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Third report on the settlement of disputes to which international organizations are parties, by August Reinisch, Special Rapporteur*

Contents

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Introduction

A. Work of the Commission on the topic to date

1. The topic "Settlement of disputes to which international organizations are parties", originally referred to as "Settlement of international disputes to which international organizations are parties",[1] was placed on the Commission's current programme of work at the end of its seventy-third session in 2022.[2] During its 2023 session, the Commission discussed the Special Rapporteur's first report[3] and provisionally adopted two draft guidelines, delimiting the scope of the topic and defining "international organization", "dispute" and "means of dispute settlement".[4]

2. During its seventy-fifth session in 2024, the Commission discussed the Special Rapporteur's second report[5] and provisionally adopted four further draft guidelines, laying down the scope of Part Two of the guidelines, addressing disputes between international organizations as well as between international organizations and States, resort to means of dispute settlement, accessibility of means of dispute settlement, and requirements for arbitration and judicial settlement.[6]

B. Discussion in the Sixth Committee

3. During the debate in the Sixth Committee of the General Assembly on the Commission's report on the work of its seventy-fifth session, several valuable observations were made on the draft guidelines, the Commission's commentary and the Special Rapporteur's second report. The Special Rapporteur expresses his deep appreciation of these observations. They were most useful and particularly rich. Thus, they can only be summarized in the present report.

4. Some delegations specifically recognized the difficulties in distinguishing between "international" and "non-international" disputes.[7] One expressly commended the Commission's decision to not qualify the term "dispute" at this stage, allowing the Commission to address all disputes. In general, several delegations highlighted the risk that

[1] At its seventy-fourth session in 2023, the Commission decided to change the title of the topic in order to clarify that it intended to address all types of disputes to which international organizations are parties. See Report of the International Law Commission on the work of its seventy-fourth session, *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), paras. 46 *et seq*.

[2] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 238.

[3] First report on the settlement of international disputes to which international organizations are parties, by August Reinisch, Special Rapporteur (A/CN.4/756).

[4] A/78/10, para. 48.

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

[6] Report of the International Law Commission on the work of its seventy-fifth session, *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), para. 62.

[7] Guatemala (A/C.6/79/SR.26, para. 119) ("His delegation noted that the Special Rapporteur, while attempting to draw a distinction between disputes of a national and international nature to which international organizations were parties, also highlighted in his second report that it was difficult to draw such a distinction because the nature of a dispute might change. His delegation shared that view and was therefore pleased that the draft guidelines offered States, international organizations and other users recommendations rather than rigid binding rules."); and Russian Federation (A/C.6/79/SR.27, para. 42) ("Her delegation fully agreed with the Special Rapporteur's assessment in paragraph 13 that 'the precise delimitation between international and non-international disputes to which international organizations are parties posed a number of difficulties.'").

the jurisdictional immunity enjoyed by international organizations may result in a denial of justice.[8]

5. When discussing draft guideline 3, States took note of[9] and agreed[10] with the scope proposed by the draft guidelines provisionally adopted by the Commission. As for draft guideline 4, several delegations expressed appreciation for the inclusion of the principles of good faith and cooperation.[11] One delegation expressly recognized the importance of giving preference to peaceful settlement of disputes and highlighted the usefulness of the availability

[8] Colombia (A/C.6/79/SR.27, para. 98) ("With regard to draft guideline 3 (Scope of the present Part), her delegation agreed with the view … that a balance should be found between the privileges and immunities of international organizations and the need for justice and remedy."); Malaysia (*ibid*., para. 103) ("The balance between immunity and accountability required careful consideration: while immunity was crucial for the effective functioning of international organizations, it must not be used to obstruct access to justice."); and Guatemala (A/C.6/79/SR.26, para. 117) ("Access to justice and due process must never be set aside as a result of prerogatives of immunity.").

[9] Argentina (A/C.6/79/SR.27, para. 148) ("His delegation therefore took note of the draft guidelines on settlement of disputes to which international organizations are parties provisionally adopted by the Commission and attached importance to the development of the third part of the draft guidelines, which would cover disputes between international organizations and private parties."); and Greece (*ibid*., para. 153) ("her delegation took note of the fact that the focus of draft guideline 3 (Scope of the present Part) was the nature of the parties to a dispute, as opposed to the distinction between international and non-international disputes, as had been the case in the past.").

[10] Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/79/SR.25, para. 89) ("Regarding draft guideline 3 (Scope of the present Part), the Nordic countries supported the text provisionally adopted by the Commission"); and Mexico (A/C.6/79/SR.27, para. 16) ("Referring to the draft guidelines on settlement of disputes to which international organizations are parties provisionally adopted by the Commission, which served as a solid starting point, he said that, with regard to draft guideline 3 …, his delegation welcomed the inclusion of disputes between international organizations, along with disputes between international organizations and States, within the scope of the term 'international disputes', even though the latter were more common.").

[11] European Union (A/C.6/79/SR.25, para. 85) ("It … welcomed draft guideline 4, according to which disputes within the scope of the draft guidelines should be settled in good faith and in a spirit of cooperation by the means of dispute settlement that might be appropriate to the circumstances and the nature of the dispute. That wording ensured sufficient flexibility to take into account the situation of regional integration organizations such as the European Union, in which particular judicial means of dispute settlement were mandatory."); Brazil (*ibid*., para. 101) ("Disputes between States and international organizations should be settled in good faith and in a spirit of cooperation, as stated in draft guideline 4"); Mexico (A/C.6/79/SR.27, para. 16) ("Both categories of disputes should be governed by basic principles of good faith and a spirit of cooperation, as reflected in draft guideline 4 …. Those principles, which were also applicable to the settlement of disputes between States, should be reflected in all the Commission's work on the topic."); Estonia (*ibid*., para. 136) ("The principle of good faith and spirit of cooperation must be applied as widely as possible in order to find amicable solutions to disputes to which international organizations were parties."); Bulgaria (*ibid*., para. 167) ("Her delegation therefore welcomed the fact that, in draft guideline 4 (Resort to means of dispute settlement), the Commission recommended that disputes be settled 'in good faith' and 'in a spirit of cooperation' and referred to all peaceful means of dispute settlement 'appropriate to the circumstances and the nature of the dispute.'); Sierra Leone (*ibid*., para. 171) ("His delegation supported the Commission's recommendation, in draft guideline 4 …, that disputes be resolved peacefully, in good faith, in a spirit of cooperation and in a manner consistent with subparagraph (c) of draft guideline 2 (Use of terms)."); India (*ibid*., para. 109) ("Referring to the draft guidelines on settlement of disputes to which international organizations are parties provisionally adopted by the Commission, she said that they reflected the importance of good faith, cooperation and the use of appropriate dispute settlement mechanisms, thus providing a solid foundation for addressing disputes between international organizations and States."); and Chile (*ibid*., para. 123) ("he said that his delegation supported the recommendation, contained in draft guideline 4 …, that disputes between international organizations or between international organizations and States be settled in good faith and in a spirit of cooperation, showing clearly that good faith and cooperation were underlying obligations that should be the guide for dispute resolution.").

of different means of dispute settlement.[12] Several States either recognized or showed appreciation for the fact that no particular means of dispute settlement were prioritized.[13]

6. States also demonstrated overall support for draft guideline 5 and the commentaries thereto.[14] While some delegations approved,[15] others remained sceptical[16] concerning the

[12] Sri Lanka (A/C.6/79/SR.27, paras. 34 and 36) ("giving preference to the peaceful settlement of disputes over coercive measures was in line with the Charter. The peaceful settlement of disputes was challenging, owing to power imbalances, enforcement difficulties and varying interpretations of international law." "Draft guideline 4 … allowed for the use of both international and regional means of dispute settlement, without prioritizing any specific mechanism, which ensured that parties could choose the means most appropriate to the specific circumstances of each dispute. The availability of different means of dispute resolution was useful, as a fact-finding mission might be particularly effective for disputes involving factual disagreements, while arbitration or judicial settlement might be more suitable for questions involving legal obligations.").

[13] Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/79/SR.25, para. 90) ("[The Nordic Countries] noted with appreciation that the draft guideline did not give priority to any specific means of dispute settlement"); Romania (A/C.6/79/SR.26, para. 16) ("Romania particularly welcomed the fact that draft guideline 4 … reflected … that there was no hierarchy among the peaceful means of dispute settlement contained in the Charter of the United Nations"); Philippines (*ibid*., para. 106) ("In that draft guideline, the Commission recommended 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), which in turn encompassed the 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, it being made clear that the recommendation did not prioritize any specific means of dispute settlement."); and Greece (A/C.6/79/SR.27, para. 156) ("Greece welcomed the fact that the Commission had chosen a formulation that was not purely descriptive and cautioned against any implication that a hierarchy existed among the various means of dispute settlement").

[14] Greece (A/C.6/79/SR.27, para. 157) ("The concept of accessibility, as reflected in draft guideline 5, was ambiguous. A distinction should be made between the establishment of a normative framework and the legal and practical availability of that framework. Moreover, certain practical aspects, such as the cost of means of dispute settlement, might be beyond the control of the parties concerned. It would be desirable for the Commission to clarify that point in the draft guideline. The text of the draft guideline nevertheless seemed balanced, insofar as it highlighted arbitration and judicial settlement, while preserving, through the use of nuanced wording, the margin of discretion of the relevant actors."); and Sierra Leone (*ibid*., para. 172) ("With respect to draft guideline 5 (Accessibility of means of dispute settlement), Sierra Leone emphasized the importance of making dispute settlement mechanisms more widely accessible. The draft guideline's focus on practical accessibility beyond mere legal availability was crucial to enabling international organizations and States to effectively resolve their disputes. His delegation appreciated the Commission's recognition, in the commentary to the draft guideline, of the challenges encountered by smaller and more resource-constrained parties in gaining access to arbitration and judicial settlement. International organizations, particularly those operating in developing regions, should not face prohibitive costs or procedural barriers to access to justice.").

[15] Austria (A/C.6/79/SR.25, para. 124) ("Practice showed that most disputes involving international organizations were settled through negotiations. In his country's experience, it was often helpful for adjudicatory forms of dispute settlement to be available and practically accessible."); Chile (A/C.6/79/SR.27, para. 125) ("His delegation shared the Commission's view, reflected in paragraph (7) of the commentary to the draft guideline, that greater accessibility and availability of means of dispute settlement would contribute to the settlement of disputes by alternative means."); and Sri Lanka (*ibid*., para. 35) ("The mere existence of formal dispute resolution mechanisms could facilitate the settlement of disputes. Parties to disputes often sought to avoid the costs, delays and uncertainties associated with litigation or arbitration, particularly in disputes involving international organizations and in trade disputes. Negotiations were commonly aimed at preventing escalation into formal litigation, which could adversely affect relationships. Thus, the possibility of third-party adjudication served as a valuable backstop that encouraged consensus-driven dispute resolution.").

[16] South Africa (A/C.6/79/SR.27, para. 3) ("It would be helpful if the Commission could provide more recent sources substantiating [the view that the availability of arbitration and judicial settlement might increase the willingness of the parties to settle disputes by alternative means], especially given the growing support, at the domestic level at least, for alternative means of dispute settlement."). This was also the case with regard to draft guideline 4: Russian Federation (*ibid*., para. 51) ("with regard to

Commission's appraisal of the degree to which the availability of arbitration and judicial proceedings affected the willingness to pursue alternative dispute settlement mechanisms. Although several delegations agreed that no hierarchy of dispute settlement mechanisms was implied by draft guideline 5,[17] some questioned the specific mention of judicial settlement and arbitration.[18] Delegations also stated that preference should be given to binding means of dispute settlement to ensure legal certainty,[19] while others suggested that the guideline should mention only arbitration and judicial settlement as other forms of dispute settlement which were practically always available.[20] In general, States agreed that accessibility and free choice

paragraph (2) of the commentary, more accurate assessments were needed of the extent to which the availability of arbitration and judicial proceedings really affected the willingness of the parties to avail themselves of 'amicable' methods of dispute settlement, in the form of direct negotiations or having recourse to diplomatic means. The Special Rapporteur had not provided convincing evidence to that effect in his report. Indeed, it was not entirely clear to her delegation why the Special Rapporteur so clearly preferred arbitration and judicial proceedings as means of settlement of disputes to which international organizations were parties."); and Colombia (*ibid*., para. 99) ("For example, it was indicated that when the relevant instrument provided for the availability of recourse to arbitration or adjudication, 'it appears that such availability may increase the willingness to find a negotiated settlement'. However, that statement was not substantiated and placed the Commission in an academic role or political position that lay beyond its purview.").

[17] European Union (A/C.6/79/SR.25, para. 84) ("as indicated in paragraph (4) of the commentary to draft guideline 5, the words 'as appropriate' were used after 'means of dispute settlement, including arbitration and judicial settlement' to stress that the draft guideline did not establish a hierarchy of the different means of dispute settlement and to ensure alignment with the idea expressed in draft guideline 4 that different means of dispute settlement might be appropriate for the settlement of different disputes."); Islamic Republic of Iran (A/C.6/79/SR.27, para. 70) ("His delegation understood that no hierarchy was implied in the wording of draft guideline 5, as subjects of international law were free to choose the most appropriate means of dispute settlement."); Chile (*ibid*., para. 125) ("A hierarchy should nevertheless not, under any circumstances, be understood to exist among the various means of dispute settlement, without prejudice to the recommendation, contained in draft guideline 4, that disputes should be settled by 'appropriate' means."); and Slovenia (A/C.6/79/SR.25, para. 109) ("there was no hierarchy of the different means of dispute settlement, as indicated in the commentary to draft guideline 5").

[18] Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/79/SR.25, para. 91) ("highlighting arbitration and judicial settlement risked giving the impression that those means were preferable to others, which was not necessarily the case."); China (A/C.6/79/SR.26, para. 49) ("singling out particular means of dispute settlement could be seen as encouraging organizations to choose them."); Argentina (A/C.6/79/SR.27, para. 148) ("However, it questioned the appropriateness of specifically mentioning judicial settlement and arbitration in draft guideline 5 …, given that, as no other means of dispute settlement were singled out, the text could be misinterpreted as recommending the promotion of those means specifically, at the expense of others."); Bulgaria (*ibid*., para. 168) ("Bulgaria recommended that caution be exercised in singling out arbitration and judicial settlement at the expense of other means of settlement, such as negotiation and mediation, and was in favour of further reflection on those draft guidelines."); and Colombia (*ibid*., para. 100) ("Again, her delegation could not see how that draft guideline was substantiated, and it did not necessarily concur with the Special Rapporteur's stated intention to focus on arbitration and judicial settlement over and above other available means. If the purpose was not to focus on those means, it was unclear why a list of terms used was set out in draft guideline 2, only to be set aside in draft guideline 5.").

[19] Italy (A/C.6/79/SR.25, para. 114) ("Italy believed that, besides amicable means of dispute settlement, preference should be given to binding means, so as to ensure legal certainty and clear recognition of the parties' rights and obligations. Arbitration and judicial settlement should therefore be made more easily available and should be more widely used for the resolution of international disputes involving international organizations.").

[20] Romania (A/C.6/79/SR.26, para. 17) ("Her delegation supported the aim behind draft guideline 5 …, namely, to recommend that access to arbitration and judicial settlement be made more widely accessible. However, the current wording encompassed all means of dispute settlement, even though – as noted in the commentary – some forms of dispute settlement, such as negotiations or consultations, were already practically always available. Her delegation therefore suggested that the draft guideline be amended so as to refer only to increasing the accessibility of arbitration and judicial settlement.").

were important issues.[21] Some delegations expressed a preference for alternative means of dispute settlement, citing high costs as a possible deterrent for States and international organizations to access arbitration or judicial settlement.[22]

7. Regarding draft guideline 6, many delegations showed appreciation for the emphasis on the requirements of the rule of law.[23] Some stressed the importance of the independence and impartiality of adjudicators,[24] while others expressed their concern that the focus on impartiality and independence could result in other equally important requirements of due process being overlooked.[25] One delegation suggested that the requirements of independence and impartiality of adjudicators and due process should be stressed for other means of dispute settlement as well.[26] Concerning the "obligatory language" used in draft guideline 6, one

[21] Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/79/SR.25, para. 87) ("As a general observation, the Nordic countries saw merit in underlining the principle of free choice of means of dispute settlement."); Portugal (A/C.6/79/SR.26, para. 80) ("His delegation agreed with the Commission, as reflected in draft guideline 5, that the means of dispute settlement, including arbitration and judicial settlement, should be made more widely accessible."); Singapore (*ibid*., para. 131) ("agreed that … the full range of means of dispute settlement referred to in draft guideline 2 (c) should be made more widely accessible for the settlement of disputes between international organizations or between international organizations and States."); and Mexico (A/C.6/79/SR.27, para. 18) ("Accessibility was a basic principle of the administration of justice in respect of which there should be no exceptions in the international context. Similarly, his delegation agreed with the pertinence of draft guideline 6 (Requirements for arbitration and judicial settlement) for ensuring that the principles of independence and impartiality prevailed in arbitration and judicial settlement proceedings involving States and international organizations.").

[22] Canada (A/C.6/79/SR.26, para. 35) ("while all forms of dispute settlement were used in practice, the most prevalent were negotiation, consultation or other amicable dispute settlement means, not only because many dispute settlement provisions required that such methods be used as a first step, but also because it was the preference of international organizations and States to discreetly and diplomatically settle disputes in an informal manner."); and South Africa (A/C.6/79/SR.27, para. 3) ("Arbitration and judicial settlement were extremely expensive, which could serve as a barrier to access for States and international organizations.").

[23] European Union (A/C.6/79/SR.25, para. 86) ("The European Union welcomed the reference in draft guideline 6 … to core elements of compliance with the rule of law in the context of dispute settlement and was of the view that those elements gave specific expression to the concept of the rule of law."); Brazil (*ibid*., para. 101) ("Brazil also welcomed draft article 6, which emphasized the need for arbitration and judicial settlement to conform to the requirements of independence and impartiality of adjudicators and due process."); Greece (A/C.6/79/SR.27, para. 158) ("Greece welcomed the reference in draft guideline 6 … to the requirements of the rule of law. The independence and impartiality of adjudicators and due process were essential in a State governed by the rule of law and were of critical importance to her country."); and Sierra Leone (*ibid*., para. 173) ("Sierra Leone strongly supported provisions calling for arbitration and judicial settlement to conform to the requirements of independence, impartiality and due process. Those elements were fundamental to upholding the rule of law in the settlement of disputes involving international organizations.").

[24] Croatia (A/C.6/79/SR.21, para. 118) ("the independence and impartiality of adjudicators were the paramount requirements for dispute settlement mechanisms and for the credibility of the entire dispute settlement process; they were also a legal obligation under the applicable rules of international law."); Sri Lanka (A/C.6/79/SR.27, paras. 37–38) ("The independence of adjudicators was vital for maintaining the integrity of the legal system. However, it was frequently compromised by external pressures, such as political influence and institutional biases, which could undermine impartial decision-making. … Due process in dispute settlement played a crucial role in the administration of justice within international legal frameworks, serving to overcome barriers such as economic constraints, bureaucratic obstacles and a lack of legal knowledge."); and Sierra Leone (*ibid*., para. 173) ("The requirement of impartial adjudication was particularly critical, as it ensured that both international organizations and States could trust the integrity of the process.").

[25] Colombia (A/C.6/79/SR.27, para. 101) ("Moreover, the focus on independence and impartiality of adjudicators and arbitrators could result in other equally important requirements being overlooked."); and India (*ibid*., para. 110) ("However, the draft guideline should also include a requirement of adherence to due process principles and procedural fairness, including the right to be heard, the right to present evidence and the right to a fair trial.")

[26] Islamic Republic of Iran (A/C.6/79/SR.27, para. 71) ("In draft guideline 6 …, it was rightly stated that arbitration and judicial settlement should conform to the requirements of independence and

State showed appreciation for such use,[27] regarding it as declaratory of an existing obligation,[28] while others expressed caution regarding the use of such language in a non-binding instrument.[29]

8. The Special Rapporteur wishes to express his gratitude for the delegations' pertinent comments. He considered the debate in the Sixth Committee when preparing the present third report and intends to revert to it at second reading.

C. Replies to the Special Rapporteur's questionnaire and memorandum of the Secretariat

9. In December 2022, the Secretariat sent a questionnaire prepared by the Special Rapporteur to States and relevant international organizations.[30] In response, both States and international organizations provided highly valuable information. In accordance with the Commission's request,[31] and relying on the information contained in the responses to the questionnaire, the Secretariat prepared a memorandum providing information on the practice of States and international organizations regarding their international disputes and disputes of a private law character.[32] The Special Rapporteur used those replies in drafting both his second report and the present report.

D. Structure of the present report

10. The present report addresses disputes between international organizations and private parties. In chapter I, the Special Rapporteur explains the scope of the report. In chapter II, he outlines the variety of practice of dispute settlement, ranging from direct negotiations to adjudicatory forms of dispute settlement such as arbitration and settlement through international and/or national courts and tribunals. In chapter III, he addresses policy issues, including the tension between jurisdictional immunity securing the independent functioning of international organizations and access to justice guaranteeing private parties their "day in court". Based on these considerations, he formulates recommendations. In chapter IV, he presents the text of the suggested guidelines and in chapter V, he briefly outlines the future work on this topic.

impartiality of adjudicators and due process. However, those requirements should apply also to other means of dispute settlement, such as mediation and conciliation and enquiry, in which neutral third parties were involved.").

[27] Philippines (A/C.6/79/SR.26, para. 107) ("Lastly, the Philippines welcomed the use of obligatory language in draft guideline 6 … and the reference to the independence and impartiality of adjudicators, and due process, both of which were core elements of the rule of law relevant to dispute settlement.").

[28] European Union (A/C.6/79/SR.25, para. 86) ("The draft guideline was formulated as an obligation. Given that the requirements referred to therein were legal obligations under applicable rules of international law, as indicated in paragraph (8) of the commentary, it could be made clear that the draft guideline was declaratory, rather than constitutive, of an obligation under international law.").

[29] South Africa (A/C.6/79/SR.27, para. 4) ("as the draft guidelines were intended to be non-binding, peremptory terms such as 'shall' should not be used in the text. Her delegation therefore preferred the version of the draft guideline contained in paragraph 246 of the Special Rapporteur's second report").

[30] "Questionnaire and background to the topic 'Settlement of international disputes to which international organizations are parties'", forwarded by the Under-Secretary-General for Legal Affairs, the United Nations Legal Counsel in a letter dated 2 December 2022. The questionnaire is reproduced in A/CN.4/756, footnote 5.

[31] A/77/10, para. 241.

[32] "Settlement of disputes to which international organizations are parties", Memorandum by the Secretariat (A/CN.4/764).

I. Focus of the present report: disputes between international organizations and private parties

11. In 2024, the Commission decided to distinguish between different types of disputes to which international organizations are parties according to the parties involved and not the applicable law.[33] Following that approach, the Special Rapporteur has structured his third report and the proposed guidelines accordingly.

A. Types of disputes

12. Typical disputes between international organizations and private parties are contractual disputes with service providers and suppliers stemming from the procurement activities of international organizations, from lease agreements and from various commercial agreements. Similarly, they may arise from employment-like relations with non-staff members or service contracts with consultants or from tort or delictual claims.[34]

13. In addition, claims for harm suffered by private persons may be based on human rights or the internal law of international organizations, raising broader issues of accountability.[35] Furthermore, disputes between international organizations as employers and private parties as staff members often transcend purely contractual relationships.[36] These issues are closely related to the question of the applicable law.

B. Applicable law

14. The definitive settlement of disputes to which international organizations are parties, in particular through adjudicatory means, regularly requires the determination of the applicable law. To the extent that disputes arise out of contractual relationships, it is most likely that the contracting parties will have either expressly chosen an applicable law, in practice, a specific national law,[37] general principles of contract law or principles such as the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts.[38] In the absence of the parties' choice of law, adjudicators are usually guided to determine such law, rules or principles as may be

[33] A/79/10, para. 19.

[34] A/CN.4/764, chap. III, sect. B (2) (United Nations Office of Legal Affairs) and sect. B (5), footnote 1 (United Nations Office of Legal Affairs). See also August Reinisch, "Accountability of international organizations according to national law", *Netherlands Yearbook of International Law*, vol. XXXVI (2005), pp. 119–167.

[35] See August Reinisch, "Securing the accountability of international organizations", *Global Governance*, vol. 7 (2001), pp. 131–149; Matthew Parish, "An essay on the accountability of international organizations", *International Organizations Law Review*, vol. 7 (2010), pp. 277–342; Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford, Oxford University Press, 2017); Stian Øby Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (Cambridge, Cambridge University Press, 2020); Rishi Gulati, *Access to Justice and International Organisations: Coordinating Jurisdiction between the National and Institutional Legal Orders* (Cambridge, Cambridge University Press, 2022).

[36] Thomas S.M. Henquet, *The Third-Party Liability of International Organisations: Towards a 'Complete Remedy System' Counterbalancing Jurisdictional Immunity* (Leiden, Brill Nijhoff, 2023), p. 199.

[37] A/CN.4/764, chap. III, sect. B (9) (Permanent Court of Arbitration) (providing in contracts with third parties that "[t]he applicable law shall be the law of the State of New York").

[38] A/CN.4/764, chap. III, sect. B (9) (United Nations Office of Legal Affairs) ("[T]he standard United Nations contract is governed by its own terms and not by any national law, whether substantive or procedural. In this regard, the standard clauses above provide that the arbitral tribunal shall apply general principles of international commercial law in its interpretation of the parties' rights and obligations under the contract (which, depending on the issue, may include the UNIDROIT [International Institute for the Unification of Private Law] Principles of International Commercial Contracts)."); see also Netherlands Advisory Committee on Issues of Public International Law, "Settlement of disputes to which international organisations are parties", Advisory report No. 47, 13 August 2024, p. 9.

applicable.[39] The same is the case in regard to tort claims where it is usually the (national) law of the place of the injurious act that will be regarded as the applicable law. Sometimes, organizations supplement or modify such otherwise applicable law.[40]

15. Disputes between international organizations and private parties may also arise based on the internal law of such organizations. One example is provided by employment disputes with staff members, the most frequent type of disputes with private parties in practice. They are usually governed by internal staff rules and regulations.[41] Some organizations even allow private parties to challenge the adoption of legislative and/or administrative acts. Examples range from private companies challenging competition law decisions of organs of regional economic integration organizations,[42] and unsuccessful bidders questioning procurement decisions,[43] to individuals requesting their removal from targeted sanctions lists.[44] Such disputes are equally governed by the internal law of the respective international organization. Furthermore, private parties may claim that they have suffered harm because of human rights violations by international organizations which, in the absence of express treaty obligations of international organizations, will frequently be based on customary human rights standards.[45]

16. While such applicable law questions are crucial for the merits of an actual settlement of disputes to which international organizations are parties, they are analytically distinct from the question of which means of dispute settlement are and/or should be available. This latter question is at the core of the Commission's topic. Thus, issues of applicable law will be addressed only incidentally, and the Commission should not endeavour to broadly assess and/or make recommendations concerning applicable law.

C. The domestic legal personality of international organizations

17. The existence of disputes of a non-international character, constituting the majority of disputes between international organizations and private parties, is premised upon the ability of international organizations to act as subjects of domestic law.[46] Such capacity to act on the domestic legal level is regularly stipulated in constituent instruments and other treaties. They usually expressly provide for the capacity of an international organization to own property, to contract and to bring legal proceedings in national courts.[47]

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[39] See, e.g., art. 35, UNCITRAL Arbitration Rules (2021); Gary B. Born, *International Commercial Arbitration*, 3rd ed. (Alphen aan den Rijn, Kluwer Law International, 2021), pp. 2823 and 2824; Yuko Nishitani, "Comparative conflict of laws", in Mathias Siems and Po Jen Yap, eds., *The Cambridge Handbook of Comparative Law* (Cambridge, Cambridge University Press, 2024), pp. 674–692, at pp. 681–686.

[40] See, e.g., "Limitation of damages in respect of acts occurring within the Headquarters district", General Assembly resolution 41/210 of 11 December 1986), providing for a cap of compensation, derogating from host State law, as envisaged by section 8 of the Agreement regarding the Headquarters of the United Nations (Lake Success, 26 June 1947), United Nations, *Treaty Series*, vol. 11, No. 147, p. 11. See also Paul Szasz, "The United Nations legislates to limit its liability", *American Journal of International Law*, vol. 81 (1987), pp. 739 *et seq*.

[41] Peter Quayle, "The modern multilateral bureaucracy: what is the role of international administrative law at international organizations?", in Peter Quayle, ed., *The Role of International Administrative Law at International Organizations, AIIB Yearbook of International Law, vol. 3* (Leiden, Brill Nijhoff, 2020), pp. 1–21, at pp. 11 and 12.

[42] See paras. 173 *et seq*. below.

[43] See para. 59 below.

[44] See para. 34 below.

[45] Kristina Daugirdas, "How and why international law binds international organizations", *Harvard International Law Journal*, vol. 57 (2016), pp. 325 *et seq*.

[46] See Tarcisio Gazzini, "Personality of international organizations", in Jan Klabbers and Åsa Wallendahl, eds., *Research Handbook on the Law of International Organizations* (Cheltenham, Edward Elgar Publishing, 2011), pp. 33 *et seq*.; Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 6th ed. (Leiden, Brill Nijhoff, 2018), p. 1065.

[47] See, e.g., art. I, sect. 1, 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, and

18. At the same time, provisions endowing international organizations with immunity from jurisdiction may partially, or often even fully, exempt organizations from the adjudicatory power of such national courts.[48] Lastly, treaty obligations to make available alternative appropriate means of dispute settlement in cases of certain disputes between international organizations and private parties[49] are sometimes provided for in order to compensate for the lack of access to domestic courts as a result of the jurisdictional immunity conferred upon international organizations. In addition, as already recognized by the International Court of Justice in its advisory opinion in the *Effect of Awards* case[50] and reaffirmed in human rights jurisprudence, such as that of the European Court of Human Rights in the *Waite and Kennedy* case,[51] as well as by the Human Rights Committee in its recent communication concerning *M.L.D. v. Philippines*,[52] such a need to provide for adequate means to settle disputes with private parties may also stem from human rights considerations.[53]

D. The difficulty of differentiating between international and non-international disputes

19. As the Special Rapporteur explained in detail in his second report, the precise distinction between international and non-international disputes to which international organizations are parties poses several difficulties.[54] It seems well accepted that disputes arising under international law or from a relationship governed by international law can be qualified as international disputes[55] and that disputes arising under national law can be regarded as non-international disputes.[56] On this basis, most disputes between international organizations and between international organizations and States concerning the interpretation and application of bilateral or multilateral treaties concluded by international

vol. 90, p. 327 ("The United Nations shall possess juridical personality. It shall have the capacity: (a) To contract; (b) To acquire and dispose of immovable and movable property; (c) To institute legal proceedings."); art. IX, sect. 2, Articles of Agreement of the International Monetary Fund (Washington D.C., 27 December 1945), United Nations, *Treaty Series*, vol. 2, No. 20 (a), p. 39; art. VII, sect. 2, Articles of Agreement of the International Bank for Reconstruction and Development (Washington D.C., 27 December 1945), United Nations, *Treaty Series*, vol. 2, No. 20 (b), p. 134, at p. 180 (The Fund/Bank "shall possess full juridical personality, and, in particular, the capacity: (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings.").

[48] See, e.g., art. II, sect. 2, General Convention.

[49] See, e.g., art. VIII, sect. 29, General Convention ("The United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party"); art. IX, sect. 31, Convention on the Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention) (New York, 21 November 1947), United Nations, *Treaty Series*, vol. 33, No. 521, p. 261; art. 54, Headquarters Agreement between the International Criminal Court and the host State (The Hague, 7 June 2007), United Nations, *Treaty Series*, vol. 2517, No. 44965, p. 173; art. 26, Agreement between the Kingdom of the Netherlands and the Organisation for the Prohibition of Chemical Weapons (OPCW) concerning the headquarters of the OPCW (with arrangement) (The Hague, 22 May 1997), United Nations, *Treaty Series*, vol. 2311, No. 41207, p. 91.

[50] International Court of Justice, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, *Advisory Opinion, I.C.J. Reports 1954*, p. 47, at p. 57.

[51] European Court of Human Rights, *Waite and Kennedy v. Germany* [GC], No. 26083/94, 18 February 1999; European Court of Human Rights, *Beer and Regan v. Germany* [GC], No. 28934/95, 18 February 1999.

[52] Human Rights Committee, *M.L.D. v. Philippines* (CCPR/C/141/D/3581/2019).

[53] See also paras. 224 *et seq*. below.

[54] A/CN.4/766, paras. 13 *et seq*.

[55] Sir Michael Wood, "The settlement of international disputes to which international organizations are parties", *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), annex I, para. 3 ("disputes that are international, in the sense that they arise from a relationship governed by international law.").

[56] A/78/10, para. 49, para. (5) of the commentary to guideline 1 ("The former type of disputes may be qualified as 'international disputes' and the latter as 'non-international' or as disputes arising under 'national' law, or as disputes of a 'private law character'.").

organizations or the alleged violation of obligations under unwritten international law can be qualified as "international" disputes. Disputes between international organizations and private parties usually arising out of contractual relationships, governed by a specific national law or general principles of contract law, or delictual disputes of a private law character, can be regarded as "non-international" disputes.

20. However, the lines differentiating between international and non-international disputes may be blurred in various ways. Since international organizations and/or States may freely choose the law applicable to their relationships, they can enter into contractual (not treaty) relations subject to a specific (national) private law.[57] "Non-international" tort claims by private parties against international organizations will usually arise under national law. However, such non-international claims may be espoused by their home States through diplomatic protection and thus transformed into international disputes.[58] Furthermore, the status of individuals as bearers of rights and obligations under international law may raise questions about whether all disputes between individuals and international organizations should be qualified as "non-international". This applies specifically where international organizations allegedly violate human rights. Similarly, the qualification of disputes between international organizations and their staff members, regularly governed by internal rules and regulations, may not be easily characterized as "non-international".[59]

21. In addition, disputes between international organizations and private parties governed by private law may involve several international law issues that could in turn give rise to an international dispute. For instance, the non-recognition of the domestic legal personality of an international organization by a national court could be in contravention of a treaty stipulation.[60] This may lead to the organization's claim against the forum State for not recognizing its domestic legal personality. In practice, disputes are more likely to arise with the forum State for not recognizing an organization's immunity from legal process. Therefore, while the underlying dispute is one of a non-international legal character between the private party suing an organization, the organization may have an international legal dispute with the forum State about the scope of immunity owed.[61] To the extent that an international organization's immunity from legal process is recognized by national courts, such a decision may be challenged under international human rights law for not providing access to court. It may also be challenged under the treaty provision stipulating the availability of alternative remedies. In the human rights context, individuals may usually only bring a claim, if at all, against the forum State for denying their fundamental right of access to justice as a result of its courts' decisions to accord immunity.[62] Furthermore, any immunity decision may give rise to a genuine international dispute between an international organization and a State, where the latter can invoke a treaty provision that imposes a duty on the organization to make available alternative means of dispute settlement.[63]

22. These difficulties led the Commission to prefer a distinction between disputes to which international organizations are parties on the basis of the other parties involved rather than on the basis of the applicable law.[64] In line with the above considerations, the Special Rapporteur thus proposes to continue the Commission's approach of focusing on the parties involved. Therefore, the suggested guideline clarifies that the third part should address

[57] A/CN.4/766, para. 21.

[58] *Ibid*., para. 20.

[59] Shinichi Ago, "What is 'international administrative law'? The adequacy of this term in various judgments of international administrative tribunals", in Quayle, *The Role of International Administrative Law at International Organizations*, pp. 88–102, at p. 100.

[60] See para. 112 below.

[61] A/CN.4/764, chap. II, sect. B (7) (Chile); chap. III, sect. B (11) (United Nations Office of Legal Affairs). See also the long-standing dispute between the Food and Agriculture Organization of the United Nations (FAO) and Italy: Food and Agriculture Organization of the United Nations, *United Nations Juridical Yearbook 1986*, pp. 147–159; A/CN.4/766, paras. 36 and 67.

[62] *Waite and Kennedy v. Germany* (see footnote 51 above). See also paras. 147 *et seq*. below.

[63] Bruce C. Rashkow, "Immunity of the United Nations: practice and challenges", *International Organizations Law Review*, vol. 10 (2013), pp. 332–348, at pp. 345 *et seq*.

[64] A/79/10, para. 19.

disputes between international organizations and private parties regardless of whether they might be qualified as non-international or international.

23. Most importantly, the Commission considered that in the case of disputes between international organizations and private parties, the latter may benefit from human rights and customary international law guarantees, such as access to justice and due process, regardless of whether their disputes may be qualified as "international" or "non-international".[65] Thus, focusing on the parties involved instead of the applicable law would allow the Commission to formulate guidelines taking more specifically into account the adequacy of means of dispute settlement available to private parties from a human rights perspective.

E. Suggested guideline

24. "7. Disputes between international organizations and private parties

"This Part addresses disputes between international organizations and private parties."

II. The practice of settling disputes between international organizations and private parties

25. Like international disputes between international organizations or between international organizations and States,[66] disputes between international organizations and private parties may also be settled by any of the peaceful means of dispute settlement laid down in draft guideline 2 (c): negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of resolving disputes. Of course, "resort to regional agencies or arrangements" seems less pertinent.

26. The following analysis of the practice of international organizations settling their disputes with private parties shows that international organizations rely on and use all of the different means of dispute settlement mentioned above. While it is difficult to ascertain the frequency of the use of non-adjudicatory means of dispute settlement, which are usually conducted in a confidential manner,[67] it seems that resort to arbitration and judicial settlement – whether before national or international courts or quasi-judicial mechanisms internal to international organizations – occurs relatively frequently.

27. The following subsections provide a detailed overview of how disputes between international organizations and private parties have been addressed in practice. Given the wealth of this practice, this overview does not claim to be exhaustive. Rather, it intends to provide a representative picture of the means of dispute settlement legally available and used.[68]

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[65] *Ibid*., para. 63, para. (10) of the commentary to guideline 3.

[66] See A/CN.4/766, paras. 27 and 28.

[67] A/CN.4/764, chap. II, sect. B (2) (United Kingdom of Great Britain and Northern Ireland) ("There are likely to be a number of other cases involving private parties, including those that are subject to confidential settlements and/or resolved by methods of alternative dispute resolution that are not published."); chap. II, sect. B (7) (Malaysia) ("all disclosure, concessions, admissions and communication made during the entire process of mediation are strictly 'without prejudice', confidential and remain known only to the parties and the mediator involved."); chap. III, sect. B (2) (United Nations Office of Legal Affairs) ("In practice, as far as the Office of Legal Affairs is aware, all such disputes have been resolved by amicable settlement without the need to resort to arbitration. Due to confidentiality considerations and limitations, the United Nations is only able to provide generic information on case law."); chap. III, sect. B (2) (World Health Organization) ("For confidentiality reasons, WHO cannot disclose examples of a signed settlement agreement").

[68] This chapter largely builds on previous work of the Special Rapporteur, in particular, the lecture he delivered in the Hague in 2024: August Reinisch, "The settlement of disputes involving international organizations", *Collected Courses of the Hague Academy of International Law*, vol. 442 (2024), pp. 83–342.

A. Negotiation, consultation or other amicable settlement

28. Many international organizations that responded to the questionnaire stated that informal dispute settlement techniques, in particular, negotiations and consultations, are the methods that they most use and that they prefer in cases of disagreements or disputes with private parties.[69] This is consistent with the replies of the United Nations to previous questionnaires, stating that it would agree to arbitration "when agreement cannot be reached by direct negotiations",[70] or by the specialized agencies and the International Atomic Energy Agency (IAEA), which reported that they would provide for arbitration only "after recourse to direct negotiation".[71]

29. That negotiation is a preferred method of dispute settlement concerning claims between the United Nations and private parties was also confirmed by the United Nations

[69] See, e.g., A/CN.4/764, chap. III, sect. A (Islamic Corporation for the Development of the Private Sector (ICD)) ("For the disputes between ICD and the external private enterprises, priority is given to conciliation and negotiation as these modes save time and costs and promote good relations between ICD and the other parties to the disputes. Arbitration and judicial enforcement are the last recourse."); chap. III, sect. A (International Islamic Trade Finance Corporation (ITFC)) ("Negotiation is a very important stage to settle any dispute before taking any formal legal action."); chap. III, sect. B (1) (Common Fund for Commodities (CFC)) ("CFC in the last 10 years has not formally settled any disputes with any parties, CFC prefers negotiation (as litigating is expensive and the mostly private counterparties of CFC often have no meaningful assets, and it makes no economic sense to incur costs for litigation if the chance of recovery is low."); chap. III, sect. B (2) (Organisation for the Prohibition of Chemical Weapons) ("Disputes arising from commercial contracts have been resolved through negotiations."); chap. III, sect. B (2) (United Nations Conference on Trade and Development (UNCTAD)) ("The vast majority of disputes are resolved through negotiation and amicable settlement. In the case of disputes with private parties, occasionally, UNCTAD may resort to arbitration."); chap. III, sect. B (2) (United Nations Framework Convention on Climate Change (UNFCCC)) ("With commercial contractors and individuals, UNFCCC has resorted to setting its differences amicably, through negotiations."); chap. III, sect. B (4) (United Nations Development Programme (UNDP)) ("UNDP considers negotiation as the most useful method of dispute settlement for contractors and non-staff personnel."); chap III, sect. B (3) (United Nations Office for Project Services (UNOPS)) ("Although UNOPS has faced a relatively high number of arbitration cases in the context of commercial disputes in recent years, the majority of UNOPS disputes are resolved through negotiation."); chap. III, sect. B (4) (Food and Agriculture Organization of the United Nations) ("In respect of disputes with private parties, such as contractual disputes with service providers and other procurement-related disputes, negotiation is most useful"); chap. III, sect. B (11) (World Food Programme (WFP)) ("in most of cases where WFP agreed on a dispute settlement method with a third party, the agreed dispute settlement method has been informal consultation or direct negotiation.").

[70] "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: supplementary study prepared by the Secretariat", *Yearbook of the International Law Commission*, 1985, vol. II (Part One) (Addendum), document A/CN.4/L.383 and Add.1-3, p. 154 (the Office of Legal Affairs of the United Nations, responding to an inquiry from the Institute of International Law, indicated that "provision is made, however, for the settlement of disputes by means of arbitration when agreement cannot be reached by direct negotiations."); see also Legal opinions of the Secretariat of the United Nations, Determination of the applicable law to contracts concluded between the United Nations and private parties – "service contracts" and "functional contracts" – UNCITRAL Arbitral Rules, 5 February 1988, *United Nations Juridical Yearbook 1998*, pp. 285–288, at p. 286 ("The experience of the Organization is derived, essentially, from negotiations with contractors and in the course of settlement of contract claims through the internal mechanism evolved by this Office for negotiated settlement of claims and, only occasionally, arbitration.").

[71] *Yearbook … 1985*, vol. II (Part One) (Addendum), document A/CN.4/L.383 and Add.1-3, p. 183 ("The majority of contracts entered into by specialized agencies and IAEA continue to provide for the settlement of disputes by arbitration, after recourse to direct negotiation."); see also A/CN.4/764, chap. III, sect. B (2) (Food and Agriculture Organization of the United Nations (FAO)) ("For *contractual disputes with service providers and other procurement-related disputes*: negotiations, negotiated settlements and (rarely) conciliation and arbitration."); see also the FAO standard dispute settlement clause (*ibid.*, sect. B (9)) ("Any dispute between the Parties concerning the interpretation and the execution of this [name of agreement], will be settled by negotiation or, if not settled by negotiation between the Parties or by another agreed mode of settlement shall, at the request of either Party, be submitted to one (1) conciliator.").

Legal Counsel during the advisory proceedings before the International Court of Justice in the *Cumaraswamy* case,[72] when he stated that the United Nations would seek a settlement or be ready to submit to arbitration.[73] More recently, the United Nations Legal Counsel stressed that "the Organization always aims at settling contractual disputes amicably" and reported that "between 2015 and 2018, the Office of Legal Affairs has worked on claims against the Organization valued at $103.50 million that were settled for a total of $8.23 million".[74] This was a result of negotiations pursued by the Office of Legal Affairs.[75] The percentage of the actual legal liability of the United Nations against the amounts originally claimed against the Organization in 2019, 2020 and 2021 were 13, 35 and 24 per cent respectively. These numbers were achieved by "settlement negotiations, arbitral proceedings and closure owing to claimants not pursuing further their claims against the Organization".[76]

30. Often, shorter duration and lower costs than those incurred in arbitration or adjudication are provided as reasons for a preference for negotiated or amicable dispute settlement.[77] Similarly, the wish to continue business relationships may be a strong incentive to prefer amicable dispute settlement methods over contentious ones.[78]

31. Negotiation and other means of amicable dispute settlement are not only pursued regarding contractors[79] and in procurement disputes, but also as a first informal step in disputes with staff members and other individuals rendering services to an international

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[72] International Court of Justice, *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.

[73] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, verbatim record 1998/17, public sitting held on Thursday 10 December 1998, at 10 a.m., para. 14. Available at icj-cij.org/sites/default/files/case-related/100/100-19981210-ORA-01-00-BI.pdf ("By determining that the words spoken by Mr. Cumaraswamy were performed during the performance of the mission for the United Nations, the words complained of are now the responsibility of the United Nations. It follows that any private plaintiff who considers himself harmed by the publication of those words may submit a claim to the United Nations which, if the suits in national courts are withdrawn, will attempt to negotiate a settlement with the plaintiffs; if this is not possible, the United Nations will make provision for an appropriate means of settlement, for example, by submission of the dispute to arbitration in accordance with the UNCITRAL Arbitration Rules.").

[74] Miguel de Serpa Soares, "Responsibility of international organizations", *Courses of the Summer School on Public International Law*, vol. 7 (Moscow, 2022), pp. 140 and 141.

[75] Economic and Social Council, Evaluation of the Office of Legal Affairs: Report of the Office of Internal Oversight Services, E/AC.51/2019/9, para. 40.

