

International Organizations as Sellers of Goods and Services

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8.1 INTRODUCTION

International organizations engaging in entrepreneurial activities by selling goods and services remains an understudied subject. It is a well-known, although often-ignored, fact that many international organizations run their gift shops and cafés, lease their premises and charge for parking. It is also commonly emphasized that international financial institutions make revenue through their loan and investment activities. And it is a curious anecdote that UN Postal Administration makes revenue by selling stamps and UNICEF by selling greeting cards. But little else has been written about the topic.¹

Yet, many international organizations engage in various types of entrepreneurial activities daily. Some of the entrepreneurial organizations (or bodies of organizations) are little-known even within the field of international organizations law, but others are traditional institutions, such as the Universal Postal Union and the International Civil Aviation Organization. Many international organizations experimenting with entrepreneurial activities remain firmly tied to the mandatory contributions of their member states, but some – such as the World Intellectual Property Organization and the International Organization for Migration – make such a significant part of their revenue by selling services (or more rarely goods) that they have become almost financially self-reliant. In fact, at least two entities, namely the United Nations Office for Procurement Services, which is a subsidiary organ of the UN General Assembly, and the European Patent Office have been designed to be entirely

¹ See, however, H. G. Schermers and N. Blokker, *International Institutional Law: Unity within Diversity*, 6th ed. (Martinus Nijhoff, 2018), paras 1050–1063.

financially independent and are thus entirely dependent on their market activities.

In engaging in entrepreneurial activities, international organizations challenge the fundamental assumptions of the law of international organizations that these creatures interact only with their member states and that they perform technical tasks set by said member states, acting as a collective principal. Although entrepreneurial international organizations do sell their services most commonly to their member states, these commercial relationships often change the dynamics between the organizations and their principals by making international organizations more dependent on the individual member states that are willing to pay for services than on the collective will of the members. In other words, international organizations start to do the bidding of their 'clients', the individual interests of which do not necessarily match those of the majority of the member states. Furthermore, there are many cases of international organizations selling their services to 'third parties', such as non-member states, other international organizations and even to private sector actors, thus entirely severing the principal-agent relationship.

This chapter takes some first steps towards an analysis of the entrepreneurial activities of international organizations by providing examples of international organizations selling goods and services and mapping their legal powers to do so. The three main sections of the chapter focus on international organizations selling goods and services to member states (Section 8.2); to other public actors, namely non-member states and other international organizations (Section 8.3); and to private actors, including non-governmental organizations, companies and individuals (Section 8.4). Section 8.5 concludes. While the chapter remains mostly descriptive, its motivation is to complicate the assumption about international organizations simply fulfilling the technical tasks set by their member states, acting as a collective principal. In line with this, the chapter also seeks to demonstrate that international organizations are not blessed entities, acting always for the salvation of humankind, but complex actors that have their own internal agendas. In this way, then, the chapter points towards the need to start rethinking the theory of the law of international organizations.

8.2 SELLING TO MEMBER STATES

Many of the business activities of international organizations conform to the fundamental assumptions of the law to the extent that they consist of these entities selling goods or services to their member states. Yet, as this section

seeks to demonstrate, the commercial relations between international organizations and their individual member states may also fundamentally challenge the assumed principal–agent dynamic between the collective of member states and the international organization.

That said, oftentimes the entrepreneurial relations between international organizations and individual member states differ quite little from the assumed activities of international organizations and are in fact organized in such a way that they are difficult to distinguish as commercial transactions. Commonly in these cases, the transaction is arranged around voluntary member state contributions.

Many international organizations have special funds for voluntary contributions or technical cooperation. When states want specific services tailored just for them, they make contributions to these funds to cover the costs of the service and overheads. For example, the work of the International Atomic Energy Agency (IAEA) can be divided into two areas, its regular programme, funded by mandatory member state contributions, and the Technical Cooperation Programme, which is funded by precisely this type of voluntary contribution. The programme provides tailored services to states, helping them to safely utilize nuclear technologies to address local needs.² In exchange for these services, the recipient state makes a contribution to the Technical Cooperation Fund,³ although it must be noted that the cooperation might also be funded by an external funder, for example through IAEA's Peaceful Uses Initiative – a practice that became very relevant during the COVID-19 pandemic as many target states ran out of funds.⁴

The power of the IAEA to provide technical assistance is provided in the Statute of the IAEA. According to Article IX of the Statute, any member state may request the assistance of the organization in projects related to the development or practical application of atomic energy for peaceful purposes or for the securing of financing for such projects and they may also ask the IAEA to supply materials and services for the project. According to paragraph F of the Article, if the IAEA approves the project, it shall enter into an agreement with the member state or group of states. The agreement sets forth the terms and conditions of the project and also stipulates, in accordance with subparagraph 3, the price of materials, services or equipment provided by the IAEA (if applicable).

² www.iaea.org/services/technical-cooperation-programme/about (accessed 30 January 2022).

³ IAEA, Technical Cooperation Report for 2018, GC63/INF/4 (2019), 34.

⁴ IAEA, Technical Cooperation Report for 2020, GC65/INF/4 (2021), 5–6.

