

§ 3 Associations of states under public international law

I. General aspects

- all modern associations are *based on international treaties* which
 - create them and (usually) grant them legal personality
 - establish their institutions
 - grant and define their competences
 - regulate their relations with their member states
- all associations depend on the collective will of their *member states* as *masters of the treaty* who can at any time eliminate or modify them or withdraw competences by terminating or amending the founding treaty
- the *competence of competences* [Kompetenz-Kompetenz], i.e. the political decision about the competences of the association, always stays with the member states, while the competence of authoritative interpretation of the competence clauses in the treaty may be attributed to an institution of the association

II. Historical associations of states

- interconnections without legal personality
- personal union (only example today: Commonwealth Realms), real union (in history), protectorate (in history)

III. The confederation

1) The concept of uniting sovereign states in a federal association of states

- states unite with selected partners in a *new general political community* on the basis of federalism
 - membership affects states as a whole, not just some policies
 - unity in diversity
 - mutual loyalty and mutual solidarity in case of threats, attacks or disasters
- members keep status as states in the sense of public intern. law
- competences usually limited to some fields concerning the state as a whole (foreign policy, defense)

2) Characteristic features

- exclusivity (state cannot be member of different confederations)
- sovereignty of the member states
- limited competences, weak institutions, difficult decision-making
 - dominance of federal, not unitary institutions
 - often unanimous decision-making

3) Examples

- ASEAN, CIS, African Union, Benelux-Union
- numerous historic examples, e.g. ancient greek confederations, USA (1777 - 1788), Swiss Confederation (before 1848), German Confederation (1815 - 1866), Confederate States of America (1861 - 1865)

4) **Advantages and disadvantages**

- little restrictions of the political independence of the member states
- member states better protected against threats emanating from third countries
- not very efficient in the performance of public functions

IV. **The international organisation**

1) **The concept of sectoral institutionalised cooperation for a specific purpose**

- states cooperate in and via *common institutions which make own decisions and* may monitor compliance with them, in order to achieve a coordinated and therefore more efficient fulfilment of public functions
- focus on the specific tasks, not on the general relations between the member states

2) **Characteristic features**

- usually highly *specialised* and limited to a small range of homogenous competences
- can have numerous member states; state can be member of many organisations
- *member states legally obliged to implement the organisation's decisions* on their territory
- however, contravening domestic measures will not be invalid or inapplicable

3) **Examples**

- UN, UN system organisations (FAO, IAO, WHO, UNESCO, IMO etc.)
- geo-regional organisations (Council of Europe, OSCE, ASEAN, AU, OAS etc.)
- economic organisations (WTO, OECD, World Bank, Mercosur, Eurasian Econ. Union etc.)
- other specialised organisations (NATO, OPCW etc.)

4) **Advantages and disadvantages**

- more efficient than the uncoordinated direct international cooperation but still a cumbersome and unreliable way
- an intern. organis. can also be a confederation

V. **The supranational organisation**

1) **The concept of supranational fulfilment of public tasks via supranational public power**

- an intern. organis. of a special kind *directly exercises public power in the member states* in order to avoid the unreliableness and delays of the intermediate step of national implementation and, thus, to achieve an even more efficient and homogeneous fulfilment of public functions
- the supranational public power follows its own rules, not any national rules, and therefore is identical in all member states

2) **Characteristic features**

- citizens and authorities in the member states are *directly bound by the supranational decisions* (individual decisions and regulations) which will neither become domestic law nor be implemented in the form of domestic law
- this presupposes the opening of the national legal system for the *direct applicability* of supranational decisions (→ open statehood)

- the execution and enforcement of the supranational decisions must not be obstructed by any domestic law; in case of conflict, in the European Union the supranational European law prevails (→ *primacy* of European Union law)
- since their measures will have a direct impact, the *competences* of supran. organisations *should be defined and limited more clearly and precisely*

3) Examples

- European river commissions (since 19th century)
- Eurocontrol (European air traffic control organisation)
- European Patent Office
- European Communities (now: European Union)