[76] General Assembly, Proposed programme budget for 2023, A/77/6 (Sect. 8) and Corr.1, para. 8.44, figure 8.I.

[77] A/CN.4/764, chap. III, sect. A (Islamic Corporation for the Development of the Private Sector (ICD)) ("For the disputes between ICD and the external private enterprises, priority is given to conciliation and negotiation as these modes save time and costs and promote good relations between ICD and the other parties to the disputes."); chap. III, sect. B (1) (Common Fund for Commodities) ("CFC prefers negotiation (as litigating is expensive and the mostly private counterparties of CFC often have no meaningful assets, and it makes no economic sense to incur costs for litigation if the chance of recovery is low)."); chap. III, sect. B (3) (World Health Organization) (concerning disputes with goods suppliers and service providers: "Informal consensual mechanisms are paramount and most of the time allow for a successful closing of the case without reaching the stage of arbitration. Given the procedural complexity and cost, arbitration is often not a viable resolution mechanism for such disputes."); chap. III, sect. B (4) (United Nations Office for Project Services (UNOPS)) ("to avoid the costs and other challenges associated with arbitration, UNOPS places a high priority on resolving disputes with third parties through settlement negotiations whenever possible. This applies to both personnel and commercial disputes.").

[78] *Ibid.*, chap. III, sect. B (2) (World Food Programme) ("Aiming at maintaining a good commercial relationship with the contractors, the majority of such disputes are resolved through negotiations on an amicable basis."); chap. III, sect. B (4) (Food and Agriculture Organization of the United Nations (FAO)) ("In respect of disputes with private parties, such as contractual disputes with service providers and other procurement-related disputes, negotiation is most useful, in particular as many suppliers or service providers wish to maintain a continuing relationship with FAO and are therefore motivated to resolve the dispute.").

[79] International Law Association, Final report on accountability of international organisations, *Report of the Seventy-first Conference held in Berlin, 16–21 August 2004*, pp. 164–234, at p. 215 (international organizations use negotiations to settle the "vast majority of contractual claims").

organization.[80] Some organizations also resort to direct negotiations and amicable dispute settlement in case of tort claims raised against them.[81]

B. Mediation and conciliation, including through ombuds institutions

32. Knowledge about the actual use of conciliation and mediation in the practice of international organizations is also limited.[82] This is a result of the inherently confidential nature of these forms of dispute settlement. In their responses to the questionnaire, international organizations report that mediation and/or conciliation are in use.[83]

33. Mediation through ombuds institutions plays an important part in the context of settling disputes with staff members, for example within the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Monetary Fund (IMF), the World Bank and the World Intellectual Property Organization (WIPO), often reducing the need to use the formal mechanisms of administrative tribunals.[84] Mediation seems to have been particularly useful in case of disputes with non-staff members where resort to the formal mechanisms of administrative tribunals is not available.[85] The Office of the United Nations Ombudsman and Mediation

[80] A/CN.4/764, chap. III, sect. B (3) (World Intellectual Property Organization (WIPO)) ("Negotiation is a useful informal dispute resolution tool in order for WIPO to reach settlement agreements with its staff members when they are in the interests of its good administration, which is assessed on a case-by-case basis.").

[81] *Ibid*., chap. III, sect. B (2) (World Health Organization) ("[Tort claims] would normally be handled by WHO insurance providers. In very few cases, WHO did not have adequate insurance in place and therefore resolved the matter amicably either directly with the victims or through the mediation of local authorities.")

[82] See, however, *Yearbook … 1985*, vol. II (Part One) (Addendum), document A/CN.4/L.383 and Add.1-3, p. 208 ("WHO has on two occasions settled, by conciliation, disputes that had arisen between it and firms carrying out UNDP-supported projects. The settlements were satisfactory to both parties.").

[83] A/CN.4/764, chap. III, sect. B (2) (United Nations Office for Project Services) ("Personnel disputes between UNOPS and personnel retained under United Nations staff contracts are resolved through the United Nations' internal justice system. This includes … informal dispute resolution processes such as negotiation and mediation through the Office of the United Nations Ombudsman."); chap. III, sect. B (2) (World Health Organization) ("[Tort claims] would normally be handled by WHO insurance providers. In very few cases, WHO did not have adequate insurance in place and therefore resolved the matter amicably either directly with the victims or through the mediation of local authorities."); chap. III, sect. B (2) (World Trade Organization) ("The methods that have been used include … mediation, conciliation, … and judicial/legal settlement (with private parties, in matters concerning contractors, staff members, and consultants)."); chap. III, sect. B (3) (Organization of African, Caribbean and Pacific States) ("Alternative dispute resolution is the most important dispute settlement mechanism for OACPS, i.e., negotiation by way of conciliation, mediation"); chap. III, sect. B (4) (Eurasian Group on Combating Money Laundering and Financing of Terrorism) ("EAG supposes that for the interest of the international organization's reputation the most preferable types of dispute settlements are negotiation, mediation, and conciliation.").

[84] General Assembly, Report of the Joint Inspection Unit for 2015 and programme of work for 2016, A/70/34, paras. 16 *et seq*.; Joint Inspection Unit, Review of the organizational ombudsman services across the United Nations system, JIU/REP/2015/6, at iii; A/CN.4/764, chap. III, sect. B (2) (United Nations Office for Project Services) (stating that staff disputes are resolved through formal mechanisms or "informal dispute resolution processes such as negotiation and mediation through the Office of the United Nations Ombudsman."); chap. III, sect. B (2) (World Health Organization) ("Staff members may use mediation to resolve a work-related concern, including a final administrative decision, which the staff member concerned considers to be in non-observance of the terms of his/her appointment."); chap. III, sect. B (2) (World Intellectual Property Organization) ("However, staff members are strongly encouraged to try to resolve workplace disputes through informal channels. This includes mediation by the WIPO Ombudsperson").

[85] A/CN.4/764, chap. III, sect. B (4) (United Nations Office of Legal Affairs) ("Disputes involving non-staff personnel have also been successfully resolved by mediation with the involvement of the Office of the United Nations Ombudsman and Mediation Services."); chap. III, sect. B (2) (United Nations Office for Project Services (UNOPS)) ("Personnel disputes between UNOPS and personnel

Services is such an ombuds institution concerning employment disputes, set up in 2002 by the Secretary-General based on a resolution of the General Assembly.[86] In 2007, the General Assembly decided to merge the Office of the United Nations Ombudsman and Mediation Services with all the ombuds institutions of the United Nations funds and programmes.[87]

34. Ombuds institutions have also been used in the context of targeted sanctions. In 2009, the Security Council of the United Nations created an Office of the Ombudsperson to what was then the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities (known as the Al-Qaida and Taliban Sanctions Committee).[88] This was a reaction to concerns about the lack of due process and access to justice for individuals affected by the Security Council's far-reaching targeted sanctions, such as asset freezes and travel bans. Most prominently, in 2008 the European Court of Justice, in *Kadi v. Council and Commission*, annulled the European Union regulation that implemented the relevant Security Council resolutions because it violated, among others, the principle of effective judicial protection under European Union law.[89] As a result, the Security Council established the above-mentioned Office of the Ombudsperson. Private parties can apply to be delisted and the Ombudsperson can recommend such delisting to the Security Council Committee.[90] Since 2009, the Security Council has extended the Ombudsperson's mandate at irregular intervals, most recently in 2024.[91] It is noteworthy, nevertheless, that this Ombudsperson is competent to deal only with ISIL (Da'esh) and Al-Qaida sanctions and not with comparable targeted sanctions imposed by the Security Council.

35. Ombuds institutions have also been employed in the context of United Nations peacekeeping missions.[92] The United Nations Interim Administration Mission in Kosovo (UNMIK) created an Ombudsperson Institution with a particularly broad mandate to address human rights concerns and private complaints.[93] Its responsibilities included advising on human rights standards, investigating complaints, monitoring activities, promoting

retained under Individual Contractor Agreements are resolved through *ad hoc* arbitration under the UNCITRAL Arbitration Rules or mediation through the Office of the Ombudsman for United Nations Funds and Programmes"). See also General Conditions of Contracts for the Services of Consultants and Individual Contractors, contained in Administrative instruction: Consultants and individual contractors, ST/AI/2013/4/Rev.1, annex II, sect. 16 ("Amicable settlement. The United Nations and the contractor shall use their best efforts to amicably settle any dispute, controversy or claim arising out of the contract or the breach, termination or invalidity thereof. Where the parties wish to seek such an amicable settlement through conciliation, the conciliation shall take place in accordance with the Conciliation Rules then obtaining of the United Nations Commission on International Trade Law (UNCITRAL), or according to such other procedure as may be agreed between the parties in writing.").

86 Secretary-General's Bulletin, Office of the Ombudsman — appointment and terms of reference of the Ombudsman, ST/SGB/2002/12; the document currently in force is Secretary-General's Bulletin, Terms of reference for the Office of the United Nations Ombudsman and Mediation Services, ST/SGB/2016/7.

87 General Assembly resolution 62/228 of 22 December 2007, paras. 25–32; Linda C. Reif, *Ombuds Institutions, Good Governance and the International Human Rights System*, 2nd rev. ed. (Leiden, Brill Nijhoff, 2020), p. 98.

88 Security Council resolution 1904 of 17 December (2009), para. 20. See also Andrej Lang, "Alternatives to adjudication in international law: a case-study of the Ombudsperson to the ISIL and Al-Qaida sanctions regime of the UN Security Council", *American Journal of International Law*, vol. 117 (2023), pp. 48–91.

89 European Court of Justice, Grand Chamber, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P, Judgment, 3 September 2008, paras. 331–372.

90 Gavin Sullivan and Marieke de Goede, "Between law and the exception: the UN 1267 Ombudsperson as a hybrid model of legal expertise", *Leiden Journal of International Law*, vol. 26 (2013), pp. 833–854, at pp. 840 and 841.

91 Security Council resolution 2734 of 10 June (2024), para. 66.

92 See, in general, Christine M. Chinkin, "United Nations accountability for violations of international human rights law", in *Collected Courses of the Hague Academy of International Law*, vol. 395 (2019), pp. 199–319.

93 UNMIK, Regulation No. 2000/38 on the establishment of the Ombudsperson Institution in Kosovo, UNMIK/REG/2000/38, 30 June 2000. See also Reif, *Ombuds Institutions*, p. 206, footnote 288.

conciliation and making recommendations to the Special Representative of the Secretary-General. Between 2000 and 2006, the Ombudsperson received 2,086 complaints, but resolved only 604 cases. Of the remaining complaints, 780 were dismissed due to insufficient evidence, withdrawal by the parties involved or lack of jurisdiction. This low rate of dispute resolution – just under 30 per cent – underscores the significant challenges faced by the Ombudsperson. These challenges included limited cooperation from UNMIK, inadequate resources and bureaucratic inefficiencies. Moreover, the Ombudsperson operated in a highly complex environment characterized by ongoing tensions, a weak legal framework and the reluctance of certain stakeholders to engage with the process, all of which hindered its ability to achieve effective outcomes.[94] In 2006, UNMIK remodelled the Ombudsperson Institution and integrated it into the local government to provide oversight over "Kosovo Institutions".[95] In order to provide for continuing oversight of UNMIK itself, it established a Human Rights Advisory Panel.[96]

36. The European Ombudsman is an institution of the European Union created by the Treaty of Maastricht in 1993.[97] Its mandate is to monitor and address instances of "maladministration" within the European institutions.[98] After the 2007 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community integrated the Common Foreign and Security Policy into the European Union's supranational structure, the Ombudsman gained jurisdiction over oversight for administrative issues in Common Security and Defence Policy missions, and may address complaints about maladministration, delays or lack of transparency through non-binding recommendations.[99] However, access is limited primarily to European Union citizens or residents, with merely indirect and informal methods available for non-European Union residents, such as representation by citizens of the European Union and own-initiative inquiries based on complaints that fall outside the Ombudsman's formal jurisdiction.[100]

37. In collaboration with mediation institutions worldwide, the Office of the United Nations High Commissioner for Human Rights and the International Ombudsman Institute, the European Commission for Democracy through Law (Venice Commission) codified the Principles on the Protection and Promotion of the Ombudsman Institution, known as the "Venice Principles" in 2019.[101] By upholding democracy, the rule of law, good governance and human rights, the Venice Principles have become a widely recognized framework, guiding ombudsmen across international organizations, including within the United Nations system, where many ombuds institutions adhere to and promote these standards.[102]

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[94] See comments by Marek Nowicki in Nicolas Lemay-Hébert, "State-building from the outside-in: UNMIK and its paradox", *Journal of Public and International Affairs*, vol. 20 (2009), pp. 65–86, at pp. 76 and 77; Rebecca Everly, "Reviewing governmental acts of the United Nations in Kosovo", *German Law Journal*, vol. 8 (2007), pp. 21–37; Jonas Nilsson, "UNMIK and the Ombudsperson Institution in Kosovo: human rights protection in a United Nations 'surrogate State'", *Netherlands Quarterly of Human Rights*, vol. 22 (2004), pp. 389 *et seq*.

[95] Sects. 1.2. and 1.3, UNMIK, Regulation No. 2006/6 on the Ombudsperson Institution in Kosovo, UNMIK/REG/2006/6, 16 February 2006; Christopher P. M. Waters, "Nationalising Kosovo's Ombudsperson", *Journal of Conflict & Security Law*, vol. 12 (2007), pp. 139–148.

[96] See para. 61 below.

[97] Art. 228, Consolidated version of the Treaty on the functioning of the European Union, *Official Journal of the European Union*, C 202, 7 June 2016, p. 47, at p. 150; European Ombudsman, "Strategy for the mandate", European Union, 2010, p. 6.

[98] Reif, *Ombuds Institutions*, pp. 481 and 482.

[99] Johansen, *The Human Rights Accountability Mechanisms of International Organizations*, at pp. 144 *et seq*.

[100] *Ibid.*, at p. 146.

[101] European Commission for Democracy through Law (Venice Commission), Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), CDL-AD(2019)005; Luka Glušac, "A critical appraisal of the Venice Principles on the Protection and Promotion of the Ombudsman: an equivalent to the Paris Principles?", *Human Rights Law Review*, vol. 21 (March 2021), pp. 22–53.

[102] "The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law", General Assembly resolution 75/186 of 16 December 2020.

C. Enquiry or fact-finding

38. Where factual questions are in dispute, fact-finding or enquiry, often performed through *ad hoc* commissions, may also be an available means of dispute settlement addressing claims of private parties.

39. In the case of disputes between international organizations and States, as in the case of inter-State disputes, fact-finding or enquiry will usually be mutually agreed upon. In the case of disputes between international organizations and private parties, this will occur less often. Rather, it is more likely that fact-finding or enquiry will be an internal response of international organizations to claims being raised against them. Such internal enquiries may then serve to assess these claims through other forms of dispute settlement.

40. Fact-finding has been particularly used in the context of harm caused in the course of peacekeeping operations and/or administration of territory by the United Nations, where private parties often do not have any adjudicatory dispute settlement options available to them. Examples are the internal reports concerning United Nations (in)action in face of the genocides in Rwanda and Srebrenica[103] and the repeated investigations concerning sexual abuse by peacekeeping forces.[104] Sometimes, fact-finding missions operate simultaneously, for example where both the United Nations Office of Internal Oversight Services (OIOS) and an external inquiry is involved.[105] States may also conduct their own inquiries in parallel, such as the investigation conducted by France into its role and United Nations actors' involvement in the Rwandan genocide.[106] In 2011, the Secretary-General of the United Nations established an independent panel of experts to investigate the cholera outbreak in Haiti, as evidence suggested a link to improper sanitation practices at a United Nations peacekeeping camp. The panel confirmed the cholera strain matched one from Nepal, the region where the peacekeepers originated, but stopped short of assigning direct blame.[107] Subsequent reports by independent researchers and organizations reinforced the connection

[103] Letter dated 15 December 1999 from the Secretary-General addressed to the President of the Security Council, Security Council (S/1999/1257), to which the "Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda" is annexed; General Assembly, "Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica", A/54/549.

[104] Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly (A/59/710), containing the report entitled "A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations"; General Assembly, "Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo", A/59/661; General Assembly, "Evaluation of the prevention, response and victim support efforts against sexual exploitation and abuse by United Nations Secretariat staff and related personnel: report of the Office of Internal Oversight Services", A/75/820; General Assembly, "Review of the reporting by United Nations peacekeeping missions on the protection of civilians: report of the Office of Internal Oversight Services", A/67/795.

[105] A/59/661; Marie Deschamps et al., *Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic*, 17 December 2015, available at https://reliefweb.int/report/central-african-republic/taking-action-sexual-exploitation-and-abuse-peacekeepers-report (accessed on 11 February 2025).

[106] Assemblée Nationale, « Rapport d'information sur le Rwanda, déposé en application de l'article 145 du Règlement, enregistré à la Présidence de l'Assemblée nationale le 15 December 1998 », available at https://www.assemblee-nationale.fr/dossiers/rwanda/r1271.asp (accessed on 11 February 2025).

[107] Alejandro Cravioto et al., "Final report of the independent panel of experts on the cholera outbreak in Haiti", 4 May 2011, available at https://reliefweb.int/report/haiti/final-report-independent-panel-experts-cholera-outbreak-haiti (accessed on 11 February 2025), at p. 28.

between United Nations peacekeepers and the outbreak.[108] Beyond this investigation, fact-finding missions in Haiti also addressed other human rights violations.[109]

41. While not providing direct access for private parties, the outcome of such fact-finding and enquiries may feed into the formulation of claims against the organizations, as can be seen in the ensuing litigation concerning Srebrenica[110] and Haiti.[111] Fact-finding missions will, only exceptionally, lead directly to compensation without additional steps. That was the case with the Board of Inquiry convened by the Secretary-General in 2009, which resulted in Israel paying $10.5 million for damages to United Nations facilities and injuries to staff in the Gaza Strip.[112]

42. The United Nations also uses internal boards of inquiry to review claims by United Nations personnel, Member States and third parties against the Organization.[113] Although they are confidential, the Secretary-General regularly decides to release summaries of the boards' reports.[114] Boards of inquiry are internal fact-finding mechanisms in United Nations peacekeeping and special political missions, tasked with reviewing incidents, identifying procedural gaps and recommending corrective actions. While not investigative or judicial bodies, they undertake reviews to enhance accountability and internal controls and their findings often inform systemic improvements and may support administrative actions, although they do not determine compensation, legal liability or disciplinary measures.[115] Boards of inquiry seldom manage to conclude their work within the envisaged 90 days.[116]

43. A board of inquiry report also serves as a basis for follow-up actions or further investigations, including those conducted by the Office for the Peacekeeping Strategic Partnership. That Office was established to support peacekeeping operations by identifying systemic issues affecting troop- and police-contributing countries. Through independent evaluations, field visits and data analysis, it assesses operational issues and recommends improvements to enhance efficiency and personnel welfare in peace operations.[117]

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[108] Ira Kurzban et al., "UN accountability for Haiti's cholera epidemic", *AJIL Unbound*, vol. 108 (2014), pp. 17–21; Transnational Development Clinic (Yale Law School), Global Health Justice Partnership (Yale Law School and Yale School of Public Health) and Association Haitïenne de Droit de l'Environnement, *Peacekeeping without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic* (2013), at pp. 2 and 13.

[109] Bri Kouri Nouvèl Gaye et al., "Haiti's renewal of MINUSTAH's mandate in violation of the human rights of the Haitian people", submission to the United Nations Human Rights Council, twelfth session of the Working Group on the Universal Periodic Review, 3–13 October 2011, available at https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/session12/HT/JS8-JointSubmission8-eng.pdf, paras. 16 and 33.

[110] See para. 160 below.

[111] See para. 167 below.

[112] Letter dated 4 May 2009 from the Secretary-General addressed to the President of the Security Council, General Assembly and Security Council (A/63/855-S/2009/250), containing the "Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009".

[113] Namie di Razza, *The Accountability System for the Protection of Civilians in UN Peacekeeping* (International Peace Institute, December 2000), pp. 1–9.

[114] See, e.g., Letter dated 21 December 2016 from the Secretary-General addressed to the President of the Security Council, Security Council (S/2016/1093), to which the "Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into the incident involving a relief operation to Urum al-Kubra, Syrian Arab Republic, on 19 September 2016" is annexed.

[115] Di Razza, *The Accountability System for the Protection of Civilians in UN Peacekeeping*; Department of Operational Support, "Standard Operating Procedure: Boards of Inquiry", DOS/2024.12 (1 December 2024).

[116] OIOS, "Inspection of boards of inquiry in peacekeeping operations", IED-20-002 (2 June 2020), available at https://oios.un.org/file/8543/download?token=K-vLnzAv#:~:text=The%20OIOS%20inspection%20focused%20on,and%20loss%2Ftheft%20of%20equipment (accessed on 11 March 2025), p. 17.

[117] General Assembly resolution 67/287 of 28 June 2013, paras. 25–33; International Peace Institute, "Accountability system for the protection of civilians: Office for Peacekeeping Strategic Partnership" (December 2000), available at https://www.ipinst.org/wp-content/uploads/2020/12/OPSP-Factsheet.pdf, p. 1.

44. Between 2010 and 2018, OIOS assessed the effectiveness of board of inquiry activities across six peacekeeping missions – the African Union-United Nations Hybrid Operation in Darfur, the United Nations Multidimensional Integrated Stabilization Mission in Mali, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, the United Nations Mission in South Sudan, the United Nations Interim Force in Lebanon and the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic – demonstrating how internal accountability mechanisms can scrutinize one another.[118]

45. Besides the United Nations, other international organizations also conduct investigations into their peace operations. For example, the African Union conducts fact-finding missions to investigate misconduct, ensure compliance with international laws and uphold discipline among mission personnel. The African Union Policy on Conduct and Discipline for Peace Support Operations establishes boards of inquiry as a non-judicial mechanism to investigate allegations, particularly those related to violations of human rights, sexual exploitation and abuse, corruption and financial mismanagement.[119]

46. Within the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the Investigations Division of the Department of Internal Oversight Services is tasked with investigating allegations of misconduct.[120] It establishes facts related to reports of possible misconduct to guide the Commissioner-General on appropriate accountability action to be taken. In the light of the allegations made by Israel concerning the involvement of UNRWA staff in the terror attacks on Israel in October 2023, the United Nations Secretary-General, in consultation with the UNRWA Commissioner-General, established the United Nations Independent Review Group on UNRWA in February 2024 to evaluate the work of UNRWA.[121] In addition, the Secretary-General initiated a separate investigation by OIOS to verify the allegations.[122]

47. The Uniform Principles and Guidelines for Investigations, endorsed by the Conference of International Investigators of international organizations, establish best practices for conducting transparent, fair and consistent investigations into fraud, misconduct and other violations within international organizations.[123] These Uniform Principles and Guidelines serve as non-binding guidance for conducting investigations, ensuring due process, confidentiality and integrity in investigative procedures, as well as alignment with each organization's regulations, policies and legal frameworks, while respecting their privileges and immunities under international and domestic law.[124]

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[118] OIOS, "Inspection of boards of inquiry in peacekeeping operations", IED-20-002 (2 June 2020), p. 7.

[119] African Union Policy on Conduct and Discipline for Peace Support Operations, available at https://www.peaceau.org/uploads/english-final-au-policy-for-conduct-discipline-in-pso.pdf (accessed on 11 February 2025), p. 3.

[120] UNRWA, Department of Internal Oversight Services, "Guide to conducting investigations", DIOS/ID/2021/ID1 (10 May 2021).

[121] Independent Review Group of UNRWA, "Final report for the United Nations Secretary-General: independent review of mechanisms and procedures to ensure adherence by UNRWA to the humanitarian principle of neutrality, 20 April 2024, available at https://www.un.org/unispal/wp-content/uploads/2024/04/unrwa_independent_review_on_neutrality.pdf (accessed on 11 February 2025).

[122] Secretary-General, "Note to correspondents – on the UN Office of Internal Oversight Services (OIOS) investigation of the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)", 5 August 2024, available at https://www.un.org/sg/en/content/sg/note-correspondents/2024-08-05/note-correspondents-—-the-un-office-of-internal-oversight-services-%28oios%29-investigation-of-the-un-relief-and-works-agency-for-palestine-refugees-the-near-east (accessed on 11 February 2025).

[123] See the list of international organizations which are members, available at https://www.ciinvestigators.org/participating-organisations/ (accessed on 11 February 2025).

[124] Conference of International Investigators, Uniform Principles and Guidelines for Investigations, 2nd ed. (2009), available at https://www.ciinvestigators.org/wp-content/uploads/2021/11/CII-Uniform-Principles-and-Guidelines-for-Investigations_2ed.pdf (accessed on 11 February 2025).

D. Inspection panels, compliance institutions and other accountability mechanisms

48. Although not vested with genuine adjudicatory powers, a number of accountability mechanisms have combined fact-finding tasks with assessments of whether international organizations have complied with their internal policies.

49. This development started with the World Bank Inspection Panel, established by resolutions of the Executive Directors of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) in 1993.[125] The Panel has the power to investigate complaints against the Bank made by a group of persons significantly and adversely affected by disregarding World Bank/IDA policies and procedures during World Bank-financed projects. In 2020, the Panel was integrated into the World Bank Accountability Mechanism.[126] The Mechanism now consists of two divisions, the Inspection Panel and the Dispute Resolution Service. Persons affected and borrowers may decide on the means that they wish to utilize to settle a dispute. Parties may resort to consultative dialogue, information-sharing, joint fact-finding, mediation, conciliation and other approaches. The dispute resolution process precedes the investigation that will be conducted by the Inspection Panel.[127] Only if parties do not come to an agreement or withdraw from the dispute settlement process may the Inspection Panel initiate an investigation.[128]

50. The Office of the Compliance Advisor Ombudsman of the International Finance Corporation and the Multilateral Investment Guarantee Agency is an accountability mechanism established both to receive complaints from communities and individuals negatively affected by projects advanced by either organization and to "enhance the environmental and social outcomes" of such projects.[129] Individuals or groups who believe they have been harmed by projects related to the International Finance Corporation or the Multilateral Investment Guarantee Agency may file a complaint.[130] Both organizations will consider, on a case-by-case basis and if invited to do so, whether to participate in the dispute resolution processes, which mainly concern complainants and clients or subclients.[131] Joint fact-finding is specifically cited as one of the dispute resolution approaches offered by the Compliance Advisor Ombudsman in its Policy, along with mediation, information-sharing and negotiation.[132] If the dispute is not resolved through any of these methods, or if one of the parties no longer wishes to continue with the process, the complaint can be transferred to

[125] "The World Bank Inspection Panel", Resolution No. IBRD 93-10 and Resolution No. IDA 93-6, 22 September 1993. See also Daniel D. Bradlow and Sabine Schlemmer-Schulte, "The World Bank's new Inspection Panel: a constructive step in the transformation of the international legal order", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 54 (1994), pp. 392–415; Alexander Orakhelashvili, "The World Bank Inspection Panel in context: institutional aspects of the accountability of international organizations", *International Organizations Law Review*, vol. 2 (2005), pp. 57–102.

[126] "The World Bank Accountability Mechanism", Resolution No. IBRD 2020-0005 and Resolution No. IDA 2020-0004, 8 September 2020. See also Edward Chukwuemeke Okeke, "Assessing the accountability mechanism of multilateral development banks against access to justice: the case of the World Bank", *King's Law Journal*, vol. 34 (2023), pp. 425–442.

[127] "The World Bank Inspection Panel", Resolution No. IBRD 2020-0004 and Resolution No. IDA 2020-0003, 8 September 2020.

[128] *Ibid.*, paras. 30–33.

[129] Sect. I, para. 2, IFC/MIGA Independent Accountability Mechanism (CAO) Policy, 28 June 2021. See also Benjamin M. Saper, "The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): an examination of accountability and effectiveness from a global administrative law perspective", *New York University Journal of International Law and Politics*, vol. 44 (2012), pp. 1279–1329; Linda C. Reif, "Compliance Advisor Ombudsman (CAO) of the International Finance Corporation and the Multilateral Investment Guarantee Agency", in Hélène Ruiz Fabri, ed., *The Max Planck Encyclopedia of International Procedural Law*, May 2020, available at www.mpepil.com/.

[130] Sect. VII, para. 30, IFC/MIGA Independent Accountability Mechanism (CAO) Policy.

[131] *Ibid*., sect. IX, paras. 63 and 75.

[132] *Ibid*., sect. IX, para. 65.

the Compliance Advisor Ombudsman,[133] which may conduct an investigation in line with its compliance function.[134]

51. Beyond the World Bank Group, the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank monitors compliance with environmental and social sustainability guidelines in the implementation of projects financed by the Bank and mediates disputes between parties who consider themselves adversely affected by those projects and the Bank's project partners.[135] The Independent Consultation and Investigation Mechanism is comprised of two stages, namely the consultation and the compliance review phases. Consultation methods "include but are not limited to: information gathering, joint fact-finding, facilitation, consultation, negotiation, and mediation".[136]

52. The Asian Development Bank first established its Inspection Function in 1995.[137] In 2003, that was transformed into its Accountability Mechanism, which took a two-pronged approach through the "Consultation Phase" and the "Compliance Review Phase".[138] Consultative dialogue, good offices and mediation are the methods that are designed to serve as modes of dispute settlement in the context of the Bank's Accountability Mechanism.[139]

53. Established originally as its Inspection Function, the African Development Bank Group's accountability mechanism was transformed into the Independent Review Mechanism[140] and was subsequently renamed the Independent Recourse Mechanism.[141] It is entrusted with compliance review, problem-solving and advisory functions.[142] The Mechanism may utilize independent fact-finding, mediation, conciliation and dialogue facilitation.[143]

54. The European Bank for Reconstruction and Development has also established its Independent Project Accountability Mechanism to replace the previous Project Complaint Mechanism, which in turn had replaced the Independent Recourse Mechanism.[144] The two

[133] *Ibid*., sect. IX, paras. 70 and 71.

[134] *Ibid*., sect. X, para. 96.

[135] Jose Ignacio Sembler et al., *Evaluation of the Independent Consultation and Investigation Mechanism (MICI)* (Washington, D.C., Inter-American Development Bank, Office of Evaluation and Oversight, 2021), pp. 1–3.

[136] Inter-American Development Bank, Policy of the Independent Consultation and Investigation Mechanism, MI-47-8, 14 April 2021, para. 25.

[137] Asian Development Bank, *Accountability Mechanism Policy 2012* (2012), para. 1. See also Susan Park, "Assessing accountability in practice: the Asian Development Bank's accountability mechanism", *Global Policy*, vol. 6 (2015), pp. 455–465, at p. 457 *et seq*.

[138] Asian Development Bank, *Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism* (2003).

[139] *Ibid.*, appendix 7, "Suggested modes of response to complaints and the dispute settlement procedure", pp. 57 and 58.

[140] African Development Bank, Resolution B/BD/2010/10 – F/BD/2010/04 amending resolution B/BD/2004/9 – F/BD/2004/7 instituting the Independent Review Mechanism, 16 June 2010, available at https://www.afdb.org/sites/default/files/2019/09/11/irm_boards_resolution_16_june_2010_english.pdf.

[141] African Development Bank, "IRM history and background", available at https://irm.afdb.org/en/page/independent-recourse-mechanism-irm/irm-history-and-background.

[142] African Development Bank, "Independent Recourse Mechanism: operating rules and procedures", approved July 2021, available at https://www.afdb.org/sites/default/files/documents/compliance-reviews/irm_new_operating_rrules_procedures_-_july_2021.pdf. See also Susan Park, "The African Development Bank and the accountability policy norm: endogenous change, norm conformance, and the development finance regime complex", *Global Governance*, vol. 29 (2023), pp. 61–84.

[143] African Development Bank, "Independent Recourse Mechanism: operating rules and procedures".

[144] European Bank for Reconstruction and Development, "Project Accountability Policy", April 2019, sect. I (Purpose), available at https://www.ebrd.com/documents/occo/ipam-policy.pdf; European Bank for Reconstruction and Development, "Project Complaint Mechanism (PCM) rules of procedure", May 2014, available at https://www.ebrd.com/documents/occo/project-complaint-mechanism-pcm-rules-of-procedure.pdf; Fernando Loureiro Bastos, "Accountability mechanisms: European Bank for Reconstruction and Development", in Hélène Ruiz Fabri, ed., *The Max Planck Encyclopedia of International Procedural Law*, May 2020 available at www.mpepil.com/.

main functions of the mechanism are the problem-solving and the compliance functions.[145] In the light of the objectives of the problem-solving function, the Independent Project Accountability Mechanism is vested with the power to adopt, in consultation with the parties, the most appropriate approach, including facilitated dialogue, mediation, conciliation, information-sharing, joint fact-finding and supported negotiation.[146]

55. The European Investment Bank Group Complaints Mechanism consists of two different but connected procedures. One of them involves the Complaints Mechanism Division, which deals with internal procedures handled by the Bank, and the other involves the European Ombudsman, which handles external procedures.[147] The internal procedure is designed to include several phases, including investigation, mediation, reporting and consultation.[148] It is also vested with problem-solving and/or mediation functions[149] and, under a "collaborative resolution process", it may also facilitate information-sharing, dialogue/negotiation, joint fact-finding and formal mediation/conciliation.[150]

56. Similar bodies have been established by the Asian Infrastructure Investment Bank,[151] the Caribbean Development Bank[152] and other international financial institutions.

57. There are collaboration endeavours aimed at ensuring the independence of accountability mechanisms of international financial institutions and development banks. One such partnership is the Independent Accountability Mechanisms Network. In 2016, it created an informal secretariat function, [153] currently hosted by the World Bank Accountability Mechanism, in order to facilitate the cooperation of more than 20 independent accountability mechanisms.[154]

58. The United Nations Development Programme has also created a Stakeholder Response Mechanism, entrusted with, among other tasks, "a structured process of joint fact-finding, dialogue and/or negotiation".[155]

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[145] European Bank for Reconstruction and Development, "Project Accountability Policy", sect. III, para. 1 (Functions and Governance).

[146] *Ibid.*, sect. III, para. 2.4 (Problem Solving); European Bank for Reconstruction and Development, "Guidance on case handling under the EBRD Project Accountability Policy", April 2019, sect. III, para. 4 (Problem Solving), available at https://www.ebrd.com/documents/ipam/guidance-on-case-handling.pdf.

[147] European Investment Bank Group, "EIB Group Complaints Mechanism Policy", November 2018, p. 7, available at https://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf.

[148] *Ibid.*, p. 15.

[149] *Ibid.*, p. 14.

[150] *Ibid.*, p. 3; European Investment Bank Group, "EIB Group Complaints Mechanism Procedures", November 2018, available at https://www.eib.org/attachments/strategies/complaints_mechanism_procedures_en.pdf.

[151] Asian Infrastructure Investment Bank, "Decision on the Oversight Mechanism", 10 July 2019, available at https://www.aiib.org/en/about-aiib/governance/_common/_download/decision-on-the-oversight-mechanism-public.pdf.

[152] Caribbean Development Bank, "Projects Complaints Mechanism Policy", May 2015, available at https://www.caribank.org/sites/default/files/publication-resources/PCM-Policy-BdAppr18.6.15.pdf.

[153] World Bank, "Independent Accountability Mechanisms Network (IAMnet)", available at https://accountability.worldbank.org/en/iamnet (accessed on 12 February 2025).

[154] *Ibid.*; World Bank, "The Independent Accountability Mechanisms Network: criteria for participation and principles for cooperation", September 2016, available at https://thedocs.worldbank.org/en/doc/3043c724b44d475060e19be691c1a0ae-0490092016/original/IAMnet-Criteria-for-Participation-and-Principles-for-Cooperation-september-2016-ENGLISH.pdf (accessed on 12 February 2025). See also Suresh Nanwani, "Independent accountability mechanisms in further pursuit of accountability: directions, cooperation and engagement", in Owen McIntyre and Suresh Nanwani, eds., *The Practice of Independent Accountability Mechanisms (IAMs): Towards Good Governance in Development Finance* (Leiden, Brill Nijhoff, 2020), pp. 262–290.

[155] United Nations Development Programme, "Stakeholder Response Mechanism: overview and guidance" (New York, 2014), p. 20, available at https://www.undp.org/sites/g/files/zskgke326/files/publications/SRM%20Guidance%20Note%20r4.pdf.

59. Procurement by international organizations may also give rise to various grievances on the part of those taking part in the tender processes, usually private parties. Some international organizations have accountability/complaint mechanisms for unsuccessful bidders who take part in procurement procedures.[156] In the case of the United Nations, which channels most of its procurement through the United Nations Global Marketplace platform,[157] unsuccessful bidders in cases valued over $200,000 are allowed to request further information about their unsuccessful proposals.[158] Bidders who are not satisfied with the debriefing procedure are entitled to file a procurement challenge concerning "the technical and/or financial evaluation of their offer by the UN".[159] The Award Review Board[160] then makes a recommendation to the Under-Secretary-General for Management Strategy, Policy and Compliance who decides without further appeal.[161] If the challenge is considered to be justified, the unsuccessful bidder may be entitled to compensation of up to $50,000 for reasonable procedural costs, excluding legal costs. However, "the awarded contract will not be suspended but may be limited in duration in case it is a multi-year contract".[162] The United Nations Development Programme, the United Nations Office for Project Services, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund, the United Nations Industrial Development Organization and UNRWA also have mechanisms to challenge unsuccessful procurement bids.[163]

60. In the European Union, the so-called European Union institutions' own-account procurement is indirectly governed by the European Union Procurement Directives,[164] which regulate the public procurement of European Union member States.[165] While the so-called Remedies Directive[166] does not apply to the European Union institutions, unsuccessful bidders can resort to annulment proceedings, challenging the institutions' procurement

[156] Joint Inspection Unit of the United Nations system, Accountability frameworks in the United Nations system (JIU/REP/2011/5), para. 141; Joint Inspection Unit of the United Nations system, Procurement reforms in the United Nations system (JIU/NOTE/2011/1), paras. 195–200. See also Peter Neumann, *United Nations Procurement Regime: Description and Evaluation of the Legal Framework in the Light of International Standards and of Findings of an Inquiry into Procurement for the Iraq Oil-for-Food Programme* (Frankfurt am Main, Peter Lang, 2008); Elisabetta Morlino, *Procurement by International Organizations: A Global Administrative Law Perspective* (Cambridge, Cambridge University Press, 2019), pp. 96–203.

[157] See https://www.ungm.org/.

[158] Department of Operational Support, Office of Supply Chain Management, Procurement Division, United Nations Procurement Manual, DOS/2020.9/Amend 1, amended 30 June 2024, chap. 10.2, available at https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/pm.pdf.

[159] *Ibid.*, chap. 10.2.2.

[160] *Ibid.*, chap. 10.2.3.

[161] *Ibid.*

[162] *Ibid.*

[163] JIU/NOTE/2011/1, para. 195. See also UNOPS, *Procurement Manual, 1 July 2021, Revision 7* (2021), sect. 10.2.3.4, available at https://content.unops.org/service-Line-Documents/Procurement/UNOPS-Procurement-Manual-2021_EN.pdf; UNIDO, *Procurement Manual* (March 2022), sects. 12.2.5 and 12.2.6, available at https://www.unido.org/sites/default/files/files/2022-03/AI_2022_02_Procurement_Manual%20Copy.pdf.

[164] See, e.g., Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, *Official Journal of the European Union*, L 94, 28 March 2014; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *Official Journal of the European Union*, L 94, 28 March 2014, p. 65.

[165] Claire Methven O'Brien and Roberto Caranta, *Due Diligence in EU Institutions' Own-Account Procurement: Rules and Practices* (Brussels, European Parliament, 2024).

[166] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, *Official Journal of the European Union*, L 395, 30 December 1989.

decisions,[167] which, in practice, have been successful only for failure to state reasons.[168] In addition, the financial rules for the European Union institutions provide for information disclosure to unsuccessful tenderers and standstill periods.[169]

61. During the United Nations Interim Administration Mission in Kosovo, the UNMIK Human Rights Advisory Panel was established under Regulation No. 2006/12 to provide for oversight after the reorganized Ombudsperson Institution lost its mandate over the mission.[170] The Advisory Panel was tasked with "[examining] complaints from any person or group of individuals claiming to be the victim of a [human rights] violation by UNMIK".[171] It was to issue findings regarding the existence of human rights breaches and, where necessary, make recommendations, both of which were to be submitted to the Special Representative of the Secretary-General.[172] The Special Representative had discretion to decide whether to act on the Advisory Panel's findings.[173] The Advisory Panel received approximately 530 complaints and issued around 335 opinions on the merits with a finding of human rights violations.[174] However, the impact of the Human Rights Advisory Panel on UNMIK administration seems to have been rather limited, with its members lamenting that UNMIK did not take "any meaningful action" in response to its recommendations.[175]

62. In addition, the Human Rights Review Panel of the European Union Rule of Law Mission in Kosovo was established in 2009 by the European Union to assess alleged human rights violations by the Mission in its executive functions.[176] Besides that Panel, the European Union has employed a number of additional, mission-specific accountability mechanisms for its Common Security and Defence Policy missions.[177] This includes the European Union naval force Operation Atalanta status-of-forces agreement claims procedures, which rely on status-of-forces agreements with Djibouti, Seychelles and Somalia.[178] However, the claims

[167] See, e.g., General Court of the European Union, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v. European Commission*, Case T-300/07 (Fifth Chamber), 9 September 2010; and *Alfastar Benelux v. Council of the European Union*, Case T-57/09 (Seventh Chamber), 20 October 2011. See also Roberto Caranta, "The liability of EU institutions for breach of procurement rules", *European Procurement & Public Private Partnership Law Review*, vol. 8 (2013), pp. 238–247.

[168] Morlino, *Procurement by International Organizations*, at p. 183.

[169] Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast), *Official Journal of the European Union*, L series, 26 September 2024.

[170] Eric de Brabandere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Leiden, Martinus Nijhoff, 2009), at p. 112.

[171] UNMIK, Regulation No. 2006/12 on the establishment of the Human Rights Advisory Panel (UNMIK/REG/2006/12), 23 March 2006, sect. 1.2.

[172] *Ibid.*, sect. 17.1.

[173] *Ibid*., sect. 17.3.

[174] Human Rights Advisory Panel, *The Human Rights Advisory Panel History and Legacy Kosovo, 2007–2016: Final Report*, 30 June 2016, p. 10, para. 23, and p. 83, para. 231, available at https://unmik.unmissions.org/sites/default/files/hrap_final_report_final_version_30_june_2016.pdf.

[175] *Ibid*., p. 17, para. 64 ("By far, the biggest limitation of the entire [Human Rights Advisory Panel] experience was the fact that UNMIK did not follow any of the Panel's recommendations. Despite the lengthy process of the Panel collecting information from the complainants and UNMIK, issuing admissibility decisions, opinions and recommendations, essentially nothing tangible came from this activity, as UNMIK failed to ever take any meaningful action in relation to the Panel's recommendations."); Reif, *Ombuds Institutions*, p. 109; Wolfgang Benedek, "Kosovo – UNMIK accountability: Human Rights Advisory Panel finds discrimination in privatization cases", *Austrian Law Journal*, vol. 2 (2015), pp. 277–284, at p. 284.

[176] Human Rights Review Panel, "European Union Rule of Law Mission, Kosovo, annual report 2022, 1 January to 31 December 2022", available at https://hrrp.eu/docs/HRRP%20Annual%20Report%202022%20-%20English.pdf; European Commission for Democracy through Law (Venice Commission), "Opinion on the existing mechanisms to review the compatibility with human rights standards of acts by UNMIK and EULEX in Kosovo", CDL-AD(2010)051, 21 December 2010.

[177] Johansen, *The Human Rights Accountability Mechanisms of International Organizations*, at pp. 119 *et seq*.

[178] *Ibid*., pp. 161 *et seq*.

must go through national authorities, limiting individual access, and key exemptions further restrict liability. In addition, geographic limitations exclude incidents on the high seas, and no claims have ever progressed beyond initial negotiations.[179]

63. In 2009, the International Criminal Court established its Independent Oversight Mechanism with the mandate to inspect, evaluate and investigate misconduct by officials of the Court, including staff at the Court's Detention Centre.[180] Operational since 2015, the Independent Oversight Mechanism conducts inspections, evaluations and investigations with a primary accountability function of handling complaints of staff misconduct rather than reviewing institutional policies. While detainees can submit complaints regarding mistreatment or procedural violations, the powers of the Independent Oversight Mechanism are limited as it can only investigate individual misconduct, its findings are non-binding, without compensation, and disciplinary action is left to the discretion of the relevant organ of the International Criminal Court, typically the Registrar.[181]

E. Claims commissions and review boards

64. When a number of private parties raise similar claims that may typically result from certain operational activities of international organizations, the latter may introduce standing bodies that process such claims in a quasi-adjudicatory manner. Some such boards or commissions display features of arbitration or adjudication, while others are more similar to internal administrative mechanisms.

65. A still theoretical example of a quasi-adjudicatory form of settling private claims against an international organization are the claims commissions envisaged for United Nations peacekeeping operations. Monetary claims raised by private parties against organizations are in fact rather frequent in this area. They typically comprise personal injury and death, destruction or damage to property, as well as claims for the non-consensual use of private property.[182] The primary method of settling such compensation claims should be a form of quasi-arbitration through "standing claims commissions" which are supposed to be established for each individual peacekeeping mission. According to the model status-of-forces agreement, one member of the commission is to be appointed by the Secretary-General, one by the host State and a chair is to be appointed jointly.[183] However, in practice no such standing claims commission has been set up for any peacekeeping operation.[184] While the United Nations refers to the problem in some contexts of identifying the host Government,[185] it has been suggested that the main reason for the lack of such claims commissions may be to enable the United Nations to keep control over the ensuing liabilities.[186]

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[179] *Ibid*., pp. 164 *et seq*.; Frederik Naert, "European Union Common Security and Defence Policy operations", in André Nollkaemper and Ilias Plakokefalos, eds., *The Practice of Shared Responsibility in International Law* (Cambridge, Cambridge University Press, 2017), pp. 669–700, at p. 689.