Interestingly, the Statute also grants the IAEA the power to provide atomic energy materials, services and equipment to its member states. According to Article XIV(E), the IAEA may set charges for such goods and services. Unlike most international organizations engaging in entrepreneurial activities, the IAEA may even make a profit in this way. Indeed, Article XIV(E) continues by stating that the scale of the charges shall be designed so as to produce sufficient revenue for the Agency to carry out its functions related to said material, equipment and services. According to the paragraph, 'the revenue shall be placed in a separate fund which shall be used to pay members for any materials, services, equipment, or facilities furnished by them' and to meet other expenses incurred by the Agency itself. Another important passage regarding profit is in paragraph F, which provides that if the IAEA makes any *excess* revenue through the aforementioned activities, this shall be placed in a general fund which may be used as the Board of Governors determines. It is this passage that confirms that the IAEA may make a profit, even though the profit goes to the Technical Cooperation Fund and is used for future projects. However, it must be noted that in practice the paragraph has been of little relevance: while the drafters of the Statute anticipated that selling nuclear materials would form an important part of the IAEA's activities, this has actually never come to be, for nuclear material supplies have remained plentiful and the IAEA has therefore never achieved the position in the markets that the drafters envisioned.⁵

Another international organization that sells its services in the form of technical cooperation is the International Civil Aviation Organization (ICAO). Much like the IAEA, the ICAO also has a Technical Cooperation Programme, run by its Technical Cooperation Bureau. Through the Programme, the ICAO provides a wide range of services to its Members States. It, for example, reviews the national civil aviation institutions, helps with air navigation plans, supports remedial action resulting from safety and security audits and facilitates capacity building. Just like in the case of the IAEA, states and donors in essence pay for tailor-made services by making contributions to the Programme. The vast majority of the contributions are provided by countries that finance their own technical cooperation projects but development banks, regional organizations, funding institutions and the aviation industry also fund some projects supporting developing states.

The foundations of the ICAO's technical cooperation are set in its constitutional document, the 1944 Chicago Convention on International Civil Aviation. According to Article 71 of the Chicago Convention, member states

⁵ Schermers and Blokker, *International Institutional Law*, 6th ed., para 1052.

can request the ICAO Council to provide, staff, maintain and administer any of its airports and other air-navigation facilities. In such situations, the Council can, under the same article, specify reasonable charges for the use of the facilities. Furthermore, Article 74 states that, when the ICAO Council provides airports or other facilities, the arrangement can, with the consent of the state, include technical assistance related to the operation of the airports and other facilities. The Article also stipulates that, in such situations, (part of) the revenue made by operating the airport or facility may be used to cover the operation expenses of the airport or facility, as well as interest and amortization charges. Technical cooperation was given a clearer legal framework in 1954 when the ICAO adopted its Financial Regulations. Regulation 9.3 states that the costs of the administration and operation of the technical cooperation shall be met by the government, organization or other entity cooperating with the ICAO. Nowadays a special position is however granted to the United Nations Development Programme (UNDP), for charges for UNDP projects shall be determined in cooperation with the UNDP, whereas otherwise the charges are based on the estimate of the ICAO of the costs incurred by it for the implementation of the project. According to Regulation 9.4, the funds received as charges for the projects shall be put into the ICAO's Administrative and Operational Services Cost Fund, which is used to meet the full costs of the administration of the projects and to support the ICAO's technical cooperation in general. This suggests that the ICAO may charge overheads that are not linked directly to the expenses of a given project but that are related to maintaining its technical cooperation in general.

The Universal Postal Union (UPU), too, has a specific funding mechanism for services provided for states, although these are not branded as technical cooperation. The UPU is financed through three 'pillars', out of which the first one consists of regular member state contributions to the UPU's regular budget and the third one of the sale of products and commercially oriented services. The second pillar is the most relevant here, however (the third pillar will be discussed in Section 8.4). It consists of member state contributions to UPU affiliated cooperatives and bodies for their services.⁶ These cooperatives and bodies include the EMS Cooperative, which consists of 178 postal operators that work together to provide an express mail service; the Telematics Cooperative, which promotes cooperation, infrastructure and services related to new postal communication and information technologies; and the UPU Clearing User Group, which provides its members a low-cost and efficient system for settling their international postal accounts. All of the

⁶ www.upu.int/en/Universal-Postal-Union/About-UPU/Finance (accessed 25 January 2022).

entities fully participate in the UPU mission, enjoy support from the organization's International Bureau and are under direct oversight of the UPU leadership. These entities are not legal entities or companies under private law but fully part of the UPU.⁷

The operation and financing of the cooperatives and similar bodies are not really regulated by the UPU Constitution, but by internal rules. The Articles coming the closest to touching the issue in the Constitution are perhaps Articles 1 and 18. Article 1(2) states that the purposes of the UPU include the improvement of postal services, whereas paragraph 3 adds that the UPU 'shall take part, as far as possible, in postal technical assistance sought by its member countries'. Article 18 holds that the 'Postal Operations Council (POC) shall be responsible for operational, commercial, technical and economic questions concerning the postal service'. The Constitution does not provide anything else related to the cooperatives or similar bodies, however; nor did the General Regulation or the Rules of Procedure of the Council of Administration (CA) and the POC – for a long time. The bodies were therefore created on an *ad hoc* basis to respond to new challenges and opportunities, particularly related to technological developments, without any coherent policy or legal framework. If any legal justification was thought of or considered necessary, it was most likely seen to be derived from the Constitution on the basis of the implied powers doctrine.

To respond to this legal gap, then, the 2008 Congress in Geneva ordered the CA to study the issue. Following the study, the 2012 Doha Congress added Article 152 to the UPU General Regulations to establish clearer decision-making between the permanent bodies of the UPU related to voluntarily funded subsidiary bodies.⁸ According to the first paragraph of the Article, the POC may, with the approval of the CA, establish aforementioned bodies 'in order to organize operational, commercial, technical and economic activities' which fall within the POC's competence under article 18 of the Constitution. According to the second paragraph of the Article, the POC shall, in so doing, also establish the legal framework of the body, including its mandate, constituency and financing. Furthermore, Article 26(3)(b) of the UPU Financial Regulations now states that one of the ways of financing the Voluntary Fund of the UPU is through 'tied voluntary contributions governed by special agreements' and Annex 2 of the Regulations regulates the mechanism more closely. According to Article 2(1), the services provided by the UPU

⁷ Ibid.

⁸ Commentary to Article 152 of the UPU General Regulations, Constitution and General Regulations Manual with Commentary by the UPU International Bureau, 2018.

must be in accordance with its purpose, and according to Article 3(3) the precise terms and conditions of such voluntary contributions shall be agreed by a signed contract between the parties. The bodies have therefore been given a legal framework retroactively.

A slightly different example of an international selling services to its member states is Eurocontrol, which collects central route charges on behalf of its member states and provides other services in exchange for a fee. Eurocontrol is a civil–military organization tasked to support European aviation, aviation service providers and airports. Although it is not an EU agency, the EU has delegated parts of its sky regulations to it, turning it into the central organization for air traffic control in Europe. Eurocontrol's centralized system – operating through its Central Route Charges Office – makes the collection of the charges easier and more efficient for its members, which include all EU member states and the EU itself.⁹ Following its Multilateral Agreement relating to Route Charges, Eurocontrol takes care of billing and collecting on a monthly basis and then disburses the route charges to the member states. It also offers similar services for terminal navigation charges and communication charges,¹⁰ as well as cross-border air navigation services, managing the upper airspace over the Netherlands, Belgium, Luxembourg and north-west Germany through its Maastricht Upper Area Control Centre.¹¹

The power of Eurocontrol to collect route charges is set directly in its constitutional document, the Eurocontrol Convention. Article 2(1)(j) of the amended convention grants Eurocontrol the power to collect route charges levied on users of air navigation services, assist member states in designing and setting up air traffic facilities and services and to provide and operate such services on behalf of the member states. Furthermore, according to the same Article, the member states may also ask Eurocontrol to assist them in air flow management and air navigation services, as well as in the collection of other charges than the aforementioned route charges. The collection of route charges is further regulated by the Multilateral Agreement relating to Route Charges, which, in Articles 1(2) and 8, reaffirms the task of Eurocontrol to collect the charges, in addition to further clarifying the framework of the route charges system.

⁹ There is, however, a series of domestic legal cases raised against Eurocontrol, challenging its practices in the collection of route charges. See J. Wurm, 'Asking National Courts to Correct Over-Flight Charges of Eurocontrol', in A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (Oxford University Press, 2010), 157.

¹⁰ www.eurocontrol.int/crco (accessed 27 February 2022).

¹¹ www.eurocontrol.int/muac (accessed 27 February 2022).

The examples provided so far do not yet challenge in any fundamental way the principal–agent dynamic of international organizations theory, although they do complicate and blur it, given that international organizations engage in closer cooperation with those member states that are willing to pay for their services. There are, however, other organizations (or bodies within them) that take the entrepreneurship much further. Although these, too, interact with the typical partners of international organizations – the member states – they are far from merely fulfilling direct orders of their collective principal (as international organizations do in most ‘realist’ accounts) or imposing rules on and disciplining their unruliest members (as often described in more critical analyses), instead at times operating almost like private companies. The two organizations or bodies that embody this trend most clearly are the International Organization for Migration (IOM) and United Nations Office for Procurement Services (UNOPS). I will use the case of IOM to illustrate the challenge that these organizations pose to the law of international organizations,¹² whereas UNOPS will be discussed in more detail in Section 8.3, it being one of the few institutions that sell services (also) to international organizations.