4) Advantages and disadvantages

- the by far most efficient form of intern. cooperation
- unsuitable for states unwilling to accept restrictions of the exercise of their sovereignty
- supranational measures not limited by domestic constit. principles and fundamental rights

VI. The supranational union / "Staatenverbund" ["compound of states"]

1) The European Union as first representative of a new form of organisation

- an association of states without historic precedent, more developed and powerful than all other associations under public intern. law
- not invented but emerged as result of many developments, reforms and compromises
- sophisticated institutional system with federal and unitarian elements, far-reaching competences, comprehensive exercise of supranational public power, highly developed legal system with powerful court of justice, legal framework for a geo-regional internal market, own currency, own citizenship

2) The debate on the legal nature of the European Union: "compound of states", "compound of states and constitutions" or supranational union?

- the state-centred "Staatenverbund" doctrine of the German Federal Constitutional Court - Maastricht judgement of 1993 (BVerfGE 89, 155); Lisbon judgement of 2009 (BVerfGE 123, 267)
- the "unconventional" approach of some scholars: Union, states, Treaties and constitutions as a constitutional unity
- the union-centered approach of a general theory of the supranational union

3) The supranational union as a dynamic non-state but state-like organisation of supranational geo-regional integration

- more than an intern. or supran. organisation, a confederation or a combination of both but not yet a federal state
- not a state but similar to a state and as dangerous as a state - therefore it needs its own catalogue of fundamental rights
- accomplishes its integrative function primarily by legislation and regulation but also serves as institutional framework for intergovernmental cooperation and as habitat for the substantive integration law
- a *dynamic* form of integration

4) **The status of the member state in the supranational union**

a) **The unaffected sovereignty of the state**

- no "shared sovereignty" since sovereignty is absolute and therefore indivisible
- unlimited public power (including the legal power - not the right! - to break Union law)
- unlimited legal capacity at public international law
- ultimate control over all public power exercised on the state territory
- comes along with the ultimate responsibility [Letztverantwortung] of the state (→ slide 1)

b) **The member states as the "masters of the treaties"**

- only as collectivity, when amending the founding treaties

c) **The basic duty to respect, implement, execute and enforce Union law**

- in the EU explicitly anchored in art. 4(3) EU Treaty

d) **Accession, secession and expulsion of member states**

- high requirements and long, complicated procedure for accession to the EU (cf. art. 49 EU Treaty)
- right to secession from the EU (with option of secession agreement, art. 50 EU Treaty)
- risk to be expelled, as a last resort, in case of material breach of treaty (art. 60(2) lit. a Vienna Convention on the Law of Treaties, no special regulation in the EU)

5) **The European concept of integration through law**

- integration based on law and the respect for law but no coercive powers of the Union
 - demanding requirements for the implementation and execution of Union law in the member states
- rule of law as a fundamental value of the Union (art. 2 EU Treaty)
- prominent role of the European Court of Justice
- effectiveness (*effet utile*) as dominant criterium when dealing with Union law
- strong characteristic features of European Union law: autonomy, unity, *direct effect* in the member states and *primacy* (in application) over national law

6) **The debate over a constitution for the European supranational union**

- a constitution for an association of states under public international law?
 - MOST EUROPEAN LAW SCHOLARS consider already the existing EC/EU treaties as a constitution which has "emerged" in the integration process
 - MANY CONSTITUTIONALISTS object that constitutions are reserved for states
 - OWN OPINION: State-like territorial organisations can have a constitution too but as any constitution it cannot "emerge" in a process but must be given in a solemn formal act and self-identify as a constitution (this is not the case with the existing treaties)
- a constitution would provide for higher legitimacy of the supranational union and compensate for the reduced significance of the national constitutions in the integration process
- the failed Treaty Establishing a Constitution for Europe of 2004
 - draft elaborated by a pluralistic European Convention
 - rejected in national referenda in France and Netherlands in 2005
- will the still missing European constitution come in the 20s?

7) **The supranational union - a suitable form of organisation for geo-regional integration in Southeast Asia?**

- your opinion: _____
- your reasons: _____