[180] "Operational mandate of the Independent Oversight Mechanism", ICC-ASP/12/Res.6, annex, para. 5.

[181] Johansen, *The Human Rights Accountability Mechanisms of International Organizations*, at pp. 273 *et seq*.

[182] Serpa Soares, "Responsibility of international organizations", p. 130.

[183] Report of the Secretary-General on model status-of-forces agreement for peacekeeping operations (A/45/594), para. 51.

[184] A/CN.4/764, chap. III, sect. B (9) (United Nations Office of Legal Affairs).

[185] Report of the Secretary-General on procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946 (A/C.5/49/65), at para. 17.

[186] See, e.g., in the context of the lump-sum agreement between the United Nations and Belgium concerning the United Nations Operation in the Congo, Jean J.A. Salmon, "Les accords Spaak-U Thant du 20 février 1965", *Annuaire français de droit international*, vol. 11 (1965), pp. 468–497, at p. 485 ("[I]l est évident que l'organisation n'avait rien à gagner d'une procédure publique qui aurait livré à une opinion parfois mal intentionnée des détails inopportuns sur des aspects certes inévitables mais néanmoins malheureux de l'activité de l'O.N.U. au Congo."). See also Transnational Development Clinic, Global Health Justice Partnership and Association Haitïenne de Droit de l'Environnement, *Peacekeeping without Accountability*, pp. 27–29, at p. 29 ("Rather than create a

66. Instead of standing claims commissions, so-called local claims review boards have been set up for each peacekeeping mission.[187] They cannot be considered independent, quasi-arbitral institutions since they are composed of United Nations staff members only and make unpublished recommendations to the Organization to settle compensation claims.[188] However, their task is clearly quasi-judicial, involving the assessment of compensation claims and the awarding of monetary compensation, albeit with marked temporal and financial limitations.[189]

67. The claims settlement system of the African Union concerning regional peace operations is based on the United Nations system.[190] For instance, the status-of-mission agreement for the African Union Mission in Somalia foresaw the establishment of a standing claims commission to address claims of a "private law character, not resulting from the operational necessity of [the African Union Mission in Somalia] to which [the African Union Mission in Somalia] or any member thereof is a party and over which the courts of Somalia do not have jurisdiction because of any provision of the [status-of-mission agreement]".[191] As is the case in the United Nations, no such claims commission seems to have been established in the African Union to date.[192]

68. The North Atlantic Treaty Organization (NATO) follows the principle of "the costs lie where they fall", which means that, in practice, each contributing State is liable for any damages caused by its personnel.[193] The "founding text of operational claims", namely the NATO Claims Policy for Designated Crisis Response Operations, is a non-binding document approved by the NATO Political Committee.[194] It foresees that troop-contributing nations and NATO operational headquarters should settle claims from third parties.[195] Claims procedures foreseen in agreements for specific operations are based on both the NATO Status-of-Forces Agreement and the Partnership for Peace Status-of-Forces Agreement,[196] neither of which foresee the creation of either a standing claims commission or a review board, but rather prescribe that claims be dealt with by the receiving State. Under these regimes, the host State will judicially address claims whenever they arise from acts performed under official duty.[197]

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claims commission as it is required to do, the U.N. instead relies on procedures in which the 'investigation, processing, and final adjudication of claims' is, in the Secretary-General's own words, '*entirely in the hands* of the Organization.').

187 Serpa Soares, "Responsibility of international organizations", pp. 131 *et seq.*; Ferstman, *International Organizations and the Fight for Accountability*, at p. 105.

188 International Law Association, Final report on accountability of international organisations, at p. 216 ("For each peacekeeping operation an internal local claims review board composed exclusively of staff members of the IO is established. The independence of these boards and the objectivity of their rulings, which are not made public, give rise to concern; this claims settlement procedure cannot be considered as an adequate alternative mechanism for the protection of private third party interests and rights.").

189 In 1998, the United Nations introduced a six-month time limit and a maximum compensation amount of $50,000, pursuant to General Assembly resolution 52/247 of 26 June 1998. See Serpa Soares, "Responsibility of international organizations", pp. 132 *et seq*.

190 Terry D. Gill et al., eds., *Leuven Manual on the International Law Applicable to Peace Operations* (Cambridge, Cambridge University Press, 2017), pp. 288–310, at p. 303.

191 Art. XXV, Status of Mission Agreement between the Transitional Federal Government of the Somali Republic and the African Union on the African Union Mission in Somalia, concluded 6 February 2007, available at https://amisom-au.org/wp-content/uploads/2011/09/Status-of-Mission-Agreement-on-AMISOM.pdf.

192 Gill, *Leuven Manual on the International Law Applicable to Peace Operations*, at p. 303.

193 Kirsten Schmalenbach, "Dispute settlement", in Klabbers and Wallendahl, *Research Handbook on the Law of International Organizations*, pp. 251–284, at p. 266.

194 Pierre Degazelle, "General principles of the NATO claims policy", *NATO Legal Gazette*, Issue 28 (July 2012), pp. 13–19, at p. 18.

195 *Ibid*.

196 The Partnership for Peace: Status-of-Forces Agreement incorporates the NATO Status-of-Forces Agreement by reference: Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces (19 June 1995).

197 Art. VIII, para. 5, Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces (London, 19 June 1951), United Nations, *Treaty Series*, vol. 199, No. 2678, p. 67.

Claims arising from acts performed outside of official duty are investigated by the host State and a recommendation is made to the sending State regarding compensation, which would be *ex gratia*.[198]

69. An interesting development in the direction of independent adjudication can be seen in the case of the Commission for the Control of INTERPOL's Files. The International Criminal Police Organization (INTERPOL) regularly processes and shares large amounts of sensitive personal data. In order to ensure that these activities comply with the organization's Constitution and its internal processing rules,[199] it set up a Supervisory Board in 1982, which in 2004 became the Commission for the Control of INTERPOL's Files.[200] In 2008, the INTERPOL General Assembly amended its Constitution to institute the Commission as an "independent body" and in 2016, it adopted a detailed Statute which regulates the Commission's powers and procedure and further strengthened its independence, impartiality and transparency.[201]

70. A similar development can be seen in the judicialization of the debarment procedure at the World Bank and other financial institutions. Since 1996, the World Bank has had in place an anti-corruption regime which includes procurement sanctions against firms which it finds to engage in corrupt practices and the cancellation or suspension of loans made out to States.[202] Since 2010, the five leading multilateral development banks have collectively enforced their sanctions regimes targeting corruption, fraud, coercion and collusion based on the Agreement for Mutual Enforcement of Debarment Decisions.[203] In implementing their procedures for debarment the organizations have, to varying degrees, undergone significant development towards increased rule of law principles, including independence, impartiality and transparency of decision-making.[204]

F. Diplomatic protection

71. Particularly in situations where numerous private parties have similar claims against international organizations stemming from their harmful activities, addressing these claims in a combined fashion may prove useful. Espousing such claims by the victims' home State exercising its right of diplomatic protection and their eventual settlement through lump-sum

198 *Ibid.*, art. VIII, para. 6.

199 See, for the versions currently in force, Constitution of the ICPO-INTERPOL, I/CONS/GA/1956 (2023); INTERPOL's Rules on the Processing of Data, III/IRPD/GA/2011 (2024).

200 Rutsel Silvestre J. Martha, "Challenging acts of INTERPOL in domestic courts", in August Reinisch, ed., *Challenging Acts of International Organizations Before National Courts* (Oxford, Oxford University Press, 2010), pp. 206–238, at p. 231; Cheah Wui Ling, "Policing Interpol: the Commission for the Control of Interpol's Files and the right to a remedy", *International Organizations Law Review*, vol. 7 (2010), pp. 375–404; INTERPOL, Rules on the Control of Information and Access to INTERPOL's Files, II.E/RCIA/GA/2004(2009).

201 Art. 36, Constitution of the ICPO-INTERPOL. See also Statute of the Commission for the Control of INTERPOL's Files, II.E/RCIA/GA/2016. See also Rutsel Silvestre J. Martha et al., *The Legal Foundations of INTERPOL*, 2nd ed. (Oxford, Hart Publishing, 2020), at pp. 182–185.

202 Jelena Madir, *Sanctions Regimes of Multilateral Development Banks: What Process is Due* (Leiden, Brill Nijhoff, 2021), pp. 19–29; Chen Yifeng, "International organizations and strategies of self-legitimization: the example of the World Bank anti-corruption sanctions regime", *Manchester Journal of International Economic Law*, vol. 13 (2016), pp. 314–333, at pp. 315–317.

203 This agreement includes the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group and the World Bank Group. Agreement for Mutual Enforcement of Debarment Decisions (9 April 2010), available at https://www.adb.org/documents/agreement-mutual-enforcement-debarment-decisions (accessed on 13 February 2025), at pp. 1 and 2; see also Edouard Fromageau, "Cross debarment", in Hélène Ruiz Fabri, ed., *The Max Planck Encyclopedia of International Procedural Law*, March 2016, available at www.mpepil.com/, paras. 2–4.

204 See Laurence Boisson de Chazournes and Edouard Fromageau, "Balancing the scales: the World Bank sanctions process and access to remedies", *European Journal of International Law*, vol. 23 (2012), pp. 963–989.

agreements is a traditional form of dispute settlement which may also be used with regard to the claims of private parties against international organizations.[205]

72. Early examples of successfully settled disputes are the consultations between the United Nations and Belgium concerning damage suffered by Belgian nationals as a result of harmful acts committed in the Congo by personnel of the United Nations Operation in the Congo, which led to a lump-sum payment and final settlement of claims.[206] Between 1965 and 1967, Belgium, Switzerland, Greece, Luxembourg and Italy successfully negotiated with the United Nations to secure compensation for their citizens affected by the United Nations Operation in the Congo.[207] Furthermore, the claims of the United Nations against Israel arising from the assassination of Count Bernadotte in 1948 were ultimately solved through direct negotiations, leading to an exchange of notes.[208]

73. Since States have traditionally taken on the role of seeking remedies for their citizens when they suffer harm or loss, relying on mechanisms such as diplomatic protection or espousal of claims has also been contemplated for settling the claims of the Haiti cholera victims. However, the Government of Haiti did not take action in that direction, which was attributed to its unstable governance and heavy reliance on international aid.[209]

74. All in all, it seems that espousal of claims against international organizations is not frequently employed.[210]

G. Arbitration

75. Arbitration is routinely envisaged for the settlement of disputes between international organizations and private parties, specifically for commercial disputes, but also for

[205] See Jean-Pierre Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, vol. 8 (1962), pp. 427 *et seq*.; Gerhard Thallinger, "The rule of exhaustion of local remedies in the context of the responsibility of international organisations", *Nordic Journal of International Law*, vol. 77 (2008), pp. 401–428; Kirsten Schmalenbach, "Dispute settlement (article VIII sections 29–30 General Convention)", in August Reinisch, ed., *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (Oxford, Oxford University Press, 2016), pp. 529–588, at p. 553.

[206] 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. See also A/CN.4/764, chap. III, sect. B (2) (United Nations Office of Legal Affairs).

[207] Exchange of letters constituting an agreement between the United Nations and Switzerland relating to the settlement of claims filed against the United Nations in the Congo by Swiss nationals (New York, 3 June 1966), United Nations, *Treaty Series*, vol. 564, No. 621, p. 193; exchange of letters constituting an agreement between the United Nations and Greece relating to the settlement of claims filed against the United Nations in the Congo by Greek nationals (New York, 20 June 1966), United Nations, *Treaty Series*, vol. 565, No. 8230, p. 3; exchange of letters constituting an agreement between the United Nations and Luxembourg relating to the settlement of claims filed against the United Nations in the Congo by Luxembourg nationals (New York, 28 December 1966), United Nations, *Treaty Series*, vol. 585, No. 8487, p. 147; exchange of letters constituting an agreement between the United Nations and Italy relating to the settlement of claims filed against the United Nations in the Congo by Italian nationals (New York, 18 January 1967), United Nations, *Treaty Series*, vol. 588, No. 8525, p. 197; Tom Dannenbaum, "Translating the standard of effective control into a system of effective accountability: how liability should be apportioned for violations of human rights by Member State troop contingents serving as United Nations peacekeepers", *Harvard International Law Journal*, vol. 51 (2010), pp. 113–192, at p. 127.

[208] Security Council, "Letter dated 14 June 1950 from the Minister for Foreign Affairs of the Government of Israel to the Secretary-General concerning a claim for damage caused to the United Nations by the assassination of Count Folke Bernadotte and a reply thereto from the Secretary-General" (S/1506).

[209] Mara Pillinger et al., "How to get away with cholera: the UN, Haiti, and international law", *Perspectives on Politics*, vol. 14 (2016), pp. 70–86, at p. 75.

[210] Karel Wellens, *Remedies against International Organizations* (Cambridge, Cambridge University Press, 2002), at p. 74; Ritter, "La protection diplomatique à l'égard d'une organisation internationale", at p. 427.

employment disputes.[211] Since arbitration is consent-based, it is usually agreed upon in commercial and other contracts entered into by international organizations and private parties, but it may also be agreed upon after a dispute has already arisen.[212]

76. Arbitration between international organizations and private parties is rarely genuinely *ad hoc*, with the entire process being established by the parties.[213] Rather, the parties usually choose institutional procedures that provide for existing arbitration rules and often imply the institutions administering the arbitrations.[214] Most such arbitrations seem to be conducted under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); some are also conducted pursuant to the American Arbitration Association Rules, the Arbitration Rules of the International Chamber of Commerce or, more recently, the Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties 1996,[215] as well as the consolidated version in the form of the Arbitration Rules 2012 of the Permanent Court of Arbitration.[216]

77. Since arbitration usually takes place in a confidential context, knowledge about arbitrations is often not in the public domain.[217] Nevertheless, at least partial details of some arbitrations have been disseminated through the publication of collections.[218] In addition, when domestic courts refuse to interfere with arbitral proceedings or accept that arbitral outcomes are enforceable in domestic legal orders, for example, under the recognition and enforcement regime of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[219] arbitral proceedings may come to light. Furthermore, the information obtained from international organizations in response to the Special Rapporteur's questionnaire has given an interesting insight into organizational practice concerning arbitration, which will be reflected in this subsection.

78. There is only limited public information available about arbitrations to which international organizations are parties. In addition, some organizations apparently try to avoid both adjudication and arbitration and prefer to settle their disputes with private parties through more informal methods. The United Nations, for instance, asserts that it only rarely

[211] See Panayotis Glavinis, *Les litiges relatifs aux contrats passés entre organisations internationales et personnes privées* (Paris, Librairie générale de droit et de jurisprudence, 1990); Stéphanie Bellier, "À propos de la clause arbitrale dans le règlement des différends de l'organisation internationale", *Annuaire français de droit international*, vol. 55 (2009), pp. 445–468; Stéphanie Bellier, *Le recours à l'arbitrage par les organisations internationales* (Paris, L'Harmattan, 2011); Rishi Gulati and Thomas John, "Arbitrating employment disputes involving international organizations", in Quayle, *The Role of International Administrative Law at International Organizations*, pp. 141–157; August Reinisch, "Arbitrating disputes with international organisations and some access to justice issues", *King's Law Journal*, vol. 34 (2023), pp. 546–561.

[212] A/CN.4/764, chap. III, sect. B (2) (United Nations Office of Legal Affairs) ("Failing [amicable settlement], the third-party [tort] claimant will be offered the option to submit the claim to arbitration in accordance with the UNCITRAL Arbitration Rules.").

[213] See Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 7th ed. (Oxford, Oxford University Press, 2022), paras. 1.09 and 1.10.

[214] Born, *International Commercial Arbitration*, at p. 189.

[215] Permanent Court of Arbitration, Optional Rules for Arbitration between International Organizations and Private Parties (1996).

[216] Permanent Court of Arbitration, Arbitration Rules 2012, available at https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/.

[217] A/CN.4/764, chap. III, sect. B (2) (United Nations Office of Legal Affairs) ("Due to confidentiality considerations and limitations, the United Nations is only able to provide generic information on case law.").

[218] See, e.g., the collections of International Chamber of Commerce arbitral awards, most recently Jean-Jacques Arnaldez et al., eds., *Collection of ICC Arbitral Awards 2016-2020* (Alphen aan den Rijn, Wolters Kluwer, 2022); and of International Council for Commercial Arbitration, ed., *Yearbook Commercial Arbitration*, most recently Stephan W. Schill, ed., *Yearbook Commercial Arbitration*, vol. XLIX (2024) (Alphen aan den Rijn, Wolters Kluwer, 2024).

[219] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.

engages in arbitration.[220] While precise figures are difficult to obtain, a recent account by the United Nations Legal Counsel provides an interesting overview regarding commercial arbitration involving the United Nations. He indicated that between the late 1990s and the late 2010s, about 40 arbitrations were initiated against the United Nations by commercial suppliers; only about a quarter led to an arbitral award, while the rest were settled. Most of the arbitrations were related to supply and construction contracts supporting peacekeeping operations.[221]

79. The response of the United Nations to the Special Rapporteur's questionnaire is particularly illustrative in regard to the scope of different types of disputes that have been submitted to arbitration:

> In general, arbitration proceedings have been initiated against the Organization by commercial vendors providing goods or services in support of United Nations peace operations, as a result of disputes arising from the following types of contracts: leases, air charter, transportation by land or sea, delivery of ground and aviation fuel and food rations and related logistics support services, and construction projects. The disputed issues have mainly related to contract performance, interpretation and termination. A few arbitrations have arisen from challenges to the Organization's decisions in public tenders, one involved a claim in tort (damage to property) and defamation and there have been some others initiated by United Nations Volunteers contesting disciplinary sanctions or seeking damages for service-incurred injury. Depending on their complexity, the disputed amounts and issues, the disputes have been adjudicated either by three-member tribunals or by sole arbitrators.[222]

80. Other United Nations bodies appear to have been equally reluctant to engage in arbitration,[223] whereas the United Nations Office for Project Services seems to routinely resort to arbitration to settle commercial disputes.[224] The United Nations specialized agencies have reported a few instances of arbitral proceedings.[225] Other international organizations have equally reported that their experience with arbitration has been limited.[226]

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[220] *Yearbook … 1985*, vol. II (Part One) (Addendum), document A/CN.4/L.383 and Add.1-3, p. 157 ("The United Nations has had recourse to arbitral proceedings in only a limited number of cases."). See also Legal opinions of the Secretariat of the United Nations, Determination of the applicable law to contracts concluded between the United Nations and private parties – "service contracts" and "functional contracts" – UNCITRAL Arbitral Rules (see footnote 70 above), at p. 286 ("The experience of the Organization is derived, essentially, from negotiations with contractors and in the course of settlement of contract claims through the internal mechanism evolved by this Office for negotiated settlement of claims and, only occasionally, arbitration."). The Secretariat also asserted in 1988, in a note to that determination, that "[i]n the last 10 years, this Office has been involved in only two commercial arbitrations". *Ibid.*, at p. 359, endnote 5.

[221] Serpa Soares, "Responsibility of international organizations", p. 141.

[222] A/CN.4/764, chap. III, sect. B (2) (United Nations Office of Legal Affairs).

[223] *Ibid*., chap. III, sect. B (2) (United Nations Development Programme (UNDP)) ("The objective is to avoid arbitration …. Over the last 15 years, UNDP has been involved in only four arbitrations, all of which involved vendors.").

[224] *Ibid*., chap. III, sect. B (2) (United Nations Office for Project Services (UNOPS)) ("Commercial disputes between UNOPS and private parties or government entities are usually resolved through negotiation or *ad hoc* arbitration in accordance with the UNCITRAL Arbitration Rules. The vast majority of commercial disputes involve private parties contracted by UNOPS to procure goods and/or services, including works, as part of UNOPS projects. In most of these cases, private parties have brought claims against UNOPS to claim damages arising from alleged breaches of contract. There have also been cases where UNOPS has a claim or counterclaim against private parties.").

[225] *Ibid*., chap. III, sect. B (2) (World Health Organization).

[226] See, e.g., A/CN.4/764, chap. III, sect. B (3) (Common Fund for Commodities) ("CFC always tries to negotiate any issues with counterparties (which are private parties) and has not (yet) resorted [to] arbitration or settlement of any disputes through the courts."); chap. III, sect. B (3) (Organisation for the Prohibition of Chemical Weapons (OPCW)) ("For disputes arising from contracts pertaining to the purchase of goods and/or services, the relevant General Terms and Conditions for Goods and for Services contain dispute settlement clauses which refer to conciliation in accordance with the Conciliation Rules of UNCITRAL, and arbitration pursuant to the UNCITRAL Arbitration Rules.

81. Based on the Special Rapporteur's research, the following types of disputes have been resolved by arbitration in practice.

1. Commercial disputes

82. Already the League of Nations was involved in arbitration with private parties. In the 1930s, the League of Nations entered into arbitration proceedings with a private consortium that it had commissioned to construct the Palais des Nations. The award rendered by the tribunal in that matter in 1938 is not published.[227] However, the construction of the Palais was plagued by multiple difficulties[228] and it stands to reason that the arbitration was connected to them.

83. The United Nations and most of the specialized agencies provide for arbitration in their standard terms concerning commercial contracts.[229] In some contract clauses, the United Nations provides for *ad hoc* arbitration, merely providing for an appointing authority.[230] In most cases, however, institutional arbitration appears to be provided for. The standard arbitration clause used by the United Nations in "commercial contracts and purchase orders as well as lease agreements" to be performed outside the United States of America provides for UNCITRAL arbitration.[231] Previously, United Nations contracts also provided for International Chamber of Commerce arbitration,[232] for contracts performed in the United States for arbitration under the American Arbitration Association Rules[233] and for those in Latin America for the rules of the Inter-American Arbitration Association.[234] Apparently, the

Similar mechanisms are in place to address potential disputes which may arise from OPCW procurement activities", adding in a footnote that "[t]o date, no such dispute has yet arisen.").

227 *Société des Nations c. L'Entreprise du Palais de Nations (EPN)*, unpublished arbitral decision, 25 July 1938, cited in Bellier, *Le recours à l'arbitrage par les organisations internationales*, p. 21, footnote 4.

228 Pierre-Etienne Bourneuf, *Genéve, Berceau de la Société des Nations* (United Nations publication, 2022), pp. 53–57.

229 United Nations Procurement Division, General Conditions of Contract: Contracts for the Provision of Goods, para 16.2, available at https://www.un.org/Depts/ptd/about-us/conditions-contract. See also A/C.5/49/65, para. 3.

230 *Yearbook … 1985*, vol. II (Part One) (Addendum), document A/CN.4/L.383 and Add.1-3, at p. 157 ("Any dispute arising out of or in connection with this contract shall, if attempts at settlement by negotiation have failed, be submitted to arbitration in New York by a single arbitrator agreed to by both parties. Should the parties be unable to agree on a single arbitrator within 30 days of the request for arbitration, then each party shall proceed to appoint one arbitrator and the two arbitrators thus appointed shall agree on a third. Failing such agreement, either party may request the appointment of a third arbitrator by the President of the United Nations Administrative Tribunal. The arbitrator shall rule on the costs which may be divided between the parties. The decision rendered in the arbitration shall constitute the final adjudication of the dispute.").

231 A/C.5/49/65, para. 5 (b) ("Any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or invalidity thereof, shall, unless it is settled amicably by direct negotiation, be settled by arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining. Such arbitration shall be conducted under the auspices of the International Chamber of Commerce (ICC) which shall also serve as the Appointing Authority under the Rules. The Parties agree to be bound by the arbitration award rendered in accordance with such arbitration, as the final adjudication of any such dispute, controversy or claim.").

232 *Ibid.*, at p. 157, ("Any dispute arising out of the interpretation or application of the terms of this contract shall, unless it is settled by direct negotiations, be referred to arbitration in accordance with the rules then obtaining of ICC. The United Nations and the contractor agree to be bound by an arbitration award rendered in accordance with this section as the final adjudication of any such dispute.").

233 *Ibid.*, p. 157 ("Any controversy or claim arising out of or in connection with the interpretation or enforcement of this Agreement or any breach thereof shall be settled by arbitration in New York City in accordance with the then obtaining rules of the American Arbitration Association. The parties hereto agree to be bound by any arbitration award rendered as a result of such arbitration as the final adjudication of any such controversy or claim.").

234 *Ibid.*, at p. 154.

unreported cases of *Aerovías Panama, S.A. v. United Nations* [235] and *Lamarche v. Organisation des Nations Unies au Congo*,[236] as well as *Canvas and Leather v. UNICEF*[237] and *Reliable Van and Storage Inc. v. United Nations*,[238] are examples of such United Nations practice. One of them triggered the Organization's decision to switch from the American Arbitration Association Rules to the UNCITRAL Arbitration Rules in its contract practice.[239] Two other early examples of United Nations arbitration practice are *UNRWA v. Iraq Clothing Co.*[240] and *UNRWA v. The General Trading and Transport Co.*[241] In the latter – a case between UNWRA and a commercial contractor – the organization first had to resort to the President of the International Court of Arbitration of the International Chamber of Commerce to appoint an arbitrator because the other contracting party had refused to cooperate in the appointment process. When a sole arbitrator was appointed, he finally rendered an award in favour of UNRWA.

84. The specialized agencies and IAEA generally opt for arbitration as a dispute settlement mechanism with "considerable variety … as to the form or mode of such arbitration".[242] This is exemplified in the unpublished cases of *Compagnie Française d'Entreprise c. OMS (French Company v. WHO)*[243] and *X. (société commerciale) c. FAO (X. (commercial company) v. FAO)*.[244] In two older cases, the Food and Agriculture Organization of the United Nations (FAO) apparently agreed on International Chamber of Commerce arbitration. In one of the cases, *Balakhany (Chad) Limited v. FAO*,[245] a sole arbitrator dismissed a contractor's claims for additional payments under a work and services contract in connection with a survey of the water resources of the Lake Chad Basin. Similarly, in *FAO*

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235 *Aerovías Panama, S.A. v. United Nations*, Arbitral Award, 14 January 1965, rendered under the rules of the American Arbitration Association, reported in *Yearbook … 1985*, vol. II (Part One) (Addendum), document A/CN.4/L.383 and Add.1-3, p. 152.

236 *Lamarche v. Organisation des Nations Unies au Congo*, at p. 158, arbitral award dated 6 August 1965 under the rules of the International Chamber of Commerce, reported in *Yearbook … 1985*, vol. II (Part One) (Addendum), document A/CN.4/L.383 and Add.1-3; Vincent Coussirat-Coustère and Pierre Michel Eisemann, eds., *Répertoire de la Jurisprudence Arbitrale Internationale*, vol. III, 1946–1988 (Dordrecht, Martinus Nijhoff, 1991), pp. 398, 1327 and 1872.

237 American Arbitration Association, *Canvas and Leather v. UNICEF*, unpublished arbitral award, 1 February 1982, reported in Jan Paulsson, *The Idea of Arbitration* (Oxford, Oxford University Press, 2013), at p. 14, footnote 23.

238 American Arbitration Association, *Reliable Van and Storage Inc. v. United Nations*, unpublished award, 18 February 1982, reported in Legal opinions of the Secretariat of the United Nations (see footnote 70 above), at p. 360, endnote 14.

239 *Ibid.*, p. 360, endnote 17 ("One of the reasons why the Organization decided to abandon use of the American Association of Arbitration procedure was the experience encountered in the case of *Canvas and Leather v. UNICEF* decided on 1 February 1982, where the arbitral award constituted no more than a few paragraphs on a page, completely ignoring the legal arguments advanced by the Organization.").

240 *UNRWA v. Iraq Clothing Co.*, unpublished arbitral award, 1954, reported in Finn Seyersted, *Common Law of International Organizations* (Leiden, Koninklijke Brill, 2008), p. 568, footnote 3.

241 International Chamber of Commerce, *Office de secours et de travaux de Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) v. The General Trading and Transport Company*, 1958 (award rendered by arbitrator Henri Batiffol), partly reprinted in *Yearbook of the International Law Commission, 1967*, vol. II, p. 208; *Yearbook … 1985*, vol. II (Part One), Addendum One, pp. 157 *et seq*.

242 *Yearbook … 1985*, vol. II (Part One) (Addendum), document A/CN.4/L.383 and Add.1-3, at p. 183 ("The majority of contracts entered into by specialized agencies and IAEA continue to provide for the settlement of disputes by arbitration, after recourse to direct negotiation. Considerable variety exists as to the form or mode of such arbitration.").

243 *Compagnie Française d'Entreprise c. OMS (French Company v. WHO)*, unpublished arbitral award, 31 May 1966, reported in J.P. Laugier, "Contribution à la théorie générale de la responsabilité des organisations internationales", PhD dissertation, Université Aix-Marseille, 1973, p. 97; Bellier, "À propos de la clause arbitrale dans le règlement des différends de l'organisation internationale", p. 446, footnote 3.

244 *X. (société commerciale) c. FAO*, unpublished arbitral award, 4 December 2001, reported in Bellier, *Le recours à l'arbitrage*, p. 22, footnote 7.

245 International Chamber of Commerce, *Balakhany (Chad) Limited v. Food and Agriculture Organization of the United Nations*, Award, 29 June 1972 (sole arbitrator, Barend van Marwijk Kooy), summarized in *United Nations Juridical Yearbook 1972*, pp. 206 and 207.

v. BEVAC,[246] a dispute concerning the purchase of electric equipment was decided by a sole arbitrator under the International Chamber of Commerce Arbitration Rules, holding that damage caused to the goods during shipment was largely to be attributed to the seller. It appears, nevertheless, that nowadays the specialized agencies also opt mostly for UNCITRAL arbitration.[247]

85. A typical commercial dispute settled by UNCITRAL arbitration that is largely accessible was *Granuco S.A.L. (Lebanon) v. Food and Agricultural Organization of the United Nations*.[248] The proceedings were conducted pursuant to the UNCITRAL Arbitration Rules, as stipulated in the General Terms and Conditions applicable to FAO Procurement Contracts. The case was heard by a three-member arbitral tribunal, with the Permanent Court of Arbitration acting as registry.[249] It arose from the termination of contracts due to alleged repeated non-performance and inadequate performance by a Lebanese company which was to deliver animal feed to be ultimately provided as humanitarian aid to Iraq in exchange for oil under the oil for food programme established by the Security Council. The arbitral tribunal rejected the claimant's *force majeure* and other arguments and awarded only a fraction of the compensation sought.[250] Another commercial dispute involving FAO was *Equipe '90 v. FAO*,[251] a commercial arbitration brought under the UNCITRAL Arbitration Rules as provided for in the general conditions of the contract between the organization and the claimant. The dispute arose from the termination by FAO of a contract for the performance of maintenance works at its headquarters, which the three-member arbitral tribunal upheld as justified.[252]

86. Some databases reveal additional, but often limited, information about unreported arbitrations involving international organizations. For instance, the International Council for Commercial Arbitration Yearbook contains the UNCITRAL award rendered in *Banque Arabe et Internationale D'Investissement (France) et al. v. Inter-Arab Investment Guarantee Corporation*,[253] a dispute arising from a loan guarantee contract. The Unilex database of the International Institute for the Unification of Private Law indicates that a dispute arising from a contract between a Canadian corporation and the United Nations concerning the transport of personnel and military personnel on behalf of the United Nations was decided by an arbitral tribunal relying upon the UNIDROIT Principles of International Commercial Contracts[254] when applying "generally accepted principles of international commercial law"

[246] International Chamber of Commerce, *Food and Agriculture Organization of the United Nations v. BEVAC Company*, Arbitral award, Case No. 5003/JJA, 29 July 1986, summarized in *United Nations Juridical Yearbook 1986*, p. 347.

[247] See, for example, FAO, Committee on Constitutional and Legal Matters, Permanent Court of Arbitration Case No. AA286 – Final arbitration award *Granuco S.A.L. (Lebanon) v. Food and Agriculture Organization of the United Nations*, eighty-eighth session, Rome, 23–25 September 2009 (CCLM 88/6), para. 2, available at http://www.fao.org/tempref/docrep/fao/meeting/017/k5709e.pdf.

[248] *Ibid*.

[249] *Ibid*., paras. 10 *et seq*.

[250] *Ibid*., para. 62.

[251] *Equipe '90 v. Food and Agricultural Organization of the United Nations*, *Ad hoc* arbitration under UNCITRAL Rules, Award, 4 December 2001, summarized in FAO, Committee on Constitutional and Legal Matters, seventy-third session, Rome, 3–4 June 2002 (CCLM 73/2), available at http://www.fao.org/3/y6612e/y6612e.htm.

[252] See also the abstract on the UNILEX database of the International Institute for the Unification of Private Law, available at http://www.unilex.info/principles/case/1880#FOOD_AND_AGRICULTURE_ORGANIZATION_OF_THE_UNITED_NATIONS_(FAO).

[253] *Banque Arabe et Internationale D'Investissement (France) et al. v. Inter-Arab Investment Guarantee Corporation*, Award, 17 November 1994, in Albert Jan van den Berg, ed., International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, vol. XXI (1996) (The Hague, Kluwer Law International, 1996), pp. 13–39.

[254] International Institute for the Unification of Private Law, Principles of International Commercial Contracts, 1994, available at https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994/.

which had been agreed upon as applicable law in the contract.[255] In a similar vein, a dispute between the United Nations and a European company concerning a contract for the supply of goods in connection with a peacekeeping operation in Africa was submitted to arbitration pursuant to the UNCITRAL Arbitration Rules. During the proceedings, the parties agreed to the application of the United Nations Convention on Contracts for the International Sale of Goods[256] and the UNIDROIT Principles of International Commercial Contracts as the law governing the merits of the case, but they ultimately reached a settlement.[257] Those Principles were equally applicable in an UNCITRAL arbitration between an international organization and an African company arising out of a contract for the provision of services. Reportedly, the arbitral tribunal awarded a large portion of the sums claimed.[258] In *EUTELSAT v. Alcatel Space*,[259] an international organization engaged in space activities brought International Chamber of Commerce arbitration against a private satellite manufacturer, unsuccessfully claiming damages for a launch delay resulting from allegedly gross negligence causing harm to a satellite during its testing phase.

87. In a number of cases, arbitrations become publicly known as a result of national court proceedings relating to such arbitrations. One example is the dispute that was arbitrated under the International Chamber of Commerce Arbitration Rules in *Westland Helicopters Ltd. v. Arab Organization for Industrialization et al.*[260] The case concerned the liability of the Arab Organization for Industrialization and its member States. The award's crucial finding, that "[i]n the absence of any provision expressly or impliedly excluding the liability of the four States, this liability subsists since, as a general rule, those who engage in transactions of an economic nature are deemed liable for the obligations which flow therefrom",[261] was rejected by the Swiss courts,[262] which concluded that the "legal independence of the Organization in relation to the founding States … rule[d] out the possibility of the contracts it conclude[d] with third parties, and more particularly the arbitration clauses to which it subscribe[d], being regarded as acts undertaken by a delegate or an organ engaging the founding States".[263]

88. The International Tin Council litigation before courts in England and partly also in the United States of America revealed that several contractors of the organization had already obtained arbitral awards against the organization, which they tried to enforce in domestic proceedings. For instance, when the English courts dismissed a petition for the compulsory winding up of the insolvent International Tin Council according to English law in *Re*

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255 Arbitration between a Canadian corporation and the United Nations concerning the transportation of United Nations personnel throughout the world, New York, undated, abstract available at http://www.unilex.info/principles/case/756#UNITED_NATIONS_ORGANIZATION.

256 United Nations Convention on contracts for the international sale of goods (Vienna, 11 April 1980), United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.

257 Arbitration between the United Nations and a European company in the context of a peacekeeping mission in Africa, New York, undated, abstract available at http://www.unilex.info/principles/case/994#UNITED_NATIONS_ORGANIZATION.

258 Arbitration between an international organization and a company situated in an African State, Award, December 1997, New York, abstract available at http://www.unilex.info/principles/case/678#INTERNATIONAL_ORGANIZATION.

259 International Chamber of Commerce, *EUTELSAT (The European Telecommunications Satellite Organization) v. Alcatel Space*, unpublished arbitral award No. 10216/AC/DB, 26 February 2001, discussed in Alexis Mourre, "Arbitration in space contracts", *Arbitration International*, vol. 21 (2005), pp. 37–57, at pp. 41–45; brief case details also available at http://4aspace.online.fr/infos/2001/200104-eutelsat.htm.

260 International Chamber of Commerce, Court of Arbitration, *Westland Helicopters Ltd. v. Arab Organization for Industrialization, United Arab Emirates, Saudi Arabia, Qatar, Egypt, Arab British Helicopter Company*, Case No. 3879/AS, Interim Award Regarding the Jurisdiction ("Compétence") of the Arbitral Tribunal, 5 March 1984, *International Legal Materials*, vol. 23 (1984), pp. 1071–1089; *Journal du droit international*, vol. 112 (1985), pp. 232–246; 8 June 1982, 5 March 1984 and 25 July 1985, *International Law Reports* (ILR), vol. 80 (1989), pp. 595–622.

261 ILR, vol. 80 (1989), p. 613.

262 Switzerland, Court of Justice of Geneva, *Arab Organization for Industrialization, Arab British Helicopter Company and Arab Republic of Egypt v. Westland Helicopters Ltd., United Arab Emirates, Kingdom of Saudi Arabia and State of Qatar*, Judgment No. 443, 23 October 1987; Federal Supreme Court (First Civil Court), 19 July 1988, ILR, vol. 80 (1989), pp. 622–666.

263 *Ibid.*, p. 658.

International Tin Council,[264] it became clear that one of the International Tin Council's creditors had previously obtained an arbitration award against the International Tin Council. The High Court refused to grant the organization's winding up because it considered that the exception to the International Tin Council's immunity for the enforcement of an arbitration award[265] did not cover such a bankruptcy remedy. The "receivership action" of *Maclaine Watson & Co. Ltd. v. International Tin Council*,[266] as well as the "direct actions",[267] also showed that other International Tin Council creditors had enforceable arbitration awards against the organization.

89. An interesting dispute about funding obligations between the International Telecommunications Satellite Organization (ITSO), an intergovernmental organization, and Intelsat S.A., a privatized company, was submitted to arbitration pursuant to the International Chamber of Commerce Arbitration Rules.[268] A specific feature of the disputants was that the claimant, ITSO,[269] was the remaining intergovernmental organization, originally established in the 1970s as INTELSAT,[270] and that the defendant, Intelsat S.A., was the "privatized" company that was taking over tasks formerly performed by INTELSAT.[271] Details about these arbitral proceedings have become partially available as a result of bankruptcy proceedings before United States courts and the parties' pleadings referring to the International Chamber of Commerce arbitration. A 2001 Public Services Agreement between ITSO and Intelsat S.A. provided not only for supervisory tasks of ITSO, but also that the Director General of ITSO and the Chief Executive Officer of Intelsat S.A. were to negotiate the annual funding of ITSO, "based upon the principles and financial expenditures of ITSO during the initial twelve-year period," subject to a $1.8 million annual cap.[272] When the parties failed to agree on the 2020 funding, ITSO instituted International Chamber of Commerce arbitration and the arbitral tribunal awarded a limited sum to ITSO to fund its core operations.

90. The fact that arbitration is a mechanism to which entities often resort can also be gleaned from national court cases, as national courts often refuse to interfere with this type of dispute settlement or accept arbitration. This is exemplified by *International Civil Aviation*

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264 *Re International Tin Council*, High Court, Chancery Division, 22 January 1987; [1987] 2 W.L.R. 1229; [1987] 1 All E.R. 890; [1987] 1 Ch 419; ILR, vol. 77 (1988), pp. 18–41; Court of Appeal, 27 April 1988; [1988] 3 W.L.R. 1159; ILR, vol. 80 (1989), pp. 181–190.

265 Art. 6, para. 1, International Tin Council (Privileges and Immunities) Order 1972, giving effect to a provision of the Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Tin Council which provided for the immunity of the Council from suit and legal process "except: … (c) in respect of the enforcement of an arbitration award".

266 *Maclaine Watson & Co. Ltd. v. International Tin Council*, High Court, Chancery Division, 13 May 1987; [1988] 1 Ch 1; ILR, vol. 77 (1988), pp. 41–55; Court of Appeal, 27 April 1988; [1988] 3 W.L.R. 1169; ILR, vol. 80 (1989), pp. 191–210; House of Lords, 26 October 1989, [1990] 2 AC 418, [1990] 3 W.L.R. 969, ILR, vol. 81 (1990), pp. 670–725.

267 *J H Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, High Court, Queen's Bench Division (Commercial Court), 24 June 1987; [1987] Butterworths Company Law Cases 667; ILR, vol. 77 (1988), pp. 56–106; Court of Appeal, 27 April 1988; [1988] 3 W.L.R. 1190; ILR, vol. 80 (1989), pp. 49–180; House of Lords, 26 October 1989, [1990] 2 AC 418, [1990] 3 W.L.R. 969, ILR, vol. 81 (1990), pp. 670–725.

268 International Chamber of Commerce, *The International Telecommunications Satellite Organization (ITSO) v. Intelsat S.A.*, Case No. 24907/MK, referred to in United States Bankruptcy Court, Eastern District of Virginia, Richmond Division, *In re: Intelsat S.A., et al.*, chap. 11, case No. 20-32299 (KLP), Debtors' objection to motion of the International Telecommunications Satellite Organization for relief from automatic stay, 5 June 2020, available at https://cases.stretto.com/public/X070/10255/PLEADINGS/1025506052080000000089.pdf.

269 Agreement relating to the International Telecommunications Satellite Organization "ITSO" (20 August 1971, as amended in 2000 and 2007), available at https://itso.int/wp-content/uploads/2018/01/ITSO-Agreement-Booklet-new-version-FINAL-EnFrEs.pdf.

270 Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (Washington, 20 August 1971), United Nations, *Treaty Series*, vol. 1220, No. 19677, p. 21.

271 See Patricia K. McCormick and Maury J. Mechanick, eds., *The Transformation of Intergovernmental Satellite Organisations: Policy and Legal Perspectives* (Leiden, Koninklijke Brill, 2013).

272 *In re: Intelsat S.A., et al.*, at para. 5 (see footnote 268 above).

Organization v. Tripal Systems Pty. Ltd. et al.,[273] where a Canadian court refused to render a declaratory judgment confirming that, because the International Civil Aviation Organization enjoyed "absolute immunity from judicial process of every kind", it was also exempt from the arbitration contractually stipulated in an airport construction agreement.

2. Lease disputes

91. Disputes over rental agreements, often concerning buildings used as office space, also appear among the commercial disputes that have been settled by arbitration. Examples are the International Chamber of Commerce arbitration in *A (organisation internationale) c. B (société)*[274] and the case of *Polis Fondi v. IFAD*,[275] which was brought pursuant to the 1976 UNCITRAL Arbitration Rules provided for in the applicable lease agreement between the owner of office space and the organization renting it. The arbitral tribunal awarded outstanding rental payments to the private party, an Italian company. In another dispute concerning a rental agreement, UNESCO apparently successfully defended itself against additional costs claims in an (unreported) arbitration.[276]

3. Disputes with service providers, contractors and consultants

92. In addition to commercial disputes between international organizations and private parties, employment disputes have also been referred to arbitration in several cases.[277] This is primarily the case where employees do not have access to administrative tribunals[278] because an international organization either does not have its own administrative tribunal or has not submitted to the jurisdiction of administrative tribunals such as the International Labour Organization (ILO) Administrative Tribunal, which may also be made competent to hear other international organizations' staff disputes. Even where administrative tribunals exist, the fact that their jurisdiction is limited to staff members implies that a number of persons rendering services, but not considered staff members in a formal sense, need to litigate their employment-related disputes outside administrative tribunals. In these cases, arbitration is usually the preferred method. For the United Nations, this concerns consultants, individual contractors and United Nations Volunteers.[279]

93. As in the case of commercial disputes settled by arbitration, such employment arbitrations often remain confidential. As with other arbitrations, they may enter the public domain where domestic courts are approached in connection with such arbitration. An

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[273] Canada, Superior Court of Quebec, *International Civil Aviation Organization v. Tripal Systems Pty. Ltd. and others*, 9 September 1994, [1994] *Recueil de Jurisprudence du Québec*, 1994 CanLII 3758 (QC CS), pp. 2560–2575.

[274] Court of Arbitration, International Chamber of Commerce, *A (organisation internationale) c. B (société)*, Case No. 2091, 14 May 1972 (sole arbitrator, Robert Lehmann), *Revue de l'arbitrage* (1975), pp. 252–267; Coussirat-Coustère and Eisemann, *Répertoire de la Jurisprudence Arbitrale Internationale*, pp. 549 and 550; case note by Philipe Fouchard, *Revue de l'arbitrage* (1975), pp. 258–267.

[275] Permanent Court of Arbitration, *Polis Fondi Immobiliari Di Banche Popolare SGR. p.A. (Italy) v. International Fund for Agricultural Development (IFAD)*, Case No. 2010-08, Award, 17 December 2010, available at https://pcacases.com/web/sendAttach/495.

[276] *Yearbook … 1985*, vol. II (Part One) (Addendum), document A/CN.4/L.383 and Add.1-3, at p. 186 ("In another case, where a building society claimed payment of additional costs, UNESCO was defendant in the proceedings brought before an arbitration tribunal. The decisions in both cases were favourable to UNESCO.").

[277] See Gulati and John, "Arbitrating employment disputes involving international organizations", in Quayle, *The Role of International Administrative Law at International Organizations*.

[278] See paras. 188 *et seq.* below.