The IOM sells its member states various migration-related services, ranging from visa processing and voluntary repatriation of migrants to border management and humanitarian services, oftentimes packaged as discrete projects.¹³ Seeking assignments much like a private market actor, the IOM prides itself on providing tailor-made solutions, adapting efficiently to its clients’ wishes,¹⁴ and ‘getting things done’, taking full advantage of its flexible constitution¹⁵ and position at the outskirts of the UN family.¹⁶ It has also been very successful in carving out niches and filling out gaps wherever it has seen business opportunities, most recently rebranding itself as an humanitarian actor – albeit one without an official humanitarian mandate (which is one of the factors increasing its flexibility).¹⁷

The IOM’s identity as a service provider is already engrained in its Constitution. The first preambular recital of the IOM Constitutions notes

¹² For a more detailed discussion, see J. Klabbers, ‘Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-Making, and the Market for Migration’ (2019) 32 *Leiden Journal of International Law* 383.

¹³ M. Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (Routledge, 2020), 6.

¹⁴ www.iom.int/speeches/message-director-general-antonio-vitorino-iom-staff.

¹⁵ Klabbers, ‘Notes on the Ideology’, 390–391; Bradley, *International Organization for Migration*, 8.

¹⁶ Bradley, *International Organization for Migration*, 18–25.

¹⁷ *Ibid.*, 8.

that the 'provision of migration services at an international level is often required to ensure the orderly flow of migration movements throughout the world', whereas Article 1 begins by stating that a function of the organization is the 'organized transfer' of migrants, refugees, displaced persons and others. The key passage is, however, Article 1(1)(c) which tasks the organization to provide, at the request of any member state, a set of specific migration services from processing and selection to recruitment and medical examination. The passage therefore presents the IOM as a service provider for member states, rather than as a cosmopolitan guardian of humanity. Furthermore, the third paragraph of Article 1 holds that both the admittance standards and numbers of migrants are within the domestic jurisdiction of states. The service provider characteristic of the IOM is also clearly expressed in the Constitution's provisions on the financing of the organization. Article 20 distinguishes between the administrative and operational costs of the organization. Whereas the former are subject to a regular membership fee, the latter are paid on a voluntary basis and may be made subject to different terms and conditions set by the paying state. Hence, the IOM has to enter the market for migration services to gain anything but the most minimal funding. Indeed, the IOM has virtually no core budget and is almost entirely dependent on overheads from the projects it undertakes, those overheads covering for example almost all of the headquarter expenses as well as some of the migration policy programmes that it is best known for.

As Jan Klabbers has demonstrated, the financially self-reliant IOM selling its services on the market, and thus acting at least partly according to the market logic, jars against the notion of international organizations following the aims and wishes of their collective principals.¹⁸ Because the IOM's financial well-being, if not existence, is reliant on attracting states as its clients, it has to focus on projects that are financially profitable, rather than maximizing its mission (which is rather vague, at any rate). This simultaneously flies against the principal-agent theory or legal functionalism and provides an extreme case of it; one that twists it to an almost unrecognisable form. At the same time as the IOM has almost unprecedented 'independence' from the collective wish of its member states – the organization following the market logic rather than the wishes of its collective principal – the market logic also makes it much more tied to the desires and orders of those individual members that purchase their services than an ideal type an international organization would be.

Moreover, the IOM also differentiates from an ideal type international organization in that it influences what its client states are doing and how they

¹⁸ Klabbers, 'Notes on the Ideology'.

are shaped, thus distorting the principal–agent relationship.¹⁹ Klabbers gives the example of the IOM's Border and Identity Solutions Unit, which can be hired to evaluate the technical needs of member states and provides them expert advice and different training services. As Klabbers notes, the role of the Unit means that 'whatever the IOM says becomes influential: it is the IOM's definition of "technical needs" that comes to prevail; it is the training provided by IOM which dictates how states end up operating'.²⁰ And the Unit is no curiosity in this regard but reflects the nature of much of the IOM's work. As services and suggestions are systematized and generalized in the various manuals and handbooks published by the organization and studied closely by national authorities, the outcome is 'a continuous loop of mutual direction and influence', which is surprisingly efficient at softly disciplining states and their activities.²¹

8.3 SELLING TO NON-MEMBER STATES AND INTERNATIONAL ORGANIZATIONS

The majority of the services sold by international organizations are sold to member states. Selling services to non-member states is much rarer; perhaps because at least the larger international organizations have such near-universal membership that all states that want to interact with them are already members. The most likely exceptions to this rule are regional organizations. Indeed, one example of an international organization selling services to non-member states is Eurocontrol. Section 8.2 discussed Eurocontrol collecting route charges on behalf of its member states and providing other air navigation related services. But Eurocontrol also markets air navigation charge services to non-member states that are willing to pay for them. According to Eurocontrol, their services provide states several benefits, including high recovery rates and timely billing, ensuring stable cash flow, compliance with ICAO rules, efficient and professional service and permanent monitoring of payments.²² In 2016, Eurocontrol concluded a Comprehensive Agreement on wide-scale service provision with two non-member states, Morocco and Israel.²³ By virtue

¹⁹ See, more generally, G. F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017).

²⁰ Klabbers, 'Notes on the Ideology', 395.

²¹ *Ibid.*

²² www.eurocontrol.int/service/bilateral-agreements-terminal-and-air-navigation-charges (accessed 17 June 2022).

