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Draft report of the International Law Commission on the work of its seventy-fifth session

Rapporteur: Ms. Penelope **Ridings**

Chapter IV
Settlement of disputes to which international organizations are parties

Addendum

Contents

Page

C. Titles of Part One and Part Two, and texts and titles of the draft guidelines on settlement of disputes to which international organizations are parties provisionally adopted by the Commission at its seventy-fifth session

1. Text of titles of Part One and Part Two and of the draft guidelines

1. The text of the titles of Part One and Part Two and of the draft guidelines provisionally adopted by the Commission at its seventy-fifth session is reproduced below.

Part One
Introduction

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Part Two
Disputes between international organizations as well as disputes between international organizations and States

Guideline 3
Scope of the present Part

This Part addresses disputes between international organizations as well as disputes between international organizations and States.

Guideline 4
Resort to means of dispute settlement

Disputes between international organizations or between international organizations and States should be settled in good faith and in a spirit of cooperation by the means of dispute settlement referred to in draft guideline 2, subparagraph (*c*), that may be appropriate to the circumstances and the nature of the dispute.

Guideline 5
Accessibility of means of dispute settlement

The means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely accessible for the settlement of disputes between international organizations or between international organizations and States.

Guideline 6
Requirements for arbitration and judicial settlement

Arbitration and judicial settlement shall conform to the requirements of independence and impartiality of adjudicators and due process.

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its seventy-fifth session

Guideline 3
Scope of the present Part

This Part addresses disputes between international organizations as well as disputes between international organizations and States.

Commentary

(1) Draft guideline 3 sets out the scope of Part Two of the guidelines. Part Two is entitled "Disputes between international organizations as well as disputes between international organizations and States". Draft guideline 3 is not intended to be a definition of certain types of disputes. Rather, it lays out the scope of Part Two by outlining which disputes are addressed therein.

(2) Disputes between international organizations have been rare in practice. They concern matters arising from joint projects, issues concerning operational activities and/or their funding.[1] Few instances have led to third-party dispute settlement procedures.[2]

(3) Disputes between international organizations and States occur more frequently.[3] They range from disputes relating to headquarters issues between organizations and their host States, disputes involving the privileges and immunities enjoyed by international organizations, to disputes concerning the withdrawal from membership. They may also relate to the scope of the powers of organizations or the compliance of member States with their obligations.

(4) An example of a dispute between international organizations and States concerning rights and obligations under headquarters or seat arrangements can be found in the advisory opinion of the International Court of Justice in the *WHO Regional Office* case,[4] which addressed the question under what conditions and modalities a specialized agency's regional office might be transferred. Another example is the *PLO Mission* case,[5] which determined whether a dispute had arisen between the United Nations and the United States that had triggered the obligation to arbitrate under the Headquarters Agreement. Privileges and immunities of international organizations, their officials and State representatives often give rise to disputes between international organizations and States which are routinely handled through direct consultations in host country committees.[6] Sometimes, however, they may lead to arbitration. Examples of this are the *EMBL* case,[7] assessing the scope of tax privileges of an international organization, and the *UNESCO* case,[8] concerning the tax privileges of an international organization's retired officials. They also may result in judicial pronouncements, such as in the "binding" advisory opinion[9] of the International Court of Justice in the *Cumaraswamy* case,[10] wherein the Court found that Malaysia had to respect the jurisdictional immunity of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers when acting in the course of the performance of his mission.

(5) In regional economic integration organizations, disputes between international organizations and their member States arise with more frequency than in organizations with a lesser degree of integration. Their constituent treaties often provide for recourse to internal

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1 Second report on the settlement of disputes to which international organizations are parties, by August Reinisch, Special Rapporteur (A/CN.4/766), para. 15.

2 See, e.g., Permanent Court of Arbitration, *International Management Group v. European Union, represented by the European Commission*, Case Nos. 2017-03 and 2017-04. See https://pca-cpa.org/en/cases/157/ and https://pca-cpa.org/en/cases/158/.

3 Settlement of disputes to which international organizations are parties, Memorandum by the Secretariat (A/CN.4/764), chap. II, sect. B 1.

4 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *Advisory Opinion of 20 December 1980, I.C.J. Reports 1980*, p. 73.

5 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion of 26 April 1988, I.C.J. Reports 1988*, p. 12.

6 See, e.g., Committee on Relations with the Host Country, established pursuant to General Assembly resolution 2819 (XXVI) of 15 December 1971.

7 *European Molecular Biology Laboratory (EMBL) v. Germany*, Arbitration Award, 29 June 1990, *International Law Reports*, vol. 105 (1997), pp. 1–74.