[279] Serpa Soares, "Responsibility of international organizations", p. 141; see also Administrative instruction: Consultants and individual contractors, ST/AI/2013/4/Rev.1, annex II, General Conditions of Contracts for the Services of Consultants and Individual Contractors, sect. 16 ("Any dispute, controversy or claim between the parties arising out of the contract, or the breach, termination or invalidity thereof, unless settled amicably, as provided above, shall be referred by either of the parties to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining.").

example is *Viecelli v. IRO*,[280] where an Italian court dismissed a claim brought by an employee of the International Refugee Organization because the employment contract expressly provided for arbitration in cases of disputes. Another example is the French case of *Beaudice c. ASECNA*,[281] where a domestic court decided over a limited appeal against an arbitral award in an employment dispute between a technician and a regional air safety organization, the Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar (ASECNA). Similarly, the Belgian case of *Centre pour le développement industriel (C.D.I.) c. X.*,[282] rejecting a challenge to an arbitral award, demonstrates that the organization stipulated arbitration as the exclusive mode of dispute settlement for the contractual relationships with its employees. When a dispute arose between a private contractor and UNESCO and the organization refused to appoint an arbitrator, the private party resorted to the French courts, which disregarded the organization's immunity from jurisdiction and ordered UNESCO to nominate its arbitrator.[283] Reportedly, the arbitral tribunal subsequently awarded the claimant two million French francs as "moral damages" in *Boulois v. UNESCO*.[284]

94. A number of employment-related arbitrations have been administered by the Permanent Court of Arbitration. While their outcomes are usually not publicly known, some basic facts have been made available on the Permanent Court of Arbitration website or elsewhere. One example is *D. v. Energy Community*, an employment dispute involving a regional technical organization. According to the information on the Permanent Court of Arbitration website, the case was instituted pursuant to the 1996 Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties, on the basis of the applicable employment contract.[285] In fact, the organization's headquarters agreement provided for the organization's immunity from suit and stipulated that any disputes with private parties, including staff members, had to be settled by arbitration.[286]

95. In the case of the United Nations and its specialized agencies, staff members of the organizations, their funds and programmes have access to administrative tribunals. However, non-staff contractors are not usually able to access them. Therefore, they have brought their claims before arbitral tribunals which are regularly provided for in the general conditions for

[280] Italy, Tribunale Trieste, *Viecelli v. IRO*, 20 July 1951, 36 *Rivista di diritto internazionale*, vol. XXXVI (1953), pp. 470–472.

[281] France, Cour d'Appel de Paris, première chambre, *Beaudice c. ASECNA*, 25 November 1977, *Journal du droit international*, vol. 106 (1979), pp. 128–131.

[282] Belgium, Tribunal Civil de Bruxelles, *Centre pour le développement industriel (C.D.I.) c. X.*, 13 March 1992, *Actualités du Droit* (1992), p. 1377.

[283] France, Tribunal de grande instance de Paris, *Boulois c. UNESCO*, 20 October 1997, *Revue de l'arbitrage* (1997), p. 575, at p. 577; Cour d'Appel, Paris, (14 Ch. A), 19 June 1998, *Yearbook Commercial Arbitration*, vol. XXIVa (1999), p. 294.

[284] Arbitral Tribunal, *Boulois v. UNESCO*, unpublished arbitral award, 4 May 2000, referred to in the fifth report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur (A/CN.4/583), para. 26 and footnote 16.

[285] Permanent Court of Arbitration, *D. v. Energy Community*, Case No. 2016-03, available at https://pca-cpa.org/en/cases/137/. The information on the website refers to the "Employment Agreement between the Parties dated July 18, 2007, the Staff Regulations of the Energy Community (as amended, December 18, 2009), and the Agreement between the Republic of Austria and the Energy Community regarding the Seat of the Secretariat of the Energy Community, dated May 29, 2007.".

[286] Art. 5, para. 4, Agreement between the Republic of Austria and the Energy Community regarding the Seat of the Secretariat of the Energy Community (Vienna, 29 May 2007), Austria, *Federal Law Gazette III*, No. 87/2007 ("With regard to any dispute between the Energy Community and a private party, including any of the Officials of the Secretariat as defined in Article 1 (d) of this Agreement, the Energy Community agrees that these shall be finally settled by a tribunal composed of a single arbitrator appointed by the Secretary General of the Permanent Court of Arbitration, Peace Palace, Carnegieplein 2, 2517 KJ The Hague, The Netherlands, in accordance with the relevant Optional Rules for Arbitration involving international organizations and private parties. The tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the tribunal shall apply such rules of international law and general principles of law as may be applicable. Matters concerning the interpretation of the Treaty establishing the Energy Community and its appendices shall not be within the competence of the tribunal.").

service providers. For instance, the case of *Reygal v. UNHCR* was brought on the basis of article 15 of the General Conditions of Contracts for the Service of Individual Contractors. This provision was referred to in the claimant's contract providing for interpretation services to be rendered to the Office of the United Nations High Commissioner for Refugees. The case was decided by a sole arbitrator, based on the UNCITRAL Arbitration Rules as revised in 2010, and was administered by the Permanent Court of Arbitration.[287] A similar procedure was followed in *A. v. UN Organization*, where another sole arbitrator decided a service provision dispute administered by the Permanent Court of Arbitration pursuant to its Optional Rules for Arbitration between International Organizations and Private Parties.[288]

96. Recourse to arbitration based on the rules of other institutions appears to be less frequent in employment disputes. One example is the International Chamber of Commerce arbitration in *K v. International Organization A*, involving the dismissal of the Director of Finance and Administration of an organization. A sole arbitrator found that, although the claimant's termination was justified on grounds of insubordination, it was wrongful and unjustified, as the organization had failed to follow its own Personnel Policy Manual and had violated the "rules of natural justice", as the claimant had not been provided with a fair hearing.[289]

4. Tort claims

97. While commercial and employment disputes that are being arbitrated are usually based on arbitration clauses contained in the underlying contracts between an international organization and a private party, in situations where the latter claims compensation for non-contractual or tort liability, an agreement to arbitrate is usually absent because the dispute could not have been anticipated. In such situations, arbitration thus depends upon the organization's willingness to submit to arbitration when a dispute has already arisen. Even though this rarely occurs,[290] it is not wholly excluded.

98. An example is the arbitration in *Starways Limited v. United Nations*.[291] In that case, a British company claimed compensation for harm sustained during the civil war in the Congo, where the United Nations was engaged in a military mission. Starways was a subcontractor of the Belgian airline Sabena, which chartered aircraft to the United Nations for its mission. When one of the aircrafts was destroyed, Starways claimed compensation from the United Nations and, since no settlement could be reached, the United Nations and Starways agreed on arbitration to determine the non-contractual liability of the United Nations, if any. The claim was, however, dismissed on the preliminary objection of the United Nations that the plaintiff had changed its name and transferred the beneficial interest in the claim to a third party.

99. There are also a few arbitrations arising out of compensation claims against the United Nations for harm suffered in the course of peacekeeping missions. While such claims are usually settled before local claims review boards,[292] in two apparently unreported instances arising from the mission in Somalia, the United Nations agreed to arbitrate the matters.[293]

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[287] Permanent Court of Arbitration, *Mr. Mohamed Ismail Reygal (Somalia) v. The United Nations High Commissioner for Refugees (UNHCR)*, Case No. 2016-28, 27 March 2017, available at https://pca-cpa.org/en/cases/138/.

[288] Permanent Court of Arbitration, *A. v. UN Organization*, Case No. 2019-04, 5 December 2019, available at https://pca-cpa.org/en/cases/201/.

[289] International Chamber of Commerce, *K (Sweden) v. International Organization A (Kenya)*, Case No. 10060 of 1999, Final Award, *Yearbook Commercial Arbitration*, vol. XXX (2005), pp. 42–65.

[290] See paras. 75 *et seq*. above.

[291] *Starways Limited v. United Nations*, unpublished award, 24 September 1969 (sole arbitrator, Bachrach), ILR, vol. 44 (1972), pp. 433–437; case note by R.H. Harpignies, "Settlement of disputes of a private law character to which the United Nations is a party – a case in point: the arbitral award of 24 September 1969 in *Re Starways Ltd. v. the United Nations*", *Revue belge de droit international*, 1971/2, pp. 451–468.

[292] See para. 66 above.

[293] In one case, an arbitral tribunal ruled on the amount of compensation due to the owners of a compound in Mogadishu that was used by peacekeeping forces for almost two years. In the other

100. Another form of tort claims that may lead to arbitration are those arising from personal injury at an organization's headquarters. Again, the United Nations provides an illustrative example. While it prefers to settle such tort claims amicably, it offers UNCITRAL arbitration to injured persons whose claims remain outstanding.[294] It is not clear whether such claims have led to arbitral proceedings.

5. Investment disputes

101. In addition to commercial disputes, disputes concerning the exercise of public powers, such as expropriation, regulation and adjudication, can be brought under investment protection treaties. While investment arbitration, usually instituted by private parties against States, is thus often referred to as a hybrid form of arbitration (sharing features of commercial and public international law dispute settlement), it may also involve international organizations, in particular where such organizations are empowered to act like States. Within regional economic integration organizations, the transfer of powers in areas relevant to investment protection has meant that international organizations may also become respondents in investment arbitration. This development was clearly envisaged with the enlargement of the European Union's common commercial policy powers in the 2007 Treaty of Lisbon, extending the European Union's external trade competencies by adding "foreign direct investment".[295]

102. To some extent, it was already inherent in the European Union's accession to the Energy Charter Treaty in the mid-1990s.[296] The European Union appears to have been the first regional organization to have been sued by investors for breaches of investment protection standards under the Energy Charter Treaty in *Nord Stream 2 v. EU*.[297] This arbitration is currently ongoing. With investment chapters of European Union-enhanced free trade agreements entering into force, such arbitrations are likely to occur more frequently.[298]

6. Other disputes

103. An unusual dispute was settled by arbitration between a number of private parties as shareholders of the Bank for International Settlements and the organization that had compulsorily recalled their shares. In *Reineccius and others v. Bank for International*

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case, the tribunal had to assess the amount of compensation due for the unconsented use of shipping containers by peacekeeping troops. In fact, both cases appear to constitute less delictual or tort claims than quasi-contractual ones. Both cases appear to be unreported, but are summarized in Serpa Soares, "Responsibility of international organizations", pp. 137 *et seq*.

294 See ST/SGB/230, para. 6 ("In the event that negotiations with a claimant do not result in an amicable settlement of the claim, the claimant shall be offered the option to submit the claim to arbitration. Such arbitration shall be held under the auspices of the American Arbitration Association, in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law in force, and taking into account, as appropriate, Headquarters Regulation No. 4 on limitation of damages in respect of acts occurring within the Headquarters district (General Assembly resolution 41/210 of 11 December 1986). The place of arbitration shall be New York City. Any award pursuant to such arbitration shall be binding on the parties as the final adjudication of the claim.").

295 Arts. 3, para. 1 (e), and 207, para. 1, Consolidated version of the Treaty on the functioning of the European Union. See also Opinion 2/15 of the Court, 16 May 2017, concerning the Free Trade Agreement with Singapore, ECLI:EU:C:2017:376, paras. 81–83.

296 The Energy Charter Treaty (Lisbon, 17 December 1994), United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95; art. 1, Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (98/181/EC, ECSC, Euratom), *Official Journal of the European Communities*, L 69, 9 March 1998, p. 1.

297 *Nord Stream 2 AG v. The European Union*, Permanent Court of Arbitration, Case No. 2020-07, pending.

298 Art. 8.21, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, *Official Journal of the European Union*, L 11, 14 January 2017, at p. 23. See also Jens Benninghofen, "Article 8.21: determination of the respondent for disputes with the European Union or its Member States", in Marc Bungenberg and August Reinisch, eds., *CETA Investment Law: Article-by-Article Commentary* (Baden-Baden, Nomos, 2022), pp. 520–533.

Settlements,[299] a five member *ad hoc* arbitral tribunal found in its partial award that the recall was lawful and determined the compensation due in its final award, based on the per-share net asset value of the Bank. This type of dispute settlement was possible due to the very special nature of the Bank for International Settlements. It was established in 1930 by central banks to promote cooperation and to provide facilities for international financial operations.[300] At the same time, it was also set up as a company governed by Swiss law whose shares were partly held by private shareholders. However, because of its fulfilment of public purposes and the endorsement of its creation by a treaty, the Bank for International Settlements has been considered an international organization.[301]

104. International organizations also availed themselves of World Intellectual Property Organization domain name arbitration against private parties. For instance, the Bank for International Settlements successfully complained against the use by third parties of domain names that were confusingly similar to its own, leading to a transfer of the disputed domain name to the organization.[302] For similar reasons, another World Intellectual Property Organization panel ordered the transfer of a private party's registered domain name <worldbank.net> to the International Bank for Reconstruction and Development,[303] whereas other organizations have been less successful.[304]

105. A special kind of arbitration took place pursuant to the 1996 Optional Rules for Arbitration between International Organizations and Private Parties before a three-member arbitral tribunal in 2019. In *Ge Gao, Hongwei Meng, Zihong Meng and Ziheng Meng (China) v. INTERPOL*,[305] the former president of INTERPOL and his family members instituted legal proceedings against the organization based on its headquarters agreement with France, which provided for the arbitral settlement of "any dispute between the Organization and a private party".[306] Reportedly, the wife of the former president of INTERPOL, who was detained by

[299] Permanent Court of Arbitration, *Reineccius and others v. Bank for International Settlements*, Partial Award on the lawfulness of the recall of the privately held shares on 8 January 2001 and the applicable standards for valuation of those shares, Decision, 22 November 2002, United Nations, *Reports of International Arbitral Awards*, vol. XXIII, pp. 183–251; and Final Award on the Claims for compensation for the shares formerly held by the claimants, interest due thereon and costs of the arbitration and on the counterclaim of the Bank against First Eagle SoGen Funds, Inc., Decision, 19 September 2003, *ibid.*, pp. 252–296.

[300] Convention respecting the Bank for International Settlements, with Annex (The Hague, 20 January 1930), League of Nations, *Treaty Series*, vol. CIV, No. 2398, p. 441.

[301] *Reineccius and others v. Bank for International Settlements* (see footnote 299 above), at pp. 212 *et seq*. See also Marc Jacob, "Bank for International Settlements (BIS)", in Rüdiger Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law*, vol. I (Oxford, Oxford University Press, 2012), pp. 821–826, at p. 825, paras. 19 and 20.

[302] See, for example, WIPO Arbitration and Mediation Center, *Bank for International Settlements v. BIS*, Case No. D2003-0986, Administrative Panel Decision, 2 March 2004, available at https://www.wipo.int/amc/en/domains/decisions/html/2003/d2003-0986.html; WIPO Arbitration and Mediation Center, *Bank for International Settlements v. BIS*, Case No. D2004-0571, Administrative Panel Decision, 1 October 2004, available at https://www.wipo.int/amc/en/domains/decisions/html/2004/d2004-0571.html.

[303] WIPO Arbitration and Mediation Center, *International Bank for Reconstruction and Development d/b/a The World Bank v. Yoo Jin Sohn*, Case No. D2002-0222, Administrative Panel Decision, 7 May 2002, available at https://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0222.html.

[304] WIPO Arbitration and Mediation Center, *European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) v. Virtual Clicks / Registrant ID:CR36884430, Registration Private Domains by Proxy, Inc.*, Case No. D2010-0475, Administrative Panel Decision, 7 July 2010, available at https://www.wipo.int/amc/en/domains/decisions/text/2010/d2010-0475.html.

[305] Permanent Court of Arbitration, *Ge Gao, Hongwei Meng, Zihong Meng and Ziheng Meng (China) v. INTERPOL*, Case No. 2019-19, available at https://jusmundi.com/en/document/decision/en-ge-gao-hongwei-meng-zihong-meng-and-ziheng-meng-china-v-interpol-final-award-friday-1st-january-2021.

[306] Art. 24, para. 1, Agreement between the International Criminal Police Organization – Interpol and the Government of the French Republic regarding Interpol's Headquarters in France, 24 April 2008, available at https://jusmundi.com/en/document/treaty/en-agreement-between-the-international-criminal-police-organization-interpol-and-the-government-of-the-french-republic-regarding-interpols-headquarters-in-france-interpol-france-headquarters-agreement-2008-thursday-24th-april-2008, replacing the Agreement between the Government of the French Republic and the International

his home State on corruption charges while travelling there, argued that the organization had failed to protect and assist him and her family and was thus "complicit in the internationally wrongful acts of its member country, China".[307] An award was rendered in 2021,[308] but no information on its content is publicly available.

106. This overview of existing practice demonstrates that arbitration is a suitable form of independent third-party adjudication that has actually been used for settling disputes between international organizations and private parties. Such disputes are mostly commercial ones based on contracts. Sometimes, they may be of a delictual/tort character. In exceptional situations, they may concern issues of a public law nature, such as investment arbitration or claims alleging human rights breaches.

H. Judicial settlement

107. This subsection of the report provides an overview of the role of international and national courts in the settlement of disputes between international organizations and private parties. It starts with the limited availability of national courts as a result of the jurisdictional immunity regularly enjoyed by international organizations. It then provides a brief overview of the practice of international courts and tribunals, in particular, courts of regional economic integration organizations and their jurisdiction over constitutional and/or administrative disputes with private parties, as well as their power to serve as adjudicatory forums for the settlement of contractual and/or tort claims. It then examines the role of administrative tribunals.

1. National courts

108. As a matter of principle, adjudication by national courts is one available means of settling disputes between international organizations and private parties. The conferment of domestic legal personality upon international organizations in different legal instruments regularly mentions their capability to "institute legal proceedings".[309]

109. While it is clearly envisaged that international organizations may actively access national courts to vindicate their rights vis-à-vis private parties, it is usually their immunity from jurisdiction that prevents them from being sued before national courts.

(a) International organizations as claimants

110. In practice, international organizations rarely sue private parties before national courts.[310] Where they have done so, they have usually not encountered legal obstacles. Specifically, national courts regularly recognize the domestic legal personality of international organizations required in order to institute legal proceedings.

111. Early United Nations practice provides illustrative examples of international organizations instituting legal proceedings before national courts. In 1950, the United Nations successfully brought an action for damages arising out of loss of and damage to cargo shipped on behalf of a United Nations agency on a United States-owned vessel. In *Balfour, Guthrie & Co. Limited., et al v. United States et al.*,[311] a United States court affirmed the capacity of the United Nations to institute legal proceedings in the United States of America based on Article 104 of the Charter of the United Nations. A few years later, the United Nations sued a private company for the recovery of money owed to it in *United Nations v.*

Criminal Police Organization concerning the headquarters of INTERPOL and its privileges and immunities in French territory (Paris, 3 November 1982), United Nations, *Treaty Series*, vol. 2387, No. 43105, p. 255.

307 See Reuters, "Wife of China's Meng, former Interpol chief, sues agency", 7 July 2019, available at https://www.reuters.com/article/us-china-france-interpol-idUSKCN1U20L6.

308 *Ge Gao, Hongwei Meng, Zihong Meng and Ziheng Meng (China) v. INTERPOL* (see footnote 305 above).

309 See para. 17 above.

310 A/CN.4/764, chap III, sects. B (2) and (4).

311 United States, District Court for the Northern District of California, *Balfour, Guthrie & Co., Limited, et al. v. United States et al.*, 90 F. Supp. 831 (1950), 5 May 1950; ILR, vol. 17 (1950), pp. 323–326.

Canada Asiatic Lines Limited before a Canadian court, which rejected the defendant's attempt to question the authority of the Secretary-General of the United Nations to represent the Organization under Canadian corporate law. Instead, the court specifically found that under Canadian law, the United Nations had the legal capacity of a body corporate, possessed juridical personality and had the right to institute proceedings.[312] In *International Civil Aviation Organization v. Tripal Systems Pty. Ltd. et al.*,[313] a specialized agency availed itself of its legal personality under Canadian law to contest the jurisdiction of an arbitral tribunal to which a contractual partner of the organization had turned. Although unsuccessful with its claim to block arbitration, the Canadian court did not consider the legal standing of the International Civil Aviation Organization problematic. Similarly, the European School in Mol, established as an international organization, had no difficulties with instituting proceedings against private parties to collect outstanding tuition fees in *European School v. Hermans-Jacobs and Heuvelmans-Van Iersel*.[314]

112. It was much more difficult for the Arab Monetary Fund to bring an action against its former Director General before English courts in *Arab Monetary Fund v. Hashim and others (No. 3)*.[315] Of course, the United Kingdom of Great Britain and Northern Ireland was not a party to the constituent instrument of the Arab Monetary Fund[316] and did not have a headquarters agreement or a seat agreement with the organization that might have called for the recognition of the Fund's legal personality under domestic law.[317] When the organization tried to recover money allegedly embezzled by its former Director General, it had to exhaust three judicial stages before the House of Lords finally accepted that under English conflict of law principles, English courts would recognize the Arab Monetary Fund's legal personality created under the law of Egypt, where the Fund was headquartered.[318] A similar approach was taken by a bankruptcy court in the United States of America in *Re Hashim and others*.[319] The court recognized the legal personality of the Arab Monetary Fund and therefore its capacity to be a party to legal proceedings, regardless of the facts that the Arab Monetary Fund was a regional international organization in which the United States did not participate

[312] Canada, Superior Court Montreal, *United Nations v. Canada Asiatic Lines Limited*, 2 December 1952, *Rapports de Pratique de Québec* (1954), pp. 158–160; ILR, vol. 26 (1958-II), pp. 622–623; *American Journal of International Law*, vol. 48 (1954), p. 668.

[313] *International Civil Aviation Organization v. Tripal Systems Pty. Ltd. and others* (see footnote 273 above).

[314] Belgium, Court of Arbitration, *European School v. Hermans-Jacobs and Heuvelmans-Van Iersel*, Case No. 12/94, 3 February 1994, *Journal des Tribunaux*, No. 5724, 2 July 1994, p. 532; ILR, vol. 108 (1998), pp. 642–648. In a preliminary question procedure from the justice of the peace for the Canton of Mol, the Belgian Court of Arbitration upheld the constitutionality of the requirement to pay tuition in the European Schools because they were not (Belgian) public authorities to which the guarantee of free access to education applied.

[315] United Kingdom, Chancery Division, *Arab Monetary Fund v. Hashim and others (No. 3)*, 9, 10, 11 and 12 October and 14 November 1989, *The All England Law Reports*, vol. 1 (1990), p. 685; [1990] 3 W.L.R. 139, Hoffmann J; Court of Appeal, 26 and 27 March and 9 April 1990 [1990] *The All England Law Reports*, vol. 2 (1990), p. 769; [1990] 3 W.L.R. 139; House of Lords, 26, 27 and 28 November 1990 and 21 February 1991, *The All England Law Reports*, vol. 1 (1991), p. 871; [1991] 2 W.L.R. 729.

[316] Arab Monetary Fund, Articles of Agreement of the Arab Monetary Fund, 27 April 1976, updated 3 April 2013, available at https://www.amf.org.ae/sites/default/files/uploads/The%20Articles%20of%20Agreement%20of%20the%20AMF%20-%20English_0.pdf.

[317] See para. 17 above.

[318] *Arab Monetary Fund v. Hashim and Others (No. 3)* (see footnote 315 above), *The All England Law Reports*, vol. 1 (1991), at p. 872 ("Although when sovereign states entered into an agreement by treaty to confer legal personality on an international organisation the treaty did not create a corporate body with capacity to sue and be sued in English courts, the registration of that treaty in one of the sovereign states conferred legal personality on the international organisation and thus created a corporate body which the English courts could and should recognise, since by comity the courts of the United Kingdom recognised corporate bodies created by the law of a foreign state recognised by the Crown.").

[319] United States Bankruptcy Court, District of Arizona, *Re Hashim and others*, 15 August 1995, 188 Bankr. 633; 1995 Bankr. LEXIS 1574; 27 Bankr. Ct. Dec. 1161 (D. Arizona 1995); ILR, vol. 107 (1997), pp. 405–428.

and that it was not specifically designated under the International Organizations Immunities Act.[320]

(b) International organizations as defendants enjoying immunity

113. Where private parties seek to raise claims against international organizations before national courts, they will regularly encounter the organizations' immunity from legal process as the main obstacle to doing so. The immunities of international organizations formed part of the discontinued work of the Commission on the status, privileges and immunities of international organizations, the second part of the topic "Relations between States and international organizations".[321] The Special Rapporteur does not propose to discuss the immunities of international organizations in detail. However, to the extent that their jurisdictional immunity considerably limits the availability of national courts as potential means of dispute settlement, it is useful to briefly outline it.[322]

114. International organizations regularly enjoy immunity from the jurisdiction of national courts as a result of treaty provisions, mostly in their constituent treaties, in multilateral privileges and immunities instruments or in bilateral headquarters or seat agreements and, in

[320] *Ibid.*, p. 426 ("the [Arab Monetary Fund] is a juridical person (a corporation, a persona ficta, an entity capable of legal battle) under U.A.E. law … Once this has been decided, capacity follows under American law as a matter of 'customary law'.").

[321] See, in particular, draft article 7 submitted by the Special Rapporteur in his fourth report, suggesting that "[i]nternational organizations … shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity" (*Yearbook of the International Law Commission, 1990*, vol. II (Part Two), para. 448, footnote 323).

[322] See, in general, Clarence Wilfred Jenks, *International Immunities* (London, Stevens, 1961); Kuljit Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (The Hague, Martinus Nijhoff, 1964); Ignaz Seidl-Hohenveldern, "L'immunité de juridiction et d'exécution des États et des organisations internationales", in Joe Verhoeven and Ignaz Seidl-Hohenveldern, eds., *Droit international 1*, Cours et Travaux de l'Institut des Hautes Etudes Internationales de Paris (Paris, Pedone, 1981), pp. 109–167; Christian Dominicé, "L'immunité de juridiction et d'exécution des organisations internationales", *Recueil des Cours*, tome 187 (1984-IV), pp. 145–238; Peter H.F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*, Legal Aspects of International Organizations, vol. 17 (Dordrecht, Martinus Nijhoff, 1994); August Reinisch, *International Organizations Before National Courts* (Cambridge, Cambridge University Press, 2000); Anthony J. Miller, "The privileges and immunities of the United Nations", *International Organizations Law Review*, vol. 6 (2009), pp. 7–115; August Reinisch, "Privileges and immunities", in Klabbers and Wallendahl, *Research Handbook on the Law of International Organizations*, pp. 132–155; August Reinisch, ed., *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford, Oxford University Press, 2013); Isabelle Pingel, "Les privilèges et immunités de l'organisation internationale", in Évelyne Lagrange and Jean-Marc Sorel, eds., *Droit des organisations internationales* (Paris, Librairie générale de droit et de jurisprudence, 2013), pp. 626–656; Niels Blokker and Nico Schrijver, eds., *Immunity of International Organizations*, Legal Aspects of International Organizations, vol. 55 (Leiden, Koninklijke Brill, 2015); Reinisch, *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies*; August Reinisch, "Privileges and immunities", in Jacob Katz Cogan et al., eds., *The Oxford Handbook of International Organizations* (Oxford, Oxford University Press, 2016), pp. 1048–1068; Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (New York, Oxford University Press, 2018); Niels Blokker, "Jurisdictional immunities of international organisations – origins, fundamentals and challenges", in Tom Ruys et al., eds., *The Cambridge Handbook of Immunities and International Law* (Cambridge, Cambridge University Press, 2019), pp. 185–200; Ramses A. Wessel, "Jurisdictional immunity of regional organisations – substantive unity in instrumental diversity?", in Ruys, *The Cambridge Handbook of Immunities and International Law*, pp. 214–242; Stephen Mathias and Nicolas Perez, "The privileges and immunities of the United Nations", in Ian Johnstone and Steven Ratner, eds., *Talking International Law: Legal Argumentation Outside the Courtroom* (New York, Oxford University Press, 2021), pp. 316–335. See, in regard to enforcement immunity, Anne-Marie Thévenot-Werner, "L'immunité d'exécution des organisations internationales en matière de litiges entre l'organisation et ses agents", in Denys Simon, ed., *Le Droit international des immunités : constantes et ruptures* (Paris, Pedone, 2015), pp. 133–158; Victor Grandaubert, *L'immunité d'exécution de l'État étranger et des organisations internationales en droit international* (Paris, Pedone, 2023).

some instances, national legislation. Whether international organizations also enjoy such immunity as a matter of unwritten international law and, if so, to what extent they do so remains controversial.[323]

115. The conferment of privileges and immunities on international organizations was not always considered self-evident. The constituent instrument of the League of Nations provided merely for "diplomatic" privileges and immunities for the League's employees and the inviolability of the League's property, not for immunity.[324] Only a 1926 agreement with its host State, Switzerland, the so-called *modus vivendi*, stipulated that the organization itself could not be sued before the Swiss courts without its consent.[325]

116. With the Charter of the United Nations, the idea gained ground that an international organization should enjoy "functional" privileges and immunities, namely, those necessary to carry out its functions and to fulfil its purposes.[326] Numerous other constituent instruments of international organizations also provide for functional privileges and immunities.[327]

117. Privileges and immunities cover a wide spectrum of special rights and prerogatives, often in the form of exceptions from parts of a national legal order. In general, privileges are exemptions from the otherwise applicable substantive law of a State, while immunities are usually regarded as exemptions from the administrative, adjudicatory or executive powers of a State.[328] The typical "privileges" of international organizations are partial exemptions from some areas of national law, such as foreign exchange controls[329] or customs rules.[330] Most prominent are fiscal privileges which comprise exemptions from the obligation to pay any direct taxes for an international organization itself[331] and frequently also for its employees.[332] Disputes about fiscal privileges are rare, although sometimes the scope of functional tax exemptions of international organizations or of their staff has led to international disputes, as

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323 See Mirka Möldner, "International organizations or institutions, privileges and immunities", in Anne Peters and Rüdiger Wolfrum, eds., *The Max Planck Encyclopedia of Public International Law*, May 2011, available at www.mpepil.com/; Sir Michael Wood, "Do international organizations enjoy immunity under customary international law?", *International Organizations Law Review*, vol. 10 (2014), pp. 287–318; Andreas R. Ziegler, "Article 105", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary, Volume II*, 3rd ed. (Oxford, Oxford University Press, 2012), at p. 2162.

324 Art. 7, Covenant of the League of Nations (28 June 1919), *Official Journal of the League of Nations*, vol. 1 (1920), *Consolidated Treaty Series*, vol. 225, p. 195. The Covenant provided only for "diplomatic privileges and immunities" for "officials of the League when engaged on the business of the League" and that League property was to be "inviolable".

325 Para. I, *Communications from the Swiss Federal Council concerning the diplomatic immunities to be accorded to the staff of the League of Nations and of the International Labour Office*, Note by the Secretary-General, submitted to the Council on 20 September 1926, dated 18 September 1926, *Official Journal of the League of Nations*, vol. 7 (1926), annex 911a, p. 1422 ("The Swiss Federal Government recognises that the League of Nations, which possesses international personality and legal capacity, cannot in principle, according to the rules of international law, be sued before the Swiss courts without its express consent.").

326 Art. 105, para. 1, Charter of the United Nations ("The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.").

327 See, e.g., art. 67 (a), Constitution of the World Health Organization (New York, 22 July 1946), United Nations, *Treaty Series*, vol. 14, No. 221, p. 185; arts. 103–105, Charter of the Organization of American States (Bogotá, 30 April 1948), United Nations, *Treaty Series*, vol. 119, No. 1609, p. 3; art. VIII, para. 2, Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994), United Nations, *Treaty Series*, vol. 1867, No. 31874, p. 3; art. 40, Statute of the Council of Europe (London, 5 May 1949), United Nations, *Treaty Series*, vol. 87, No. 1168, p. 103.

328 Schermers and Blokker, *International Institutional Law*, at p. 268. See also August Reinisch, "The privileges and immunities of international organizations and equality. Some reflections on their justifications from an egalitarian perspective", in Ramses Wessel et al., eds., *Liber amicorum in honour of Niels Blokker* (forthcoming).

329 See, e.g., art. II, sect. 5, General Convention.

330 See, e.g., art. II, sect. 7, General Convention.

331 See, e.g., art. II, sect. 7, General Convention.

332 See, e.g., art. V, sect. 18, General Convention.

in the *EMBL-Germany*[333] and in the *UNESCO-France* arbitrations,[334] discussed in the Special Rapporteur's second report,[335] as well as before national courts.[336] Concerning indirect taxes, various reimbursement schemes are frequently envisaged.[337] In addition, privileges and immunities treaties usually accord international organizations such special rights as the inviolability of premises and archives[338] and the freedom of communication.[339] Immunities lead to the exemption of the international organizations, of their staff and agents from the jurisdiction of national criminal, civil and administrative courts and authorities.

118. These privileges and immunities are usually specified in multilateral privileges and immunities treaties concluded between an international organization's member States. Within the "United Nations family", there are two conventions of this type, the Convention on the Privileges and Immunities of the United Nations (General Convention) and the Convention on the Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention), dealing with the privileges and immunities of the United Nations and its specialized agencies, respectively. Similar multilateral privileges and immunities treaties have been concluded with regard to other organizations.[340] Bilateral headquarters or seat agreements between the international organization and the country where it has its headquarters or seat, as well as treaties concluded with non-member States in which international organizations operate, regularly contain further provisions on the exact scope of privileges and immunities.[341]

119. In addition, in a number of States, domestic legislation provides for privileges and immunities of international organizations. Such legislation is typically required in countries following a "dualist" legal tradition of incorporation.[342] Nevertheless, countries of a "monist" legal tradition also sometimes enact specific legislation.[343] These statutes often clarify the

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333 See *European Molecular Biology Laboratory (EMBL) v. Federal Republic of Germany*, Arbitration Award, 29 June 1990, ILR, vol. 105 (1997), pp. 1–74, in which it was held that the functional tax privileges of an international organization for its "official activities" did not cover value added tax exemptions for food and accommodation supplied against payment.

334 See *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France, decision of 14 January 2003*, *Reports of International Arbitral Awards*, vol. XXV, pp. 231–266, in which an arbitral tribunal found that the privilege contained in an international organization's headquarters agreement, exempting the salaries and emoluments of staff members, did not extend to pension payments since such payments would be due to "former" staff members and not to staff members and because they were not covered by the notion of "salaries and emoluments".

335 A/CN.4/766, paras. 66–68.

336 See France, Conseil d'État, *M. Aquarone v. France*, Decision, Case No. 148683, 6 June 1997, ILDC 1809 (FR 1997); Australia, High Court, *Macoun v. Commissioner of Taxation*, Appeal judgment, 2 December 2015, ILDC 2560 (AU 2015), [2015] HCA 44, (2015) 90 ALJR 93, (2015) 326 ALR 452, 2015 ATC 20-543; Netherlands, Supreme Court, *X v. State Secretary for Finance*, 16 January 2009, *Netherlands Yearbook of International Law*, vol. 41 (2010), pp. 394–403; Rutsel Silvestre J. Martha, *Tax Treatment of International Civil Servants* (Leiden, Koninklijke Brill, 2010).

337 See, e.g., art. II, sect. 8, General Convention.

338 See, e.g., art. II, sect. 3, General Convention.

339 See, e.g., art. III, sect. 9, General Convention.

340 See, e.g., Agreement on privileges and immunities of the Organization of American States (Washington, 15 May 1949), United Nations, *Treaty Series*, vol. 1438, No. 24376, p. 79, Organization of American States, *Treaty Series*, No. 22; General Agreement on Privileges and Immunities of the Council of Europe (Paris, 2 September 1949), United Nations, *Treaty Series*, vol. 250, No. 3515, p. 12.

341 See, e.g., Agreement regarding the Headquarters of the United Nations of 1947; 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; Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Tin Council (London, 9 February 1972), United Nations, *Treaty Series*, vol. 834, No. 11942, p. 287.

342 See, e.g., United States of America, International Organizations Immunities Act 1945, 59 Stat. 669, 22 U.S.C.A. paras. 288 *et seq*.; United Kingdom, International Organisations Act 1968 chap. 48, Halsbury's Statutes of England 4th ed., vol. 10, title Constitutional Law (part 5).

343 Switzerland, Bundesgesetz über die von der Schweiz als Gaststaat gewährten Vorrechte, Immunitäten und Erleichterungen sowie finanziellen Beiträge, AS 2007 6637 (Federal Act on the Privileges,

scope of the privileges and immunities of international organizations. Such legislation may also be necessary in case a State wishes to extend privileges and immunities to an international organization of which it is not a member and with which it has not (yet) concluded a treaty in order to confer privileges and immunities also on entities not strictly falling into the category of an international organization.[344]

120. For the purpose of the settlement of disputes to which international organizations are parties, the central issue is the jurisdictional immunity of the organizations themselves. As regards the scope of the immunity to be enjoyed by international organizations before national courts, the different formulations found in the various immunity instruments have in fact led to different interpretations, implying that in some instances, national courts exercised jurisdiction over claims brought against international organizations.

121. Most of the constituent instruments provide for "functional" (privileges and) immunities which, in regard to immunity from the jurisdiction of national courts, are often made more precise in multilateral privileges and immunities treaties and bilateral agreements as "immunity from every form of legal process".[345] This is largely understood as providing for absolute jurisdictional immunity as well as immunity from enforcement measures.[346] "Immunity from every form of legal process" thus deprives national courts of the power to hear and ultimately settle disputes between private parties and international organizations. Only the instruments governing development banks generally do not provide for jurisdictional immunity. Rather, they stipulate where national court proceedings can be instituted.[347]

Immunities and Facilities and Financial Contributions granted by Switzerland as a Host State); Germany, Gesetz über die Vorrechte, Immunitäten, Befreiungen und Erleichterungen in der Bundesrepublik Deutschland als Gaststaat internationaler Einrichtungen (Gaststaatgesetz) vom 30. November 2019, Federal Gazette I. 1929 (Act on Privileges, Immunities, Exemptions and Facilities in the Federal Republic of Germany as a Host State of International Organizations; Austria, Bundesgesetz zur Stärkung Österreichs als internationaler Amtssitz- und Konferenzstandort, Federal Gazette I No. 54/2021 (Federal Law to strengthen Austria as an international headquarters and conference location).

344 United States of America, International Organizations Immunities Act. See also Switzerland, Federal Act on the Privileges, Immunities and Facilities and Financial Contributions granted by Switzerland as a Host State, implementation ordinance of 7 December 2007. The Austrian Law on the Granting of Privileges and Immunities to International Organizations, Federal Act of 14 December 1977, Austrian Federal Law Gazette No. 677/1977, was mainly adopted in order to permit the granting of privileges and immunities to the Conference on Security and Co-operation in Europe, which was not recognized as an international organization at the time.

345 Art. II, sect. 2, General Convention; art. III, sect. 4, Specialized Agencies Convention; art. 3, Council of Europe Agreement; art. 2, Agreement on privileges and immunities of the Organization of American States. See also art. VIII, sect. 16, Agreement regarding the headquarters of the Food and Agriculture Organization of the United Nations; art. 8, Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Tin Council.

346 See "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat", *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, at p. 224, para. 76 ("These words have been broadly interpreted to include every form of legal process before national authorities, whether judicial, administrative or executive functions according to national law.").

347 See, e.g., art. VII, sect. 3, Articles of Agreement of the International Bank for Reconstruction and Development ("Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."); art. XI, sect. 3, Agreement establishing the Inter-American Development Bank (Washington, 8 April 1959), United Nations, *Treaty Series*, vol. 389, No. 5593, p. 69; art. 50, Agreement establishing the Asian Development Bank (Manila, 4 December 1965), United Nations, *Treaty Series*, vol. 571, No. 8303, p. 123.

122. The jurisdictional immunity of international organizations has engendered a rich jurisprudence of national courts which cannot be exhaustively addressed here.[348] Rather, this section aims to provide an overview of how national courts have exceptionally allowed private claimants to proceed in their lawsuits against international organizations and can thus serve as judicial dispute settlement mechanisms. It starts out with a short overview of national court decisions reacting to waivers of the immunity accorded to international organizations. It then provides some examples of court decisions denying immunity as a result of applying a restrictive immunity standard inspired by the development of State immunity exempting commercial or *jure gestionis* activities from the acts for which immunity is to be accorded. Subsequently, it refers to the development involved in limiting the scope of immunity by exempting activities that some courts consider to be outside the scope of functional immunity. Lastly, it addresses the different approaches to limiting the jurisdictional immunity of international organizations as a result of concerns about access to justice for private parties.

(c) Waiver of immunity

123. Immunity provisions regularly contain the possibility of waivers. In practice, however, waivers of jurisdictional immunity appear to be extremely rare. Rather than waiving their jurisdictional immunity, international organizations usually insist on their immunity and regularly ask the forum State to intervene on their behalf to ensure such immunity.[349]

124. Most immunity instruments require an express waiver of immunity in a particular case. The paradigmatic formulation is found in the General Convention, which provides for the United Nations to have "immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity".[350] This has been generally interpreted to mean that an advance contractual waiver through a choice of forum clause would not be effective,[351] although some doubts remain.[352] Equally, it has been understood to exclude the possibility of implied waivers.[353] A few immunity instruments envisage that an

[348] See, in general, on national jurisprudence Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts*; Blokker and Schrijver, *Immunity of International Organizations*; Cedric Ryngaert, "The immunity of international organizations before domestic courts: recent trends", *International Organizations Law Review*, vol. 7 (2010), pp. 121–148.

[349] See, e.g., A/CN.4/764, chap. III, sect. B (11) (United Nations Office for Project Services (UNOPS)) ("UNOPS has not established a practice of waiving immunity in cases where disputes have already arisen and cannot be settled otherwise, as this would be contrary to established United Nations practice. In view of the privileges and immunities of the United Nations, the established practice of the United Nations is not to appear in local courts of Member States. Instead, where it is necessary to take action before local courts, the United Nations requests the government of the State concerned, through its Ministry for Foreign Affairs, to make representation on behalf of the United Nations."); chap. III, sect. B (11) (World Food Programme) ("WFP does not have a practice of waiving its immunity from legal process. Any waiver is exceptional and is decided by the Secretary-General of the United Nations and the Director-General of FAO in accordance with the relevant provisions of the [Convention on the Privileges and Immunities of the United Nations] and [the Convention on the Privileges and Immunities of the Specialized Agencies], respectively.").

[350] Art. II, sect. 2, General Convention.

[351] Legal opinions of the Secretariat of the United Nations, "Law applicable to contracts concluded by the United Nations with private parties – Procedures for settling disputes arising out of such contracts – Relevant rules and practices", *United Nations Juridical Yearbook 1976*, pp. 159–176, at p. 175 ("This wording was changed by the Legal Committee of the Preparatory Commission to read in the more restrictive fashion that it now stands. It must be concluded, therefore, that it was not the intention of the Preparatory Commission, or of the General Assembly, to extend the right of waiver to waiver in future by the terms of a contract."); Miller, "The privileges and immunities of the United Nations", at p. 90; August Reinisch, "Immunity of property, funds, and assets (article II section 2 General Convention)", in Reinisch, *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies*, pp. 63–98, at pp. 95–97.

[352] See Chanaka Wickremasinghe, "International organizations or institutions, immunities before national courts", in Peters and Wolfrum, *The Max Planck Encyclopedia of Public International Law*, July 2009, available at www.mpepil.com/, para. 9.

[353] See, e.g., Belgium, Tribunal Civil de Bruxelles, *Manderlier v. Organisation des Nations Unies and État Belge (Ministre des Affaires Étrangères)*, 11 May 1966, *Journal des Tribunaux*, No. 4553, 10 December 1966, at p. 714 ("[A]ux termes de la section 2 l'O.N.U. jouit de l'immunité de

organization's jurisdictional immunity may be waived in a contract,[354] while some even provide for an organization's duty to waive its immunity, particularly where reliance upon it would "impede the course of justice".[355]

125. As mentioned, the express waiver requirement usually applicable to the immunity of international organizations has been reaffirmed by numerous courts.[356] In a few cases, however, national courts have found implicit waivers, allowing them to adjudicate disputes with private parties. The most noteworthy examples are express choice of forum clauses, selecting a particular national court or court system. An illustration is the French employment case of *Agence de coopération culturelle et technique v. Housson*,[357] in which the Court of Cassation in France regarded a choice of forum clause in favour of French courts as a waiver of the organization's immunity. Similarly, in *Arab Banking Corporation v. International Tin Council and Algemene Bank Nederland and Others (Interveners) and Holco Trading Company Ltd. (Interveners)*,[358] the High Court in England interpreted a choice of forum clause in favour of English courts as a waiver of immunity from suit that could be effectively performed in advance by contract, although the organization's headquarters agreement

juridiction sauf dans la mesure où elle y a expressément renoncé dans un cas particulier; cette disposition est générale et absolue et n'est pas affectée par la carence de l'O.N.U. à instituer certaines juridictions ayant compétence pour trancher pareil litige." ["[A]ccording to Section 2, the United Nations enjoys immunity from jurisdiction except to the extent that it has expressly waived such immunity in a particular case; this provision is general and absolute and is not affected by the failure of the United Nations to institute certain courts or tribunals having jurisdiction to settle such a dispute."]); *Pasicrisie Belge* (1966), III[e] partie, at p. 103; UNJYB (1966), p. 283; ILR, vol. 45 (1972), pp. 446–455; *United States Lines, Inc. v. World Health Organization*, Philippines, Intermediate Appellate Court, 30 September 1983, UNJYB (1983), p. 232; ILR, vol. 107 (1997), pp. 182–185, at p. 184 ("The records reveal that when defendant—appellee filed its special appearance and Motion to Dismiss, it made reservation to the effect that [its appearance before the court was only to affirm its immunity from legal process]. Thus totally negating the theory that its voluntary appearance before the trial court completely means a waiver of the immunity provided for by law."); *Boimah v. United Nations General Assembly*, United States District Court for the Eastern District of New York, 664 F. Supp. 69, 24 July 1987, p. 71 ("Under the [General] Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases."); *Brzak and Ishak v. United Nations and others*, Appeal Judgment, ILDC 2152 (US 2010), Court of Appeals of the United States (2nd Circuit), Docket No. 08-2799-CV, 597 F 3d 107 (2d Cir 2010), 2 March 2010, para. 13 ("Although the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [Convention on the Privileges and Immunities of the United Nations]. The United Nations has not waived its immunity.").

354 See, e.g., art. IX, sect. 3, Articles of Agreement of the International Monetary Fund ("except to the extent that [the Fund] expressly waives its immunity for the purpose of any proceedings or by the terms of any contract."); title I, sect. 2 (b), International Organizations Immunities Act.

355 See, e.g., annex I, art. IV, para. 1 (a), Convention for the establishment of a European Space Agency (Paris, 30 May 1975), United Nations, *Treaty Series*, vol. 1297, No. 21524, p. 161 ("the Council has the duty to waive this immunity in all cases where reliance upon it would impede the course of justice and it can be waived without prejudicing the interests of the Agency.").