²³ www.eurocontrol.int/our-member-and-comprehensive-agreement-states (accessed 17 June 2022).

of the Agreements, Morocco and Israel are now fully integrated into Eurocontrol's working structures and enjoy the full range of Eurocontrol provided services. Eurocontrol has also concluded bilateral agreements with Belarus, Uzbekistan and Egypt regarding the collection of air navigation charges.²⁴

A bit more common (though still rare) case than international organizations having commercial relations with non-member states is them, or their bodies, selling services to other international organizations or bodies. A peculiar such example – that is explored in more detail in Eelco Szabó's Chapter 12 – is GAVI's Partner Engagement Framework. GAVI provides funding for its target states, which can then select the organizations or companies they wish to work with. Common partner organizations include, for example, the World Health Organization (WHO) and UNICEF. After winning their contracts through competition, the organizations are also required to report their activities to GAVI.

A more straightforward example of international organizations selling services to each other is the case of the United Nations Humanitarian Air Service (UNHAS), which operates under the World Food Programme (WFP). The UNHAS delivers humanitarian actors – both public and private sector organizations – to and from crisis and conflict areas where commercial airlines do not fly, or where flights are difficult to find or very expensive. Some of the most frequent users of the UNHAS services include, for example, the UNHCR, WHO and IOM (in addition to the WFP itself).²⁵ Chartering the airplanes from commercial airlines, the UNHAS charges a fee from the users of its services, at least partly planning its business according to market conditions,²⁶ although an important part of its funding comes from donor contributions. Indeed, a hint of entrepreneurial attitude is detectable, for example, in the fact that the FAO's financial committee has observed that the UNHAS managed to make yearly 'profit' in the sense that its actual expenditure has often been lower than the budget and the ticket sales have funded activity also for future budget years.²⁷

²⁴ Eurocontrol Central Route Charges Office, Report on the Operation of the Route Charges System in 2019, 5, 8, available at www.eurocontrol.int/sites/default/files/2020-04/eurocontrol-crco-report-2019.pdf (accessed 18 June 2022).

²⁵ FAO Financial Committee, Report of the External Auditor on air transport services, FC 181/7, 2020, Annex 4.

²⁶ For example, in 2019, the prices varied significantly from 90 USD for flights in Nigeria to 500 USD in The Democratic Republic of the Congo. FAO Finance Committee, Report of the External Auditor on air transport services, 2020, NC753/e, para. 122.

²⁷ FAO Finance Committee, Report of the External Auditor on air transport services, 2020, NC753/e, para. 53.

The legal foundation for the UNHAS activities can be found in the WFP General Regulations and General Rules. According to Article II(2)(d) of the document, the purposes and functions of the WFP include providing 'services to bilateral donors, United Nations agencies and non-governmental organizations for operations which are consistent with the purposes of WFP and which complement WFP's operations'. The UNHAS can be interpreted as one such service, the transportation of humanitarian actors to crisis areas fitting the purposes of emergency and refugee relief under subparagraphs (b) and (c) of the same Article. Accordingly, the WFP established the predecessor of the UNHAS, the WFP/Air Service, in the 1980s to carry its food and non-food items, and soon the service also started serving a larger community.²⁸ The actual mandate for the UNHAS – a service catering for the entire humanitarian community – however came much later, in 2003, when the UN High-Level Committee on Management came to an inter-agency administrative agreement to assign the WFP the management of all UN humanitarian air operations.²⁹ Nevertheless, although the UNHAS is the result of this decision, it remains a generic name for a common support service provided by the WFP, with vague guidelines, rather than a clearly regulated institution.³⁰

Another example that can be considered as international organizations (or parts of them) selling services to each other is the case of the United Nations Development Programme (UNDP), which receives billions of dollars yearly in voluntary contributions, distributing the money to participant organizations in the form of projects. When the UNDP carries out a development programme, it hires specialized agencies to implement it, and the agencies can therefore be seen as selling their services to the UNDP. Since the UNDP is a common activity of participating organizations, it is perhaps misleading to describe the situation as a commercial transaction, but the gist is nevertheless an organization receiving funds from another organization in exchange for its services.³¹

Perhaps the most interesting example of (a body of) an international organization selling services to other international organizations (or their bodies) is however the case of the UNOPS. Established in its current form

²⁸ A. Dorn and R. Cross 'Flying Humanitarians: The UN Humanitarian Air Service', in A. Dorn (ed.), *Air Power in UN Operations: Wings for Peace* (Ashgate, 2014), 101.

²⁹ Joint Inspection Unit, Review of the United Nations Humanitarian Air Service (UNHAS), prepared by Tadanori Inomata, JIU/Note/2003/3, paras 13–15. See CEB/2002/5, 8 October 2002, paragraph 23 and CEB/2003/3, June 2003, paragraph 13.

³⁰ Joint Inspection Unit, Review of the United Nations Humanitarian Air Service (UNHAS), prepared by Tadanori Inomata, JIU/Note/2003/3, paras 17–18.

³¹ Schermers and Blokker, *International Institution Law*, 6th ed., para 1063.

by a General Assembly resolution in the mid-1990s,³² after beginning its life as part of the UNDP,³³ the UNOPS is a subsidiary organ of the UN General Assembly, listed on the UN website as one of the ‘other entities or bodies’ established by the UN.³⁴ The purpose of the UNOPS is to provide a range of operational services, from procurement of goods, such as medical supplies and equipment, to construction and infrastructure projects. It can be hired either to execute or implement projects. In the former role it is responsible for the management of an entire project, including its goals and objectives, whereas as an implementor its role is limited to certain subcontractor services (such as procurement) within a more general project, as specified in a Project Agreement between the UNOPS and the contractor.

What makes the UNOPS particularly interesting here is that it is financially fully self-dependent and thus entirely reliant on the projects it sells to its clients. It is therefore not surprising that it is perhaps the main competitor to the IOM in business-mindedness, constantly comparing itself to private companies and emphasizing its competitiveness. Although a large portion of the UNOPS projects are now conducted for UN member states, the UNOPS and its predecessors were explicitly established to provide procurement and project services for other UN entities, and recently the UNOPS has provided lots of services for other international organizations as well. Since 2017, for example, it has worked on World Bank financed infrastructures programs in Yemen, restoring urban services such as schools, roads, water services, solar power and electricity supply.³⁵ And in Zimbabwe it helps the country to recover from Cyclone Idai, rehabilitating water and sanitation services, schools, roads and irrigation networks, again with World Bank funding.³⁶

The external relations of the UNOPS to its clients are specified through agreements. According to the UNOPS’s Financial Regulation 7.02, the Executive Director has the power to enter into such written contractual arrangements as are necessary to undertake UNOPS activities, whereas Regulation 7.04 states that UNOPS shall agree with its clients on services

³² General Assembly decision 48/501, available at Resolutions and decisions adopted by the General Assembly during its 48th session. Volume 2, 24 December 1993–19 September 1994. A/48/49 (Vol. II), 1994, p. 59 (GAOR, 48th sess., Suppl. no. 49 A).

³³ See D. Dijkzeul, ‘Not Just States or the Secretary-General: The Emergence of UNOPS as a New UN Organization’, in J. Oestreich (ed.), *International Organizations as Self-Directed Actors: A Framework for Analysis* (Routledge, 2012), 195.

³⁴ www.un.org/en/about-us/un-system (accessed 21 May 2022).

³⁵ www.unops.org/news-and-stories/stories/finding-light-amid-yemens-darkest-times (accessed 25 April 2022).

³⁶ www.unops.org/news-and-stories/stories/supporting-post-disaster-recovery-in-zimbabwe (accessed 25 April 2022).

through a project agreement. Rules 107.01 and 107.02, which specify the Regulation, further stipulate that the agreement should contain, *inter alia*, the rights and responsibilities of the client and UNOPS, arrangements for the suspension or termination of activities and settlement of disputes. The agreement must also include such provisions which ensure that the privileges and immunities of the UN and UNOPS are not compromised.

All in all, then, international organizations do not sell their services only to their member states, but also to non-member states and other international organizations, thus distorting further the fundamental assumptions about international organizations interacting only with their member states. Furthermore, as Section 8.4 demonstrates, international organizations also do an increasing amount of business with the private sector.

8.4 SELLING TO PRIVATE ACTORS

In addition to selling their goods and services to member states and other public sector actors, international organizations also sell to private actors, including non-governmental organizations, companies and individuals. Some examples of this have already been mentioned in this chapter, such as the selling of stamps and souvenirs or the collection of parking charges. The UNHAS also sells the same flights to humanitarian NGOs as it sells to international organizations, some of its main clients including, for example, the International Rescue Committee, Danish Refugee Council, World Vision, Médecins Sans Frontières and Save the Children.³⁷ Furthermore, the UNOPS's services are also, at least in theory, available to private sector actors. It is only a moderate exaggeration to say that these examples merely form the tip of the iceberg.

Very common commercial activities of international organizations involving the private sector are international organizations selling courses and publications. Examples of the former include, for example, the little-known World Customs Organization (WCO) running the WCO Academy, which is an e-portal selling customs-related courses to the private sector and the academia, and the World Tourism Organization (abbreviated UNWTO to distinguish it from the more famous WTO) selling courses to the tourist sector through its Tourism Online Academy. Selling publications is even more common. As Schermers and Blokker note, '[m]ost international organizations

³⁷ FAO Financial Committee, Report of the External Auditor on air transport services, FC 181/7, 2020, Annex 4.

sell documents and other publications’,³⁸ including the aforementioned WCO, which has a bookstore that sells books for businesses and other private actors.

A scroll through WCO’s constitutional document, namely the Convention Establishing a Customs Co-operation Council (which is what the WCO was called before it was renamed in 1994), WCO’s other regulations or its website does not reveal what it bases its power to sell its bookstore products or courses on. However, the General Terms and Conditions of its bookstore (which are similar in its key points to those of the Academy and other terms and conditions), available on the bookstore website,³⁹ suggest that its relations to its customers are regulated by a combination of international law, EU law and Belgian law (Belgium being the state where WCO has its headquarters). According to a notice on the cancellation rights at the beginning of the terms and conditions, the customer has a 14-day cancellation period, in accordance with the Belgian Law of 6 April 2010 on market practices and consumer protection. Article 11.2 of the General Terms and Conditions states that all orders will be invoiced exclusively of value added tax, since, according to an EU directive, ‘the WCO shall be regarded as non-taxable person in respect to the activities or transactions in which it engages as public authority’. Article 19.1 states that the rights and obligations of the WCO and its customers ‘shall be governed by these Terms and Conditions and, in the second place, by Belgian laws’. Paragraph 2 of the same Article states that ‘[g]iven the WCO’s capacity as an international organization and in particular its jurisdictional privileges’, any dispute between the customer and the WCO shall be settled by an arbitration process, determined by a decision of WCO (annexed to the document); although paragraph 3 provides the exception that if the customer is a member state of the WCO, the dispute shall be settled amicably. Paragraph 4 further clarifies that none of this should be construed as a waiver of the privileges and immunities of the WCO or its customers.

To give another example, the sale of the ICAO products and services is coordinated through its Ancillary Revenue Generation Fund, which, although not matching the organization’s regular programme budget or the technical cooperation programmes, is nevertheless an important source of revenue. In 2018, the Ancillary Revenue Generation Fund made a revenue of 25.5 million Canadian dollars and a profit (when business-related expenses were taken into account) of over 11 million Canadian dollars (CAD) through different business activities. The printing of training materials is the most

³⁸ Schermers and Blokker, *International Institutional Law*, 6th ed., para 1058.

³⁹ www.wcoompublications.org/en/article/terms-and-conditions (accessed 25 June 2022).

important one, representing 30–35 per cent of ICAO's external revenues. In 2018, almost 5 million CAD of profit was made through publications, and almost 3 million CAD was profit from licensing. Delegation and conferences also made a profit of about 1.5 million CAD, whereas training and events profited almost 700.00 CAD each, and new products close to half a million CAD.⁴⁰ One example of new products is the ICAO TV, which was launched in 2020 and provides online access to video content and disseminates ICAO information.⁴¹ Indeed, the ICAO puts much effort in advertising its products and services. During 2018, for example, the ICAO distributed over 2.4 million marketing emails to increase awareness of the ICAO products and services. The ICAO also deployed a new events app and launched the ICAO Instagram channel, which accumulated over 5,000 followers in under six months.⁴²

A more curious case is international organizations selling software and other such products. The aforementioned WCO engages in this activity as well, selling a product called the WCO trade tools, which helps actors in international trade to classify their products and support the exporting and importing of goods. But the UPU is perhaps the strongest example in this regard. As mentioned in Section 8.2, the UPU has based one of its three funding pillars on the sale of products and commercially oriented services. And the pillar is in no way insignificant for the UPU's overall budget. In 2019, the UPU's revenue from the sale of products and services was almost one third compared to the funding it received through statutory member state contributions and matched the sum of voluntary contributions. Most of the revenue came from the sale of the UPU's International Financial System (IFS) and International Postal System (IPS) Lines of Products and related products.⁴³ The IFS products are software designed for operations and the accounting of electronic postal payments, as well as for the tracking of postal payments, whereas the IPS products are 'integrated international mail management applications that combine mail processing, operation management and ... messaging into one application'.⁴⁴ These products are sold to post offices and

⁴⁰ ICAO, Financial Statement and Reports of the External Auditor for the Financial Year Ended 31 December 2018, ICAO Doc 10129 (2019), para. 3.26. See also note 3.2, paras 126–127, in the same Statement.

⁴¹ www.icao.int/annual-report-2020/Pages/supporting-strategies-finances-revenue-generating-activities.aspx (accessed 15 January 2022).

⁴² www.icao.int/annual-report-2018/Pages/supporting-strategies-finances-revenue-generating-activities.aspx (accessed 15 January 2022).

⁴³ www.upu.int/UPU/media/upu/documents/Finance/dfiEtatsFinanciers2020En.pdf, Note 20 (accessed 25 January 2022).

⁴⁴ www.upu.int/en/Postal-Solutions/Technical-Solutions/Products/IPS-Line-of-products (accessed 25 January 2022).

other postal actors, many of which are now private actors. Other revenue through the selling of UPU products and services include, for example, revenue from addressing different postal and barcode services, internet relay chat services and services provided by the Telematics Cooperative.⁴⁵ Under Article 21(2)(a) of the UPU's Financial Regulations, this revenue can be used, for example, to maintain the UPU's Reserve Fund.