8 *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision, 14 January 2003, Reports of International Arbitral Awards (UNRIAA), vol. XXV, pp. 231–266.

9 Art. VIII, sect. 30, Convention on the Privileges and Immunities of the United Nations (General Convention) (New York, 13 February 1946), United Nations, *Treaty Series*, vol. 1, No. 4, p. 15; art. IX, sect. 32, Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), United Nations, Treaty Series, vol. 33, No. 521, p. 261. See also Roberto Ago, "'Binding' advisory opinions of the International Court of Justice", *American Journal of International Law*, vol. 85 (1991), pp. 439–451; Guillaume Bacot, "Réflexions sur les clauses qui rendent obligatoires les avis consultatifs de la C.P.J.I et de la C.I.J.", *Revue générale de droit international public*, vol. 84 (1980), pp. 1027–1067.

10 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62.

courts before which members can challenge the legality of acts of the organs of organizations in proceedings often termed "annulment actions"[11] and where the compliance of member States with the law of the respective organizations can be tested by their organs in "infringement actions".[12]

(6) To the extent that regional economic integration organizations exercise powers conferred by their member States, they may often also act as substitute for them in disputes with third States. This is the case in the World Trade Organization, where the European Union, a founding member of the organization,[13] regularly takes part in the quasi-judicial dispute settlement system offered by the Organization to settle its trade disputes with third countries.[14] Since the World Trade Organization is open to any "separate customs territory",[15] other regional economic integration organizations may also become members of this organization and thus participate in this form of dispute settlement. International organizations may also become members of the United Nations Convention on the Law of the Sea[16] and take part in the dispute settlement procedures provided therein.[17] To date, however, few disputes to which international organizations are parties have been brought before the International Tribunal for the Law of the Sea.[18]

(7) Most disputes between international organizations or disputes between international organizations and States concern questions of treaty interpretation and application. Disputes between international organizations and States may also concern alleged violations of customary international law, such as the dispute that formed the background to the advisory opinion of the International Court of Justice in the *Reparation for Injuries* case[19] or the dispute between Belgium and the United Nations concerning harm suffered by Belgian nationals in the course of United Nations military operations.[20] Most of these disputes

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[11] See, e.g., art. 263, Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 115, 9 May 2008, p. 162; art. 22 (b), Convention on the Statute of the Central American Court of Justice (Panama City, 10 December 1992), United Nations, *Treaty Series*, vol. 1821, No. 31191, p. 279; arts. 17 et seq., Treaty Creating the Court of Justice of the Cartagena Agreement (Andean Community) (Cartagena, 28 May 1979), *International Legal Materials*, vol. 18 (1979), p. 1203, as amended by the Protocol of Cochabamba amending the Treaty creating the Court of Justice (Cochabamba, 28 May 1996), available from https://www.wipo.int/wipolex/en/treaties/details/401; art. 9, para. 1 (c), Protocol on the Community Court of Justice (ECOWAS) (Aruba, 6 July 1991), United Nations, *Treaty Series*, vol. 2375, No. 14843, p. 178, as amended by the Supplementary Protocol amending the Protocol on the Community Court of Justice (Accra, 19 January 2005), ECOWAS document A/SP.1/01/ 05; art. 15, para. 2, Règlement n°1 1/96/CM portant Règlement des procédures de la Cour de Justice de l'UEMOA (Rules of procedure of the West African Economic and Monetary Union Court of Justice) (5 July 1996).

[12] See, e.g., arts. 258 and 259, Consolidated version of the Treaty on the Functioning of the European Union; arts. 23 et seq., Cochabamba Protocol; art. 9, para. 1 (d), Protocol on the Community Court of Justice (ECOWAS), as amended; art. 15, para. 1, Rules of procedure of the West African Economic and Monetary Union Court of Justice. See, in detail, A/CN.4/766, paras. 159 et seq.

[13] Art. XI, para. 1, Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994), United Nations, *Treaty Series*, vol. 1867–1869, No. 31874.

[14] World Trade Organization, "The European Union and the WTO: disputes involving the European Union (formerly EC) – cases", available at https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm.

[15] Art. XII, para. 1, Marrakesh Agreement establishing the World Trade Organization.

[16] Art. 305, para. 1 (f), and annex IX, art. 1, United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, Treaty Series, vol. 1833, No. 31363, p. 3.

[17] Annex IX, art. 7 (Participation by international organizations), United Nations Convention on the Law of the Sea.

[18] See, e.g., *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community), Order of 20 December 2000, ITLOS Reports 2000*, p. 148.

[19] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion of 11 April 1949, I.C.J. Reports 1949*, p. 174.