356 See, e.g., United States, Court of Appeals for the District of Columbia Circuit, *Mendaro v. The World Bank*, 717 F.2d 610, 27 September 1983, at p. 617 ("[T]he immunity from employee suits may be waived by the members of the international organization, or its administrative directors. However, under national and international law, waivers of immunity must generally be expressly stated."); United States, District Court for the District of Columbia, *Lempert v. Rice and ors*, Trial court judgment, 956 FSupp2d 17 (DDC 2013), Civil Action No 12-01518 (CKK), ILDC 2325 (US 2013), 19 July 2013; Austria, Supreme Court of Justice, *E v. King Abdullah bin Abdulaziz International Centre for Interreligious and Intercultural Dialogue*, Final appeal decision, 29 November 2017, ILDC 2903 (AT 2017), 8 Ob 53/17b.

357 France, Cour d'appel de Bordeaux, *Agence de coopération culturelle et technique v. Housson*, 18 November 1982, Cour de Cassation, 24 October 1985. See also England, High Court, Queen's Bench Division (Commercial Court), *Standard Chartered Bank v. International Tin Council and Others*, 17 April 1986, [1986] 3 All E.R. 257, [1987] 1 WLR 641; ILR, vol. 77 (1988), pp. 8–18.

358 England, High Court, Queen's Bench Division, *Arab Banking Corporation v. International Tin Council and Algemene Bank Nederland and Others (Interveners) and Holco Trading Company Ltd. (Interveners)*, 15 January 1986, ILR, vol. 77 (1988), pp. 1–8.

required waivers to be "in a particular case".[359] In *African Reinsurance Corporation v. JDP Construction Nigeria Limited*,[360] the Supreme Court of Nigeria interpreted a choice of forum clause in a construction agreement as a waiver.[361]

126. Some older Italian cases even interpreted choice of law clauses as implicit waivers of immunity.[362] However, in most cases national courts distinguish between the question of applicable law and proper forum and do not consider choice of law clauses to imply a waiver of jurisdictional immunity.[363]

127. In general, national courts appear to be reluctant to accept implied waivers of immunity. This applies especially in the context of acts related to judicial proceedings. In this sense, the Supreme Court of Austria held, in *Company Baumeister L v. O*, a construction dispute between a private party and the Organization of the Petroleum Exporting Countries (OPEC) Fund for International Development, that receiving court papers on behalf of the organization did not constitute effective service of process and did not amount to an implicit waiver of immunity.[364] In a case brought against OPEC, *Prewitt Enterprises Incorporated and Similarly situated purchasers of petroleum products in the United States v. Organization of Petroleum Exporting Countries*, a United States Court of Appeals concluded that, according to the Austrian headquarters agreements with OPEC, the organization could be served only if there was an express waiver of immunity or consent to be served. It thus rejected the argument that "actual receipt of the pleadings constituted constructive consent or waiver".[365] In *Ochani v. WHO*, a court in India held that the Government's request that an organization cooperate and assist did not constitute a waiver.[366] That national courts are hesitant to accept implicit waivers of immunity is also evident in the decision of the Supreme Court of Canada in *World Bank Group v. Wallace et al.*, in which it ruled that the partial

[359] Art. 8, para. 1 (a), Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Tin Council.

[360] Nigeria, Supreme Court, *African Reinsurance Corporation v. JDP Construction Nigeria Limited*, Suit No. LD/2342/2000, 11 May 2007, ILDC 2634 (2007), 11 NWLR (Pt 1045) 224.

[361] *Ibid*., para. 32 ("It was specifically provided in the written contract that any dispute arising from the contract could be litigated upon in a Lagos High Court … It is, in my view, very ridiculous and unethical for the appellant to now claim that it had not waived its diplomatic immunity in the instant case by agreeing that it could be sued in the written contract.").

[362] Italy, Court of Cassation, *Branno v. Ministry of War*, 14 June 1954, ILR, vol. 22 (1955), pp. 756 and 757; 38 RivDI (1955), pp. 352–353, Italy, Court of Cassation, *Maida v. Administration for International Assistance*, 27 May 1955, ILR, vol. 23 (1965), pp. 510–515, 39 RivDI (1956), pp. 546–550. See Reinisch, *International Organizations Before National Courts*, at pp. 224 and 225.

[363] United States, Alaska, Supreme Court, *Price v. Unisea, Inc., International Pacific Halibut Commission and Sompo Japan Insurance Company of America*, 289 P.3d 914, at 921, Appeal judgment, 289 P3d 914 (Alaska 2012), ILDC 2132 (US 2012), 7 December 2012, at para. 23 ("A choice of law clause, on the other hand, indicates which jurisdiction's law will govern the interpretation of a contract if litigation ensues. It does not indicate an agreement on IPHC's part to subject itself to the jurisdiction of any court.").

[364] Austria, Supreme Court of Justice, *Company Baumeister Ing Richard L v. O*, 10 Ob 53/04y, 14 December 2004, ILDC 362 (AT 2004), para. 19 (initially citing the Introductory Act to the Austrian Jurisdiction Code "'With regard to an international organisation, the body responsible for external representation of the organisation is responsible for submitting the declaration of waiver'. The waiver must be declared explicitly and is only binding for the case for which it is issued … with regard to the principle of good faith, which also applies under international law, immunity can also be waived by implicit behaviour. Purely passive behaviour, however, (such as the receipt of the claim or of a summons, non-appearance at a court hearing) cannot constitute an implicit waiver of immunity.").

[365] United States, Court of Appeals, *Prewitt Enterprises Incorporated and similarly situated purchasers of petroleum products in the United States v. Organization of Petroleum Exporting Countries*, 353 F.3d 916, 18 December 2003, ILDC 715 (US 2003), para. 16, footnote. 18.

[366] India, Delhi High Court, *Ochani v. World Health Organization and Another*, I.A. 7551/2001, S.No.1700/1999, 4 December 2001, *Oxford International Organizations*, vol. 591, para. 16 ("Merely because the Central Government informed the plaintiff that it has requested defendant No. 1 to cooperate and assist the High Court in the matter does not tantamount to granting permission to the plaintiff to sue the defendant. Any immunity provided by any statutory provision cannot be waived or abridged either by requesting the party to cooperate or assist the court nor can it be taken away except by way of legal authority.").

voluntary disclosure of documents on the part of the organization did not amount to a waiver of its "archival" immunity,[367] and more generally insisted on the requirement of an express waiver.[368]

128. National courts have also been reluctant to consider arbitration clauses to constitute waivers of jurisdictional immunity. In *Leonard A. Sacks & Associates, P.C. v. IMF*, a private contractor unsuccessfully sought to modify or vacate an arbitration award it had obtained against IMF. The District of Columbia Court of Appeals did not consider their arbitration agreement to constitute a waiver which must be explicit.[369] In *El Omari v. INTERPOL*, another United States appellate court rejected the claim that the provision for arbitration in the headquarters agreement of INTERPOL with France constituted an express waiver of immunity that would have allowed a private party to claim damages for having been listed under a "red notice".[370] Similarly, in *Humphrey Construction Ltd v. Pan African Postal Union*,[371] an appellate court in the United Republic of Tanzania found that an arbitration clause in a construction agreement did not amount to an implied waiver of immunity.

129. Peculiar jurisprudence was developed by United States courts referring to the treaty-based possibility of bringing lawsuits against international development banks[372] as "waivers" of immunity. Thus, United States courts have permitted certain lawsuits against international organizations based on what is often termed a "statutory waiver".[373] It is important to note, however, that these treaty provisions do not constitute waivers in the sense of a contractual or *ad hoc* renouncement to enjoy immunity. Rather, the "statutory waiver" cases are based on an interpretation of the applicable privileges and immunities instrument, the United States International Organizations Immunities Act, which provides for absolute immunity, except if "waived" by the organization.[374] Many constituent instruments of international development banks do not broadly provide for their jurisdictional immunity.

[367] Canada, Supreme Court, *World Bank Group v. Kevin Wallace et al*., 2016 SCC 15, 29 April 2016, para. 82.

[368] *Ibid*., para. 92 ("In this context, limiting the IBRD's or the IDA's waiver to strictly its own express terms is consistent with the purpose of protecting them from state interference …. If 'waiver' is limited to express waiver, then the IBRD and the IDA will be firmly in control of when their personnel may be subjected to domestic legal processes … If s. 8 were to include forms of implied and constructive waiver — concepts that are liable to vary significantly across the globe — then inconsistencies from jurisdiction to jurisdiction could cause considerable confusion and interfere with the IBRD's and the IDA's orderly operations.").

[369] United States, Court of Appeals, District of Columbia Circuit, *Leonard A. Sacks & Associates, P.C. v. International Monetary Fund*, 25 February 2022, 26 F.4th 470 (D.C. Cir. 2022), p. 12 ("The Fund's entitlement to absolute immunity from suit, together with the fact that it explicitly reaffirmed its immunity in its agreement to arbitrate with Sacks, compels us to affirm.").

[370] United States, Court of Appeals for the Second Circuit, *El Omari v. The International Criminal Police Organization, also known as INTERPOL*, 24 May 2022, 35 F.4th 83 (2nd Cir. 2022), p. 18 ("even if we were to make the extraordinary assumption that the dispute resolution provisions of the Headquarters Agreement had some application to this case, those provisions do not waive any immunity Interpol might have from suit in the courts of France, let alone of the United States.").

[371] United Republic of Tanzania, Court of Appeal, Dar es Salaam, *Humphrey Construction Ltd v. Pan African Postal Union (PAPU)*, Civil Revision No. 1 of 2007, [2008] TZCA 187, 16 May 2008.

[372] See, e.g., art. VII, sect. 3, Articles of Agreement of the International Bank for Reconstruction and Development.

[373] See Charles H. Brower, II, "United States", in Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts*, pp. 303–327; David P. Stewart and Ingrid Wuerth, "The jurisdictional immunities of international organizations: recent developments and the challenges of the future", in Paul B. Stephan and Sarah A. Cleveland, eds., *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law* (New York, Oxford University Press, 2020), pp. 411–432.

[374] Title I, sect. 2 (b), International Organizations Immunities Act ("International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.").

Rather, they expressly permit suit brought against these organizations only excluding those actions brought by members or persons acting for or deriving claims from members.[375]

130. In *Lutcher v. Inter-American Development Bank*,[376] the District of Columbia Circuit Court interpreted article XI, section 3, of the Bank's Articles of Agreement[377] as a broad "waiver of immunity" the Bank would otherwise enjoy under the International Organizations Immunities Act. It thus permitted a damages suit by a Bank borrower against the organization, which was then dismissed for failure to state a claim. Since this rationale would also apply to employment-related disputes by private individuals working for such international organizations, United States courts had to limit the scope of the judicially developed "statutory waiver" theory. They did so in a series of cases, starting with *Mendaro v. The World Bank*,[378] holding that the treaty-based "waiver" permitted lawsuits only in respect of "external" affairs of the organization, upholding its immunity from suits in "internal" employment disputes. This reasoning was followed in *Chiriboga v. IBRD*,[379] *Novak v. World Bank*,[380] *Morgan v. IBRD*[381] and other cases.[382]

131. An interesting interpretation was given to the constituent instrument of the East African Development Bank which provided for the Bank's "immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers".[383] In *East African Development Bank v. Blueline Enterprises Limited*,[384] a Court of Appeal in the United Republic of Tanzania ruled that this implied a "qualified immunity in respect of cases arising out of its exercise of borrowing powers".[385] This did not change the fact that the organization enjoyed absolute immunity from legal process in the exercise of its "lending" powers.

(d) Jurisprudence restricting immunity to non-commercial activities

132. In practice, the jurisdictional immunity of international organizations may not always be as absolute as the usually broad immunity provisions discussed above might suggest. Most common are situations in which national courts rely upon national law which explicitly provides for less than absolute immunity. The best known examples are found in United States[386] and Italian law.[387]

133. In the United States of America, the 1945 International Organizations Immunities Act provides for the same immunity as enjoyed by "foreign governments",[388] which has been

375 See footnote 347 above.

376 United States, District of Columbia Circuit Court, *Lutcher S.A. Celulose e Papel and F. Lutcher Brown v. Inter-American Development Bank*, 382 F.2d 454 (D.C. Cir. 1967), at 458, ILDC 1767 (US 1967), 13 July 1967.

377 Art. XI, sect. 3, Agreement establishing the Inter-American Development Bank.

378 *Mendaro v. The World Bank* (see footnote 356 above).

379 United States, District Court for the District of Columbia, *Chiriboga v. IBRD*, 616 F. Supp. 963 (D.D.C. 1985), 29 March 1985.

380 *Tuck v. Pan American Health Organization*, United States, U.S. District Court DC, 17 November 198, *Novak v. World Bank*, 703 F.2d 1305 (D.C. Cir. 1983), 1 April 1983.

381 United States, District Court for the District of Columbia, *Morgan v. IBRD*, 752 F. Supp. 492 (D.D.C. 1990), 13 September 1990.

382 See Brower, "United States".

383 Art. 44, Treaty amending and re-enacting the Charter of the East African Development Bank (with annexed Charter) (Kampala, 13 September 1979, Dar-es-Salaam, 7 January 1980 and Nairobi, 23 July 1980), United Nations, *Treaty Series*, vol. 1989, No. 34027, p. 257.

384 United Republic of Tanzania, Court of Appeal, *East African Development Bank v. Blueline Enterprises Limited*, Civil Appeal No. 110 of 2009, 22 December 2011, [2011] TZCA 1, ILDC 3428 (TZ 2011).

385 *Ibid*., para. 41.

386 See Brower, "United States".

387 See Beatrice I. Bonafè, "Italian courts and the immunity of international organizations", in Blokker and Schrijver, *Immunity of International Organizations*, pp. 246–278; Riccardo Pavoni, "Italy", in Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts*, pp. 155–171.

388 Title I, sect. 2 (b), International Organizations Immunities Act.

controversially interpreted since the United States 1976 Foreign Sovereign Immunities Act[389] codified the restrictive immunity of foreign States. For a considerable period of time, United States courts managed to avoid the question of whether the reference was to the historic absolute or to the contemporary restrictive State immunity standard by holding that, even under a restrictive State immunity standard, a particular action would be inadmissible against an international organization.[390] In 1998, the United States District of Columbia Circuit Court held that the reference to the historic absolute State immunity standard should prevail,[391] while the United States Court of Appeals for the Third Circuit found that the immunity conferred by the International Organizations Immunities Act would change with the law of foreign sovereign immunity, leading to a denial of immunity for a commercial transaction with a private party.[392] Most recently, the Supreme Court of the United States confirmed this view when it decided in *Jam v. International Finance Corporation*[393] – a damages claim alleging harm stemming from a project in India funded by the International Finance Corporation – that the International Organizations Immunities Act merely conferred restrictive immunity as enjoyed by States.[394] In regard to claims against the United Nations,

[389] Foreign Sovereign Immunities Act, 90 Stat. 2891, 28 U.S.C.A., paras. 1330, 1332, 1391(f), 1441 (d) and 1602–1611.

[390] *Morgan v. IBRD* (see footnote 381 above); United States, District Court for the Southern District of New York, *De Luca v. United Nations Organization, Perez de Cuellar, Gomez, Duque, Annan and others*, 10 January 1994, 841 F. Supp. 531 (S.D.N.Y. 1994); United States, *Tuck v. Pan American Health Organization*, 17 November 1980, No. 80-1546 (D.D.C. 1980); United States Court of Appeals, District of Columbia Circuit, 13 November 1981; 668 F.2d 547 (D.C. Cir. 1981), UNJYB (1981), p. 177.

[391] United States, Court of Appeals, District of Columbia Circuit, *Atkinson v. Inter-American Development Bank*, 156 F.3d. 1335, at p. 1341 (D.C. Cir. 1998), 9 October 1998 ("In light of [the International Organizations Immunities Act] and legislative history, we think that despite the lack of a clear instruction as to whether Congress meant to incorporate in the [International Organizations Immunities Act] subsequent changes to the law of immunity of foreign sovereigns, Congress' intent was to adopt that body of law only as it existed in 1945 — when immunity of foreign sovereigns was absolute."); see also United States, District Court for the District of Columbia, *Polak v. International Monetary Fund*, 657 F Supp 2d 116 (DC District, 2009), affirmed by United States, Court of Appeals, District of Columbia Circuit, 2010 WL 4340534; *Nyambal v. International Monetary Fund*, 772 F 3d 277 (DC Cir, 2014), 25 November 2014.

[392] United States, Court of Appeals for the Third Circuit, *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010), 16 August 2010 ("If Congress wanted to tether international organization immunity to the law of foreign sovereign immunity as it existed at the time the IOIA was passed, it could have used language to expressly convey this intent. For example, Congress could have simply stated that international organizations would be entitled to the "same immunity as of the date of this Act." Or, it could have just specified the substantive scope of the immunity it was conferring. Because it did neither, we interpret the IOIA in light of the Reference Canon to mean that Congress intended that the immunity conferred by the IOIA would adapt with the law of foreign sovereign immunity.").

[393] United States, Supreme Court, *Jam v. International Finance Corporation*, 139 S. Ct. 759 (2019), 27 February 2019. See also Desiree LeClercq, "A rules-based approach to *Jam*'s restrictive immunity: implications for international organizations", *Houston Law Review*, vol. 58 (2020), pp. 55–98; Clemens Treichl and August Reinisch, "Domestic jurisdiction over international financial institutions for injuries to project-affected individuals: the case of *Jam v. International Finance Corporation*", *International Organizations Law Review*, vol. 16 (2019), pp. 105–136; Philippa Webb, "Should the *2004 UN State Immunity Convention* serve as a model/starting point for a future UN Convention on the immunity of international organizations?", in Blokker and Schrijver, *Immunity of International Organizations*, pp. 61–73; Nigel D. White, "Jam tomorrow? Implications for United Nations human rights liability of the United States Supreme Court's judgment on immunity", *Human Rights Law Review*, vol. 20 (2020), pp. 189–204; Fernando Lusa Bordin, "To what immunities are international organizations entitled under general international law? Thoughts on *Jam v IFC* and the 'default rules' of IO immunity", *Questions of International Law, Zoom-in*, vol. 72 (2020), pp. 5–28.

[394] United States, Supreme Court, *Jam v. International Finance Corporation*, 139 S. Ct. 759 (2019), 27 February 2019, p. 15 ("The International Organizations Immunities Act grants international organizations the 'same immunity' from suit 'as is enjoyed by foreign governments' at any given time. Today, that means that the Foreign Sovereign Immunities Act governs the immunity of international organizations. The International Finance Corporation is therefore not absolutely immune from suit."). See also *Rodríguez et al. v. Pan American Health Organization*, 29 F.4th 706 (D.C. Cir. 2022), 29 March 2022.

United States courts uphold the Organization's absolute immunity on the basis of the directly applicable General Convention.[395]

134. A similar line of jurisprudence has been prevailing in Italy for a considerable period of time. Italian courts denied immunity in cases of purely "commercial" disputes involving international organizations.[396] One should note, however, that the application of sovereign immunity principles often resulted from specific reservations to privileges and immunities instruments pursuant to which Italy granted international organizations only "restrictive" immunity accorded to foreign States under general principles of international law.[397] The legality of such a reservation has been controversial and led to a major dispute between Italy as the headquarters State of FAO and the latter, as discussed in the Special Rapporteur's second report.[398]

135. Before this controversy with FAO was settled, it led to a number of court judgments affirming the jurisdiction of Italian courts in lease disputes between the organization and its landlord, the most famous one being *Food and Agriculture Organization of the United Nations v. Istituto Nazionale di Previdenze per i Dirigenti di Aziende Industriali (INPDAI)*.[399] Already in 1977, in *Bari Institute of the International Centre for Advanced Mediterranean Agronomic Studies v. Jasbez*,[400] the highest Italian court had denied an international organization's immunity from suit in an employment dispute with an interpreter, relying on the reservation entered by Italy accepting the organization's immunity only to the extent that immunity had to be granted to foreign States under "general principles of international law". Furthermore, in a number of cases involving the Intergovernmental Committee for European Migration, Italian courts applied a restrictive (sovereign) immunity standard to this organization.[401]

136. An example of a national court openly relying on a State immunity rationale is *Anonymous v. International Centre for Advanced Mediterranean Agronomic Studies*, in

[395] United States, Court of Appeals for the Second Circuit, *Georges and others v. United Nations and others*, Case No. 15-455, 834 F.3d 88 (2nd Cir 2016), 18 August 2016; United States District Court for the Southern District of New York, *Deng v. United Nations*, Case No. 22-CV-5539 (LTS), 2022 WL 3030437, 29 July 2022; United States District Court for the Southern District of New York, *Hamdan v. United Nations Headquarters*, No. 1:22-CV-8746 (LTS), 2022 WL 17822579, 19 December 2022; United States District Court for the Southern District of New York, *Kaambo v. Office of the United Nations Secretary-General*, No. 22-CV-9447 (LTS), 2023 WL 2216254, 21 February 2023.

[396] Pavoni, "Italy", in Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts*.

[397] See Adesione dell'Italia alla Convenzione sui privilegi e le immunità della istituzioni specializzate delle Nazioni Unite, *Gazzetta Ufficiale della Repubblica Italiana*, No. 173, 28 July 1952, p. 2791. See also Gian Luca Burci, "Immunity of property, funds, and assets (article III section 4 Specialized Agencies Convention", in Reinisch, *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies*, pp. 99–122, at pp. 113 *et seq.*

[398] See A/CN.4/766, paras. 36 and 67.

[399] Italy, Tribunale di Roma, *Istituto Nazionale di Previdenze per i Dirigenti di Aziende Industriali (INPDAI) c. F.A.O.*, 24 January 1981, *Rivista di Diritto Internazionale Privato e Processuale* (1982), pp. 95–97; Italy, Supreme Court of Cassation, *Food and Agriculture Organization of the United Nations v. Istituto Nazionale di Previdenze per i Dirigenti di Aziende Industriali (INPDAI)*, Judgment No. 5399, 18 October 1982, UNJYB (1982), p. 234, RivDI (1983), p. 187, ILR, vol. 87 (1992), pp. 1–10.

[400] Italy, Court of Cassation, *Bari Institute of the International Centre for Advanced Mediterranean Agronomic Studies v. Jasbez*, Case No. 4502, 21 October 1977, 61 RivDI (1978), p. 577, ILR, vol. 77 (1988), pp. 602–609, at p. 609 ("Miss Jasbez was entrusted with responsibilities which consisted of the mechanical repetition in a foreign language of words spoken or written by others … These responsibilities were therefore unconnected with the intellectual process of taking decisions in the furtherance of the organization's aims, nor did they form part of the public function of that process … In conclusion, the Italian courts must be held to have jurisdiction in this case.")

[401] Italy, Supreme Court of Cassation, *Mrs. C. v. Intergovernmental Committee for European Migration (ICEM)*, Case No. 19/70, Decision, 7 June 1973, UNJYB (1973), p. 197; Italy, Court of Cassation, *ICEM v. Chiti*, Case No. 2910, 7 November 1973, ILR, vol. 77 (1988), p. 577; Italy, Court of Cassation, *ICEM v. Di Banella Schirone*, Case No. 1266, 8 April 1975, ILR, vol. 77 (1988), pp. 572–577.

which a Greek court held that "disputes arising from employment relationships against the Institute were related to actions taken in the Institute's private capacity and did not derive from the exercise of governmental authority. In consequence, Greek courts had jurisdiction for such action".[402] Similarly, a French appellate court in *Agence de coopération culturelle et technique v. Housson*[403] read an "implied" restriction into an (unqualified) provision granting immunity. It distinguished between official and private acts (*actes d'autorité* and *actes de gestion*) and between staff and personnel recruited on the basis of contracts governed by French private law. In the latter case, it held that the organization would not enjoy immunity from suit. In *International Commission for the Conservation of Atlantic Tunas v. Public Prosecutor*, the Constitutional Court of Spain refused to grant absolute immunity to acts qualified as *jure gestionis*, such as dismissing an employee who performed administrative tasks.[404] This is in line with the previous Spanish *Tamara* case, which also concerned administrative staff of the same organization.[405] In *Closed joint-stock company and National Information Agency 'Television News Service' v. International Inter-State Broadcasting Company 'MIR'*, the Supreme Commercial Court of the Russian Federation ruled that the international organization's functional immunity did not cover commercial activities such as purchasing equipment or shares, which went beyond the broadcasting purposes of the organization.[406] Similarly, a district court in Israel ruled that the United Nations Truce Supervision Organization did not enjoy absolute immunity for acts of a private nature in *United Nations Truce Supervision Organization and Attorney General v. Siragnian*.[407]

137. African courts equally followed this logic. For instance, in *African Reinsurance Corporation v. JDP Construction Nigeria Limited*,[408] the Supreme Court of Nigeria held that host State legislation conferred upon international organizations immunities enjoyed by States, thus excluding commercial activities. It found that a construction dispute concerning the African Reinsurance Corporation's headquarters was commercial in nature and was therefore not covered by the organization's restrictive immunity.[409] In *Tononoka Steels Limited v. Eastern and Southern Africa Trade and Development Bank*,[410] an appellate court in Kenya also relied upon a restrictive State immunity standard in order to dismiss the organization's claim to immunity in a breach of contract suit instituted by a private party arising out of a lending operation.

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[402] Greece, Crete, Court of Appeal, *Anonymous v. International Centre for Advanced Mediterranean Agronomic Studies*, Judgment, Appeal No. 479/1991, ILDC 1596 (GR 1991), para. H4. A subsequent Greek court decision, also relying on the State immunity rationale, held that a procurement dispute was covered by the organization's restrictive immunity. Greece, Council of State, *ALS Analytical Laboratory Systems SA v. Mediterranean Agronomic Institute of Chania*, Interim measures, No. 112/2007, 10 January 2007, ILDC 1597 (GR 2007), para. H3 ("The Centre was an international organization that exercised public authority in the areas of postgraduate training and co-operation among the agricultural personnel of the Mediterranean Basin. The proposed supply contract and all its preparatory acts were connected to the Centre's public interest purposes to provide 'supplementary education … and develop … a spirit of international cooperation among agricultural personnel in Mediterranean countries' pursuant to the Preamble of the [International Centre for Advanced Mediterranean Agronomic Studies] Agreement.").

[403] *Agence de coopération culturelle et technique v. Housson* (see footnote 357 above).

[404] Spain, Constitutional Court, *International Commission for the Conservation of Atlantic Tunas v. Public Prosecutor, Amparo* appeal, Case No. 120/2021, 31 May 2021, ILDC 3314 (ES 2021).

[405] Spain, High Court of Justice, *Tamara v. Labour Court of First Instance No. 36 of Madrid*, Appeal decision, Case No. 11811/2016, 4 November 2016, ILDC 2924 (ES 2016).

[406] Russian Federation, Supreme Commercial Court, *Closed joint-stock company and National Information Agency 'Television News Service' v. International Inter-State Broadcasting Company 'MIR'*, Decision on 'nadzor review', 13111/03, 20 January 2004, ILDC 27 (RU 2004).

[407] Israel, District Court, *United Nations Truce Supervision Organization and Attorney General v. Siragnian*, Miscellaneous Civil Application 4262/04, 30 January 2005, ILDC 2693 (IL 2005).

[408] *African Reinsurance Corporation v. JDP Construction Nigeria Limited* (see footnote 360 above).

[409] *Ibid*., para. 33 ("having regard to the fact that the activities covered in this case are commercial in nature, the appellant in fact was not covered by the provisions of the Diplomatic Immunity arrangement it now relied on as a defence.").

[410] Kenya, Nairobi Court of Appeal, *Tononoka Steels Limited v. Eastern and Southern Africa Trade and Development Bank*, Appeal judgment, Civil Appeal No. 255 of 1998, 13 August 1999, 2 EA 536 (CAK), ILDC 1283 (KE 1999).

138. Latin American courts have also relied on a restrictive State immunity concept in several cases instituted against international organizations. In a case involving the Latin American Institute for Educational Communication, the Supreme Court of Mexico concluded that when international organizations engage in activities similar to those of private individuals, they are generally not protected by jurisdictional immunity. It found that the act of hiring personnel was incidental rather than central to the organization's main purpose or functions, thus falling in the *jure gestionis* category.[411]

139. Courts in Asia also sometimes follow a State immunity logic. For instance, in *Bank Bumiputra Malaysia Bhd. v. International Tin Council and Another*,[412] a court in Malaysia found that the International Tin Council's granting of immunity in its headquarters agreement applied only in the United Kingdom of Great Britain and Northern Ireland. Since the International Tin Council had entered into a commercial transaction with a Malaysian entity, it could not claim (sovereign) immunity before Malaysian courts.

(e) Courts permitting the settlement of disputes with private parties performing work for international organizations

140. In a number of cases, national courts have upheld their jurisdiction over employment disputes between international organizations and persons performing work for them. Such cases rarely concern staff members and are mostly confined to persons performing various forms of secretarial or supportive functions. The rationale for limiting the organizations' immunity, regularly based on applicable treaty provisions, often seems to be that such relationships are not covered by the functional immunity of international organizations and may also be influenced by parallel developments in the field of State and diplomatic immunity, exempting employment relations with persons not involved in the exercise of State functions from the immunity otherwise enjoyed by States.[413]

141. Italian courts have relied on such a distinction. For instance, in *Pistelli v. European University Institute*, the Supreme Court of Cassation of Italy held that disputes concerning "labour relations that are entirely separate from the institutional and organisational functions" of an international organization have a "private character" and are thus subject to the jurisdiction of Italian courts.[414] In a similar way, in *Ryabov v. Eurasian Development Bank*, the Supreme Court of the Russian Federation considered that the organization's functional immunity concerned only the execution of its functions and the achievement of its purposes and did not cover the employment relations between the claimant and the organization.[415] In

[411] Mexico, Supreme Court, Case decisión, Tesis de jurisprudencia 102/2003, 2003, Tesis 2a./J. 102/2003, available at https://bj.scjn.gob.mx/documento/tesis/182825.

[412] Malaysia, High Court, *Bank Bumiputra Malaysia Bhd. v. International Tin Council and Another*, 13 January 1987, *The Malayan Law Journal*, vol. 2 (1987), p. 732; ILR, vol. 80 (1989), pp. 24–30.

[413] See art. 11, United Nations Convention on Jurisdictional Immunities of States and Their Property, General Assembly resolution 59/38 of 2 December 2004, *International Legal Materials*, vol. 44 (2005), p. 803. See also European Court of Human Rights, *Cudak v. Lithuania* [GC], No. 15869/02, 23 March 2010; European Court of Human Rights, *Sabeh El Leil v. France* [GC], No. 34869/05, 29 June 2011; European Court of Justice, *Mahamdia v. Algeria* [GC], Case C-154/11; ECLI:EU:C:2012:491, 19 July 2012.

[414] Italy, Supreme Court of Cassation, *Paola Pistelli v. European University Institute*, Appeal Judgment, Case No. 20995, 28 October 2005, ILDC 297 (IT 2005), para. 6 ("Regarding this distinction and with specific reference to labour relations, following some uncertainty, the case law for the Court of Cassation All Sections has taken the view that Italian courts have jurisdictional authority over all labour disputes involving international law entities which enjoy immunity and are therefore outside the Italian legal order when those disputes concern labour relations that are entirely separate from the institutional and organisational functions of the entity, and therefore having a private character.").

[415] Russian Federation, Supreme Court, *SN Ryabov v. Eurasian Development Bank*, Supervisory review, N 5-B10-49, ILDC 1559 (RU 2010), 9 July 2010, H6 ("According to Article 31(1) of the EDB Charter, the EDB enjoyed judicial immunity in all cases except those which were not the result of the exercise of its powers or not related to the implementation of those powers. Thus, the immunity of the EDB applied to cases arising from the exercise of the powers assumed by the Bank in implementing its core functions set out in the Agreement and the EDB Charter.").

World Bank Office Dhaka v. Ismet Zerin Khan,[416] the Supreme Court of Bangladesh found that the immunities granted to the organization were limited to its "external activities" and did not cover its "internal activities", thus permitting a former Bank employee to challenge her job termination.

142. One should note that, in cases upholding the immunity of international organizations in employment-related disputes, national courts often rely on the notion that the claimants either took part in a *jure imperii*/sovereign activity or in exercising functions of the international organization, as was evident in the *Spaans* case in the Netherlands.[417] Similarly, in *Killeen v. International Centre of Insect Physiology and Ecology*, a court in Kenya upheld an international organization's immunity from suit in an employment dispute because the "contract … fell squarely within the operations of the Defendant in Kenya in respect of which diplomatic immunity and privileges 'as one necessary for the fulfilment of the Defendant's purposes' may be invoked".[418]

(*f*) Access to justice overriding immunity

143. An additional tendency, eroding the broad jurisdictional immunity of international organizations, stems from the fact that national courts are increasingly caught between their obligations to grant immunity to international organizations, on the one hand, and to provide access to justice to private parties, on the other hand. Since the right of access to justice is often contained in national constitutional law, in addition to being enshrined in human rights instruments, some national courts have accorded precedence to this obligation and denied the immunity of international organizations where no alternative form of dispute settlement was considered to be available. Moreover, the fact that a number of privileges and immunities instruments also expressly obligate international organizations to make available "appropriate modes of settlement of … disputes arising out of contracts or other disputes of a private law character" has contributed to national courts questioning the absolute immunity of international organizations.

144. Access to court is based on customary international law notions of due process and the avoidance of denial of justice.[419] It has become a traditional part of many international human rights instruments and of national fundamental rights guarantees. Nevertheless, with regard to potential claims against international organizations, it has been "dormant" for a long time.

145. Most human rights treaties do not explicitly contain a right of access to court. Instead, instruments such as the Universal Declaration of Human Rights,[420] the International Covenant on Civil and Political Rights[421] and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)[422] provide for due process or fair trial guarantees. However, in the actual application of such standards, it

[416] Bangladesh, Supreme Court, High Court Division, *World Bank Office Dhaka and another v. Ismet Zerin Khan*, 2018(1) LNJ 82, Civil Revision No. 3352 of 2011, Judgment, 12 March 2017, unofficial English translation available at https://www.lawyersnjurists.com/lawyer_ci/case/world-bank-office-dhaka-and-another-vs-ismet-zerin-khan-2018-1-lnj-82.

[417] See, e.g., The Netherlands, District Court of the Hague, *Iran-US Claims Tribunal v. A.S.*, 9 July 1984, *Netherlands Yearbook of International Law*, vol. 16 (1985), p. 472 (upholding the tribunal's immunity because the translating and interpreting services provided by claimant fell "within the category of *acta jure imperii*, since these services are essential for the Tribunal to duly perform its tasks.").

[418] Kenya, Nairobi, High Court, *Killeen v. International Centre of Insect Physiology and Ecology*, Civil Case 1737 of 2002, 27 May 2005, ILDC 77 (KE 2005), para. 9.

[419] See Jan Paulsson, *Denial of Justice in International Law* (Cambridge, Cambridge University Press, 2005), pp. 134–138.

[420] Art. 10, Universal Declaration of Human Rights, General Assembly resolution 217(III) (1948) ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

[421] Art. 14, para. 1, International Covenant on Civil and Political Rights (19 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14688, p. 171.

[422] Art. 6, para. 1, Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.

has become clear that the right to a fair trial requires not only a trial to be fair if one is provided under national procedural law, but also the right to have a trial in the first place.[423]

146. Human rights bodies together with national, often constitutional, courts have developed the notion that access to justice must be effective. This implies that exemptions, which include jurisdictional immunity, are granted only where alternative – equally effective – means of dispute settlement are readily available. The concept of the availability of an alternative forum was inspired by the fundamental rights debate within the predecessor organization of the European Union, the European Economic Community, as crystallized in the *Solange* jurisprudence.[424] It was then imported into the immunity versus access to court debate by national courts and human rights institutions and has now become part of a widely accepted view on the jurisdictional immunity of international organizations.

147. The leading case in this regard is *Waite and Kennedy v. Germany*,[425] in which the European Court of Human Rights reconsidered Strasbourg's traditional approach to immunities of international organizations by no longer accepting a general exclusion of international organizations from the jurisdiction of national courts.[426] Instead, the Court recognized that (civil) claims against international organizations involved the right of access to court under article 6 of the European Convention on Human Rights. It further held that while this right of access to justice might be limited for legitimate purposes, such as protecting the independent functioning of an international organization, such limitation was legitimate and permissible only if it also was proportionate. In the Court's view, the proportionality of the granting of immunity depended upon the availability of "reasonable

[423] European Court of Human Rights, *Golder v. United Kingdom*, No. 4451/70, 21 February 1975, para. 36; European Court of Human Rights, *Osman v. United Kingdom*, No. 23452/94, 28 October 1998, para. 136. Some of the older case law was premised on the idea that where certain potential defendants/respondents enjoyed immunity, a State lacked jurisdiction and was not able to grant access to court.

[424] National courts such as the Constitutional Court of Germany exerted some pressure on the Community by holding that they would exercise their fundamental rights review even over Community acts "as long as" the Community did not have its own internal corresponding system of control. Germany, Federal Constitutional Court, *Internationale Handelsgesellschaft mbH v. Einfuhr- und-Vorratstelle für Getreide und Futtermittel*, 29 May 1974, [1974] 2 CMLR 540 (*Solange I*). Only when the European Court of Justice developed its fundamental rights jurisprudence in the 1970s did national courts renounce their judicial control powers "as long as" the European Community itself provided adequate relief. Germany, Federal Constitutional Court, *Re the application of Wünsche Handelsgesellschaft*, 22 October 1986, [1987] 3 CMLR 225 (*Solange II*).

[425] *Waite and Kennedy v. Germany* (see footnote 51 above); *Beer and Regan v. Germany* (see footnote 51 above). The cases arose from the fact that German courts granted the European Space Agency jurisdictional immunity from suit by individuals who claimed to be employees of the organization. The claimants considered that this violated their right of access to court under article 6 of the European Convention on Human Rights. See also Nicolas Angelet and Alexandra Weerts, "Les immunités des organisations internationales face a l'article 6 de la Convention européenne des droits de l'homme", *Journal de Droit International*, vol. 34 (2007), pp. 3–26; Ryngaert, "The immunity of international organizations before domestic courts"; August Reinisch and Ulf Andreas Weber, "In the shadow of Waite and Kennedy: the jurisdictional immunity of international organizations, the individual's right of access to the courts and administrative tribunals as alternative means of dispute settlement", *International Organizations Law Review*, vol. 1 (2004), pp. 59–110; Marcello Di Filippo, "Immunity from suit of international organisations versus individual right of access to justice: an overview of recent domestic and international case law", in Daniel Pavón Piscitello (dir.), *Derecho Internacional de los Derechos Humanos: manifestaciones, violaciones y respuestas actuales* (Córdoba, Argentina, Editorial de la Universidad Católica de Córdoba), vol. 1 (2014), pp. 203–242; Rémi Cèbe, "Quelques réflexions sur les immunités des organisations internationales", in Anne Peters et al., eds., *Immunities in the Age of Global Constitutionalism* (Leiden, Brill Nijhoff, 2014), pp. 333–352.

[426] See, e.g., European Commission of Human Rights, *Ary Spaans v. The Netherlands*, No. 12516/86, 12 December 1988 (Admissibility), Decisions and Reports, vol. 58 (1988), p. 119, at p. 122 ("The Commission notes that it is in accordance with international law that States confer immunities and privileges to international bodies like the Iran-United States Claims Tribunal which are situated in their territory. The Commission does not consider that such a restriction of national sovereignty in order to facilitate the working of an international body gives rise to an issue under the Convention.").

alternative means".[427] The possibility of legal recourse to administrative tribunals or similar institutions for staff members of an international organization, to arbitration for contractors of international organizations,[428] or to claims commissions for victims of vehicle accidents or military measures taken by peacekeeping forces may embody such alternative remedies.

148. The idea that private parties have a right of access to justice concerning the determination of their rights and obligations vis-à-vis international organizations is not merely a specific approach limited to the contracting parties of the European Convention on Human Rights. Recently, it was explicitly endorsed by the Human Rights Committee in *M.L.D v. Philippines*.[429] It is also reflected in various other international courts and tribunals,[430] as well as administrative tribunals of international organizations that have recognized the "general principle" that employees should have access to a form of employment dispute settlement.[431] National courts have also espoused the *Waite and Kennedy* test to the extent that today, the availability of "reasonable alternative means" of redress is often considered to be a relevant factor and sometimes even a requirement for the granting of jurisdictional immunity to international organizations.

(i) Constitutional law requirements to provide access to justice

149. Several national constitutions provide for the right to a judge and/or access to justice or related rights.[432] In particular, the constitutional access to justice provisions under Italian[433] and German law[434] have given rise to interesting national court proceedings.

150. Already well before the European Court of Human Rights handed down its judgment in *Waite and Kennedy* in 1999, the Constitutional Court of Germany affirmed that German

[427] *Waite and Kennedy v. Germany* (see footnote 51 above), at para. 68 ("a material factor in determining whether granting … immunity from … jurisdiction is permissible … is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.").

[428] European Court of Human Rights, *Klausecker v. Germany*, No. 415/07, 29 January 2015, para. 55.

[429] CCPR/C/141/D/3581/2019.

[430] See Court of Justice of the European Communities, *SAT Fluggesellschaft mbH v. EUROCONTROL*, Opinion of Mr Advocate General Tesauro, Case C-364/92, 10 November 1993, pp. 43–54, at p. 48.

[431] See, e.g., ILO Administrative Tribunal, *Rubio v. Universal Postal Union*, No. 1644, Judgment, 10 July 1997, para. 12.

[432] See, e.g., art. 120, Constitution of the Plurinational State of Bolivia, 2009 ("Every person has the right to be heard by a competent, impartial and independent jurisdictional authority, and may not be tried by special commissions or submitted to other jurisdictional authorities other than those established prior to the time the facts of the case arose."); art. 20, Constitution of Cabo Verde, 1980, revised 1992 ("Everyone shall be guaranteed access to justice, independently of their economic condition, and within a reasonable period of time, effective protection of their legitimate rights and interests before the courts."); art. 97, Constitution of Egypt, 2014, revised 2019 ("Litigation is a right that is safeguarded and an inalienable right for all. The State shall guarantee the accessibility of judicature for litigants and rapid adjudication on cases. It is prohibited to immunize any administrative act or decision from judicial review. No person may be tried except before the ordinary judge. Exceptional courts are prohibited."); art. 48, Constitution of Kenya, 2010 ("The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice"); art. 36, Constitution of Turkey 1982, revised 2017 ("Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. No court shall refuse to hear a case within its jurisdiction."); art. 77, para. 2, Constitution of Poland 1997, revised 2009 ("Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights."); art. 15, para. 2, Constitution of Fiji, 2013 ("Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal."). Margaret Y.K. Woo at al., "Access to civil justice", *American Journal of Comparative Law*, vol. 70 (2022), pp. i89–i117.

[433] Constitution of Italy, art. 24, para. 1 ("Everyone is entitled to institute legal proceedings for the protection of his rights and legitimate interests."); and art. 25, para. 1 ("No one shall be denied the right to be tried by his natural judge pre-established by law.").

[434] Constitution of Germany, art. 19, para. 4 ("Should any person's rights be violated by public authority, recourse to court shall be open to him. Where no other jurisdiction has been established, recourse to the courts of ordinary jurisdiction is available."); and art. 101, para. 1 ("Extraordinary courts are inadmissible. No one may be removed from the jurisdiction of his lawful judge.").

courts lacked jurisdiction over employment disputes between the European Organisation for the Safety of Air Navigation (EUROCONTROL) and its staff in *Hetzel v. EUROCONTROL*.[435] Not only did it do that, but it also held that the organization's immunity before the German courts did not violate the minimum requirements of the rule of law principle contained in the Constitution of Germany because the ILO Administrative Tribunal provided an adequate alternative remedy.[436] Although the Constitutional Court of Germany adopted a rather deferential attitude towards the adequacy of alternative means, such as administrative tribunals of international organizations,[437] it is obvious that it insisted on retaining the ultimate power to assess the adequacy of alternative remedies.

151. In the well-known *FAO v. INPDAI* case,[438] denying the immunity of FAO for commercial activities in the form of renting office space, the Supreme Court of Italy took the constitutional right to a judge into consideration when assessing the scope of immunity of an international organization. The Court of Cassation rejected the claim to immunity made by FAO, observing that under the constitutive treaty of FAO, member States were required to undertake to accord to the organization immunities only in so far as it may be possible under their own constitutional procedures.[439] In the court's view, the Constitution of Italy[440] required that the legitimate interests of citizens should be afforded judicial protection.[441]

152. Similarly, in *ZM v. Arab League*,[442] the Federal Supreme Court of Switzerland held that the League of Arab States enjoyed absolute immunity in Switzerland only as long as a procedure for the settlement of disputes with private parties existed. Comparable jurisprudential developments took place in France. Traditionally, French courts routinely dismissed actions directed against international organizations because they would interfere with the independent operation of such organizations.[443] In 1997, however, in *UNESCO v. Boulois*, a French appellate court actually refused to accord immunity to an international

[435] Germany, Federal Constitutional Court, Second Chamber, *Hetzel v. EUROCONTROL*, 10 November 1981, BVerfG 59, 63. See also Albert Bleckmann, *Internationale Beamtenstreitigkeiten vor nationalen Gerichten* (Berlin, Duncker and Humblot, 1981); Ignaz Seidl-Hohenveldern, *Die Immunität internationaler Organisationen in Dienstrechtsstreitfällen* (Berlin, Duncker and Humblot, 1981).

[436] *Hetzel v. EUROCONTROL* (see footnote 435 above), at p. 91 ("status and procedural principles conformed to an international minimum standard of basic procedural fairness as it results from developed legal orders following the rule of law and from the procedural law of international courts.").

[437] See Germany, Federal Constitutional Court, Second Chamber, *B. and others v. EPO*, 3 July 2006, 2 BvR 1458/03; Germany, Federal Constitutional Court, Second Chamber, *D. v. Decision of the EPO Disciplinary Board*, 28 November 2005, 2 BvR 1751/03.

[438] *Food and Agriculture Organization of the United Nations v. Istituto Nazionale di Previdenze per i Dirigenti di Aziende Industriali (INPDAI)*, UNJYB (1982) (see footnote 399 above), p. 234.

[439] Art. XVI, para. 2, Constitution of the Food and Agriculture Organization of the United Nations (Quebec, 16 October 1945), *British and foreign state papers*, vol. 145, p. 910, as amended by Conference resolutions No. 30/55 and No. 37/57 ("Each Member Nation and Associate Member undertakes, insofar as it may be possible under its constitutional procedure, to accord to the Organization all the immunities and facilities which it accords to diplomatic missions, including inviolability of premises and archives, immunity from suit and exemptions from taxation.").

[440] Art. 24, para. 1, Constitution of Italy ("Everyone is entitled to institute legal proceedings for the protection of his rights and legitimate interests.").

[441] *Food and Agriculture Organization of the United Nations v. Istituto Nazionale di Previdenze per i Dirigenti di Aziende Industriali (INPDAI)*, UNJYB (1982) (see footnote 399 above), at p. 235.

[442] Switzerland, Federal Supreme Court, *ZM v. Arab League*, 4 C.518/1996, unpublished judgment of 25 January 1999, partly published in *Revue suisse de droit international et européen*, vol. 10 (2000), at p. 642.

[443] France, Tribunal Civil de Versailles, *Chemidlin v. Bureau international des Poids et Mesures*, 27 July 1945, *Ann. Dig.*, vol 12 (1943-45), p. 281; France, Court of Appeal of Paris (Twenty-first Chamber), *International Institute of Refrigeration v. Elkaim*, 7 February 1984, ILR, vol. 77 (1988), pp. 498–506; Cour de Cassation, 1. ch. civ., 8 November 1988, *Annuaire français de droit international*, vol. 35 (1989), p. 875.

organization where the claimant would have been deprived of a forum hearing his claims.[444] Similar reasoning was applied in *Banque africaine de développement v. M.A. Degboe*.[445]

153. Courts in countries outside Europe have also assessed the compatibility of the jurisdictional immunity of international organizations with constitutional law. For instance, the Supreme Court of Argentina developed the so-called *Cabrera* doctrine,[446] suggesting in *Cabrera c. Comisión Técnica Mixta de Salto Grande*[447] that article 4 of the Commission's headquarters agreement was unconstitutional because it contravened article 18 of the Constitution of Argentina, which provides that every individual has the right to access to justice. In *María Garese c. UNESCO*,[448] the Supreme Court of Uruguay heard a challenge to the constitutionality of the immunity provision of the Convention on the Privileges and Immunities of the Specialized Agencies after the applicant was not able to execute a judgment against the organization. The court recognized that the immunities of jurisdiction and execution granted to the international organization restricted the applicant's rights under article 12 of the Constitution of Uruguay. However, it found that the restriction was appropriate as it was the least restrictive measure to guarantee the independence of international organizations.[449] In an *amparo* in revision arising from a labour case against the Latin American Institute for Educational Communication,[450] article 17 of the Constitution of Mexico, providing for the right of access to justice,[451] was at issue. The Supreme Court found, however, that the immunities of international organizations were granted by the State in the exercise of its sovereignty and did not *per se* violate the Constitution.[452] In that particular case, the court upheld the immunity from execution of the organization because an interim

444 France, Tribunal de grande instance de Paris, *UNESCO v. Boulois*, 20 October 1997, *Rev. Arb.* (1997) 575; Cour d'Appel Paris (14e Ch. A), 19 June 1998, *Yearbook Commercial Arbitration*, vol. XXIVa (1999) pp. 294 and 295, at p. 295 (UNESCO's immunity "would inevitably lead to preventing [claimant] from bringing his case to a court. This situation would be contrary to public policy as it constitutes a denial of justice and a violation of the provisions of Art. 6(1) of the [European Convention on Human Rights].").

445 France, Cour de Cassation, Chambre sociale, *Banque africaine de développement v. M.A. Degboe*, 25 janvier 2005, 04-41012, *Journal du droit international*, vol. 132 (2005), p. 1142 ("*l'impossibilité pour une partie d'accéder au juge chargé de se prononcer sur sa prétention et d'exercer un droit qui relève de l'ordre public international constituant un déni de justice fondant la compétence de la juridiction française lorsqu'il existe un rattachement avec la France*" ["the impossibility for a party to have access to the court responsible for ruling on his claim and to exercise a right which is a matter of international public policy constituting a denial of justice justifying the jurisdiction of the French court where there is a connection with France"]). See also Cour de Cassation, Rapport annuel (1995), 418, cited by C. Byk, "Case note on *Hintermann v. Union de l'Europe occidentale*", *Journal du droit international*, vol. 124 (1997), pp. 142–151, at p. 142 (English translation in ILR, vol. 113 (1999), p. 487) ("*Les immunités de juridiction des organisations internationales … ont, pour conséquence, lorsque n'est pas organisé au sein de chaque organisation un mode de règlement arbitral ou juridictionnel des litiges, de créer un déni de justice …. Ce déni de justice peut-il être évité par la primauté de la convention européenne des droits de l'homme, qui garantit le libre accès au juge et le procès équitable ?*" ["The jurisdictional immunities of international organizations … are capable of creating a denial of justice wherever any such organization does not have an appropriate method for the settlement of disputes by arbitration or through the courts … Can such a denial of justice be avoided by granting precedence to the European Convention on Human Rights, which guarantees freedom of access to the courts and the right to a fair hearing?"]).

446 Raúl E. Vinuesa, "Argentina", in Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts*, pp. 17–30.

447 Argentina, Supreme Court, *Washington Cabrera c. Comisión Técnica Mixta de Salto Grande*, 5 December 1983, *Corte Suprema de Justicia de la Nación*, Fallos: 305:2150.

448 Uruguay, Supreme Court of Justice, *María Garese c. UNESCO*, No. 529/2023, 8 June 2023.

449 *Ibid.*, para. 5.2.

450 Mexico, Supreme Court of Justice of the Nation, Amparo en revision No. 197/2013, 15 January 2014.

451 Art. 17, Political Constitution of the United Mexican States, 5 February 1917, amended 8 October 2013 ("All people have the right to enjoy justice before the courts and under the terms and conditions set forth by the laws. The courts shall issue their rulings in a prompt, complete and impartial manner. Court's services shall be free, judicial fees are prohibited."), *Diario Oficial de la Federación* (Official Federal Gazette).

452 Mexico, Supreme Court of Justice of the Nation, Amparo en revision No. 197/2013, 15 January 2014, p. 43.

order of seizure of property was not necessary and would endanger the international organization's ability to carry out its functions.[453]

154. In *Amaratunga v. Northwest Atlantic Fisheries Organization*, the Supreme Court of Canada held that the Constitution of Canada did not provide for a right of access to justice that could have trumped the immunity enjoyed by the defendant organization. Rather, it merely guaranteed a fair trial if a trial takes place.[454] The argument that the jurisdictional immunities regularly enjoyed by international organizations would be unconstitutional was similarly unsuccessful in United States courts. While the potential friction between the right of the United Nations to immunity and the constitutional right of access to court was recognized in some older cases, such as *People v. Mark S. Weiner*[455] and *Urban v. United Nations*,[456] the more recent case of *Weinstock v. Asian Development Bank* unequivocally dismissed the argument that Congress, by granting immunity to the Asian Development Bank, had deprived the plaintiff of his "fundamental right to access to court".[457]

(ii) Human rights requirements to provide access to justice

155. The availability of "reasonable" alternative means of redress as a requirement for the granting of jurisdictional immunity to international organizations, as laid down in the *Waite and Kennedy* judgment of the European Court of Human Rights,[458] was a crucial consideration in Belgian court decisions denying the immunity of international organizations.[459] In *Siedler v. Western European Union*,[460] the Brussels Labour Court of Appeal found that the internal procedure for the settlement of staff disputes within the Western European Union did not offer the guarantees inherent in a fair trial. Thus, the limitation on the access to domestic courts as a result of the organization's immunity from suit was incompatible with article 6, paragraph 1, of the European Convention on Human Rights. Expressly relying on *Waite and Kennedy*, the Belgian court investigated whether the internal appeals procedure of the Western European Union constituted a "reasonable alternative means" to effectively protect the plaintiff's rights. The court found that there were no provisions for the execution of the judgments of the Western European Union appeals commission,[461] that there was no public hearing and that the publication of decisions was not guaranteed,[462] that the members of the commission were appointed by the Intergovernmental Council of the Western European Union for a short time (two years), which created an excessively close link with the organization itself, and that it was not possible to challenge a

[453] *Ibid.*, p. 46.

[454] Canada, Supreme Court, *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, 29 November 2013, para. 61 ("As for the *Canadian Bill of Rights*, the 'right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations' recognized in s. 2(*e*) does not create a substantive right to make a claim. Rather, it provides for a fair hearing if and when a hearing is held.").

[455] United States, Criminal Court of the City of New York, New York County, *People v. Mark S. Weiner*, 19 January 1976, 378 N.Y.S.2d 966, at 975 ("There is a limit to which the international agreement creating the United Nations can inure to the detriment, disadvantage, and unequal protection of a citizen of the United States" and "[a] basic concept and motivating factor of the founders of this Republic was the absolute right of every citizen to petition for redress in its courts.").

[456] United States Court of Appeals, District of Columbia Circuit, *Urban v. United Nations*, 2 August 1985, 768 F.2d 1497, 1500 (D.C. Cir. 1985) (A "court must take great care not to 'unduly impair [a litigant's] constitutional right of access to the courts'.").

[457] United States, District Court for the District of Columbia, *Weinstock v. Asian Development Bank and ors*, Ruling on motion to dismiss for lack of subject matter jurisdiction, Civil Action No 1:05-CV-00174, ILDC 321 (US 2005), 13 July 2005, para. 10 ("The Court finds Plaintiff's first three claims, which are based on the premise that the IOIA unconstitutionally limits this Court's jurisdiction, wholly without merit. … Indeed, this Court and the District of Columbia Circuit Court of Appeals have interpreted and applied the IOIA numerous times without questioning its constitutionality.").

[458] *Waite and Kennedy v. Germany* (see footnote 51 above).

[459] See also Eric de Brabandere, "Belgian courts and the immunity of international organizations", in Blokker and Schrijver, *Immunity of International Organizations*, pp. 206–245.

[460] Brussels Labour Court of Appeal (4th chamber), *Siedler v. Western European Union*, 17 September 2003, *Journal des Tribunaux* 2004, 617, ILDC 53 (BE 2003).

[461] *Ibid.*, para. 59.

[462] *Ibid.*, para. 60.

particular member of the appeals commission.[463] As a result, the Belgian court concluded that the Western European Union personnel statute did "not offer all the guarantees inherent in the notion of due process" and that thus "the limitation on the access to the normal courts by virtue of the jurisdictional immunity of the [Western European Union was] incompatible with Article 6(1) [of the European Convention on Human Rights]".[464]

156. The *Siedler* case, which was upheld by the Supreme Court of Belgium,[465] is remarkable because it demonstrates that national courts may be willing to discard an organization's immunity when they consider that the requirement of the availability of adequate alternative means of dispute settlement has not been fulfilled. This consideration was equally present in *Energies nouvelles et environnement v. Agence spatiale européenne*,[466] where a Brussels court upheld the immunity of the European Space Agency from suit because in the specific case, the claimant had one or more "reasonable" alternative means.[467] The court also explicitly relied upon the case law of the European Court of Human Rights and found that the possibility of diplomatic representations by the Belgian representative to the European Space Agency or even the seizure of the organization's ombudsman, while not strictly speaking a form of judicial or administrative redress, would constitute "reasonable alternative means" in the sense of the jurisprudence of the European Court of Human Rights.[468] Lastly, Belgian courts extended the *Waite and Kennedy* rationale, demanding "reasonable" alternative means to enforcement proceedings in *Lutchmaya v. General Secretariat of the ACP Group*.[469] Since the international organization had not made available any dispute settlement mechanism to execute a compensation judgment, the claimant's right of access to a court was restricted to such an extent that the very substance of this right would be affected.

157. The decision of the Supreme Court of the Russian Federation in *Ryabov v. Eurasian Development Bank*[470] justified its denial of immunity based not only on a limited reading of the functional immunity enjoyed by the defendant organization,[471] but also on the fact that the lack of availability of an internal staff dispute settlement mechanism was contrary to article 6 of the European Convention on Human Rights.[472]

158. In general, national courts tend to exercise a light review when it comes to assessing the reasonableness and effectiveness of "alternative means".[473] Still, some courts display a remarkable level of detail. For instance, in *X v. Organisation for Economic Co-operation and Development*,[474] the Court of Cassation of France found that the staff dispute resolution mechanism at the Organisation for Economic Co-operation and Development offered the required guarantees of independence and impartiality, of public hearings and of written reasoned judgments.[475] It thus rejected the claimant's argument that the mechanism violated her rights under article 6 of the European Convention on Human Rights. Similar decisions are found in Italy, where courts have upheld the immunity of international organizations in

463 *Ibid.*, para. 61.

464 *Ibid.*, paras. 62 and 63.

465 Belgium, Court of Cassation, *Western European Union v. Siedler*, Appeal Judgment, 21 December 2009, ILDC 1625 (BE 2009).

466 Belgium, Civ. Bruxelles (4 ch.), *SA Energies nouvelles et environnement v. Agence spatiale européenne*, 1 Decembre 2005, *Journal des Tribunaux* (2006), p. 171.

467 *Ibid.*, pp. 171 and 173.

468 *Ibid*.

469 *Lutchmaya v. General Secretariat of the ACP Group*, Appeal Decision, 4 March 2003, *Journal des Tribunaux* 2003, 684; ILDC 1363 (BE 2003); *General Secretariat of the ACP Group v. Lutchmaya*, Final Appeal Judgment, 21 December 2009, ILDC 1573 (BE 2009).

470 *SN Ryabov v. Eurasian Development Bank* (see footnote 415 above).

471 See para. 141 above.

472 *SN Ryabov v. Eurasian Development Bank* (see footnote 415 above), H10 ("The internal documents of the EDB did not disclose any accessible means for the effective protection of Ryabov's labour rights.").

473 See, e.g., Canada, Superior Court of Quebec, *Trempe v. Staff Association of the International Civil Aviation Organization and ors*, Judgment on jurisdiction, ILDC 1748 (CA 2003), 20 November 2003.

474 France, Court of Cassation, *X v. Organisation for Economic Co-operation and Development*, Appeal Judgment, ILDC 1749 (FR 2010), Case No. 09-41030, 29 September 2010.

475 *Ibid*., para. 4.

employment disputes if they have set up effective alternative dispute settlement procedures. Thus, the judgments in *European University Institute v. Piette*,[476] *Pistelli v. European University Institute*[477] and *Drago v. International Plant Genetic Resources Institute*[478] have basically endorsed the result of the *Waite and Kennedy* jurisprudence. Swiss courts have adopted similar reasoning. In *Consortium X. v. Switzerland*,[479] the Supreme Court of Switzerland upheld the immunity of an international organization only after first satisfying itself that the alternative remedies provided for were sufficient from a human rights perspective.

159. However, it may be premature to predict whether national courts will generally follow the *Waite and Kennedy* approach as interpreted by some national courts, making immunity dependent upon the availability of adequate alternative remedies.[480] In fact, a number of courts seem to have rejected it and continue to grant immunity to international organizations, irrespective of whether alternative mechanisms of dispute settlement exist or not. A case in point is the judgment in *Entico Corp Ltd v. UNESCO*.[481] In that case, the England and Wales High Court rejected the argument that the immunity of UNESCO was "conditional" upon the availability of alternative mechanisms under article 6 of the European Convention on Human Rights. Rather, it found that the *Waite and Kennedy* reasoning was inapplicable because the governing immunity instrument, the 1947 Specialized Agencies Convention, had been adopted long before the European Convention on Human Rights had entered into force for a minority of the Convention's contracting parties. As a result, it upheld the defendant organization's immunity.

160. The Supreme Court of the Netherlands, in the well-known *Srebrenica* case,[482] a tort action brought by relatives of the victims of the genocide committed in Bosnia and Herzegovina, also limited the impact of the *Waite and Kennedy* approach. The United Nations, as co-defendant with the Netherlands, invoked its immunity from legal process under the Charter of the United Nations and the 1946 General Convention. In rejecting the *Waite and Kennedy* argument, the Supreme Court of the Netherlands reasoned that the European Court of Human Rights had not considered the relationship between article 6 of the European Convention on Human Rights and Article 103 of the Charter of the United Nations. It thus found that there was no reason to assume that the European Court of Human Rights had meant to include the United Nations when it had held that the availability of "reasonable alternative means to protect effectively their rights under the Convention" was "a material factor" in determining whether the granting of immunity to an international organization was permissible under the European Convention on Human Rights. In particular, regarding acts of the United Nations under Chapter VII of the Charter of the United Nations, demanding such a test appeared implausible in the Supreme Court's view.[483]

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476 *European University Institute v. Piette*, Court of Cassation, 18 March 1999, (2000) RDIPP 472, No 149.

477 *Paola Pistelli v. European University Institute* (see footnote 414 above).

478 Italy, Supreme Court of Cassation, *Drago v. International Plant Genetic Resources Institute (IPGRI)*, Final Appeal Judgment, ILDC 827 (IT 2007), Case No. 3718, 19 February 2007.

479 Switzerland, Federal Supreme Court, *Consortium X v. Switzerland*, Final Appeal Judgment, ILDC 344 (CH 2004), 2 July 2004, partly published as ATF 130 I 312.

480 See Ryngaert, "The immunity of international organizations before domestic courts", at p. 121; Reinisch and Weber, "In the shadow of Waite and Kennedy", at p. 59.

481 England and Wales High Court (Commercial Court), *Entico Corporation Ltd. v. United Nations Educational Scientific and Cultural Association* [sic] *(UNESCO)*, 531, 18 March 2008.

482 Netherlands, Supreme Court, *Stichting Mothers of Srebrenica and others v. Netherlands and United Nations*, Final Appeal Judgment, LJN: BW1999, ILDC 1760 (NL 2012), 13 April 2012.

483 *Ibid.*, para. 4.3.3 ("It should be noted here that paragraph 67 of the [*Waite and Kennedy*] judgment refers to 'international organisations' without any qualification but that – in the absence of any consideration concerning the relationship between article 6 of the European Convention on Human Rights on the one hand and articles 103 and 105 of the Charter of the United Nations … plus article II, paragraph 2, of the Convention on the other – there are no grounds for assuming that the reference of the European Court of Human Rights to 'international organisations' also included the United Nations, in any event not in relation to the activities of the United Nations in the context of Chapter VII of the Charter (Action with respect to threats to the peace, breaches of the peace, and acts of aggression).").

161. In the subsequent judgment of the European Court of Human Rights in *Stichting Mothers of Srebrenica and Others v. The Netherlands*,[484] the court upheld the immunity decision of the Netherlands and found no violation of the right of access to court as a result of respecting the immunity from suit of the United Nations. According to the European Court, it did not follow "that in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court".[485] The European Court expressly relied on the *Jurisdictional Immunities* case of the International Court of Justice[486] with regard to sovereign immunity and held that *Waite and Kennedy* could also not be interpreted "in such absolute terms either".[487]

162. Nevertheless, the Supreme Court of the Netherlands seems to have followed the *Waite and Kennedy* doctrine in a more recent case brought against NATO, in which it held that where "reasonable alternative means are available to a litigant, it can be assumed that the granting of immunity from jurisdiction does not affect the essence of his right of access to justice".[488] When assessing the reasonableness of the alternative remedies available, courts in the Kingdom of the Netherlands also tend to employ a light review.[489]

163. Such a light review, as already encountered when assessing the adequacy of alternative remedies under constitutional law requirements, can also be ascertained in German court decisions.[490]

164. In spite of such apparent setbacks to the *Waite and Kennedy* approach recently, it appears that many national courts, in particular in Europe, have "internalized" the demands for effective alternative remedies to be available against international organizations to such an extent that they may be willing to curtail their immunity from suit in future cases. Probably the clearest case in point is a 2022 ruling of the Constitutional Court of Austria in the *OPEC Immunity case*.[491] Therein, it declared the jurisdictional immunity accorded to OPEC in its headquarters agreement with Austria unconstitutional because the organization's staff members did not have access to reasonable alternative means of redress. Since the European Convention on Human Rights enjoys the rank of constitutional law in Austria, the Constitutional Court was able to use article 6 of the European Convention on Human Rights as a yardstick of the constitutionality of the immunity provision in the headquarters agreement. In relying on *Waite and Kennedy*, the Constitutional Court found that the lack of an appropriate mechanism for settling employment disputes implied that the jurisdictional

484 European Court of Human Rights, *Stichting Mothers of Srebrenica and Others v. The Netherlands*, No. 65542/12, 11 June 2013.

485 *Ibid*., para. 164.

486 International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.

487 *Stichting Mothers of Srebrenica and Others v. The Netherlands* (see footnote 484 above), at para. 164.

488 The Netherlands, Supreme Court, *Supreme v. SHAPE and JFCB*, ECLI:NL:HR:2021:1956, 24 December 2021, para. 3.2.3 ("A factor of particular importance in determining whether the granting of immunity from jurisdiction to an international organisation is proportional is whether the litigant has reasonable alternative means of protecting the rights granted to him by the European Convention on Human Rights. If reasonable alternative means are available to a litigant, it can be assumed that the granting of immunity from jurisdiction does not affect the essence of his right of access to justice.").

489 Netherlands, Supreme Court, *X v. European Patent Organisation*, Final Appeal Judgment, ILDC 1464 (NL 2009), Case No. 08/00118, LJ BI9632, 23 October 2009, para. 3.5 (holding that the fact that the ILO Administrative Tribunal rarely provided oral hearings did not as such mean that it had breached the due process rights of the complainant.). See, in general, Clemens Treichl, "The denial of oral hearings by international administrative tribunals as a factor for lifting organizational immunity before European courts: a(nother) critical view", *International Organizations Law Review*, vol. 16 (2019), pp. 407–446.

490 See, e.g., Germany, Higher Administrative Court of Hesse, *A v. European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT)*, Appeal Order, ILDC 2247 (DE 2010), 7 E 2900/09, NJW 2010, 2680, 17 February 2010, upholding the organization's absolute immunity and stating, *in eventu*, that the EUMETSAT Appeals Board provided sufficient human rights protection.

491 Austria, Constitutional Court, *Anonymous v. Organization of the Petroleum Exporting Countries (OPEC)*, Decision on the constitutionality of treaties, SV 1/2021-23; ILDC 3402 (AT 2022), 29 September 2022.

immunity of OPEC was inconsistent with article 6 of the European Convention on Human Rights.[492] In early 2024, a French appellate court in *X. v. ESA*[493] also rejected the immunity of an international organization because it would have led to a violation of an applicant's right of access to justice as guaranteed by article 6 of the European Convention on Human Rights.[494]

(iii) Treaty requirements to provide access to appropriate modes of dispute settlement

165. In addition to the constitutional law and human rights requirements to provide access to justice, treaty provisions in many privileges and immunities instruments impose a duty on the organizations enjoying jurisdictional immunity to make available appropriate alternative means of dispute settlement. The most important example of such a clause is article VIII, section 29, of the General Convention, which provides that the "United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party". A parallel obligation is contained in article IX, section 31, of the Convention on the Privileges and Immunities of the Specialized Agencies and in other privileges and immunities[495] or headquarters agreements.[496] These obligations are clearly imposed on the organizations and not on the States before whose courts claims are brought. Still, national courts have been confronted with demands to disregard the organizations' jurisdictional immunity in case alternative "appropriate modes of settlement" were not available. This so-called conditionality debate[497] has been raised in several national court cases, in particular in regard to article VIII, section 29, of the General Convention.

166. Most courts seem to accept that, while there may have been a political *quid pro quo* to demand "appropriate modes of settlement" of disputes arising out of "contracts or other

[492] *Ibid*., para. 57 ("As long as the Headquarters Agreement does not guarantee … that an appropriate mechanism is established for settling employment disputes to protect the rights of employees … it cannot be presumed … that the Republic of Austria, through Article 9 of the Headquarters Agreement, limits access to a court … in a proportionate manner and thus accords the international organization immunity from national jurisdiction in a manner consistent with Article 6 paragraph 1 ECHR."). See also Philipp Janig, "*X v. OPEC*. Judgment No. SV 1/2021 (SV 1/2021-23). ECLI:AT:VFGH:2022:SV1.2021.", *American Journal of International Law*, vol. 118 (2024), pp. 331–337.

[493] France, Paris Court of Appeal, *X. v. ESA*, RG n° 20/17725, 16 January 2024.

[494] *Ibid*., para. 73 ("*Cette absence de recours effectif devant une juridiction présentant les garanties d'indépendance est contraire à l'article 6 § 1 de la CESDH et à l'ordre public international. Dès lors, à défaut de recours effectif contre les décisions de refus de levée de l'immunité de juridiction qui ont été notifiées aux appelants, la fin de non recevoir tirée de l'immunité de juridiction opposée par les intimés devant le tribunal judiciaire de Paris est mal fondée et doit être rejetée*." ["This lack of an effective remedy before a court offering guarantees of independence is contrary to article 6, para. 1, of the ECHR and to international public policy. Accordingly, in the absence of an effective remedy against the decisions refusing to waive the immunity from jurisdiction that were notified to the appellants, the plea of immunity from jurisdiction raised by the respondents before the Paris judicial court is unfounded and must be dismissed."]).

[495] Art. 12, Agreement on Privileges and Immunities of the Organization of American States; art. 24, Agreement on the Status of the North Atlantic Treaty Organization, national representatives and international staff (Ottawa, 20 September 1951), United Nations, *Treaty Series*, vol. 200, No. 2691, p. 3; art. 31, 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.

[496] Art. 54, Headquarters Agreement between the International Criminal Court and the host State (The Hague, 7 June 2007), United Nations, *Treaty Series*, vol. 2517, No. 44965, p. 173; art. 26, Agreement between the Kingdom of the Netherlands and the Organisation for the Prohibition of Chemical Weapons (OPCW) concerning the headquarters of the OPCW (with arrangement).

[497] Luca Pasquet, "Litigating the immunities of international organizations in Europe: the 'alternative-remedy' approach and its 'humanizing' function", *Utrecht Journal of International and European Law*, vol. 36 (2021), pp. 192–205; Patrício Masbernat and Gloria Ramos-Fuentes, "Doctrina jurisprudencial de tribunales de América Latina acerca del principio quid pro quo como fundamento y límite de las inmunidades de jurisdicción de las organizaciones internacionales", *Revista de la Facultad de Derecho*, Universidad de la República de Uruguay, vol. 50 (2021); Yaraslau Kryvoi, "Procedural fairness as a precondition for immunity of international organizations", *International Organizations Law Review*, vol. 13 (2016), pp. 255–272.

disputes of a private law character to which the United Nations is a party" when granting the Organization jurisdictional immunity, such immunity was not made expressly conditional upon the actual availability of such alternative means of dispute settlement. Some courts have even found that the obligation to "make provisions for appropriate modes of settlement" indicates that international organizations enjoy immunity before national courts. For instance, the High Court for Eastern Denmark relied, not on article II, section 2, but on article VIII, section 29, of the General Convention when it held the United Nations Children's Fund immune in a contractual dispute.[498] A related reasoning can be found in the *Cumaraswamy* case,[499] where the International Court of Justice concluded that, even if the United Nations was required to bear responsibility for certain acts, article VIII, section 29, of the General Convention made it clear that the dispute should not be "dealt with by national courts".[500]

167. The argument that the immunity of international organizations that are under a duty to provide alternative means of dispute settlement may be conditional upon the actual availability of the latter has also been prominently addressed in the *Haiti Cholera* litigation brought against the United Nations in courts in the United States of America.[501] The United States cases basically reiterated older United States and foreign jurisprudence, clearly rejecting the alleged conditionality.[502] For instance, in *Bisson v. United Nations and others*, the District Court for the Southern District of New York found that failure to fulfil the duty to implement an effective system for the settlement of private disputes did not constitute a waiver of the jurisdictional immunity of the United Nations.[503] In addition, in *Brzak v. United Nations*, a United States appellate court considered that the "purported inadequacies with the United Nations' internal dispute resolution mechanism" did not amount to an implicit waiver of immunity.[504] In a similar way, but even more explicitly, a conditionality between the

[498] Denmark, High Court for Eastern Denmark, *Investment & Finance Company of 11 January 1984 Limited (Investerings- & Finansieringsselskabet af 11/1 1984 ApS) v. UNICEF (United Nations Children's Fund)*, Case No. U 2000 478 Ø, 26 August 1999, ILDC 64 (DK 1999), para. 14 ("The Defendant must against the background of … Article VIII, item 29, subsection 1 of the Convention from 1946 be considered to be vested with immunity in relation to the case concerning private outstanding amounts such as the current one.").

[499] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 7272 above).

[500] *Ibid.*, at para. 66.

[501] United States, New York, District Court for the Southern District of New York, *Georges and others v. United Nations and others and United States (intervening)*, Trial Court Judgment, No 13-CV-7146 JPO, ILDC 2336 (US 2015), 84 FSupp3d 246 (SDNY 2015), 9 January 2015; *Georges and others v. United Nations and others*, Case No 15-455, 834 F 3d 88 (2nd Cir 2016), 18 August 2016.

[502] Belgium, Brussels Appeals Court, *Manderlier v. United Nations and Belgian State*, Decision, 15 September 1969, *Pasicrisie Belge* (1969), p. 246; UNJYB (1969), p. 236, at p. 237 ("it must be admitted that in the present state of international institutions there is no court to which the appellant can submit his dispute with the United Nations; and although this situation, which does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights, may be regrettable, it must be recognized that the judge of first instance was correct in declaring that the action brought against the United Nations was inadmissible."); *Boimah v. United Nations General Assembly* (see footnote 353 above), at para. 71 ("The question under both the Convention and the Act, therefore, is whether the United Nations has ever 'expressly waived' its immunity to employee actions brought pursuant to Title VII. The court can find no evidence of an express waiver … Recent case law is clear that an international organization's self-regulation of its employment practices is an activity essential to the 'fulfillment of its purposes', and thus an area to which immunity must extend.").

[503] United States, District Court for the Southern District of New York, *Bisson v. United Nations, World Food Programme and ABC Organization*, Opinion, Case No. 06-6352, 11 February 2008 ("§ 29(a) [of the General Convention] contains no language effecting an express waiver under any circumstances and that, even assuming *arguendo* that the UN failed to provide an adequate settlement mechanism, such failure did not constitute waiver because express waiver may not be inferred from conduct.").

[504] *Brzak and Ishak v. United Nations and others* (see footnote 353 above), at para. 13 ("Although the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [Convention on the Privileges and Immunities of the United Nations]. The United Nations has not waived its immunity.").

availability of appropriate modes of settlement and immunity was rejected in the Haiti cholera case of *Georges and others v. United Nations*.[505] There, the trial court held that "nothing in the text of the [Convention on the Privileges and Immunities of the United Nations] suggests that the absolute immunity of section 2 is conditioned on the UN's providing the alternative modes of settlement contemplated by section 29",[506] and that even though the obligation to provide for appropriate modes of settlement was a legal duty, it could not override the clear and specific granting of the "immunity from every form of legal process" of the United Nations.[507] The second circuit court affirmed this view on appeal.[508]

168. Other jurisdictions have insisted on the importance of providing for alternative means of dispute settlement for the enjoyment of jurisdictional immunity. For instance, in the case of *Duhalde v. Pan American Health Organization*, the Supreme Court of Argentina upheld the immunity of the organization precisely because it had internal mechanisms to resolve employment disputes.[509] The organization's compliance with its obligations under section 31 of the Specialized Agencies Convention, as well as the fact that the immunity enjoyed by the Pan American Health Organization did not completely block the plaintiff's constitutional right to access to justice, were determinant in the Court's reasoning.[510] *Duhalde v. Pan American Health Organization* followed the landmark case of *Cabrera v. Comisión Técnica Mixta de Salto Grande*.[511] Therein, the Supreme Court of Argentina had held that article IX, section 31, of the Specialized Agencies Convention showed "a clear limit to the power to internationally agree to jurisdictional exemption[s]" by prescribing the need to establish appropriate means of dispute settlement.[512] The Court also found that this trend complied with what was foreseen in different human rights documents and even held that the limitation in question was of a *jus cogens* character.[513] The Court held that the clause granting immunities to the Commission was unconstitutional because it was absolute and resulted in denial of justice.[514]

(iv) Conclusions on access to justice

169. National courts generally remain reluctant to lift the immunity of international organizations in order to provide private litigants with access to justice on the basis of their own constitutional law, their human rights commitments or the organizations' treaty obligations to make provisions for appropriate modes of settlement. Nevertheless, more recent jurisprudence in many countries has shown a growing awareness of the underlying need to grant access to justice to private parties to have their claims against international organizations heard by an independent and impartial tribunal. In practical terms, that often means that courts will assess whether alternative modes of dispute settlement conforming to

[505] *Georges and others v. United Nations and others and United States (intervening)* (see footnote 501 above).

[506] *Ibid*., para. 12.

[507] *Ibid*., para. 13 ("It is true that section 29 uses mandatory language, providing that the UN 'shall make provisions for appropriate modes of settlement of … disputes ….'. This language may suggest that section 29 is more than merely aspirational—that it is obligatory and perhaps enforceable. But even if that is so, the use of the word 'shall' in section 29 cannot fairly be read to override the clear and specific grant of 'immunity from every form of legal process'—absent an express waiver—in section 2").

[508] *Georges and others v. United Nations and others* (see footnote 501 above) (finding that the availability of appropriate modes of settlement of disputes of a private law character is not a condition precedent to jurisdictional immunity).

[509] Argentina, Supreme Court, *Mario Alfredo Duhalde c. Organización Panamericana de la Salud*, 31 August 1999, paras. 12 and 13.

[510] *Ibid.*, paras. 10 and 11.

[511] *Washington Cabrera v. Comisión Técnica Mixta de Salto Grande* (see footnote 447 above). See also Vinuesa, "Argentina".

[512] *Washington Cabrera v. Comisión Técnica Mixta de Salto Grande* (see footnote 447 above), at para. 9 ("un claro límite a la facultad de convenir internacionalmente la exención jurisdiccional" (unofficial translation)).

[513] *Ibid.*, at para. 9

[514] *Ibid*., para. 11.

such requirements are available and that, when they are not available, immunity may not be accorded.

2. International courts and tribunals

170. International courts and tribunals, in particular judicial organs of regional economic integration organizations, may also serve as adjudicatory means of settling disputes between international organizations and private parties. The scope of their jurisdiction will usually depend on the respective founding treaty. A number of international organizations permit private parties to challenge their activities or inactions through special procedures aimed at the annulment of challenged acts or at stating a failure to act.

171. Such disputes clearly transcend contractual or other disputes of a private law character. Rather, they may be qualified as constitutional and/or administrative disputes whereby the public authority of international organizations is questioned. This may also be the reason why the conditions for bringing such kinds of claims before the courts of regional economic integration organizations are usually very clearly circumscribed. In addition, the constituent agreements of regional economic integration organizations sometimes permit such courts to decide contractual and delictual claims.

172. Another type of international court or tribunal specifically established for settling claims between international organizations and private parties is the administrative tribunal. Such tribunals are regularly set up to settle employment disputes. Lastly, human rights courts and tribunals may play a broader role in the future if international organizations submit to their jurisdiction.

(a) Regional economic integration organization courts and their jurisdiction over constitutional and/or administrative disputes with private parties

173. Several regional economic integration organizations provide for so-called annulment actions to be brought before their courts. These typically enable the organizations' member States to challenge acts of regional economic integration organization organs if they breach the organizations' founding treaty and related rules. In a number of such organizations, even private parties, both individuals and companies, have this possibility as well.

174. The European Union is a good example of a regional economic integration organization that provides for such annulment proceedings before its internal courts, the General Court and the Court of Justice. In actions for annulment, pursuant to article 263 of the Treaty on the functioning of the European Union, natural and legal persons are also permitted to challenge "acts" of the organs of the European Union. These have been broadly interpreted in the jurisprudence of the European Court of Justice as comprising the "legislative" acts of regulations and directives, "administrative" ones such as decisions and even "any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position".[515] Although private parties have to prove their special legal interest in order to have standing, which usually implies that they have to show that an act is addressed to them or is of "direct and individual concern"[516] to them,[517] they have been routinely successful in having administrative acts struck down, in particular decisions of the European Union Commission

[515] Court of Justice of the European Communities, *IBM v. Commission*, Case 60/81, Judgment, 11 November 1981, *European Court Reports 1981–8*, p. 2639, at para. 9.

[516] Art. 263, Consolidated version of the Treaty on the functioning of the European Union ("Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.").

[517] See, e.g., Court of Justice of the European Communities, *Plaumann & Co. v. Commission*, Case 25/62, Judgment, 15 July 1963, *European Court Reports 1963*, p. 95, at p. 107 ("Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.").

in the context of competition, antidumping or subsidies law. Article 263 of the Treaty on the functioning of the European Union lists four grounds of invalidity: (a) lack of competence; (b) infringement of an essential procedural requirement; (c) infringement of the Treaties or any rule of law relating to their application; and (d) misuse of powers.[518] In particular, under the second ground, private parties have been successful in annulling European Union acts that failed to provide reasons[519] or a fair hearing.[520]

175. The entitlement to due process has played a particular role in the European Union's implementation of United Nations Security Council targeted sanctions and its own autonomous economic sanctions practice, referred to as "restrictive measures". In the *Kadi* case, the applicant, whose assets were frozen because he was listed in a European Union regulation as a suspected terrorist, successfully complained that his due process rights were infringed because he had no possibility to challenge his listing.[521]

176. Although the courts of the European Union have probably developed the most extensive practice of settling disputes between international organizations and private parties challenging the legality of the formers' acts, other regional economic integration organizations and their internal judicial dispute settlement mechanisms have offered similar redress. One example is the judicial system of the European Economic Area, a regional trade agreement between the European Union and the three European Free Trade Association (EFTA) countries: Iceland, Liechtenstein and Norway.[522] Through a separate agreement, the European Free Trade Association States established a surveillance authority and a court.[523] The EFTA Court has jurisdiction in annulment actions brought by private parties against decisions of the EFTA Surveillance Authority and in actions for failure to act under similar conditions as courts of the European Union.[524]

177. In a number of Latin American regional economic integration organizations, annulment proceedings can be brought by private parties. Thus, private parties whose rights and interests are affected by the actions of the Andean Community are entitled to submit actions for annulment to the Community's Court of Justice against acts issued by certain of its organs.[525] It has been reported that, at least until 2020, more than half of all these annulment actions were submitted to the Court by legal or natural persons.[526] Private parties may also bring annulment cases before the Central American Court of Justice whenever they are affected by acts of organs of the Central American Integration System.[527] Such actions have been instituted by private parties against acts issued by, among others, the Council of

[518] Art. 263, Consolidated version of the Treaty on the functioning of the European Union.

[519] See, e.g., Court of Justice of the European Communities, *Eurocoton and others v. Council*, Case C-76/01, Judgment, 30 September 2003, *European Court Reports 2003–8/9*, p. 10091.

[520] See, e.g., Court of Justice of the European Communities, *Transocean Marine Paint v. Commission*, Case 17/74, Judgment, 23 October 1974, *European Court Reports 1974–6*, p. 1063; Court of Justice of the European Communities, *Al-Jubail v. Council*, Case C-49/88, Judgment, 27 June 1991, *European Court Reports 1991–6*, p. 3187.

[521] *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (see footnote 89 above).

[522] Agreement on the European Economic Area, *Official Journal of the European Union*, L 1, 3 January 1994, p. 3.

[523] Art. 27, Agreement between EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, *Official Journal of the European Union*, L 344, 31 January 1994, p. 1, at p. 5 (as amended). See also Carl Baudenbacher, Per Tresselt and Thorgeir Örlygsson, eds., *The EFTA Court: Ten Years On* (Oxford, Hart Publishing, 2005); EFTA Court, ed., *The EEA and the EFTA Court: Decentred Integration* (Oxford, Hart Publishing, 2014).

[524] Art. 36, para. 2, and art. 37, para. 3, Agreement between EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

[525] Art. 19, Protocol of Cochabamba amending the Treaty creating the Court of Justice of the Cartagena Agreement [the Andean Subregional Integration Agreement] (Cochabamba, 28 May 1996).

[526] Hugo Ramiro Gómez Apac and Karla Margot Rodríguez Noblejas, "La acción de nulidad en el derecho comunitario andino como un proceso contencioso administrativo", *USFQ Law Review*, vol. 7 (2020), pp. 307–334, at p. 318 (in Spanish).

[527] Art. 22 (b) and (g), 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.

Central American Health Ministers,[528] the Central American Parliament[529] and the Meeting of Presidents.[530] Observers have noted that one of the most frequent grounds for requesting the annulment of acts is the lack of competence of an organ to issue the act in question.[531] In the Caribbean Community, the Revised Treaty of Chaguaramas allows private natural or juridical persons "of a contracting party" to submit applications before the Caribbean Court of Justice[532] concerning both the interpretation and application of the Treaty.[533] The Court has ruled that this provision includes matters pertaining to judicial review, while recognizing that it had "to be careful" not to prejudice the flexibility needed by Caribbean Community organs to operate.[534]

178. Certain courts of African regional economic integration organizations also possess the power to hear annulment cases. For example, the Court of Justice of the Common Market for Eastern and Southern Africa can hear cases submitted by persons resident in member States of the Common Market for Eastern and Southern Africa concerning the legality of an act (regulation, directive or decision) of the Council of the Common Market for Eastern and Southern Africa.[535] Likewise, the East African Court of Justice can hear cases submitted by persons resident in a partner State of the East African Community concerning the legality of any Act, regulation, directive, decision or action of an institution of the Community.[536] Applicants have requested annulment on the grounds that, *inter alia*, the decision in question did not comply with the transparency requirements set out in the East African Community Treaty[537] or that it was incompatible with the Treaty provisions on the jurisdiction of the East African Court of Justice.[538] Similarly, the Court of Justice of the West African Economic and Monetary Union (WAEMU) permits annulment actions by private persons,[539] and has reviewed acts in fields such as the Union's commercial policy[540] and competition matters.[541] The Community Court of Justice of the Economic Community of West African States

[528] Central American Court of Justice, *Grifold Therapeutics v. COMISCA*, 198-09-26-09-2019, 26 September 2019.

[529] Central American Court of Justice, *Ricardo Alfredo Flores Asturias v. Central American Parliament*, 90-09-12-11-2008, 19 October 2009; Central American Court of Justice, *Pablo Javier Pérez Campos and Manuel Enrique Bermúdez Ruidíaz v. Central American Parliament*, 7-28-10-2015, 9 February 2017.

[530] Central American Court of Justice, *Confederación de Asociaciones de Agentes Aduanales de Centroamérica y el Caribe v. Reunión de presidentes*, 01-16-01-2008, 26 October 2011.

[531] Alejandro Daniel Perotti et al., *Derecho y doctrina judicial comunitaria. Corte Centroamericana de Justicia y tribunales supremos nacionales*, segunda edición (San José, Editorial Jurídica Continental, 2017), p. 188.

[532] Agreement Establishing the Caribbean Court of Justice (St. Michael, 14 February 2001), United Nations, *Treaty Series*, vol. 2255, No. 40205, p. 319.

[533] Arts. 211 (d) and 222, Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (Nassau, 5 July 2001), United Nations, *Treaty Series*, vol. 2259, No. 40269, p. 293.

[534] *Trinidad Cement Limited v. The Caribbean Community*, [2009] CCJ 4 (OJ), Judgment, 10 August 2009, paras. 38 and 39.

[535] Art. 26, Treaty establishing the Common Market for Eastern and Southern Africa (Kampala, 5 November 1993), United Nations, *Treaty Series*, vol. 2314, No. 41341, p. 265.

[536] Art. 30, Treaty for the establishment of the East African Community (Arusha, 30 November 1999), United Nations, *Treaty Series*, vol. 2144, No. 37437, p. 255.

[537] *Bizuru v. Inter-University Council for East Africa*, East African Court of Justice, Reference No. 13/2017, Judgment, 28 September 2020.

[538] *East African Law Society v. Secretary General of the East African Community*, East African Court of Justice, Reference No. 01/2011, Judgment, 14 February 2013.

[539] Art. 15 (2), Regulation No. 1/96/CM on the Rules of Procedure of the WAEMU Court of Justice, 5 July 1996; Ousseni Illy, "The WAEMU Court of Justice", in Robert Howse and others, eds., *The Legitimacy of International Trade Courts and Tribunals* (Cambridge, Cambridge University Press, 2018), pp. 349–364, at pp. 355 and 356.

[540] *Le Groupement de Développement Economique d'Intervention et de Réalisation des Investissements GDEIRI-SA v. La Commission de l'UEMOA*, WAEMU Court of Justice, Judgment No. 02/05, 25 January 2005.

[541] *La Société Nationale Burkinabé d'Hydrocarbures (SONABHY) v. La Commission de UEMOA et al*, WAEMU Court of Justice, Judgment No. 02/2021, 19 May 2021.

(ECOWAS)[542] has broad jurisdiction, ranging from disputes concerning the interpretation of the Community's legislation to human rights cases.[543]

179. Within the Eurasian Economic Union,[544] private parties can challenge the compliance of decisions made by the Commission of the Union with the organization's constituent treaty before the Court of the Union.[545] However, only "legal entities and individual entrepreneurs" directly concerned by such acts[546] have access to the Court of the Union. The Eurasian Economic Union has ruled that a decision of the Commission is of direct concern to an economic entity if it has legal consequences for it[547] or when the decision applies to it and its business activities.[548]

(b) International courts hearing contractual disputes

180. International courts or tribunals do not normally have the power to settle contractual disputes between international organizations and private parties. However, in some regional economic integration organizations, the organizations' internal courts may be made competent to hear such claims by agreement of the parties. For instance, in the European Union, the Court of Justice of the European Union may serve as a forum for the settlement of such contractual disputes.[549] Although article 272 of the Treaty on the functioning of the European Union refers to a contractual "arbitration clause" conferring jurisdiction on the courts of the European Union, the procedural rules and the composition of the courts are not at the disposal of the parties.[550] Thus, this form of dispute settlement is a genuinely judicial one and such clauses should be more precisely referred to as "choice of forum" clauses. The European Union does not enjoy jurisdictional immunity in its member States and their national courts are thus generally competent to hear disputes to which the Union is a party.[551] It is the specific conferral of jurisdiction on the Court of Justice of the European Union that exempts the European Union from national adjudication. Such "arbitration/choice of forum

[542] Protocol on the Community Court of Justice (Abuja, 6 July 1991) United Nations, *Treaty Series*, vol. 2375, No. 14843, p. 178, ECOWAS Protocol A/P.l/7/91, as amended by Supplementary Protocol A/SP.1/01/05 amending the preamble and articles 1, 2, 9 and 30 of Protocol A/P.l/7/91 relating to the Community Court of Justice (Accra, 19 January 2005). See also Alioune Sall, *La Justice de l'intégration: Réflexions sur les institutions judiciaires de la CEDEAO et de l'UEMOA* (Dakar, L'Harmattan, 2018).

[543] Art. 9, Protocol on the Community Court of Justice as amended by Supplementary Protocol A/SP.1/01/05.

[544] Treaty on the Eurasian Economic Union (Astana, 29 May 2014), United Nations, *Treaty Series*, vol. 3049, No. 52764, p. 3.

[545] *Ibid.*, annex 2, p. 167, at p. 174, Statute of the Court of the Eurasian Economic Union (Astana, 29 May 2014), para. 39 (2).

[546] Tatsiana Mikhaliova and Alena Douhan "Eurasian Economic Union Court (EAEU Court)", in Giuliana Ziccardi Capaldo, ed., *The Global Community Yearbook of International Law and Jurisprudence 2023: Global Law, Politics, Ethics, Justice* (Oxford, Oxford University Press, 2024), pp. 633–654, at p. 641.

[547] Eurasian Economic Union Court, *General Freight CJSC v. Commission*, case No. CE-1-2/2-16, Judgment, 4 April 2016, para. 3, as reported in Tatsiana Mikhaliova, "Jurisdiction of the Court of the Eurasian Economic Union and its role in the development of the Eurasian legal order: one step back and two steps forward", *Polish Yearbook of International Law*, vol. 39 (2019), pp. 251–264, at p. 257, footnote 14.

[548] Eurasian Economic Union Court, *Sevlad LLC v. Commission*, case No. CE-1-2/1-16-KC and No. CE-1-2/1-16-AP, Judgment, 7 April 2016, as reported in Mikhaliova, "Jurisdiction of the Court of the Eurasian Economic Union", at p. 257, footnote 13.

[549] See art. 272, Consolidated version of the Treaty on the functioning of the European Union ("The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.").

[550] Bernhard Schima, "Article 272 TFEU", in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin, eds., *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford, Oxford University Press, 2019), pp. 1854–1856, at p. 1854.

[551] Art. 274, Consolidated version of the Treaty on the functioning of the European Union ("Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.").

clauses" are frequently found in the European Union's contracts with private parties in matters of rental, insurance and subsidies. The scope of such jurisdiction is restrictively interpreted.[552] Although these cases constitute only a small percentage of the cases brought before the Court of Justice of the European Union, they have given rise to an established jurisprudence of settling contractual disputes between the European Union and private parties.[553]

181. In a similar way, the 2005 ECOWAS Supplementary Protocol grants the Community Court of Justice of ECOWAS the power to hear disputes regarding "any matter provided for in an agreement".[554] This provision seems to have given rise to a contractual claim by a Nigerian company against the ECOWAS Commission and its president, leading to a default judgment,[555] which was subsequently confirmed.[556] The East African Court of Justice and the Court of Justice of the Common Market for Eastern and Southern Africa can also hear matters arising from "arbitration clauses" contained in contracts or agreement to which the organizations are a party.[557] In *Building Design Enterprise v. COMESA*, the Court did not decide on the merits because the parties had reached a settlement.[558]

182. Pursuant to article 38 of the Protocol of Cochabamba amending the Treaty creating the Court of Justice of the Cartagena Agreement,[559] the Court of Justice of the Andean Community can hear disputes between bodies and institutions of the Andean Integration System and third parties. However, according to the Statute of the Court, this "arbitral" function is meant to be regulated by a decision of the Andean Council of Ministers for Foreign Affairs,[560] which has not yet been adopted. This inaction has proved to be a determinant obstacle for the Court to decide disputes between the Universidad Andina Simón Bolivar (an institution of the Andean Community) and private parties.[561] The Central American Court of Justice can equally decide to act as an "arbitrator" when chosen by the parties.[562]

183. The United Nations Convention on the Law of the Sea also provides for a set of very detailed jurisdictional provisions under which the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea may decide, among other issues, over mostly

[552] Court of Justice of the European Communities, *Commission of the European Communities v. Jan Zoubek*, Judgment, Case 426/85, Judgment, 18 December 1986, *European Court Reports 1986*, paras. 10 and 11.

[553] Koen Lenaerts et al., eds., *EU Procedural Law*, 2nd ed. (Oxford, Oxford University Press, 2023), pp. 569–587; Graham Butler, "The EU's contractual relations and the arbitration clause: disputes at the Court of Justice of the European Union", *European Law Review*, vol. 46 (2021), pp. 345–363.

[554] Art. 9, para. 6, Protocol on the Community Court of Justice as amended by Supplementary Protocol A/SP.1/01/05.

[555] Community Court of Justice of ECOWAS, *Vision Kam-Jay Investment Limited v. President of the Commission and ECOWAS Commission*, Judgment No. ECW/CCJ/JUD/24/16, 6 October 2016.

[556] Community Court of Justice of ECOWAS, *Vision Kam-Jay Investment Limited v. President of the Commission and ECOWAS Commission*, Judgment No. ECW/CCJ/JUD/01/18, 7 February 2018.

[557] Art. 32 (a), Treaty for the establishment of the East African Community; art. 28 (a), Treaty establishing the Common Market for Eastern and Southern Africa.

[558] Court of Justice of the Common Market for Eastern and Southern Africa, *Building Design Enterprise v. COMESA*, Reference No. 1/2002, Order, 18 October 2002.

[559] Treaty creating the Court of Justice of the Cartagena Agreement (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 at https://www.wipo.int/wipolex/en/treaties/details/401.

[560] Second transitional provision, Statute of the Court of Justice of the Andean Community (Lima, 22 June 2001), *Gazeta Oficial del Acuerdo de Cartagena*, No. 680 (2001), available at www.tribunalandino.org.ec/.

[561] Court of Justice of the Andean Community, *Universidad Andina Simón Bolivar c. Shequinah Its Cía. Ltda.*, 01-AR-2018, Judgment, 28 June 2018, *Gazeta Oficial del Acuerdo de Cartagena*, No. 3675 (2019), para. 3.10; Court of Justice of the Andean Community, *María Elena Aguirre Vaca c. Universidad Andina Simón Bolivar*, 02-AR-2018, Judgment, 9 April 2019, *Gazeta Oficial del Acuerdo de Cartagena*, No. 4258 (2021), para. 3.4.

[562] Art. 22 (ch), Convention on the Statute of the Central American Court of Justice.

contractual disputes between private parties and the International Seabed Authority.[563] It appears that, to date, this possibility has not been used.[564]

184. Furthermore, some administrative tribunals have been empowered to hear contractual disputes with private parties. For instance, article II, paragraph 4, of the Statute of the ILO Administrative Tribunal provides that "[t]he Tribunal shall be competent to hear disputes arising out of contracts to which the International Labour Organization is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution".[565] ILO is reported to rely on this provision in its contracts with consultants, who are not staff members, providing for the ILO Administrative Tribunal to settle their disputes.[566]

(c) International courts hearing tort disputes

185. For international courts or tribunals to have jurisdiction to hear tort claims by private parties is rare. There are, however, some – again mostly regional economic integration organizations – that allow their internal courts or tribunals to hear such claims. An important example is the Court of Justice of the European Union, which is competent to hear claims by private parties invoking what is called the non-contractual liability of the European Union.[567] On this basis, rich case law has developed where natural or legal persons, including those from outside the Union, have sued the European Union for damages caused by its organs and agents.[568] However, according to the Court's settled jurisprudence, three restrictively interpreted conditions must be met: (a) the norm breached must have intended to confer rights on individuals and the breach must be "sufficiently serious"; (b) actual damage must be shown to have occurred; and (c) there must be a direct link between the alleged breach and the damages sustained by the injured parties.[569] The requirement that the breach must be sufficiently serious has led the Court to hold that the "non-contractual liability of the

[563] Art. 187 (c), United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3 (providing for the jurisdiction of the Seabed Disputes Chamber in "disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in art. 153, paragraph 2 (b), concerning: (i) the interpretation or application of a relevant contract or a plan of work; or (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests").

[564] Albert J. Hoffman, "The role of the Seabed Disputes Chamber in dispute settlement relating to activities in the Area", in Alfonso Ascencio-Herrera and Myron H. Nordquist, eds., *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority: A Twenty-Five Year Journey* (Leiden, Brill, 2022), pp. 139–150, at p. 144.

[565] Art. II, para. 4, Statute of the Administrative Tribunal of the International Labour Organization, adopted by the International Labour Conference on 9 October 1946 and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992, 16 June 1998, 11 June 2008, 7 June 2016, 17 June 2019 and 18 June 2021, available at https://www.ilo.org/resource/statute-administrative-tribunal-international-labour-organization.

[566] Dražen Petrović, "Access to justice – an unfinished task", in Abdoulkader Dileita, ed., *International Administrative Justice and International Organizations: Overview and Prospects. On the Occasion of the 20th Anniversary of the African Development Bank Administrative Tribunal* (Abidjian, 2020), pp. 59–76, at p. 71. See, e.g., ILO Administrative Tribunal, *James v. ILO*, Judgment No. 1052, 26 June 1990; ILO Administrative Tribunal, *K.K. v. ILO*, Judgment No. 2148, 15 July 2002; ILO Administrative Tribunal, *A.Z., D.S., V.C. and O.P. v. ILO*, Judgment No. 3445, 11 February 2015; *K. v. ILO*, Judgment No. 4809, ILO Administrative Tribunal, 31 January 2024.

[567] See Consolidated version of the Treaty on the functioning of the European Union, art. 268 ("The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.") and art. 340 ("In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.").

[568] See Ton Heukels and Alison McDonnell, eds., *The Action for Damages in Community Law* (The Hague, Kluwer Law International, 1997).

[569] Court of Justice of the European Communities, *United Parcel Service, Inc. v. European Commission*, Case T-834/17, Judgment, 23 February 2022, paras. 81–88.

European Union can arise only if the institution concerned manifestly and gravely disregarded the limits set on its discretion".[570]

186. The courts of African regional economic integration organizations have similar powers, among them the Community Court of Justice of ECOWAS,[571] the Court of Justice of the West African Economic and Monetary Union[572] and the Court of Justice of the Central African Economic and Monetary Community (CEMAC).[573] Nevertheless, the actual practice of these courts appears to be limited.[574]

187. Neither the Central American Integration System, the Andean or the Caribbean legal regimes expressly grant their courts jurisdiction to hear tort disputes.

(d) Administrative tribunals

188. Probably the most frequently occurring disputes between an international organization and a private party are disputes between organizations and the persons who work for them in different forms of employment or service-providing relationships.[575]

189. Staff members are usually able to access so-called administrative tribunals, which function as specialized employment courts created by international organizations, whereas non-staff members will have such access only in exceptional cases and must usually resort instead to arbitration or merely informal means of dispute settlement.[576]

190. Historically, disputes arising between an international organization and its staff members have been settled internally, mostly by informal means, such as the possibility for

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[570] Court of Justice of the European Communities, *HTTS Hanseatic Trade Trust & Shipping GmbH v. Council of the European Union*, Case C-123/18 P, Judgment, 10 September 2019, para. 42.

[571] Art. 9, para. 2, Protocol on the Community Court of Justice as amended by Supplementary Protocol A/SP.1/01/05 ("The Court shall have the power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparation for official acts or omissions of any Community institution or Community officials in the performance of official duties or functions.").

[572] Art. 15, para. 5, Regulation No. 1/96/CM on the Rules of Procedure of the WAEMU Court of Justice ("The Court of Justice alone shall have jurisdiction to declare non-contractual liability engaged and to order the Union to pay compensation for damage caused either by material acts or by legislative acts of the Union bodies or its servants in the course of or in connection with the performance of their duties.").

[573] Art. 23, Convention régissant la Cour de Justice Communautaire (Convention Governing the Community Court of Justice) (Libreville, 30 January 2009) available at www.cemac.int ("In its jurisdictional role, the Court shall hear in particular: … disputes relating to compensation for damage caused by the institutions, organs or specialized institutions of CEMAC or by its officials or contractual agents in the performance of their duties, without prejudice to the provisions set out in the CEMAC Treaty").

[574] See, e.g., WAEMU Court of Justice, *Le Fonds de Solidarité Africain c. UEMOA et al.*, Judgment No. 03/2019, 10 April 2019 (in French); Court of Justice of the Central African Economic and Monetary Community, *A.X.C. v. La Banque des États de l'Afrique Centrale*, Judgment No. 001/2021, 18 March 2021 (in French).

[575] See Chittharanjan Felix Amerasinghe, "Sources of international administrative law", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, vol. 1 (Milan, Dott. A. Giuffrè Editore, 1987), pp. 67–95; C.F. Amerasinghe, *The Law of the International Civil Service*: *As Applied by International Administrative Tribunals*, vol. I, 2nd ed. (Oxford, Clarendon Press, 1994); Suzanne Basdevant, *Les fonctionnaires internationaux* (Paris, Sirey, 1931); Mohammed Bedjaoui, *Fonction publique internationale et influences nationales* (London, Stevens, 1958); M.B. Akehurst, *The Law Governing Employment in International Organizations* (Cambridge, Cambridge University Press, 1967); Olufemi Elias, ed., *The Development and Effectiveness of International Administrative Law* (Leiden, Martinus Nijhoff, 2012); Hans-Joachim Priess, *Internationale Verwaltungsgerichte und Beschwerdeausschüsse: eine Studie zum gerichtlichen Rechtsschutz für Beamte internationaler Organisationen* (Berlin, Duncker & Humblot, 1989); Quayle, *The Role of International Administrative Law at International Organizations*; Gerhard Ullrich, *Das Dienstrecht der Internationalen Organisationen: Institutionelles Völkerrecht, Recht und Praxis* (Berlin, Duncker & Humblot, 2009); Santiago Villalpando, "International administrative tribunals", in Cogan, *The Oxford Handbook of International Organizations*, pp. 1085–1104.

[576] See paras. 92 *et seq*. above.

League of Nations staff members to appeal their dismissal to the Council, which in turn relied on the view of a committee of jurists.[577] In the 1920s, international organizations started to set up administrative tribunals for this task. The first was the League of Nations Administrative Tribunal in 1927,[578] which had the power to adjudicate claims based on service contracts or staff regulations made by officials or former officials of the League of Nations Secretariat and the International Labour Office. It was subsequently continued as the ILO Administrative Tribunal,[579] which has jurisdiction to hear employment disputes concerning numerous other specialized agencies and other international organizations.[580]

191. The United Nations established the United Nations Administrative Tribunal in 1949,[581] on the basis of its implied powers, as affirmed by the International Court of Justice in its advisory opinion in the *Effects of Awards* case.[582] That tribunal was abolished in the wake of the highly critical 2006 report of the Redesign Panel on the United Nations system of administration of justice,[583] which considered the existing United Nations Administrative Tribunal system insufficient from a human rights perspective.[584] It was thus replaced by the two-tiered United Nations internal justice system consisting of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal,[585] which can also be made competent by specialized agencies to hear their staff disputes.[586]

192. Administrative tribunals have also been set up for regional organizations, such as the Organization of American States,[587] the Council of Europe,[588] the African Union,[589] the

[577] League of Nations Assembly Resolution, 17 December 1920; Acts of the first Assembly, Plenary sessions, at p. 663. See Akehurst, *The Law Governing Employment in International Organizations*, p. 13.

[578] Resolution adopted by the Assembly of the League of Nations on 26 September 1927 on the establishment of an Administrative Tribunal, League of Nations, *Official Journal*, Special Supplement No. 54, pp. 201 and 478.

[579] Statute of the Administrative Tribunal of the International Labor Organization. See also Jacques Ballaloud, *Le Tribunal Administratif de l'Organisation Internationale du Travail et sa Jurisprudence* (Paris, Pedone, 1967); Frank Gutteridge, "The ILO Administrative Tribunal", in Chris de Cooker, ed., *International Administration: Law and Management Practices in International Organisations* (Leiden, Koninklijke Brill, 2009), pp. 655–686.

[580] See a complete list with the organizations recognizing the jurisdiction of the Tribunal, available at www.ilo.org/ilo-administrative-tribunal/organizations-recognizing-jurisdiction.

[581] "Establishment of a United Nations Administrative Tribunal", General Assembly resolution 351 (IV) [A] of 24 November 1949.

[582] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (see footnote 50 above).

[583] General Assembly, "Report of the Redesign Panel on the United Nations System of Administration of Justice" (A/61/205).

[584] *Ibid*., para. 5 ("The Redesign Panel found that the administration of justice in the United Nations … fails to meet many basic standards of due process established in international human rights instruments.").

[585] "Administration of justice at the United Nations", General Assembly resolution 63/253 of 24 December 2008, annex I, "Statute of the United Nations Dispute Tribunal"; *ibid.*, annex II, "Statute of the United Nation Appeals Tribunal".

[586] Staff members from the United Nations Children's Fund, the United Nations Development Programme and the United Nations Institute for Disarmament Research are among those who can access the system. For a complete overview of access, see https://www.un.org/en/internaljustice/overview/who-can-use-the-system.shtml.

[587] Statute of the Administrative Tribunal of the Organization of American States, CP/RES. 48 (I-O/71) of 16 July 1971. See also General Assembly of the Organization of American States, resolution AG/RES. 35 (I-O/71) of 22 April 1971.

[588] Statute of the Administrative Tribunal of the Council of Europe, resolution (94) 11 of the Committee of Ministers of the Council of Europe of 5 April 1994, appendix 2, replacing the 1965 Appeals Board of the Council of Europe. That statute was replaced by a new one adopted by resolution CM/Res(2022)65 of the Committee of Ministers on 16 November 2022.

[589] Organisation of African Unity, Council of Ministers, "Statute of the Administrative Tribunal" (CM/99/Rev.2), adopted during the seventh ordinary session in Addis Ababa, October–November 1966.

League of Arab States,[590] NATO[591] and others. International financial institutions started to create their own administrative tribunals only in the 1980s. First the World Bank[592] and IMF,[593] then regional development banks, such as the Inter-American Development Bank,[594] the Asian Development Bank[595] and the African Development Bank,[596] as well as the Bank for International Settlements,[597] have established their own administrative tribunals.

193. Regional economic integration organizations also often make their internal courts competent to hear staff disputes. For instance, staff disputes in the original three European Communities went to the European Court of Justice.[598] Over time, a number of reforms took place and employment disputes became subject to different judicial institutions, ranging from the Court of First Instance[599] to a special employment tribunal, the European Union Civil Service Tribunal,[600] which operated between December 2005 and September 2016. They are now subject to the General Court of the European Union.[601] Another example of a judicial organ of a regional economic integration organization acting as an administrative tribunal can be found in the Benelux Court of Justice,[602] which is open to the staff of the Benelux

590 Council of the League of Arab States, "Statute of the Tribunal for the League of Arab States", Resolution No. S 1980/DG41/C2-31/3/1964.

591 NATO Civilian Personnel Regulations, art. 62 and appendix 1 to annex IX; North Atlantic Council, "Rules of procedure of the Administrative Tribunal", 1 July 2013, PO(2013)0356.

592 The World Bank Administrative Tribunal: Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation, as adopted by the Board of Governors on 30 April 1980, and amended on 31 July 2001 and 18 June 2009. See International Development Association, Board of Governors, resolution No. 118, "Administrative Tribunal" (30 April 1980). See also Nassib G. Ziadé, ed., *Problems of International Administrative Law: On the Occasion of the Twentieth Anniversary of the World Bank Administrative Tribunal* (Washington, D.C., World Bank, 2008).

593 International Monetary Fund Board of Governors, "Establishment of the Administrative Tribunal of the International Monetary Fund", resolution No. 48-1 of 21 December 1992.

594 Statute of the Administrative Tribunal of the Inter-American Development Bank Group, resolution DE-11/13 (27 February 2013), available at www.iadb.org.

595 Statute of the Administrative Tribunal of the Asian Development Bank (1 April 1991), available at www.adb.org.

596 Statute of the Administrative Tribunal of the African Development Bank Group (16 July 1997), available at www.afdb.org.

597 Statute of the Administrative Tribunal of the Bank for International Settlements (13 January 2014), available at www.bis.org.

598 Art. 173, Treaty establishing the European Economic Community (Rome, 25 March 1957), United Nations, *Treaty Series*, vol. 298, No. 4300, p. 3.

599 Art. 3, para. 1, Council of the European Communities, "Decision of 24 October 1988 establishing a Court of First Instance of the European Communities" (88/591/ECSC, EEC, Euratom) ("The Court of First Instance shall exercise at first instance the jurisdiction … (a) in disputes between the Communities and their servants"), *Official Journal of the European Communities*, No. L 319, 25 November 1988, p. 1.

600 Council of the European Union, "Decision of 2 November 2004 establishing the European Union Civil Service Tribunal" (2004/752/EC, Euratom), annex I, art. 1 ("The European Union Civil Service Tribunal … shall exercise at first instance jurisdiction in disputes between the Communities and their servants"), *Official Journal of the European Union*, L 333, 9 November 2004, p. 7.

601 Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants, third preambular paragraph ("jurisdiction at first instance in disputes between all institutions, bodies, offices or agencies, on the one hand, and their servants, on the other … should be conferred on the General Court."), *Official Journal of the European Union*, L 200, 26 July 2016, p. 137; art. 270, Consolidated version of the Treaty on the functioning of the European Union ("The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.")

602 Treaty instituting the Benelux Economic Union (The Hague, 3 February 1958), United Nations, *Treaty Series*, vol. 381, No. 5471, p. 165; Treaty concerning the establishment and the statute of a Benelux Court of Justice (Brussels, 31 March 1965), United Nations, *Treaty Series*, vol. 924, No. 13176, p. 2.

Economic Union – since 2008, the Benelux Union.[603] Similarly, the Court of Justice of the Common Market for Eastern and Southern Africa, the Court of Justice of the Andean Community and the Central American Court of Justice decide employment disputes between the organizations and their employees.[604] The Court of Justice of the West African Economic and Monetary Union has also heard staff disputes.[605] The jurisdiction over employment disputes of the Community Court of Justice of ECOWAS led the court to describe itself as a "public service court".[606] According to the 2005 ECOWAS Supplementary Protocol, the Court has jurisdiction to hear staff complaints when all internal administrative remedies have been exhausted,[607] which has led applicants to ground employment claims on both human rights instruments and pertinent ECOWAS staff regulations.[608] The former Tribunal in the Southern African Development Community [609] also had jurisdiction over internal employment disputes with the Community.

194. While staff members of most international organizations nowadays have access to judicial dispute settlement in the form of administrative tribunals, such access has remained lacking for persons who work for international organizations but do not have the formal status of staff members. Their procedural remedies are often limited to informal dispute settlement or arbitration.[610] Having the formal dispute settlement mechanisms of administrative tribunals in view, in a number of instances, non-staff members also tried to access administrative tribunals.

195. Early jurisprudence of the United Nations Administrative Tribunal was rather restrictive in extending its jurisdiction to individuals other than regular staff members.[611] Although the Statute of the Tribunal provided access for "any other person who can show that he or she is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied",[612]

[603] Art. 3, Additional Protocol to the Treaty concerning the establishment and the statute of a Benelux Court of Justice, relating to the jurisdictional protection of persons in the service of the Benelux Economic Union (The Hague, 29 April 1969), United Nations, *Treaty Series*, vol. 924, No. 13176, p. 2.

[604] Art. 27, para. 1, Treaty establishing the Common Market for Eastern and Southern Africa; art. 40, Protocol of Cochabamba amending the Treaty creating the Court of Justice of the Cartagena Agreement; art. 22 (j), Convention on the Statute of the Central American Court of Justice.

[605] See, e.g., WAEMU Court of Justice, *Dieng Ababacar v. WAEMU Commission*, Case No. 03/98, Judgment, 29 May 1998; WAEMU Court of Justice, *Akakpo Tobi Edoé v. WAEMU Commission*, Case No. 02/2001, Judgment, 20 June 2001.

[606] Community Court of Justice of ECOWAS, *Nnamdi F.C. Chukwu v. President of ECOWAS Commission et al.*, Application No. ECE/CCJ/APP/44/21, Ruling No. ECW/CCJ/RUD/01/22, 2 February 2022, para. 43.

[607] Art. 10 (e), Protocol on the Community Court of Justice as amended by Supplementary Protocol A/SP.1/01/05.

[608] See, e.g., Community Court of Justice of ECOWAS, *Dorothy Etim v. President of the Commission of the Economic Community of West African States*, Application No. ECE/CCJ/APP/44/21, Judgment No. ECW/CCJ/JUD/03/24, 30 January 2024, para. 19.

[609] Art. 18, Protocol on the Tribunal in the Southern African Development Community and Rules of Procedure Thereof (Windhoek, 7 August 2000), available at https://www.sadc.int/sites/default/files/2021-08/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf.

[610] A/CN.4/764, chap. III, sect. B (2) (United Nations Office for Project Services (UNOPS)) ("Personnel disputes between UNOPS and personnel retained under Individual Contractor Agreements are resolved through *ad hoc* arbitration under the UNCITRAL Arbitration Rules or mediation through the Office of the Ombudsman for United Nations Funds and Programmes, as the General Assembly has not provided individual contractors with access to the United Nations' internal justice system."); chap III, sect. B (2) (World Food Programme) ("Disputes with affiliate workforce (other than consultants) – contracts with service contract holders, special service agreements holders, or casual labourers – provide for alternative mechanisms for the resolution of disputes, typically arbitration, as these categories of personnel do not have access to the internal appeal process or before ILOAT.").

[611] A/61/205, para. 15.

[612] Art. 2, para. 2 (b), Statute of the United Nations Administrative Tribunal, General Assembly resolution 351 (IV) [A] of 24 November 1949, as amended.

the Tribunal interpreted this clause to be generally restricted to staff members.[613] It was only gradually and exceptionally that the Tribunal granted other individuals working with the United Nations access to it in order to avoid a lack of legal remedies.[614]

196. In 2006, the Redesign Panel on the United Nations System of Administration of Justice, which had been tasked by the General Assembly with overhauling the United Nations administrative justice, criticized the narrow *ratione personae* jurisdiction of the United Nations Administrative Tribunal.[615] It recommended that all individuals performing personal services under a contract, including "consultants and locally recruited personnel of peacekeeping missions", should have full access to a legal remedy.[616] However, the final Statute of the United Nations Dispute Tribunal does not reflect this planned expansion of jurisdiction.[617] Thus, both the United Nations Dispute Tribunal and the United Nations Appeals Tribunal have pursued a restrictive approach, emphasizing that their jurisdiction is limited "to persons who are staff members of the United Nations or who were former staff members. [It] does not [cover] applications from non-staff members".[618]

197. Similarly, non-staff members of international organizations do not have standing before the ILO Administrative Tribunal.[619] However, the Tribunal has interpreted the term "staff member" broadly and thus exercised its jurisdiction whenever there is a risk of denial of justice owing to a lack of an alternative remedy.[620] In addition, the Tribunal has permitted

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613 A/61/205, paras. 16 and 17; Rishi Gulati, "The internal dispute resolution regime of the United Nations: has the creation of the United Nations Dispute Tribunal and United Nations Appeals Tribunal remedied the flaws of the United Nations Administrative Tribunal?", *Max Planck Yearbook of United Nations Law*, vol. 15 (2011), pp. 489–538, at p. 503.

614 See, e.g., United Nations Administrative Tribunal, *Hernandez-Sanchez v. Secretary-General of the United Nations*, Judgment No. 1074, 26 July 2002, sect. VII (concerning an Inspector of the Joint Inspection Unit); United Nations Administrative Tribunal, *Teixeira v. Secretary-General of the United Nations*, Judgment No. 230, 14 October 1977, sect. IV (concerning a translator who had concluded 25 special service agreements with the Economic Commission for Latin America); United Nations Administrative Tribunal, *Irani v. Secretary-General of the United Nations*, Judgment No. 150, 6 October 1971, sect. IX (concerning an individual with an "service hiring contract" under the Programme for the Provision of Operational, Executive and Administrative Personnel (OPEX)). See also United Nations Administrative Tribunal, *Salaymeh v. Commissioner-General of UNRWA*, Judgment No. 469, 17 November 1989 (unpublished); United Nations Administrative Tribunal, *Zafari v. Commissioner-General of UNRWA*, Judgment No. 461, 10 November 1989 (unpublished). See also August Reinisch, "The immunity of international organizations and the jurisdiction of their administrative tribunals", *Chinese Journal of International Law*, vol. 7 (2008), pp. 285–306, at pp. 292–294; Gulati, *Access to Justice and International Organisations*, at p. 82.

615 A/61/205, paras. 15–20.

616 *Ibid.*, para. 20 (b); art. 3, para. 1 (d), Draft statute of the United Nations Dispute Tribunal, in "Note by the Secretary-General on the administration of justice: further information requested by the General Assembly" (A/62/748 and Corr.1, annex I). See also August Reinisch and Christina Knahr, "From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal: reform of the administration of justice system within the United Nations", *Max Planck Yearbook of United Nations Law*, vol. 12 (2008), pp. 447–483, at pp. 469 and 470; Abdelaziz Megzari, *The Internal Justice of the United Nations: A Critical History 1945–2015* (Leiden, Koninklijke Brill, 2015), at p. 422.

617 Art. 3, para. 1, Statute of the United Nations Dispute Tribunal ("An application under article 2, paragraph 1, of the present statute may be filed by: (*a*) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes; (*b*) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes; (*c*) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes").

618 See, e.g., United Nations Dispute Tribunal, *Yodjeu Ntemde (the Son of God; the Holy Grail; the King of this World) v. Secretary-General of the United Nations*, Judgment on receivability, Judgment No. UNDT/2023/073, 20 July 2023, para. 6.

619 However, they may access the tribunal through a choice of forum clause in a contract. See art. II, para. 4, Statute of the ILO Administrative Tribunal. See para. 184 above.

620 See ILO Administrative Tribunal, *Chadsey v. Universal Postal Union*, Judgment No. 122, 15 October 1968. See also Gulati and John, "Arbitrating employment disputes involving international organizations", in Quayle, *The Role of International Administrative Law at International Organizations*, at p. 148.

non-staff contractors of organizations to bring suits on the basis of a specific choice of forum clause in favour of the Tribunal.[621]

(e) Human rights courts and tribunals

198. Since international organizations are not regularly parties to regional human rights treaties, they cannot be respondents in complaint proceedings before such human rights courts. Thus, the African Court on Human and Peoples' Rights has repeatedly rejected claims brought against the African Union and its organs due to the Union not being a party to either the African Charter on Human and Peoples' Rights or the Protocol establishing the Court.[622] Similarly, the now defunct European Commission of Human Rights[623] rejected the possibility of applications being submitted against the European Communities, as they were not a party to the European Convention on Human Rights.[624] Instead, cases have been brought against European Union member States.[625] In a number of cases, the European Court of Human Rights has held that the responsibility of European Union member States can still be engaged when they have transferred powers to the European Union and give effect to European Union law.[626] Nevertheless, the European Court of Human Rights has also ruled that the human rights protection guaranteed by European Union law is equivalent to that granted by the Convention and that, consequently, there is a presumption that European Union member States do not breach the Convention when complying with their obligations stemming from their European Union membership.[627]

199. The fact that international organizations generally cannot be respondents in complaint proceedings before human rights courts may change. After a first failed attempt in the 1990s,[628] the European Union intended to accede to the European Convention on Human Rights after an amendment to the Treaty of Lisbon.[629] In parallel, Protocol No. 14 to the European Convention on Human Rights, which entered into force in 2010, expressly permits the accession of the European Union to the Convention.[630] However, the qualms expressed within the Court of Justice of the European Union about the compatibility of submitting to the jurisdiction of the European Court of Human Rights with European Union law[631] have so

[621] See para. 184 above.

[622] African Court on Human and Peoples' Rights, *Femi Falana v. The African Commission on Human and Peoples' Rights*, Application No. 019/2015, Order, 20 November 2015; African Court on Human and Peoples' Rights, *Atabong Denis Atemnkeng v. The African Union*, Application No. 014/2011, Judgment, 15 March 2013; African Court on Human and Peoples' Rights, *Femi Falana v. The African Union*, Application No. 001/2011, Judgment, 26 June 2012.

[623] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994), United Nations, *Treaty Series*, vol. 2061, No. 2889, p. 7.

[624] European Commission of Human Rights, *Confedération Française Démocratique du Travail v. The European Communities*, Application No. 8030/77, Decision of admissibility, 10 July 1978.

[625] William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford, Oxford University Press, 2015), p. 948.

[626] See, e.g., European Court of Human Rights, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], No. 45036/98, 30 June 2005.

[627] See, e.g., European Court of Human Rights, *Avotiņš v. Latvia* [GC], No. 17502/07, 23 May 2016.

[628] Court of Justice of the European Communities, Opinion 2/94 of the Court, *Accession of the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 28 March 1996, *European Court Reports 1996*, pp. 1759 and 1763.

[629] Art. 6, para. 2, Consolidated version of the Treaty on the functioning of the European Union. See also Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford, Hart Publishing, 2013).

[630] Art. 17, para. 1, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (Strasbourg, 13 May 2004), United Nations, *Treaty Series*, vol. 2677, No. 2889, p. 3.

[631] Court of Justice of the European Communities, Opinion 2/13, *Request for an Opinion pursuant to Article 218(11) TFEU, made on 4 July 2013 by the European Commission*, Full Court, 18 December 2014, (ECLI:EU:C:2014:2454).

far blocked progress. Nevertheless, there are currently plans for finalizing the accession protocol.[632]

200. The fact that adherence to human rights treaties is possible in principle is also evidenced by the fact that the European Union acceded in 2010 to the Convention on the Rights of Persons with Disabilities of the United Nations[633] and in 2023 to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).[634]

201. However, while the European Union has thus accepted the inter-party dispute settlement mechanism in the Istanbul Convention, it has not acceded to the Optional Protocol to the Convention on the Rights of Persons with Disabilities, which would provide the Committee on the Rights of Persons with Disabilities with jurisdiction over individual communications.[635]

I. Conclusion on practice

202. This overview of the practice of settling disputes between international organizations and private parties has demonstrated that all "means of dispute settlement" mentioned in draft guideline 2 (c) are used. While international organizations often seem to favour consensual forms of dispute settlement falling short of binding third-party adjudication, private parties appear to prefer having recourse to arbitration or adjudication. The confidential nature of many dispute settlement mechanisms makes it difficult to assess how frequently they are actually used.

203. In regard to adjudicatory means of dispute settlement, the overview has demonstrated that recourse to them depends upon their legal availability. Arbitration depends upon the consent of the disputing parties, which may be provided for contractually in advance of any actual disputes or after they have arisen. International courts and tribunals are rarely available for the settlement of disputes between international organizations and private parties because they often possess only limited jurisdiction. Similarly, national courts are regularly prevented from adjudicating disputes brought against international organizations as a result of the jurisdictional immunity routinely accorded to international organizations.

III. Policy issues and suggested recommendations

204. This chapter, building on the practice described above, formulates recommendations that should be followed for the purpose of settling disputes between international organizations and private parties. These recommendations partly reflect existing legal obligations contained in various international legal instruments, as well as private contractual arrangements between disputing parties as discussed in chapter II. However, the recommendations are of a more general nature and are also intended to apply in the absence of any specific stipulations for the settlement of disputes. Furthermore, they are rooted in the

[632] Council of Europe, Steering Committee for Human Rights (Comité directeur pour les droits de l'homme (CDDH)), "CDDH *Ad Hoc* Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights, Report to the CDDH", 46+1(2023)35FINAL, 30 March 2023.

[633] Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, *Official Journal of the European Union*, L 23, 27 January 2010, p. 35.

[634] Council Decision (EU) 2023/1075 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union, *Official Journal of the European Union*, L 143 I, 2 June 2023, p. 1.

[635] Art. 1, Optional Protocol to the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), United Nations, *Treaty Series*, vol. 2518, No. 44910, p. 283. An overview of parties to the Optional Protocol is available at https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-15-a&chapter=4&clang=_en.

need to find an appropriate balance between competing policy demands such as jurisdictional immunity and access to justice.

205. This part analyses underlying policy considerations that will form the basis for the recommendations contained in the ensuing suggested guidelines.

A. Choice of dispute settlement means and effective settlement of legal disputes

206. The principle that international organizations are generally free to choose the means of dispute settlement[636] also applies with regard to disputes with private parties. This is confirmed by the principle of party autonomy, recognized by most national legal systems, according to which parties are free to submit their legal relationship to legal rules of their own choice and their disputes to the types of dispute settlement they consider appropriate. International organizations and private parties have used this freedom and resorted to various means of dispute settlement in practice, as outlined in chapter II.

207. The choice of means of dispute settlement should be guided by the consideration that, depending on the nature of the dispute and the circumstances, certain means of dispute settlement may be more appropriate than others. In this regard, a similar consideration appears to be relevant to that which also formed the basis for draft guideline 4 addressing disputes between international organizations and States. As stated in the Commission's draft commentary, "[w]here a dispute mainly involves a disagreement over facts, enquiry or fact-finding may be a more 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".[637]

208. Notwithstanding the fact that international organizations and private parties often expressly choose certain forms of dispute settlement in advance, the general freedom to settle disputes in an appropriate fashion should be expressly acknowledged. This recommendation is, of course, without prejudice to specific requirements stemming from jurisdictional immunity and access to justice considerations. These requirements will be addressed in separate guidelines.

B. Suggested guideline

209. "8. Resort to means of dispute settlement

> "Disputes between international organizations and private parties 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."

C. Dispute settlement means and jurisdictional immunity

210. International organizations regularly enjoy both domestic legal personality and jurisdictional immunity. While domestic legal personality allows them to be parties before national courts, thus to sue and to be sued,[638] jurisdictional immunity shields them from the exercise of the adjudicatory powers of such courts over them, thus from being sued,[639] unless the organizations waive their immunity.[640]

211. Both domestic legal personality and jurisdictional immunity crucially relate to the settlement of disputes between international organizations and private parties because most such disputes arise from contractual or tort relations between them and may be settled by

[636] A/CN.4/766, paras. 27–198.
[637] A/79/10, para. 63, para. (4) of the commentary to guideline 4.
[638] See para. 17 above.
[639] See paras. 113 *et seq*. above.
[640] See paras. 123 *et seq*. above.

resort to national courts. Domestic legal personality enables, and jurisdictional immunity may prevent, this form of dispute settlement.

212. It is widely accepted that the jurisdictional immunity regularly accorded to international organizations primarily serves the purpose of securing their independent functioning, preventing national courts from interfering in their activities. Moreover, jurisdictional immunity ensures that no State is able to exert additional influence over the activities of an international organization.

1. Independent functioning

213. The jurisdictional immunity of international organizations serves the important purpose of ensuring their independent functioning.[641] Exempting international organizations from the adjudicatory and enforcement jurisdiction of national courts and administrative bodies is intended to ensure that international organizations can fulfil their tasks without any interference from adjudicatory organs of member or non-member States. This functional independence rationale is widely accepted in national and international jurisprudence.[642]

214. At the same time, the fact that the jurisdictional immunity of international organizations can generally be waived and that international organizations may actively choose to resort to national courts or allow disputes with private parties to be litigated against

[641] See, e.g., C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge, Cambridge University Press, 2005), p. 316; Eric de Brabandere, "Immunity as a guarantee for institutional autonomy: a functional perspective on the necessity of UN immunity in post-conflict administrations", in Richard Collins and Nigel D. White, eds., *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (New York, Routledge, 2011), pp. 278–296; Charles H. Brower, II, "International immunities: some dissident views on the role of municipal courts", *Virginia Journal of International Law*, vol. 41 (2000), pp. 1–92; Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge, Cambridge University Press, 2002), p. 148; Reinisch, *International Organizations Before National Courts*, p. 234; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions*, 5th ed. (London, Sweet and Maxwell, 2001), p. 487; Schermers and Blokker, *International Institutional Law*, p. 268; Michael Singer, "Jurisdictional immunity of international organizations: human rights and functional necessity concerns", *Virginia Journal of International Law*, vol. 36 (1995), pp. 53–166, at p. 53.

[642] See, e.g., Supreme Court of the Netherlands, *Iran-United States Claims Tribunal v. A.S.*, 20 December 1985, ILR, vol. 94 (1994) p. 321, at p. 329 ("the interest of the international organization in having a guarantee that it will be able to perform its tasks independently and free from interference under all circumstances"); *Stichting Mothers of Srebrenica and others v. Netherlands and United Nations* (see footnote 482 above), para 4.2 ("Both the basis for and the scope of this immunity, which is aimed at ensuring that the UN can function completely independently and thus serves a legitimate purpose, are therefore different from those underlying the immunity from jurisdiction enjoyed by foreign states."); Belgium, Court of Appeal of Brussels, *El Hamidi and Chlih v. North Atlantic Treaty Organization (NATO) and Belgium (intervening)*, Appeal decision, 23 November 2017, ILDC 3043 (BE 2017), JT 6772, para. 21 ("*De manière générale, on peut dire que l'immunité de juridiction conférée à une organisation internationale par ses États membres vise à lui permettre d'assumer sa mission en toute indépendance et sans interférence indue*." ["In general, immunity from jurisdiction conferred on an international organization by its member States was intended to enable the organization to carry out its mission independently and without undue interference."]); *E v. King Abdullah bin Abdulaziz International Centre for Interreligious and Intercultural Dialogue* (see footnote 356 above), para. 13 ("to protect international organizations from intervention and interference by the organs of individual States."); *Beer and Regan v. Germany* (see footnote 51 above), para. 53 ("Like the Commission, the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments. The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations."); *Stichting Mothers of Srebrenica and Others v. The Netherlands* (see footnote 484 above), para. 154 ("To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations.").

them, demonstrates that settling disputes through resort to national courts may not always hamper the independent functioning of international organizations.

215. National courts may be very apt to settle disputes between international organizations and private parties, in particular, where they arise from contractual relations governed by their national law or are brought on the basis of national tort law.[643] Reliance on and invocation of jurisdictional immunity should thus be guided by consideration of the extent to which adjudication is likely to affect the independent functioning of international organizations. The question of whether other alternative means of dispute settlement are available in order to ensure access to justice for private parties also needs to be taken into account.[644]

2. Preventing undue influence of individual States through their courts

216. Related to the purpose of ensuring the independent functioning of international organizations is the consideration that their jurisdictional immunity may prevent individual States from garnering unequal influence over their activities. This rationale is also widely accepted in national and international jurisprudence.[645] It was broadly elaborated by the Office of Legal Affairs of the United Nations in its *amicus curiae* brief in *Broadbent v. OAS*,[646] in which it argued that jurisdictional immunity would prevent unilateral attempts to gain "an undue share of influence over [an international organization's] affairs".[647]

3. Recommendations

217. It is submitted that the far-reaching jurisdictional and enforcement immunity enjoyed by international organizations serves a legitimate purpose and that eroding such immunity would not be a healthy development. Thus, it is suggested that their jurisdictional immunity should be respected as a matter of principle.

218. Nevertheless, a proper balance between the interest of organizations in securing their independent functioning through jurisdictional immunity and the interest of private parties in

643 Gulati, *Access to Justice and International Organisations*, pp. 219 *et seq*.

644 See paras. 220 *et seq*. below.

645 See, e.g., *Mendaro v. The World Bank* (see footnote 356 above), at p. 615 ("the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory."); Supreme Court of the Philippines, *International Catholic Migration Commission v. Calleja (Director of Bureau of Labor Relations) and Trade Unions of the Philippines and Allied Services*, 28 September 1990, ILR, vol. 102 (1996), pp. 149–162, at p. 159 ("The grant of immunity from local jurisdiction to ICMC and IRRI is clearly necessitated by their international character and respective purposes. The objective is to avoid the danger of partiality and interference by the host country in their internal workings. The exercise of jurisdiction by the Department of Labor in these instances would defeat the very purpose of immunity, which is to shield the affairs of international organizations, in accordance with international practice, from political pressure or control by the host country to the prejudice of member States of the organization, and to ensure the unhampered performance of their functions."); *Waite and Kennedy v. Germany* (see footnote 51 above), para. 63 ("the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.").

646 United States, Court of Appeals for the District of Columbia Circuit, *Broadbent v. Organization of American States*, 628 F.2d 27, 8 January 1980.

647 Brief for the United Nations as *amicus curiae*, reprinted in *United Nations Juridical Yearbook 1980*, p. 227, at p. 229 ("Intergovernmental organizations may be considered as collective enterprises of their member States. Their constituent treaties define precisely the influence each member is to have on the operations of the organizations, and how that influence is to be exercised – generally through collective organs. If individual members could then exert additional influence on those organizations, largely through the fortuitous circumstance of where their headquarters, or other offices or officials or assets, happen to be located this could drastically change the constitutionally agreed sharing of power within the organizations. Thus the immunity granted by States to an intergovernmental organization is really their reciprocal pledge that none will attempt to garner unilaterally an undue share of influence over its affairs.").

terms of access to effective remedies must be struck.[648] Therefore, the suggested guideline endorsing respect for jurisdictional immunity of international organizations must be read in conjunction with the following guidelines calling for access to justice and the availability of dispute settlement mechanisms conforming to rule of law and human rights requirements.

D. Suggested guideline

219. "9. Jurisdictional immunity of international organizations

"The jurisdictional immunity of international organizations, serving the purpose of ensuring their independent functioning, should be respected."

E. Access to justice

220. As explained in draft guideline 8, the free choice of means of dispute settlement also applies to disputes between international organizations and private parties.[649] As shown in chapter II above, international organizations and private parties routinely choose various means of dispute settlement. In regard to the most frequently occurring types of disputes – contractual and staff disputes – they regularly provide for arbitration and adjudication by staff dispute settlement mechanisms.

221. In situations where such chosen, independent third-party adjudication is not available, the jurisdictional immunity of international organizations may pose practical problems of access to justice for private parties who would otherwise access national courts.

222. Access to justice is particularly relevant in the context of private parties because it is not only a rule of law demand but also embedded as a human rights guarantee. It can also be grounded in the customary international law principles prohibiting a denial of justice and it is often expressly provided for in treaties, obliging international organizations to make effective dispute settlement available.

223. Thus, there are strong policy reasons for favouring independent and impartial third-party adjudication as the preferred form of dispute settlement. These considerations will form the background of the suggested recommendations.

1. Human rights considerations and customary international law

224. Human rights instruments regularly contain two types of procedural rights to a remedy for private parties: a general right to an effective remedy, mostly concerning alleged human rights violations, and a specific right of access to courts, mostly concerning alleged violations of rights under private law.

[648] Jean-Francois Flauss, "Immunités des organisations internationales et droit international des droits de l'homme", in Société française pour le droit international, ed., *La soumission des organisations internationales aux normes internationales relatives aux droits de l'homme* (Paris, Pedone, 2009), pp. 71–94; Kryvoi, "Procedural fairness as a precondition for immunity of international organizations"; Edward Chukwuemeke Okeke, "The tension between the jurisdictional immunity of international organizations and the right of access to court", in Quayle, *The Role of International Administrative Law at International Organizations*, pp. 25–51; Eric Robert, "The jurisdictional immunities of international organizations: the balance between the protection of the organization's interests and individual rights", in Nicolas Angelet et al., eds., *Droit du pouvoir, pouvoir du droit : Mélanges offerts à Jean Salmon* (Bruxelles, Bruylant, 2007), pp. 1433–1460; Fernanda Araújo Kallás e Caetano, "A imunidade de jurisdição das organizações internacionais face ao direito de acesso à justiça", *Revista de Direito Internacional/Brazilian Journal of International Law*, vol. 13 (2016) pp. 391–403; Masbernat and Ramos-Fuentes, "Doctrina jurisprudencial de tribunales de América Latina"; Gulati, *Access to Justice and International Organisations*.

[649] See paras. 206 *et seq*. above.

225. The right to an effective remedy found in many human rights treaties[650] usually relates to rights recognized in such instruments. It thus comprises claims of a public law nature and often merely guarantees an "effective remedy" before authorities that may be different from judicial ones; however, it sometimes also envisages judicial remedies. The right to an effective remedy is largely considered to form part of customary international law.[651]

226. In addition to procedural guarantees under criminal law, the right to a fair trial/due process often relates to the determination of one's civil rights. It thus focuses on rights of a private law nature and it provides for judicial remedies.[652] Nevertheless, it should be noted

[650] Art. 8, Universal Declaration of Human Rights ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); art. 2, para. 3, International Covenant on Civil and Political Rights ("Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted."); art. 13, European Convention on Human Rights ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."); art. 25, para. 1, American Convention on Human Rights (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123 ("Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."); art. 7, para. 1 (a), African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217 ("Every individual shall have the right to have his cause heard. This comprises: *a*) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force").

[651] See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005; International Law Association, Final report on accountability of international organisations, at p. 208 ("The right to a remedy may be seen as a norm of customary international law, one of the essential features of which is that the parties are treated as equal."); International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioner's Guide*, rev. ed. (Geneva, 2018); Bardo Fassbender, "Targeted sanctions imposed by the UN Security Council and due process rights: a study commissioned by the UN Office of Legal Affairs and follow-up action by the United Nations", *International Organizations Law Review*, vol. 3 (2006), pp. 437–486; Pierre Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Cheltenham, Edward Elgar Publishing, 2017), pp. 100–103; Humberto Cantú Rivera, *The Universal Declaration of Human Rights: A Commentary* (Leiden, Brill, 2024), at p.187 ("The evolution of a declarative right to an effective remedy by the competent national tribunals in the [Universal Declaration of Human Rights] into an enforceable right recognized in nearly all the different international and regional human rights instruments highlights a clear international consensus on its relevance for the protection of all other human rights."); Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford, Oxford University Press, 2011).

[652] Art. 14, International Covenant on Civil and Political Rights ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); art. 6, para. 1, European Convention on Human Rights ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

that some human rights instruments more broadly refer to "rights and obligations"[653] in an unqualified way or to rights and obligations of "any other nature".[654]

227. Although the text of fair trial/due process guarantees in human rights instruments does not usually explicitly provide for a right of access to courts, human rights bodies and courts have clarified that access to justice is inherent in a fair trial.[655] This is an important development, given the older view of the European Commission of Human Rights that the jurisdictional immunity of international organizations did not raise any access to justice issues.[656] For the European Convention on Human Rights, in the landmark *Waite and Kennedy* case, the European Court of Human Rights clearly found that the jurisdictional immunity enjoyed by international organizations could impair the right of access to justice enjoyed by individuals unless such impairment could be justified through the availability of reasonable alternative means.[657] This rationale was recently endorsed by the Human Rights Committee of the United Nations in its views concerning *M.L.D v. Philippines* in regard to article 14 of the International Covenant on Civil and Political Rights.[658]

228. The access to justice rationale is also reflected in several decisions of national courts[659] and arbitration tribunals.[660] Most importantly, a human rights-inspired call for access to justice in claims against international organizations was already present in the advisory

[653] Art. 10, Universal Declaration of Human Rights ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

[654] Art. 8, para. 1, American Convention on Human Rights ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.").

[655] See, e.g., *Golder v. United Kingdom* (see footnote 423 above), at para. 36 ("[T]he right of access [to court] constitutes an element which is inherent in the right stated by Article 6 § 1."); African Commission on Human and Peoples' Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/02, 15 May 2006, para. 213 ("The protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief."); Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V, para. 9 ("Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law."); Inter-American Court of Human Rights, *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Judgment, 28 August 2013, Series C, No. 268, para. 181 ("The Court has developed the right to a hearing protected by Article 8 (1) of the Convention, understanding that, in general, it signifies the right of everyone to have access to the court or the organ of the State responsible for determining his or her rights and obligations.").

[656] See *Ary Spaans v. The Netherlands* (see footnote 426 above), p. 119, at p. 122.

[657] *Waite and Kennedy v. Germany* (see footnote 51 above), at para. 68. See also European Court of Human Rights, *Perez v. Germany*, No. 15521/08, 29 January 2015, para. 93 ("The Court limits itself to reiterate that it would be incompatible with the purpose and object of the Convention if the Contracting States, by attributing immunities to international organisations, were absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. This applies, in particular, to the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial").

[658] CCPR/C/141/D/3581/2019, para. 8.6 ("Taking into account the jurisprudence of international judicial bodies, the Committee observes that while international organizations have an international legal personality and enjoy jurisdictional immunities, the host State party may still have jurisdiction under the Covenant if the international organization does not provide a reasonable alternative means of dispute resolution.").

[659] See paras. 143 *et seq*. above. See also, in particular, *Manderlier v. United Nations and Belgian State* (see footnote 502 above), UNJYB (1969), at p. 237 (admitting that there was no court to which the appellant could submit his dispute with the United Nations and that this situation "does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights.").

[660] See, e.g., *A (organisation internationale) c. B (société)* (see footnote 274 above), p. 254, where a sole arbitrator held that where organizations enjoyed immunity from domestic jurisdiction, they necessarily had a duty to submit to arbitration in order to protect the right of access to justice.

opinion of the International Court of Justice in the *Effect of Awards* case. Therein the Court stated that, in the light of the immunity of the United Nations from suit in domestic courts, it would "hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals … that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them".[661] Other international courts and tribunals have also recognized the inherent tension between immunity and access to justice in the case of private parties affected by acts of international organizations.[662]

229. The right of access to justice is also largely considered to form part of customary international law.[663]

2. Rule of law considerations

230. As discussed in the Special Rapporteur's second report,[664] the rule of law, which is also relevant at the international level,[665] originated at the national level. Concerning dispute settlement, access to justice is a core requirement of the rule of law at the national level.[666] It follows from the rule of law notion that no one is above the law and that disputes should be settled by fair adjudication.[667]

231. Many international courts and tribunals have emphasized that access to justice and the right to a remedy can be grounded in rule of law considerations.[668]

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[661] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (see footnote 50 above), at p. 57.

[662] See, e.g., *SAT Fluggesellschaft mbH v. EUROCONTROL* (see footnote 430 above), at p. 48 (Advocate General Tesauro, stressing the "inadequacy of the proposition that ascribes absolute immunity to such organizations … taking account, moreover, of the need not to deprive individuals of the protection afforded to subjective rights that might be impaired by the activities of international organizations"); Court of Justice of the Andean Community, *Carlos Javier Suárez Cornejo c. Secretaría General de la Comunidad Andina*, 01-DL-2021, Judgment, 9 May 2022, *Gazeta Oficial del Acuerdo de Cartagena*, No. 4466 (2022), para. 3.1.8; Court of Justice of the Common Market for Eastern and Southern Africa, *Eastern and Southern African Trade and Development Bank (PTA Bank) and another v. Martin Ogang*, Reference 1B/2000, Judgment, 29 March 2001, p. 10 ("It is precisely to obviate injustice to an international civil servant in such circumstances or happenstance that most large international organizations have established administrative tribunals with exclusive authority to deal with employee grievances.").

[663] 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. 1–56, at p. 3; Opinion prepared by Louise Doswald-Beck, "ILO: The right to a fair hearing interpretation of international law", available at https://web.archive.org/web/20091130005046/http://www.ilo.org/public/english/staffun/info/iloat/doswald.htm; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, Clarendon Press, 1989), at p. 96 ("at least the core of a number of the due process guarantees stated in Article 14 of the Covenant have a strong claim to customary law status …. Such rights include the right to be tried by a competent, independent and impartial tribunal established by law"); Ursula Kriebaum, "*Rule of law* notions in human rights law", *ZEuS Zeitschrift für Europarechtliche Studien* [Journal for European Legal Studies], vol. 3 (2019), pp. 369–382.

[664] See A/CN.4/766, paras. 204 *et seq*.

[665] "Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels", General Assembly resolution 67/1 of 24 September 2012, para. 2.

[666] Tom Bingham, *The Rule of Law* (London, Penguin, 2011), pp. 85 *et seq*.; William Lucy, "Access to justice and the rule of law", *Oxford Journal of Legal Studies*, vol. 40 (2020), pp. 377–402.

[667] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London, Macmillan, 1885), pp. 177 *et seq*.; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, Cambridge University Press, 2004); Jeremy Waldron, "The rule of law and the importance of procedure", in James E. Fleming, ed., *Getting to the Rule of Law: NOMOS L*, Yearbook of the American Society for Political and Legal Philosophy (New York, New York University Press, 2011), pp. 3–31, at p. 6.

[668] See, e.g., Inter-American Court of Human Rights, *Suárez Rosero v. Ecuador*, Judgment, 12 November 1997, Series C, No. 35, para. 65 ("Article 25 of the American Convention provides that everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent

3. Treaty obligations to settle disputes between international organizations and private parties

232. A further legal argument for providing access to justice stems from clauses in treaties that accord jurisdictional immunity to international organizations. They also often contain a legal obligation to provide for dispute settlement mechanisms. The prime examples are the General Convention, the Specialized Agencies Convention and other treaties that obligate international organizations to make available "appropriate modes of settlement" for "[d]isputes arising out of contracts or other disputes of a private law character" to which the organizations are parties.[669] Some privileges and immunities instruments provide even more explicitly for a duty to arbitrate disputes which would be exempt from the jurisdiction of national courts because of an international organization's immunity from suit.[670]

233. It has been the traditional view of the United Nations that this notion does not include claims of a public law character, which are often referred to as claims in relation to the exercise of the constitutional functions of the United Nations, or claims based on political or policy-related grievances concerning actions of its main organs.[671] That distinction seems to

court or tribunal. The Court has ruled that this provision 'constitutes one of the basic pillars not only of the American Convention, but of the very rule of law in a democratic society in the sense of the Convention'."); African Commission on Human and Peoples' Rights, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe*, Communication No. 294/2004, Decision, 3 April 2009, para. 118 ("It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute. Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist."); African Commission on Human and Peoples' Rights, *Article 19 v. Eritrea*, Communication No. 275/2003, 30 May 2007, para. 66 ("The independence of the judiciary is a crucial element of the rule of law."). See also *Golder v. United Kingdom* (see footnote 423 above), at para. 34 ("in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts."); European Court of Human Rights, *Agrokompleks v. Ukraine*, No. 23465/03, 6 October 2011, para. 136 ("the State's respecting the authority of the courts is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law. For this to be the case, the constitutional safeguards of the independence and impartiality of the judiciary do not suffice. They must be effectively incorporated into everyday administrative attitudes and practices."). See also European Court of Justice, *Unión de Pequeños Agricultores v. Council of the European Union*, Case C-50/00 P, Judgment, 25 July 2002, EU:C:2002:462, paras. 38 and 39 ("The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."); Court of Justice of the European Communities, *Maximillian Schrems v. Data Protection Commissioner*, Case C-362/14, Judgment, 6 October 2015, EU:C:2015:650, para. 95 ("The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law.").

669 See the discussion starting at para. 165165 above.

670 See, e.g., art. 21, General Agreement on Privileges and Immunities of the Council of Europe ("Any dispute between the Council and private persons regarding supplies furnished, services rendered or immovable property purchased on behalf of the Council, shall be submitted to arbitration, as provided in an administrative order issued by the Secretary General with the approval of the Committee of Ministers.").

671 A/CN.4/764, chap. III, sect. B (2) (United Nations Office of Legal Affairs) ("Consistent with article VIII, section 29 (a), of the General Convention, the United Nations makes a distinction between claims of a private law character and claims of a public law character. The latter category of claims falls outside the scope of article VIII, section 29, of the General Convention. Those include, for instance, claims made against the United Nations in relation to the exercise of its constitutional functions. Thus, the Secretary-General stated in his report to the General Assembly in 1995 that 'the Organization does not agree to engage in litigation or arbitration with the numerous third parties that

be corroborated by the *travaux préparatoires* of the relevant conventions, specifying that claims of a private law character relate to contract and other matters incidental to the performance by the agency of its main functions under its constitutional instruments and not to the actual performance of its constitutional functions.[672]

234. When damages claims were brought by victims of the cholera outbreak in Haiti, allegedly caused by negligent failure to prevent its spread through United Nations peacekeepers, the Office of Legal Affairs of the United Nations adopted a very broad interpretation of the notion of disputes of a non-private law character. It declared these claims not to be receivable because they involved "political and policy matters".[673] This view has been criticized for failing to distinguish between the actual performance of constitutional functions and incidental matters that remain questions of a private law character, such as claims concerning wrongful acts and harm.[674]

235. It may be difficult to find broadly acceptable abstract distinctions between private and public law also as a result of the different uses in different legal systems.[675] It seems that the original consideration of insulating the actual performance of the treaty-based "constitutional functions" of international organizations might be the most promising criterion. Where claims are aimed at preventing organs of organizations from carrying out their functions, they would be of a non-private law character.[676] Where claims relate, however, to compensation for harm done to property or persons as a result of such activity, they may fall under the notion of disputes of a private law character. In this regard, it also seems important to take into account the fact that the standard status-of-forces agreements envisage standing claims commissions exactly for these types of claims.[677] Furthermore, the practice of international

submit claims … based on political or policy-related grievances against the United Nations, usually related to actions or decisions taken by the Security Council or the General Assembly in respect of certain matters.'").

672 General Assembly, "Co-ordination of the privileges and immunities of the United Nations and of the specialized agencies: final report of Sub-Committee 1 of the Sixth Committee" (A/C.6/191 and Corr.1), at para. 32 ("it was observed that this provision applied to contracts and other matters *incidental* to the performance by the Agency of its main functions under its constitutional instrument and not to the actual performance of its constitutional functions.").

673 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, the United Nations Legal Counsel, to Brian Concannon, Director, Institute for Justice & Democracy in Haiti, 21 February 2013, available at https://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf., at p. 2 ("With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations").

674 Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, on extreme poverty and human rights (A/71/367). See also Frédéric Mégret, "La responsabilité des Nations Unies aux temps du choléra", *Revue belge de droit international*, vol. 1 (2013), pp. 161–189; Schmalenbach, "Dispute settlement (article VIII sections 29–30 General Convention)", at p. 552, para. 47; Kristina Daugirdas, "Reputation and accountability: another look at the United Nations' response to the cholera epidemic in Haiti", *International Organizations Law Review*, vol. 16 (2019), pp. 11–41.

675 See Burkhard Hess, "The private-public divide in international dispute resolution", *Collected Courses of the Hague Academy of International Law*, vol. 388 (2016), pp. 49–266.

676 Henquet, *The Third-Party Liability of International Organisations*, p. 209.

677 See paras. 65 *et seq*. above.

organizations seems to accept the private law character of tort and delictual claims,[678] as well as defamation[679] and unjust enrichment[680] claims.

236. In addition, one should keep in mind that while the above-mentioned treaty obligations to settle disputes usually relate only to disputes of a "private law character", some treaties refer to any dispute.[681] Furthermore, it seems that from a policy perspective, all kinds of disputes, even those of a more administrative law nature, should be open to dispute settlement,[682] as is also evident from the broader human right to a remedy as distinct from the narrower right of access to courts for the determination of civil rights and obligations.[683]

237. An example of a reaction to such demands can be seen in the creation of an independent ombudsperson for the Al-Qaida and Taliban Sanctions Committee.[684] The Ombudsperson replaced the previous "focal point" who received delisting requests which were decided solely by the members of the Security Council sitting on sanctions committees.[685] Still, even the independent ombudsperson, whose mandate is limited to the ISIL (Da'esh) and Al-Qaida sanctions and does not extend to other targeted sanctions of the Security Council, can only "recommend" delisting, which remains to be decided upon by the Security Council's sanctions committee and has thus been considered insufficient to provide an effective remedy.[686] Nevertheless, the practice of generally accepting the ombudsperson's recommendations points in the right direction and similar mechanisms should be adopted for other targeted sanctions regimes.[687]

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678 See A/CN.4/764, chap III, sect. B (10) (United Nations Conference on Trade and Development), (United Nations Framework Convention on Climate Change), (World Food Programme) and (World Intellectual Property Organization).

679 This is implied in the assessment of the International Court of Justice that the defamation claim brought against one of its Special Rapporteurs in a national court, against which the latter was protected by his functional immunity, triggered the Organization's responsibility for a claim covered by article VIII, section 29, of the General Convention. See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 7272 above), at para. 66 ("The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.").

680 Schmalenbach, "Dispute settlement (article VIII sections 29–30 General Convention)", at p. 552, para. 45.

681 Art. 33, Headquarters Agreement Between the Government of Canada and the International Civil Aviation Organization (with exchange of letters dated at Ottawa on 10 February 1992 and at Montreal on 13 February 1992) (Calgary, 4 October 1990 and Montreal, 9 October 1990), E101905, *Canada Treaty Series 1992*, No. 7; United Nations, *Treaty Series*, vol. 1669, No. 28718, p. 105 ("The Organization shall make adequate provision for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes to which the Organization is a party").

682 Netherlands Advisory Committee on Public International Law, "Settlement of disputes to which international organisations are parties", p. 9; Gulati, *Access to Justice and International Organisations*, pp. 35 *et seq*.; Rishi Gulati, "The International Law Commission's work on the topic of the settlement of disputes to which international organizations are parties: the need for a meaningful outcome", *Max Planck Yearbook of United Nations Law*, vol. 27 (2023), pp. 194–214, at p. 208.

683 See paras. 224 *et seq*. above.

684 Security Council resolution 1904 (2009).

685 Security Council resolution 1730 (2006).

686 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights impact of counter-terrorism and countering (violent) extremism policies and practices on the rights of women, girls and the family (A/HRC/46/36), para. 15 ("Notwithstanding the fact that the Office of the Ombudsperson undertakes important and valuable work to delist, the process provides neither a fair process nor a fair remedy to those who are subject to it, as is required by international law.").

687 Netherlands Advisory Committee on Issues of Public International Law, "Settlement of disputes to which international organisations are parties", p. 10.

238. The possibility provided for in many regional economic integration organizations to permit private parties to bring annulment actions against acts of international organizations[688] also shows that disputes of a public law character are not necessarily excluded from adjudicatory dispute settlement.

239. As discussed above,[689] the non-availability of "appropriate modes of settlement" or "reasonable alternative means" has led to a conditionality debate before national courts and partly also before human rights courts. Most courts have upheld the immunity of international organizations even in situations where they found that international organizations have not provided for "appropriate modes of settlement" or complied with human rights demands to establish "reasonable alternative means". However, a few have denied the organizations' jurisdictional immunity. While it is clear that such denial of immunity will put increased pressure on international organizations to adopt alternative dispute settlement mechanisms, it is preferable to uphold immunity in order to guarantee the independent functioning of international organizations. Nevertheless, the establishment and thus availability of adequate alternative means of dispute settlement must remain a crucial demand.

4. Broader policy demands

240. Bodies tasked with the codification and development of international law have repeatedly called for the wider availability of adjudicatory dispute settlement involving international organizations.

241. In 1957, the Institute of International Law adopted a resolution on judicial redress against the decisions of international organs.[690] The resolution recommended the availability of "judicial or arbitral methods" in case of disputes arising from a decision of an international organization which "involves private rights or interests".[691] The resolution adopted by the Institute in 1971 on conditions of application of humanitarian rules of armed conflict to hostilities in which United Nations Forces may be engaged[692] contained several provisions on the procedure for implementing the liability of the United Nations for damage caused by its forces.[693] The resolution expressed the desirability of establishing "bodies composed of independent and impartial persons" for the assessment of claims presented by injured persons.[694] In 1977, the Institute adopted a resolution on contracts concluded by international organizations with private persons,[695] which recommended that contracts "provide for the settlement of disputes arising out of such contracts by an independent body",[696] which may be an arbitral tribunal, an intra-organizational tribunal or a national judicial body.[697] It further recommended that, in cases of contracts entered into by international organizations with private parties which do not contain a dispute settlement clause, the organizations should either waive their immunity or agree to arbitration if no settlement can be achieved.[698] In 2017, the Institute adopted a resolution on review of measures implementing decisions of the

688 See paras. 173 *et seq*. above.

689 See paras. 165 *et seq*. above.

690 Institute of International Law, resolution on judicial redress against the decisions of international organs, Institute of International Law, *Annuaire*, vol. 47, Session of Amsterdam (1957), Part II, p. 488. Also available from www.idi-iil.org.

691 *Ibid*., para. III (1) ("As a minimum, expresses the wish that, for every particular decision of an international organ or organization which involves private rights or interests, there be provided appropriate procedures for settling by judicial or arbitral methods juridical differences which might arise from such a decision.").

692 Institute of International Law, resolution on conditions of application of humanitarian rules of armed conflict to hostilities in which United Nations Forces may be engaged, Institute of International Law, *Yearbook*, vol. 54, Session of Zagreb (1971), Part II, p. 465. Also available from www.idi-iil.org.

693 *Ibid*., art. 8, para. 1.

694 *Ibid*., art. 8, para. 2.

695 Institute of International Law, resolution on contracts concluded by international organizations with private persons, Institute of International Law, *Annuaire*, vol. 57, Session of Oslo (1977), Part II, p. 333. Also available from www.idi-iil.org.

696 *Ibid*., art. 7.

697 *Ibid*., art. 8.

698 *Ibid*., art. 9.

Security Council in the field of targeted sanctions,[699] based on its previous work on judicial redress against the decisions of international organs.[700] Taking into account the *Kadi* cases before the European Court of Justice[701] and related developments,[702] the resolution carefully balanced the absence of judicial review of Security Council decisions and the limited possibility for regional or national courts to review implementing measures.[703] The resolution also called for "further improvement of listing and delisting procedures".[704]

242. Similar calls for the wider use of adjudication of international disputes to which international organizations are parties have been made by the International Law Association. In particular, the Association's rules and recommended practices on liability/responsibility of international organisations, drawn up by its Committee on accountability of international organisations and endorsed in its 2004 resolution,[705] are relevant to disputes between international organizations and private parties. The rules and recommended practices are contained in an extensive report,[706] which also addressed questions of dispute settlement, proposing, among other things, the insertion of arbitration clauses in agreements between international organizations and both States and non-State entities.[707] In the report, the Committee noted that "[a] successful claim to jurisdictional immunity combined with the absence of adequate alternative methods of protection could easily amount to denial of justice".[708] In regard to contractual[709] and tort claims[710] of private parties against international organizations, the Committee specifically called for settlement through independent adjudicatory bodies.

243. At the regional level, the Committee of Legal Advisers on Public International Law[711] of the Council of Europe has been dealing with the question of the settlement of disputes of

[699] Institute of International Law, resolution on review of measures implementing decisions of the Security Council in the field of targeted sanctions", Institute of International Law, *Annuaire*, vol. 78, Session of Hyderabad (2017), Part II, pp. 94–98.

[700] Institute of International Law, resolution on judicial redress against the decisions of international organs.

[701] Court of Justice of the European Communities, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Case T-315/01, Judgment, 21 September 2005, European Court Reports 2005, p. 3649; *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (see footnote 89 above); *Yassin Abdullah Kadi v. European Commission*, Case T-85/09, Judgment, 30 September 2010, *European Court Reports 2010*, p. 5177; *European Commission and Others v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Judgment, 18 July 2013, ECLI:EU:C:2013:518.

[702] Switzerland, Federal Supreme Court, *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Case No. 1A 45/2007, Administrative Appeal Judgment, 14 November 2007, ILDC 461 (CH 2007); European Court of Human Rights, *Nada v. Switzerland* [GC], No. 10593/08, 12 December 2012.

[703] Institute of International Law, resolution on review of measures implementing decisions of the Security Council in the field of targeted sanctions, arts. 4 and 11.

[704] *Ibid*., art. 8.

[705] International Law Association, resolution No. 1/2004 on the accountability of international organisations, *Report of the Seventy-first Conference Held in Berlin, 16–21 August 2004*, p. 13.

[706] International Law Association, Final report on accountability of international organisations.

[707] *Ibid*., p. 228 ("When concluding agreements with States or non-state entities, IO-s should continue inserting a clause providing for compulsory referral to arbitration of any dispute that the parties have been unable to solve through other means.").

[708] *Ibid*., p. 219.

[709] *Ibid*., p. 215 ("Contractual liability claims: Disputes arising out of contracts between private parties and IO-s should be settled by an independent body. Such an independent body could be an arbitral body set up in accordance with the rules of a permanent institution or in pursuance of *ad hoc* clauses; or a tribunal set up by an IO, or a national judicial body, if this is compatible with the status and functions of the IO.").

[710] *Ibid*., p. 216 ("Tort liability claims: … With regard to claims originating from private claimants for damage sustained in the course of the operational activity conducted under the control and command of the IO, IO-s should either refer such claims to arbitration or establish a standing claims commission or *ad hoc* mixed claims commissions to deal with them.").

[711] Council of Europe, ed., *The CAHDI Contribution to the Development of Public International Law: Achievements and Future Challenges* (Leiden, Brill Nijhoff, 2016).

a private character to which an international organization is a party since 2014. This work focuses on the settlement of third-party claims for bodily injury or death and property loss or damage allegedly caused by an international organization and the effective remedies available to claimants in such situations.[712] As part of this work, the Committee has designed a questionnaire to solicit States' views on this issue, and maintains regularly updated answers to the questionnaire.[713] While the Committee seems to be in the process of preparing further documents integrating the responses of individual States, they have not yet been published.[714] In addition, the Parliamentary Assembly of the Council of Europe has addressed the more specific question of the jurisdictional immunity of international organizations and the rights of their staff[715] and the more general topic of the accountability of international organizations for human rights violations.[716]

244. Between 2015 and 2018, the Inter-American Juridical Committee of the Organization of American States developed a practical application guide on jurisdictional immunities of international organizations.[717] In addition to noting a tendency of domestic courts in various States in the Americas to limit their immunity in disputes with private parties,[718] one of the guidelines explicitly demands that "[i]nternational organizations should provide means of dispute resolution in order to ensure access to justice for individuals who are parties to a dispute not [sic] covered by jurisdictional immunity".[719] Offering arbitration or waiving immunity are specifically recommended in order to safeguard access to justice.[720] In regard to the quality of the dispute settlement means to be offered, the Committee – invoking the human rights requirements under the *Waite and Kennedy*[721] doctrine – demands that they be "adequate and effective",[722] adding that such mechanisms "should also be governed by the principles of independence, transparency, professionalism, decentralization, legality, and due process".[723]

245. The question of access to justice in relation to acts and omissions of international organizations harming private parties has led to an intensified scholarly debate over the last

[712] Committee of Legal Advisers on Public International Law (CAHDI), "Meeting report, 47th meeting, Strasbourg, 20–21 March 2014" (CAHDI (2014) 11), paras. 20–26.

[713] The most current answers to the questionnaire are collected at https://www.coe.int/en/web/cahdi/settlement-of-disputes-of-a-private-character-to-which-an-international-organisation-is-party.

[714] See, e.g., https://www.coe.int/en/web/cahdi/-/67th-cahdi-meeting-vienna-19-20-september-2024, agenda item 3.1.

[715] Council of Europe, Parliamentary Assembly, "Jurisdictional immunity of international organisations and the rights of their staff", Recommendation 2122 (2018) of 26 January 2018, para. 1.1. (to "encourage the international organisations to which the member States of the Council of Europe belong to look at whether 'reasonable alternative means of legal protection' are available in the event of disputes between international organisations and members of their staff").

[716] Council of Europe, Parliamentary Assembly, "Accountability of international organisations for human rights violations", resolution 1979 (2014) of 31 January 2014.

[717] "Practical application guide on the jurisdictional immunities of international organizations", in "Inter-American Juridical Committee report: immunities of international organizations" (CJI/doc.554/18 rev.2), 16 August 2018, p. 4.

[718] *Ibid*., guideline 4, Rapporteur's notes.

[719] *Ibid*., guideline 5, means of dispute resolution.

[720] *Ibid*., guideline 5, Rapporteur's notes ("international practice recommends that international organizations provide alternative means of handling individual claims in the event that their governing treaties or statutes do not include dispute resolution mechanisms. International organizations can offer, among other things, facilities for submitting disagreements to arbitration, sufficient insurance policies to cover potential damages, and the option of waiving immunity in the interest of justice.").

[721] *Waite and Kennedy v. Germany* (see footnote 51 above).

[722] "Practical application guide on the jurisdictional immunities of international organizations", in "Inter-American Juridical Committee report", guideline 6, Characteristics of dispute resolution mechanisms ("Dispute resolution mechanisms established by international organizations to resolve private law disputes should be adequate and effective.").

[723] *Ibid*., guideline 6, Rapporteur's notes.

decades, frequently calling for more effective remedial mechanisms of an adjudicatory nature.[724]

246. Equally, the replies of States and international organizations to the questionnaire confirm the need for effective dispute settlement.[725]

5. Recommendations

247. On the basis of the above considerations, it appears appropriate to recommend that arbitration and/or judicial settlement of disputes should be made available more broadly for the settlement of disputes between international organizations and private parties because these means of dispute settlement satisfy the demands of access to justice.

248. In regard to arbitration, this could be achieved by contractually providing for arbitration clauses in a more extensive manner, as well as by encouraging international organizations and private parties to agree on arbitration, even in situations where a dispute has already arisen. In this context, guidance can be taken from model arbitration clauses such as those formulated by the Permanent Court of Arbitration [726] or other arbitration institutions.[727]

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[724] Johansen, *The Human Rights Accountability Mechanisms of International Organizations*; Gulati, *Access to Justice and International Organisations*; Henquet, *The Third-Party Liability of International Organisations*; Jan Wouters et al, eds., *Accountability for Human Rights Violations by International Organisations* (Antwerp, Intersentia, 2010).

[725] See, e.g., A/CN.4/764, chap. II, sect. B (2) (Austria) ("Labour disputes must be settled by an independent and effective dispute settlement mechanism protecting the rights of the employees in line with the European Convention on Human Rights"); chap. II, sect. B (7) (Chile) ("Disputes involving private parties generally fall outside the scope of the available dispute settlement methods, since the vast majority of international organizations do not have mechanisms in place for the settlement of disputes with private parties. … It is necessary for international organizations to provide settlement mechanisms for such disputes"); chap. II, sect. B (7) (Belgium) ("Matters concerning the settlement of commercial disputes and labour law disputes should not cause problems if there are internal appeals mechanisms that effectively protect the rights of individuals who suffer a prejudice caused by an organization, as guaranteed under the [European Convention on Human Rights]."); chap. II, sect. B (4) (Kingdom of the Netherlands) ("For disputes between an international organization and a private party, consultations might be less useful because there might be a perceived imbalance between the international organization on the one hand and the private party on the other hand. In such cases, arbitration or judicial settlement might prove to be more useful."); chap. II, sect. B (6) (United Kingdom) ("In general terms the United Kingdom would welcome improvements in the efficiency of dispute resolution methods to ensure disputes are resolved as quickly and efficiently as possible."); chap. III, sect. B (3) (Organization of African, Caribbean and Pacific States) ("Alternative dispute resolution is the most important dispute settlement mechanism for OACPS, i.e., negotiation by way of conciliation, mediation, arbitration and enforcement of an arbitral award through the enforcement system of a State."); chap. III, sect. B (5) (World Trade Organization) ("One trend observed is that relationships with contractors have become increasingly more complex, resulting in a greater need for more sophisticated agreements. In turn, this has led to a greater availability and use of different methods of dispute settlement.").

[726] Permanent Court of Arbitration, Arbitration Rules 2012, annex, Model arbitration clause for treaties and other agreements ("Any dispute, controversy or claim arising out of or in relation to this [agreement] [treaty], or the existence, interpretation, application, breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the PCA Arbitration Rules 2012. *Note – Parties should consider adding*: (a) The number of arbitrators shall be … (one, three, or five); (b) The place of arbitration shall be … (town and country); (c) The language to be used in the arbitral proceedings shall be ….").

[727] See, e.g., UNCITRAL Arbitration Rules (2021), annex, Model arbitration clause for contracts ("Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. *Note. Parties should consider adding: (a)* The appointing authority shall be … [name of institution or person]; *(b)* The number of arbitrators shall be … [one or three]; *(c)* The place of arbitration shall be … [town and country]; *(d)* The language to be used in the arbitral proceedings shall be …."); International Chamber of Commerce, Standard ICC Arbitration Clause, available at www.iccwbo.org, "Arbitration Clauses" ("All disputes arising out of or in connection with the present

249. The wider availability of judicial settlement would be more difficult to achieve. In most instances it would require an amendment of the existing jurisdictional limitations of international courts or tribunals or limitations of the mostly absolute jurisdictional immunity international organizations enjoy before national courts. Of course, international organizations may also provide for the wider use of judicial settlement through national courts by more systematically resorting to the option of waiving their immunity.[728] Given that even some constituent treaties contemplate such a waiver in order to avoid a denial of justice, this would be in line with the access to justice rationale. Furthermore, it would involve the creation of new international courts or tribunals either as judicial organs of organizations or as separate institutions offering dispute settlement to organizations and private parties.[729] In some instances, it could also be achieved by recognizing the jurisdiction of existing judicial bodies, as in the case of administrative tribunals.[730]

250. Where reasonable means of dispute settlement other than arbitration or adjudication are envisaged, such means should provide at least an equivalent level of protection of due process/fair trials rights,[731] as discussed in detail below.[732]

F. Suggested guideline

251. "10. Access to justice

"Arbitration, judicial settlement or other reasonable alternative means of dispute settlement shall be made more widely accessible for the settlement of disputes between international organizations and private parties."

G. Dispute settlement and rule of law and human rights requirements

252. Means of dispute settlement, in particular those of an adjudicatory character, do not only have to be available, they also have to conform to rule of law and human rights standards.

253. Core rule of law requirements for the good "administration of justice" are the independence and impartiality of arbitral or judicial institutions, as well as respect for due process especially through safeguarding the principle of the equality of the parties in the course of adjudicatory proceedings.[733] Useful guidance on the understanding of adjudicatory independence, albeit with an emphasis on criminal justice, can be derived from the 1985

contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.").

728 "Practical application guide on the jurisdictional immunities of international organizations", in "Inter-American Juridical Committee report", guideline 10, Rapporteur's notes ("The waiver of immunity is a remedy available to organizations to prevent immunity from impeding justice in certain cases.").

729 See the overview of regional economic integration organization courts, paras. 173173 *et seq*. above.

730 International Law Association, Final report on accountability of international organisations, pp. 213 and 214 ("Procedural aspects of remedial action by staff members … 2. Each IO should either recognise the jurisdiction of existing international administrative tribunals or establish an administrative tribunal of its own to deal with such disputes.").

731 See *Waite and Kennedy v. Germany* (see footnote 51 above), at para. 68 ("reasonable alternative means to protect effectively their rights under the Convention."); CCPR/C/141/D/3581/2019, para. 8.6 (requiring "reasonable alternative means of dispute resolution"); "Practical application guide on the jurisdictional immunities of international organizations", in "Inter-American Juridical Committee report", guideline 6, Characteristics of dispute resolution mechanisms ("Dispute resolution mechanisms established by international organizations to resolve private law disputes should be adequate and effective.").

732 See paras. 252 *et seq*. below.

733 "Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels", General Assembly resolution 67/1 of 24 September 2012.

Basic Principles on the Independence of the Judiciary[734] as well as the 2001 Bangalore Principles of Judicial Conduct.[735]

254. Furthermore, the International Court of Justice has identified the right to an independent and impartial tribunal as well as due process as core elements of the "good administration of justice".[736] With a particular view to employment disputes between international organizations and private parties, the International Court of Justice referred to due process rights such as "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".[737] In a similar vein, FAO referred to "the independence and impartiality of those charged with adjudicating the dispute, the right of defence, the right of both parties to state their cases, and the practicality of the proceedings and the possibility of having recourse to them at reasonable cost" as "fundamental principles on which judicial proceedings are based both under national legal systems and international law", which it intended to guarantee as an alternative settlement mechanism for disputes of a private law character.[738]

1. Independence and impartiality

255. The independence and impartiality of adjudicators is a crucial rule of law requirement for the proper administration of justice.[739] It is also a core element of the fair trial guarantees of human rights instruments.[740]

256. Arbitration rules and the institutional rules of judicial bodies regularly require adjudicators to be independent and impartial.[741] The independence and impartiality of adjudicators is secured through several mechanisms in arbitration practices. Procedural rules regularly provide for disclosure obligations,[742] allowing the parties to make an assessment of

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[734] *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August–6 September 1985: report prepared by the Secretariat* (A/CONF.121/22/Rev.1, United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2, annex.

[735] Bangalore Principles of Judicial Conduct, 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/INF/2/Add.1), para. 2.

[736] International Court of Justice, *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166.

[737] *Ibid*., at p. 209, para. 92.

[738] "Note on modes of settlement of disputes", reprinted in Food and Agriculture Organization of the United Nations, annex I, *United Nations Juridical Yearbook 1986*, pp. 156–158, at p. 157. See also A/CN.4/766, paras. 36 and 67.

[739] Bangalore Principles of Judicial Conduct (E/CN.4/2003/65, annex), Value 1 ("Judicial independence is a pre-requisite to the rule of law"); European Commission for Democracy through Law (Venice Commission), "Report on the rule of law", CDL-AD(2011)003rev, 4 April 2011, para. 41 ("it seems that a *consensus* can now be found for the necessary elements of the rule of law … These are: … (4) Access to justice before independent and impartial courts, including judicial review of administrative acts").

[740] Art. 10, Universal Declaration of Human Rights ("an independent and impartial tribunal"); art. 14, International Covenant on Civil and Political Rights ("a competent, independent and impartial tribunal established by law"); art. 6, para. 1, European Convention on Human Rights ("an independent and impartial tribunal established by law"); art. 8, para. 1, American Convention on Human Rights ("a competent, independent, and impartial tribunal, previously established by law").

[741] See, e.g., art. 6, para. 7, UNCITRAL Arbitration Rules (2021) and Permanent Court of Arbitration, art. 6, para. 7, Arbitration Rules 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").

[742] See, e.g., art. 11, UNCITRAL Arbitration Rules (2021) and Permanent Court of Arbitration, art. 11, Arbitration Rules 2012 ("When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or

whether they have confidence in the independence and impartiality of the adjudicators. Moreover, they provide for rules determining when adjudicators should not take part in decision-making, which adjudicators can achieve by either resigning or recusing themselves from a particular case. This is procedurally supported by options to challenge adjudicators if parties are concerned about adjudicators' independence or impartiality.[743] Different procedures apply in regard to such challenges.[744] In addition, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) permits national courts to refuse recognition and/or enforcement of awards rendered by tribunals comprising arbitrators who are not sufficiently independent and/or impartial.[745]

257. In judicial proceedings, procedures to ensure independence or impartiality usually require judges to request their own disqualification.[746] Often the matter is then settled by the decision of the court, that is, the other judges.[747]

258. Independence primarily refers to the structural "independence of the judiciary from political interference by the executive branch and legislature"[748] and 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, thus requiring a lack of bias.[749]

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her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances."); art. 5.4, Arbitration Rules (2020), London Court of International Arbitration; art. 18, para. 2, Arbitration Rules, Stockholm Chamber of Commerce; art. 11.4, Administered Arbitration Rules (2018), Hong Kong International Arbitration Centre.

743 See, e.g., art. 12, para. 1, UNCITRAL Arbitration Rules (2021) and Permanent Court of Arbitration, art. 12, para. 1, Arbitration Rules 2012 ("Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."); art. 19, para. 1, Arbitration Rules, Stockholm Chamber of Commerce. See also Chiara Giorgetti, ed., *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Leiden, Brill, 2015).

744 Born, *International Commercial Arbitration*, at p. 2054.

745 Art. V, para. 1, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (relied upon for a refusal to recognize and enforce awards in case of incorrectly composed tribunals).

746 See, e.g., European Court of Human Rights, Rules of Court (28 March 2024), rule 28 – Inability to sit and recusal; European Court of Human Rights, "Practice directions: Recusal of judges" (issued on 22 January 2024 by the President of the Court in accordance with rule 32 of the Rules of Court); Statute of the Inter-American Court of Human Rights (La Paz, 31 October 1979), Organization of American States resolution 448 (IX-0/79), *Ninth regular session, La Paz, Bolivia, October 22-31, 1979, Proceedings, vol. 1*, p. 97, art. 19; Rules of Procedure of the Inter-American Court of Human Rights (November 2009), art. 21; Court of Justice of the Common Market for Eastern and Southern Africa, Rules of Procedure, 2016, rule 9 on composition and quorum. See an overview of practice on recusal in national courts in Shimon Shetreet, ed., *The Culture of Judicial Independence: Rule of Law and World Peace* (Leiden, Koninklijke Brill, 2015); Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Oxford, Hart Publishing, 2009); H.P. Lee, ed., *Judiciaries in Comparative Perspective* (Cambridge, Cambridge University Press, 2011).

747 See, e.g., Rules of Procedure of the General Court, 4 March 2015, *Official Journal of the European Union*, L 105, 23 April 2015, p. 1, arts. 16 and 17; Protocol 5 on the Statute of the EFTA Court, *Official Journal of the European Communities*, L 344, 31 December 1994, p. 68, art. 6; Rules of Procedure of the EFTA Court, *Official Journal of the European Union*, L 179, 20 May 2021, p. 13, art. 6 on depriving a Judge of his office; Agreement establishing the Caribbean Court of Justice, art. IV on the constitution of the Court; Protocol on the Statute of the African Court of Justice and Human Rights, annex, art. 9 on resignation, suspension and removal from office.

748 Human Rights Committee, general comment No. 32 (2007), para. 19.

749 *Ibid*., para. 21 (stressing that "judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other."); 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 ("'Independence' refers to the absence of any external control, in particular the absence of relations with a disputing party that might influence an Arbitrator's decision. 'Impartiality' refers to the absence of bias or predisposition of an Arbitrator towards a disputing party or issues raised in the proceeding.").

259. In arbitration, the core meaning and substantive content of the requirements of independence and impartiality are made more precise by various non-binding instruments that often serve as guidelines, such as the International Bar Association Guidelines on Conflicts of Interest[750] or various codes of conduct.[751] They sometimes contain illustrative lists exemplifying what kind of relationships may create a conflict of interest for arbitrators or lay down further disclosure obligations and incompatibility rules.

260. In adjudication, the statutes of international courts and tribunals and their rules of procedure are similarly aimed at securing the independence and impartiality of adjudicators. This is frequently done by imposing incompatibility rules for judges, either by prohibiting any or specific other professional activities[752] or by excluding a judge's participation in case of conflicts of interest.[753] Codes of conduct often exemplify conflicts of interest.[754] State legislation usually contains similar guarantees for judges sitting on national courts.[755] Such provisions often also address issues specific to the judicial function, such as security of tenure, terms of office, extrajudicial activities and others.

2. Due process

261. The right to be heard and the right to be heard equally, embodied in the mandate of adjudicators to treat the parties in a fair and equal way, is crucial to any form of adjudication based on the rule of law[756] and conforming to human rights demands.[757] It is considered to

[750] 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).

[751] See, e.g., A/CN.9/1148.

[752] See, e.g., rule 4, para. 1, European Court of Human Rights, Rules of Court (30 October 2023) ("the judges shall not during their term of office engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality or with the demands of a full-time office. Each judge shall declare to the President of the Court any additional activity."); Convention on the Statute of the Central American Court of Justice, arts. 14 and 15; Court of Justice of the Economic Community of West African States, Protocol (A/P.I/7/91) on the Community Court of Justice, art. 4 on terms of office of members of the Court.

[753] See, e.g., