintenance and improvement of air navigation safety."<sup>31</sup> The charges, moreover, "are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services."<sup>32</sup> In the end, the Court concluded that

[t]aken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority.<sup>33</sup>

The picture that emerges from *SAT Fluggesellschaft* is, at a minimum, that an entity that exercises delegated powers without much discretion, and does so in the public interest, is, in the eyes of the Court, classified as an international organization.<sup>34</sup> In doing so, the Court confirmed an earlier decision of the Court of First Instance in *Vardakas*,<sup>35</sup> where it held that the European Committee for Standardization (ECS) qualified as an international organization despite having been set up by national standardization bodies instead of member states. What mattered, as the Court noted, was that ECS

has been recognized by States and by international organizations created by States, such as the European Communities, and has been entrusted with tasks in the public interest by those States and international organizations.<sup>36</sup>

There are few domestic court cases against the European Union, even though it does not enjoy immunity from suit.<sup>37</sup> One case where immunity was explicitly invoked on behalf of the (then) EEC involved the demise of the International Tin Council, a commodity organization of which the EEC was one of the members. Kerr LJ discussed this at some length, only to find the argument wanting: to his mind, the privileges and immunities enjoyed by the EEC did not include "immunity from any legal process."<sup>38</sup>

Functionalism finds its normative justification in the contribution of organizations to the common good, and the CJEU, in similar spirit, has placed considerable weight on the public nature of the tasks of an international organization, both in *SAT Fluggesellschaft* and in *Vardakas*. This raises the question of the extent to which the European Union can itself be deemed instrumental to the common good or the public interest. These are, obviously, different notions, and they cannot be meaningfully discussed without also asking whose common good: one can hold that the European Union contributes to Europe's common good without necessarily also contributing to the global common good. Indeed, this is the picture that emerges from a perusal of the European Union's basic documents.

The Union's overriding aim, according to Article 3 TEU, is "to promote peace, its values and the well-being of its peoples." It "shall offer its citizens an area of freedom, security and justice without internal frontiers" and "work for the sustainable development of Europe" while promoting "economic, social and territorial cohesion, and solidarity among Member States" and ensuring "that Europe's cultural heritage is safeguarded and enhanced." In the same article,



paragraph 5 is devoted to the world at large, and this too starts by pointing to internal, domestic interests: “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens.” Only thereafter does the global public interest make a muted appearance, with references to human rights, sustainable development, and the observance of international law. Moreover, the institutional framework of the Union is told to promote the interests of the European Union, its citizens and member states (Article 13 TEU), and the Commission is explicitly instructed to “promote the general interest of the Union,” as Article 17 TEU puts it.

This kind of language is rare in instruments establishing international organizations, even regional ones. The Charter of the Organization of American States (OAS), for example, makes repeated reference to what the OAS aims to hold good for the American continent, but in terms radically different from the TEU. One of the “essential purposes” of the OAS is to “strengthen the peace and security of the continent”; another is to “promote, by cooperative action, their [i.e., the members’] economic, social, and cultural development,” but even so, the OAS Charter does not draw a sharp line between the wellbeing of its member states and that of the rest of the world. The European Council, by contrast, is instructed to bear in mind the “strategic interests and objectives” of the Union (Article 22 TEU). The very idea of the European Union having strategic interests and objectives distinguishes it from other regional organizations, or, indeed, from international organizations generally.<sup>39</sup>

### By Way of Conclusion

So where does this lead? The functionalist theory of international organizations law holds that organizations are created for the common good, and it is this starting point that gives rise to a number of rules and doctrines: ideas about the powers of international organizations, their privileges and immunities, and even their accountability, tend to be informed by the proposition that organizations do not act out of self-interest but in view of the common interest, broadly defined.

The European Union has a difficult time fitting into this framework in that its self-declared mission is mostly limited to the common good of the Union and its member states and citizens rather than aiming at the general or global common good. In this respect, the European Union is difficult to distinguish from other interest groups, and among international organizations perhaps its closest analogue is the OIC: set up to “safeguard and protect the common interests and support the legitimate causes of the Member States” (Article 1 OIC). Like the European Union, the OIC is more in the nature of an interest group, espousing and endorsing the interests of its members and the organization itself. It posits itself as a political actor, much like the European Union, and aims to exercise influence within UN bodies as the largest united bloc of states.<sup>40</sup>

What this boils down to is the observation that the law of international organizations may need a conceptual overhaul. The very concept of “international organization” is so broad as to allow entities to invoke it as they see fit and to use the question of their precise status as a political instrument. The European Union, for one, seems to be doing so, sometimes insisting that it is a regular international organization but sometimes, also, that it is a very special entity. This is not to blame the European Union, of course: it merely utilizes the tools put at its disposal by the international legal order. Hence, it would be for that international legal order to rethink its categories and, with respect to international organizations in particular, to rethink the relationship between organizations devoted to the common good.<sup>41</sup> If the link to the common good can only be established by insisting on a high level of abstraction (“organizations imply interstate cooperation

and are thus good”) or requires extremely rose-tinted glasses or some sort of *Verelendungstheorie*,<sup>42</sup> then perhaps something is amiss. In much the same way as domestic law recognizes a number of different legal persons (limited liability companies, foundations, associations, partnerships, etc.), so too the law of international organizations may well move towards greater recognition of the diversity of international organizations and create different regimes for different kinds of entities. In order to do so it will have to decide on how the common good can be represented, and that is, of course, no small task. Yet, doing so will not only be analytically helpful but also normatively rewarding. After all, it remains somewhat unsatisfying to treat interest-based entities, such as the European Union, OPEC, the OIC, or the Organisation Internationale de la Francophonie, with their distinct political and economic agendas, in the same way as the WHO or UNICEF.

### Notes

- 1 Statehood is usually thought to depend on at least three factors: territory, population, and effective government. The first two are formal in nature, while the third is substantive. See generally, Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013).
- 2 For a thoughtful recent contribution, see Bruno de Witte, “The European Union as an International Legal Experiment,” in *The Worlds of European Constitutionalism*, ed. Gráinne de Búrca and J.H.H. Weiler (Cambridge: Cambridge University Press, 2012).
- 3 Note, e.g., Wilhelmsson’s idea of the European Union as a “jack-in-the-box” surprisingly popping up in domestic legal settings. See Thomas Wilhelmsson, “Jack-in-the-Box Theory of European Community Law,” in *Dialectic of Law and Reality: Readings in Finnish Legal Theory*, ed. Lars D. Eriksson and Samuli Hurri (Helsinki: Forum Iuris, 1999).
- 4 For a good overview, see Mark A. Pollack, “Theorizing the European Union: International Organization, Domestic Polity, or Experiment in New Governance?” *Annual Review of Political Science* 8 (2005).
- 5 See Jan Klabbers, “Ostseerat,” in *Enzyklopädie zum Europäischen Recht*, ed. Peter Müller-Graff and Armin Hatje (Baden-Baden: Nomos, 2014).
- 6 See Robin R. Churchill and Geir Ulfstein, “Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law,” *American Journal of International Law* 94 (2000).
- 7 See, e.g., Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2009); and H.G. Schermers and Niels M. Blokker, *International Institutional Law* (Leiden: Martinus Nijhoff, 2011).
- 8 It is perhaps telling that a comprehensive exposition in strictly theoretical terms is missing, although Schermers and Blokker, *International Institutional Law*, is often regarded as the leading functionalist work. The closest thing to a functionalist manifesto is a brief article by Michel Virally, “La Notion de fonction dans la théorie de l’organisation internationale,” in *Mélanges offerts à Charles Rousseau: La communauté internationale*, ed. Suzanne Bastid et al. (Paris: Pédone, 1974).
- 9 See *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, 1949 ICJ REP. 174.
- 10 See Peter H.F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Dordrecht: Martinus Nijhoff, 1994), 5.
- 11 Reportedly, Mussolini presented a draft for an organization made up of the United Kingdom, France, Germany, and Italy to establish a directorate to dominate 1930s Europe – France, however, resisted the temptation. See Remco van Diepen, *Voor Volkenbond en vrede: Nederland en het streven naar een nieuwe wereldorde 1919–1946* (Amsterdam: Bert Bakker, 1999), 143.
- 12 See Bryan Schwartz and Elliott Leven, “International Organizations: What Makes Them Work?” *Canadian Yearbook of International Law* 30 (1992).
- 13 See [http://www.oic-oci.org/page\\_detail.asp?p\\_id=52](http://www.oic-oci.org/page_detail.asp?p_id=52).