[20] Exchange of Letters Constituting an Agreement between the United Nations and Belgium Relating to the Settlement of Claims Filed against the United Nations in the Congo by Belgian Nationals (New York, 20 February 1965), United Nations, *Treaty Series*, vol. 535, No. 7780, p. 197.

concern alleged breaches of international law. They thus arise under international law and can be characterized as international disputes.[21]

(8) While the disputes addressed in Part Two regularly arise under international law, that does not exclude the possibility that they may also be of a non-international character. International organizations and States are free to subject agreements they have entered into to domestic law.[22] There does not appear to be a frequent practice in this regard, but examples of a service[23] and a loan[24] agreement that have given rise to arbitration and judicial settlement illustrate this possibility.[25]

(9) The formulation of draft guideline 3, specifying that Part Two addresses disputes between international organizations as well as disputes between international organizations and States, does not exclude the possibility that disputes may arise between international organizations and other subjects of international law. There are different views on how to exactly delimit the scope of which entities may be considered to be "other subjects of international law".[26] A limited concept would include only such *sui generis* subjects of international law as the Holy See or the Sovereign Order of Malta, which have both retained treaty-making powers and the right to send and receive diplomatic representatives,[27] as well as other entities with treaty-making capacity, such as insurgents.[28] Pursuant to broader concepts private parties, including individuals or legal persons under national law such as corporations or associations, can also be viewed as subjects of international law to the extent that they are direct bearers of rights and/or obligations under international law, as in the fields of human rights or international criminal law.[29]

(10) Since there appears to be hardly any practice concerning disputes between international organizations and the traditional *sui generis* subjects of international law, it does

[21] See paras. (2) to (7) of the commentary to draft guideline 1 of the draft guidelines on settlement of disputes to which international organizations are parties provisionally adopted by the Commission at its seventy-fourth session, A/78/10, para. 49. See also *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), annex I, para. 3.

[22] See para. (3) of the commentary to draft article 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook of the International Law Commission, 1982*, vol. II (Part Two), para. 63.

[23] Permanent Court of Arbitration, *District Municipality of La Punta (Peru) v. United Nations Office for Project Services (UNOPS)*, Case No. 2014-38. Available at https://pcacases.com/web/view/109.

[24] Community Court of Justice of the Economic Community of West African States, *ECOWAS Bank for Investment and Development v. Cross River State*, Judgment No. ECW/CCJ/JUD/01/21, 5 February 2021.

[25] See A/CN.4/766, para. 21.

[26] Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague, T.M.C. Asser Press, 2004); Roland Portmann, *Legal Personality in International Law* (Cambridge, Cambridge University Press, 2010) pp. 5–28; James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford, Oxford University Press, 2019) pp. 105–116; Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public*, 14th ed. (Paris, Dalloz, 2018) pp. 27–30.

[27] Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law (A/CN.4/752), paras. 113–137; draft articles on the law of treaties, *Yearbook of the International Law Commission, 1959*, vol. II, p. 96, para. (7) of the commentary to draft article 2.

[28] Draft articles on the law of treaties, *Yearbook of the International Law Commission, 1962*, vol. II, p. 162, para. (8) of the commentary to draft article 1; see also *ibid.*, p. 164, para (2) of the commentary to draft article 3.

[29] See, e.g., Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, 3rd revised ed. (Leiden/Boston, Brill Nijhoff, 2020), pp. 213–273; Louis Henkin, "International Law: Politics, Values and Functions", *Recueil des Cours*, vol. 216 (1989), pp. 33–35; Hersch Lauterpacht, *International Law and Human Rights* (London, Stevens, 1950) pp. 27–72; Manuel Diez de Velasco, *Instituciones de Derecho Internacional Público*, 18th ed. (Madrid, Tecnos, 2013), pp. 301–302; José E. Alvarez, "Are Corporations 'Subjects' of International Law?", *Santa Clara Journal of International Law*, vol. 9 (2011), pp. 1–36; Hernán Valencia Restrepo, *Derecho Internacional Público*, 4th ed. (Medellín, Librería Jurídica Sánchez R Ltda., 2016), paras. 371–377; cf. Raymon Ranjeva and Charles Cadoux, *Droit International Public* (Vanves, Edicef, 1992), p. 127.

not seem necessary to expressly mention them in the text of draft guideline 3. It is however understood that, should such disputes arise, they would also be covered by Part Two.

(11) To the extent that private parties may be regarded as subjects of international law, and in particular where international organizations permit them to directly access dispute settlement mechanisms, such disputes would also be covered by Part Two if the text of draft guideline 3 included disputes with “other subjects of international law”.

(12) Since private parties regularly enjoy certain rights with regard to the settlement of disputes stemming from customary or treaty law guaranteeing access to justice and due process, [30] it was considered preferable to address disputes between international organizations and private parties in a separate part of the guidelines. These disputes between international organizations and private parties will be addressed in Part Three of the present draft guidelines.