In some rare cases, selling services to private actors can even form the majority of the revenue of an international organization. This is the case with the World Intellectual Property Organization (WIPO) and the European Patent Office (EPO), both of which charge fees for intellectual property applications. The WIPO administers the Patent Cooperation Treaty (in addition to processing the international registration of trademarks and acting as a depository for internationally deployed industrial designs and as a registry for applications for appellations of origin). In this role, it processes 'international patent' applications, governed by the Treaty. The 'international patent' is actually not a patent but a pre-patent that can establish the patentability of the invention. However, once the 'international patent' application criteria have been met, there will be no subsequent requirement for amending the application when it is filed in (designated) Member States to the Treaty.⁴⁶

Partly similarly, a European Patent granted by EPO is not a uniform patent for all Member States. But it goes further than the 'international patent' in that the granting of the patent implies that the patent will be treated as if it had been granted by the national authorities of the Member States. It does not therefore demand a national patent application process at all but forms a kind of series of parallel patents (although in a more limited number of jurisdictions than the 'international patent').⁴⁷

The WIPO and EPO services are therefore highly valuable to businesses applying for patents. Hence, although both have to compete with other intellectual property application services, they do very well in that competition. The WIPO may, depending on the year, make over 90 per cent of the organization's total revenue through fees charged for intellectual property applications, whereas the EPO is entirely financed in this way. Because the demand for the service depends on the demand for intellectual property titles,

⁴⁵ www.upu.int/UPU/media/upu/documents/Finance/dfiEtatsFinanciers2020En.pdf, Note 20 (accessed 25 January 2022)

⁴⁶ C. May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (Routledge, 2007), 42–44.

⁴⁷ A. Reinisch, 'Decisions of the European Patent Organization before National Courts', in A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (Oxford University Press, 2010), 137, 137.

it is dependent on the performance of the global economy, investment in research and development, new technological discoveries, as well as exchange rate fluctuations.⁴⁸

Another, much less known, international organization charging private sector actors for intellectual property applications is the International Union for the Protection of New Varieties of Plants (UPOV). UPOV shares headquarters with the WIPO and WIPO's Director General is the Secretary-General of UPOV, but the two are nevertheless separate organizations. The UPOV was established in 1961 by the International Convention for the Protection of New Varieties of Plants, with the mission 'to provide and promote an effective system of plant variety protection ... for the benefit of society'.⁴⁹ The UPOV Convention encourages the breeding of new plant varieties by granting the breeders 'a breeder's right', which enables its propagation for commercial purposes. To facilitate the applications, the UPOV has created an on-line tool called UPOV Prisma, charging a fee for each application through the software.⁵⁰ This business is much less lucrative than that of the WIPO and EPO, but nevertheless forms another peculiar example of an international organization selling services to private actors. Furthermore, the UPOV also runs a plant variety database called Pluto. Although users are able to search and display results for free, the UPOV charges a fee for the premium service which has more and better functions and features.⁵¹

In the case of the WIPO, EPO and UPOV, the power of the organization to sell services is clearly established in their constitutions. The power of the WIPO to gather finances by rendering legal-technical assistance is set in Article 11(3)(b)(iii) of the Convention Establishing the WIPO. The actual legal framework for the international patent system and the WIPO's power to administer it are set in the Patent-Cooperation Treaty. Furthermore, Article 11(2)(b)(iii) of the Convention Establishing the WIPO also gives the organization the power to gather funds by selling publications, and 11(2)(b)(v) by collecting rents and interests. Article 51 of the European Patent Convention states that the EPO 'may levy fees for any official task or procedure carried out under [the] Convention' and, according to Article 21(1)(c) of the 1991 UPOV Convention, the revenue of UPOV shall be made, *inter alia*, by charging payments for services rendered.

⁴⁸ Schermers and Blokker, *International Institutional Law*, 6th ed., para 1061.

⁴⁹ www.upov.int/portal/index.html.en (accessed 29 January 2022). On the birth of UPOV, see K. Raustiala and D. Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organization* 277, 284–288.

⁵⁰ www.upov.int/upovprisma/en/fees.html (accessed 29 January 2022).

⁵¹ www.upov.int/pluto/en/fees.html (accessed 29 January 2022).

8.5 CONCLUDING REMARKS

The entrepreneurial activities described in this chapter challenge the idea that international organizations interact only with their member states, following the (collective) principal–agent relationship. In selling goods and services, international organizations engage in commercial relations with various actors, from non-member states and other international organizations to private sector actors, including individuals, companies and non-governmental organizations. Although in some cases the international organizations have been equipped for these interactions with constitutional powers from the very beginning, in many cases the activities developed ad hoc and over time and are therefore regulated, if at all, through internal rules and the implied powers doctrine. Furthermore, even though most of the services sold by international organizations are sold to their member states – oftentimes through arrangements that veil the commercial relationship – these interactions complicate the fundamental assumptions of the law of international organizations in significant ways. Since the services are rendered to individual member states, in engaging in entrepreneurial activities, international organizations distort the image of them acting under the control and in the interest of their collective principals. Instead, they are increasingly doing the bidding of individual member states that have the will and means to pay for their services, sometimes packaged as discrete projects.

Although a historical account of the birth and development of the entrepreneurial activities of international organizations is beyond the scope of this article, it would seem that such activities have steadily increased, especially following the budgetary problems of international organizations and the rise of managerial mindsets – in particular the New Public Management thinking – from the late 1980s onwards. It seems therefore likely that the phenomenon is going to continue expanding and become more important in the near future, raising questions about its implications for the law of international organizations, not least in terms of accountability and immunities. These questions indicate a need to rethink the theory of international organizations law.