- 14 A useful overview is Howard Davies and David Green, *Global Financial Regulation: The Essential Guide* (Cambridge: Polity, 2008).
- 15 See Jan Klabbers, "Theorizing International Organizations," in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016).
- 16 See Nagendra Singh, *Termination of Membership of International Organisations* (London: Stevens and Sons, 1958), vii.
- 17 For a recent ethnography of the World Bank, see Galit A. Sarfaty, *Values in Translation* (Stanford CA: Stanford University Press, 2012).
- 18 See generally Jan Klabbers, "Self-Control: International Organizations and the Quest for Accountability," in *The International Legal Responsibility of the European Union*, ed. Malcolm Evans and Panos Koutrakos (Oxford: Hart, 2013).
- 19 See Case 22/70 *Commission v. Council* (ERTA) EU:C:1971:32.
- 20 See Jan Klabbers, "Presumptive Personality: The European Union in International Law," in *International Law Aspects of the European Union*, ed. Martti Koskenniemi (The Hague: Martinus Nijhoff, 1998).
- 21 See generally also Jan Klabbers, "The Concept of Legal Personality," *Ius Gentium* 11 (2005).
- 22 For a fine overview, see Deirdre Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford: Oxford University Press, 2009).
- 23 See generally Jan Klabbers, *The European Union in International Law* (Paris: Pédone, 2012), 28–31.
- 24 See Pollack, "Theorizing the European Union," 358. Recent theorists have returned to federalism as inspiration for the explanation of the workings of the European Union. See, e.g., Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009).
- 25 See UN Doc A/CN.4/556, 12 May 2005, at 5. See also UN Doc A/CN.4/593, 31 March 2008, 4: the "Commission expresses some concerns as to the feasibility of subsuming all international organizations under the terms of this one draft in the light of the highly diverse nature of international organizations, of which the European Community is itself an example."
- 26 See UN Doc A/CN.4/556, 6.
- 27 See UN Doc A/CN.4/582, 1 May 2007, 23.
- 28 See UN Doc. A/CN.4/637, 14 February 2011, 7.
- 29 See Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* EU:C:1963:1.
- 30 Case C-364/92 *SAT Fluggesellschaft mbH v. Eurocontrol* EU:C:1994:7.
- 31 *Ibid.*, para 27.
- 32 *Ibid.*, para 28.
- 33 *Ibid.*, para 30.
- 34 The CJEU essentially confirmed its position in Case C-113/07 P *Selex Sistemi Integrati SpA v. Commission* EU:C:2009:191, also addressing the position of Eurocontrol in light of EU competition law.
- 35 See Case T-4/92 *Evangelos Vardakas v. Commission* EU:T:1993:29.
- 36 *Ibid.*, 47. Note, however, that the CJEU felt compelled to present a broad interpretation of the staff regulations on which Mr. Vardakas relied, so it remains uncertain whether the concept of international organization in *Vardakas* must be seen as the CJEU's general concept, or as a special concept for purposes of the staff regulations.
- 37 Currently, the matter is governed by Article 343 TFEU and Protocol No. 7 to the Lisbon Treaty. The latter deals with the European Union's privileges and immunities, but it does not include immunity from suit for the European Union itself.
- 38 See *MacLaine Watson v. Department of Trade*, Court of Appeal, judgment of 27 April 1988, reproduced in 80 *International Law Reports* 47. Kerr's words can be found at 127. While counsel for the EEC made the argument, Kerr LJ did note that the EEC's claim to sovereign immunity was not supported by an "affidavit or other document emanating from the E.E.C. itself" (128).
- 39 Moreover, this can hardly be a slip of the pen, as the phrase recurs in several other provisions: Articles 26 and 31 TEU.

- 40 The well-known Non-Aligned Movement never was quite as united and never was considered an international organization to begin with.
- 41 See Jan Klabbers, "Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation," *Melbourne Journal of International Law* 14 (2013).
- 42 It has been suggested, not entirely in jest, that OPEC contributes to the common good by indirectly providing the impetus to switch to sustainable energy production and consumption. See Cedric Ryngaert, "Domestic Legal Remedies against OPEC," in *Challenging Acts of International Organizations before National Courts*, ed. August Reinisch (Oxford: Oxford University Press, 2010), 256.

## References

- Bekker, Peter H.F. *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*. Dordrecht: Martinus Nijhoff, 1994.
- Churchill, Robin R., and Geir Ulfstein. "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law." *American Journal of International Law* 94 (2000): 623–659.
- Curtin, Deirdre. *Executive Power of the European Union: Law, Practices, and the Living Constitution*. Oxford: Oxford University Press, 2009.
- Davies, Howard, and David Green. *Global Financial Regulation: The Essential Guide*. Cambridge: Polity, 2008.
- de Witte, Bruno. "The European Union as an International Legal Experiment." In *The Worlds of European Constitutionalism*, edited by Gráinne de Búrca and J.H.H. Weiler, 19–56. Cambridge: Cambridge University Press, 2012.
- Klabbers, Jan. "Presumptive Personality: The European Union in International Law." In *International Law Aspects of the European Union*, edited by Martti Koskenniemi, 231–253. The Hague: Martinus Nijhoff, 1998.
- Klabbers, Jan. "The Concept of Legal Personality." *Ius Gentium* 11 (2005): 35–66.
- Klabbers, Jan. *An Introduction to International Institutional Law*. Cambridge: Cambridge University Press, 2009.
- Klabbers, Jan. *The European Union in International Law*. Paris: Pédone, 2012.
- Klabbers, Jan. *International Law*. Cambridge: Cambridge University Press, 2013.
- Klabbers, Jan. "Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation." *Melbourne Journal of International Law* 14 (2013): 149–170.
- Klabbers, Jan. "Self-Control: International Organizations and the Quest for Accountability." In *The International Legal Responsibility of the European Union*, edited by Malcolm Evans and Panos Koutrakos, 75–99. Oxford: Hart, 2013.
- Klabbers, Jan. "Ostseerat." In *Enzyklopädie zum Europäischen Recht. Band 1: Europäisches Organisations- und Verfassungsrecht*, edited by Peter Müller-Graff and Armin Hatje, 1163–1172. Baden-Baden: Nomos, 2014.
- Klabbers, Jan. "Theorizing International Organizations." In *The Oxford Handbook of the Theory of International Law*, edited by Anne Orford and Florian Hoffmann. Oxford: Oxford University Press, forthcoming.
- Pollack, Mark A. "Theorizing the European Union: International Organization, Domestic Polity, or Experiment in New Governance?" *Annual Review of Political Science* 8 (2005): 357–398.
- Ryngaert, Cedric. "Domestic Legal Remedies against OPEC." In *Challenging Acts of International Organizations before National Courts*, edited by August Reinisch, 239–257. Oxford: Oxford University Press, 2010.
- Sarfaty, Galit A. *Values in Translation*. Stanford, CA: Stanford University Press, 2012.
- Schermers, H.G., and Niels M. Blokker. *International Institutional Law*. Leiden: Martinus Nijhoff, 2011.
- Schütze, Robert. *From Dual to Cooperative Federalism: The Changing Structure of European Law*. Oxford: Oxford University Press, 2009.

- Schwartz, Bryan, and Elliott Leven. "International Organizations: What Makes Them Work?" *Canadian Yearbook of International Law* 30 (1992): 165–194.
- Singh, Nagendra. *Termination of Membership of International Organisations*. London: Stevens and Sons, 1958.
- van Diepen, Remco. *Voor Volkenbond en vrede: Nederland en het streven naar een nieuwe wereldorde 1919–1946*. Amsterdam: Bert Bakker, 1999.
- Virally, Michel. "La Notion de fonction dans la théorie de l'organisation internationale." In *Mélanges offerts à Charles Rousseau: La communauté internationale*, edited by Suzanne Bastid et al., 277–300. Paris: Pédone, 1974.
- Wilhelmsson, Thomas. "Jack-in-the-Box Theory of European Community Law." In *Dialectic of Law and Reality: Readings in Finnish Legal Theory*, edited by Lars D. Eriksson and Samuli Hurri, 437–454. Helsinki: Forum Iuris, 1999.