Guideline 4
Resort to means of dispute settlement

Disputes between international organizations or between international organizations and States should be settled in good faith and in a spirit of cooperation by the means of dispute settlement referred to in draft guideline 2, subparagraph (*c*), that may be appropriate to the circumstances and the nature of the dispute.

Commentary

(1) Draft guideline 4 generally recommends that the disputes covered by Part Two be settled by resorting to appropriate means of dispute settlement.

(2) In practice, international organizations settle their disputes with other international organizations and States by having recourse to all means of dispute settlement referred to in draft guideline 2, subparagraph (*c*).[31] Since disputes are often settled in a confidential manner, it is difficult to precisely assess the actual use and frequency of specific dispute settlement means. However, both international organizations and States often express a preference for “amicable” methods of dispute settlement, in the form of direct negotiations and/or having recourse to diplomatic means.[32] This suggests that they aim at settling disputes without resorting to independent third-party adjudication, in the form of arbitration or judicial settlement. To what extent the availability of the latter types of dispute settlement facilitates amicable dispute settlement is difficult to assess empirically, although it appears that such availability may increase the willingness to find a negotiated settlement.[33]

(3) Draft guideline 4 recommends the settlement of disputes between international organizations or between international organizations and States by any means of peaceful dispute settlement referred to in draft guideline 2, subparagraph (*c*). Draft guideline 2,

[30] Art. 10, Universal Declaration of Human Rights, General Assembly resolution 217 (III); art. 6 para. 1, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221; art. 14 para. 1, International Covenant on Civil and Political Rights (New York, 16 December 1966), *ibid*., vol. 999, No. 14668, p. 171; art. 8 para. 1, American Convention on Human Rights: “Pact of San José, Costa Rica” (San José, 22 November 1969), *ibid*., vol. 1144, No. 17955, p. 123; art. 7 para. 1, African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981), ibid., vol. 1520, No. 26363, p. 217. See also Francesco Francioni, “The rights of access to justice under customary international law”, in Francesco Francioni (ed.), *Access to Justice as a Human Right* (Oxford, Oxford University Press, 2007), pp. 1–55; Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford, Oxford University Press, 2021).

[31] See the overview in A/CN.4/766, paras. 27–198; see also A/CN.4/764.

[32] Miguel de Serpa Soares, “Responsibility of international organizations”, *Courses of the Summer School on Public International Law*, vol. 7 (Moscow, 2022), p. 125. See also A/CN.4/764, chap. II, sect. B.

[33] Gerald Fitzmaurice, “The future of public international law and of the international legal system in the circumstances of today”, in Institute of International Law (eds), *Livre du Centenaire 1873–1973. Evolution et perspectives du droit international* (Basel, Editions S. Karger S.A., 1973), pp. 196–363, at p. 276; C. Wilfred Jenks, *The Prospects of International Adjudication* (London, Stevens/, 1964), p. 107.

subparagraph (*c*), in turn encompasses all peaceful means of dispute settlement contained in Article 33 of the Charter of the United Nations, as reaffirmed by the Manila Declaration on the Peaceful Settlement of International Disputes.[34] By broadly referring to the means of peaceful dispute settlement, draft guideline 4 makes clear that the recommendation does not prioritize any specific means of dispute settlement.

(4) The free choice of dispute settlement means is reinforced by the additional language of draft guideline 4 referring to means "that may be appropriate to the circumstances and the nature of the dispute". This language is inspired by paragraph 5 of the Manila Declaration which refers to "such peaceful means as may be appropriate to the circumstances and the nature of their dispute". Depending on the nature of the dispute and the circumstances, certain forms of dispute settlement may be more appropriate than others. Where a dispute mainly involves a disagreement over facts, enquiry or fact-finding may be the most appropriate method of dispute settlement, while a dispute concerning the existence of a legal obligation may be more aptly settled through arbitration or judicial settlement.

(5) Draft guideline 4 recommends resorting to dispute settlement in normative language but avoids using language that could be understood as creating a legally binding obligation. Therefore, the term "should" is more appropriate than the expression "shall" in this context. This results from the nature of guidelines. As opposed to draft articles, which are intended to ultimately lead to a treaty, guidelines are not intended to impose legal obligations.

(6) The recommendatory language is also an acknowledgment that, in some situations, specific means of dispute settlement may be legally provided for in treaties. A few constituent documents of international organizations,[35] a number of multilateral privileges and immunities treaties,[36] and many bilateral headquarters agreements[37] contain express obligations with regard to the settlement of specific types of disputes to which international organizations are parties. The draft guidelines do not intend to alter such obligations. By recommending resorting to the appropriate means, they acknowledge that, in some situations, specific means may be obligatory.

(7) Draft guideline 4 recommends the settlement of disputes between international organizations or between international organizations and States in good faith and in a spirit of cooperation, which is also language inspired by paragraph 5 of the Manila Declaration. This clarifies that good faith and cooperation are underlying obligations that should guide the efforts to settle disputes covered by Part Two.

Guideline 5
Accessibility of means of dispute settlement

The means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely accessible for the settlement of disputes between international organizations or between international organizations and States.

[34] General Assembly resolution 37/10 of 15 November 1988, annex.

[35] Art. XIV, para. 2, Constitution of the United Nations Educational, Scientific and Cultural Organization (London, 16 November 1945), United Nations, *Treaty Series*, vol. 4, No. 52, p. 275; art. XVIII (a), Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (Washington, 20 August 1971), United Nations, *Treaty Series*, vol. 1220, No. 19677, p. 21.

[36] Art. VIII, sect. 30, Convention on the Privileges and Immunities of the United Nations (General Convention); art. IX, sect. 32, Convention on the Privileges and Immunities of the Specialized Agencies; art. X, sect. 34, Agreement on the Privileges and Immunities of the International Atomic Energy Agency (Vienna, 1 July 1959), United Nations, *Treaty Series*, vol. 374, No. 5334, p. 147; art. 32, Agreement on the Privileges and Immunities of the International Criminal Court (New York, 9 September 2002), United Nations, *Treaty Series*, vol. 2271, No. 40446, p. 3.

[37] Art. VIII, sect. 21, Agreement regarding the Headquarters of the United Nations (Lake Success, 26 June 1947), United Nations, *Treaty Series*, vol. 11, p. 11; art. XVII, sect. 35, Agreement regarding the Headquarters of the Food and Agriculture Organization of the United Nations (Washington, 31 October 1950), United Nations, *Treaty Series*, vol. 1409, No. 23602, p. 521; art. 29, para. 1, Agreement (with annexes) regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory (Paris, 2 July 1954), United Nations, *Treaty Series*, vol. 357, No. 5103, p. 3.

Commentary

(1) Draft guideline 5 addresses the accessibility of dispute settlement means. While draft guideline 4 recommends the use of the appropriate means of peacefully settling disputes to which international organizations are parties, draft guideline 5 addresses the separate issue of whether dispute settlement means are actually available and accessible.

(2) Draft guideline 5 recommends the wider accessibility of the means of dispute settlement referred to in draft guideline 2, subparagraph (*c*). The expression "accessibility" has been chosen to emphasize practical issues, such as costs and legal remedies available, and not only the legal availability of means of dispute settlement. The recommendation that means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely "accessible" is intended to focus on the practical use of the different forms of settling disputes to which international organizations are parties.

(3) While amicable forms of dispute settlement, such as negotiations or consultations, are practically always available, other means of dispute settlement, especially those involving neutral third parties, may not be easily available. Whether international organizations or States have, for instance, access to arbitration or judicial settlement in practice mostly depends upon whether such means of dispute settlement have been expressly stipulated.[38] International organizations and States are always free to agree on any form of dispute settlement in an *ad hoc* fashion once a dispute has already arisen. Practice demonstrates, however, that such forms of *ex post* agreement to resolve disputes by arbitration or judicial settlement rarely occur.[39] Thus, to make them practically available, a recommendation to make such forms of dispute settlement more widely accessible appears useful.

(4) Like draft guideline 4, draft guideline 5 does not establish a hierarchy of the different means of dispute settlement. This is stressed by the use of the words "as appropriate" after "means of dispute settlement, including arbitration and judicial settlement". The words "as appropriate" also align with the idea expressed in draft guideline 4 that different means of dispute settlement may be appropriate for the settlement of different disputes.

(5) Draft guideline 5 recommends the wider accessibility of all means of dispute settlement and does not prioritize any particular means. The phrase "including arbitration or judicial settlement" was inserted because these methods of dispute settlement are particularly inaccessible if not expressly stipulated. The Commission has noted the problem of limited access to justice for international organizations several times.[40]

(6) The limited access of international organizations to dispute settlement in general, and to the International Court of Justice in particular, has led to repeated calls for broader access of the United Nations and its specialized agencies, as well as international organizations generally, to the Court, including to its contentious jurisdiction.[41]

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[38] See para. (7) of the commentary to draft guideline 4 above. See also A/CN.4/766, paras. 52 et seq.

[39] See the rare example of such a *compromis* in Exchanges of Notes Constituting an Agreement for the Settlement of a Dispute Concerning the Taxation Liability of the European Atomic Energy Community (EURATOM) Employees Working in the United Kingdom on the Dragon Project (Brussels, 11 July 1966), United Nations, *Treaty Series*, vol. 639, No. 9147, p. 99, which led to the arbitral award in *Taxation liability of Euratom employees between the Commission of the European Atomic Energy Community (Euratom) and the United Kingdom Atomic Energy Authority*, 25 February 1967, UNRIAA, vol. XVIII, p. 503.

[40] See, e.g., *Yearbook of the International Law Commission, 2002*, vol. II (Part Two), para. 486, noting the inadequacy of available dispute settlement options for international organizations, in particular in regard to responsibility issues. Further, the Commission's long-term programme of work continues to include the topics "Arrangements to enable international organizations to be parties to cases before the International Court of Justice" (*Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, at p. 233) and "Status of international organizations before the International Court of Justice" (*Yearbook of the International Law Commission, 1970*, vol. II, document A/CN.4/230, p. 268, para. 138); *Yearbook of the International Law Commission, 2016*, vol. II (Part One), document A/CN.4/679, para. 58.

[41] Report of the Secretary-General on a review of the role of the International Court of Justice (A/8382). See also Philippe Couvreur, "Développements récents concernant l'accès des organisations intergouvernementales à la procédure contentieuse devant la Cour Internationale de Justice", in Emile

(7) The recommendation to make the means of dispute settlement, including arbitration and judicial settlement, more widely accessible for the settlement of disputes covered by Part Two of the guidelines is not intended to encourage resort to specific forms thereof, especially to litigation or arbitration. Rather, it is premised on the notion that the availability and accessibility of such means will contribute to the settlement of disputes by alternative means.[42]

Guideline 6
Requirements for arbitration and judicial settlement

Arbitration and judicial settlement shall conform to the requirements of independence and impartiality of adjudicators and due process.

Commentary

(1) Draft guideline 6 addresses core requirements of the rule of law for the settlement of disputes through arbitration or judicial settlement.

(2) The concept of the rule of law has developed at the national level.[43] Its relevance at the international level, namely with regard to States and international organizations, is strongly supported by the 2012 declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels,[44] as well as by the resolutions on the same topic that the General Assembly has adopted annually since the rule of law was put on its agenda in 2006.[45] The General Assembly confirmed in its 2012 declaration that "the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities".[46]

(3) Draft guideline 6 focuses on arbitration and judicial settlement because it is in these forms of third-party dispute settlement that independence and impartiality, as well as compliance with due process, are most crucial and well established. This does not affect the

Yakpo and Tahar Boumedra (eds.), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague, Kluwer Law International, 1999), pp. 293–323; Ignaz Seidl-Hohenveldern, "Access of international organizations to the International Court of Justice," in A.S. Muller, D. Raič and J.M. Thuránszky (eds.), *The International Court of Justice* (The Hague, Kluwer Law International, 1997), pp. 189–203; Jerzy Sztucki, "International organizations as parties to contentious proceedings before the International Court of Justice?," in Muller, Raič and Thuránszky (eds.), *The International Court of Justice*, pp. 141–167; Tullio Treves, "International organizations as parties to contentious cases: selected aspects", in Laurence Boisson de Chazournes, Cesare P.R. Romano and Ruth Mackenzie (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (Ardsley, New York, Transnational Publishers, 2002), pp. 37–46; International Law Association, Final report on accountability of international organisations, *Report of the Seventy-first Conference held in Berlin, 16–21 August 2004*, pp. 231–233.

42 See para. (2) of the commentary to draft guideline 4 above.

43 See, in general, Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, Part. II (London, Macmillan, 1885); Lon L. Fuller, *The Morality of Law* (New Haven, Yale University Press, 1964); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Clarendon Press, 1979); Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, Cambridge University Press, 2004). While some legal traditions emphasize equality and procedural aspects, such as access to justice and the right to a fair procedure (see, e.g., Jeremy Waldron, "The rule of law and the importance of procedure", *Nomos*, vol. 50 (2011), pp. 3–31), others focus on the (formal) legality of State action (see, e.g., Hans Kelsen, *Pure Theory of Law*, 2nd ed. (Berkeley, University of California Press, 1970); Jens Meierhenrich, "Rechtsstaat versus the rule of law", in Jens Meierhenrich and Martin Loughlin (eds.), *The Cambridge Companion to the Rule of Law* (Cambridge, Cambridge University Press, 2021), pp. 39–67.

44 General Assembly resolution 67/1 of 24 September 2012.

45 See, most recently, The rule of law at the national and international levels, General Assembly resolution 78/112 of 7 December 2023; The rule of law at the national and international levels, General Assembly resolution 77/110 of 7 December 2022; The rule of law at the national and international levels, General Assembly resolution 76/117 of 9 December 2021.

46 General Assembly resolution 67/1, para. 2.

requirement of independence and impartiality of other forms of dispute settlement, such as conciliation or mediation.[47]

(4) By requiring the "independence and impartiality of adjudicators", draft guideline 6 refers to the core requirement of the rule of law for those who have been empowered to settle a dispute.[48] Independence primarily refers to the relationship between an adjudicator and the parties or their counsel, thus demanding an absence of structural, personal, financial, or other close connection to them, whereas impartiality relates more to the views and opinions held by an adjudicator, requiring a lack of bias.[49]

(5) Independence and impartiality are regularly required in the applicable rules of international arbitral tribunals and courts.[50]

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47 See, e.g., arts. 4 and 7, para. 1, Permanent Court of Arbitration Optional Conciliation Rules (1996); arts. 12–14, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965), United Nations, Treaty Series, vol. 575, No. 8359, p. 159; art. 5, Convention on Conciliation and Arbitration within the Conference on Security and Co-operation in Europe (Stockholm, 15 December 1992), United Nations, *Treaty Series*, vol. 1842, No. 31413, p. 121; art. 7, United Nations Model Rules for the Conciliation of Disputes between States, General Assembly resolution 50/50 of 11 December 1995, annex; art. 3, UNCITRAL Mediation Rules, Report of the United Nations Commission on International Trade Law, Fifty-fourth Session (28 June–16 July 2021) (A/76/17), annex III. See also Christian Tomuschat and Marcelo Kohen (eds.), *Flexibility in International Dispute Settlement: Conciliation Revisited*, (Leiden, Brill Nijhoff, 2020), pp. 25 et seq.

48 General Assembly resolution 67/1, para. 13 ("We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice."); *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166, para. 92 (identifying "the right to an independent and impartial tribunal established by law" as an element of the right to a "fair hearing"); Bangalore Principles of Judicial Conduct, document E/CN.4/2003/65, annex, adopted by the Judicial Group on Strengthening Judicial Integrity, The Hague, 25–26 November 2001, recognized by the Economic and Social Council as a further development and as complementary to the Basic Principles on the Independence of the Judiciary in its resolution 2006/23 on strengthening basic principles of judicial conduct (E/2006/99(SUPP)), para. 2 ("WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law", Bangalore Principles of Judicial Conduct, fifth preambular paragraph); Bangalore Principles of Judicial Conduct, Value 1 ("Judicial independence is a pre-requisite to the rule of law"). See also Hélène Ruiz-Fabri and Jean-Marc Sorel (eds.), *Indépendance et impartialité des juges internationaux* (Paris, Pedone, 2010); Giuditta Cordero-Moss (ed.), *Independence and Impartiality of International Adjudicators* (Cambridge, Intersentia, 2023).

49 See, e.g., Code of Conduct for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, 2011, General Assembly resolution 66/106 of 9 December 2011, paras. 1–2; UNCITRAL, Draft code of conduct for arbitrators in international investment dispute resolution and commentary (A/CN.9/1148), sect. II. C., text of the draft commentary, para. 19.

50 See, e.g., art. 6, para. 7, UNCITRAL Arbitration Rules (2010) and art. 6, para. 3, Permanent Court of Arbitration, Arbitration Rules (17 December 2012) (referring to an "independent and impartial arbitrator"); art. 18, para. 1, Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (1 January 2017) ("Every arbitrator must be impartial and independent"); Articles 2 and 20, Statute of the International Court of Justice (respectively, "The Court shall be composed of a body of independent judges" and "Every member of the Court shall, before taking up [their] duties, make a solemn declaration in open court that [they] will exercise [their] powers impartially and conscientiously"); art. 2, para. 1, Statute of the International Tribunal for the Law of the Sea ("The Tribunal shall be composed of a body of 21 independent members"); art. 21, para. 4, European Convention on Human Rights ("During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office"); art. 17, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Ouagadougou, 10 June 1998), available on the website of the African Commission: https://au.int/ (under "Treaties") ("The independence of the judges shall be fully ensured in accordance with international law.").

(6) The core meaning and substantive content of the requirements of independence and impartiality are made more precise by various non-binding instruments[51] or by provisions contained in the statutes of international courts and tribunals,[52] as well as in their rules of procedure.[53]

(7) In addition to independence and impartiality, some instruments also refer to integrity, propriety, competence and/or diligence as requirements for adjudicators[54] – concepts that often overlap with and/or complement independence and impartiality.

(8) By requiring "due process", draft guideline 6 refers to the core procedural requirements of third-party dispute settlement.[55] Due process or a fair trial/hearing specifically entails the right to be heard and the right to be heard equally.[56] In its 1973 advisory opinion in *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, the International Court of Justice elaborated in a very detailed manner on the requirements of due process or a "fair hearing".[57]

(9) Both the independence and impartiality of adjudicators, and due process are core elements of the rule of law relevant to dispute settlement. In the practice of the International Court of Justice, these elements are also referred to as requirements of "the good administration of justice".[58] The Court, for instance, found that "[t]he principle of equality of the parties follows from the requirements of good administration of justice".[59] It further determined that "the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent" are elements of the well-recognized right to a fair hearing.[60] It also considered "the right to a

[51] See, e.g., Burgh House Principles on the Independence of the International Judiciary, adopted in 2004 by the International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals; Bangalore Principles of Judicial Conduct; International Bar Association, Guidelines on Conflicts of Interest in International Arbitration (adopted by resolution of the Council of the International Bar Association on 23 October 2014); UNCITRAL, Draft code of conduct for arbitrators in international investment dispute resolution and commentary.

[52] See, e.g., Article 16–17, Statute of the International Court of Justice.

[53] See, e.g., rule 4, para. 1, European Court of Human Rights, Rules of Court. Available from https://prd-echr.coe.int/web/echr/rules-of-court.

[54] See, e.g., values 3, 4 and 6, Bangalore Principles of Judicial Conduct.

[55] See Arman Sarvarian and others (eds.), *Procedural Fairness in International Courts and Tribunals* (London, British Institute of International and Comparative Law, 2015), pp. 108–109; Clooney and Webb, *The Right to a Fair Trial in International Law*.

[56] Institute of International Law, resolution on the equality of parties before international investment tribunals, *Yearbook*, vol. 80 (2018–2019), Session of The Hague (2019), pp. 1–11 (referring in the preamble to "the principle of equality of the parties [as] a fundamental element of the rule of law that ensures a fair system of adjudication"); European Commission for Democracy through Law (Venice Commission), Report on the rule of law, document CDL-AD(2011)003rev, 4 April 2011, para. 60 ("The rights most obviously connected to the rule of law include … (3) the right to be heard").

[57] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (see footnote 48 above), para. 92 ("[C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision.").

[58] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, Advisory Opinion of 23 October 1956, I.C.J. Reports 1956, p. 77, at p. 85; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (see footnote 48 above); *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at para. 47.

[59] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.* (see footnote 58 above), p. 86.

[60] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, (see footnote 48 above), para. 92.

reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case" as well as "the right to equality in the proceedings vis-à-vis the opponent" to be "elements of the right to a fair hearing".[61]

(10) In light of the general acceptance that the independence and impartiality of adjudicators, and due process are not merely aspirations, but legal obligations, draft guideline 6 is formulated in obligatory language, stating that arbitration and judicial settlement "shall" conform to these requirements of the rule of law.

(11) On the domestic level, the rule of law is often considered to also encompass a right of access to justice.[62] Given the principle of consent to dispute settlement in international law, such principle is not transferable to the international level.[63] Because draft guideline 6 is formulated in mandatory terms, using the verb "shall", a broad reference to conform to the requirements of the rule of law could thus be misunderstood as comprising a right of access to justice for international organizations and States in the form of arbitration or judicial settlement.[64] Thus, draft guideline 6 only refers to the requirements of the rule of law pertinent once international organizations and States have access to arbitration or judicial settlement.

(12) This does not alter the fact that wider accessibility of all means of dispute settlement, including arbitration and judicial settlement, is to be recommended, as provided for in draft guideline 5.

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[61] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, (see footnote 58 above), para. 30.

[62] General Assembly resolution 67/1, para. 14. See also European Court of Human Rights, *Golder v. United Kingdom*, No. 4451/70, 21 February 1975, Series A no. 18, para. 36; *Waite and Kennedy v. Germany* [GC], No. 26083/94, 18 February 1999, para. 50. See also Francesco Francioni, "The rights of access to justice under customary international law", in Francesco Francioni (ed.), *Access to Justice as a Human Right* (Oxford, Oxford University Press, 2007), pp. 1-55, at p. 3; Tom Bingham, *The Rule of Law* (London, Penguin, 2010), p. 85.

[63] A/78/10, para. 41, at para. (5) of the commentary to draft conclusion 6 on general principles of law ("[T]he right of access to courts that invariably exists across national legal systems … cannot be transposed to international courts and tribunals because it would be incompatible with the fundamental principle of consent to jurisdiction in international law, which underlies the structure and functioning of international courts and tribunals"). See also A/CN.4/766, para. 213.

[64] See also draft guideline 5, which calls for the wider accessibility of all forms of dispute settlement, including arbitration and judicial settlement.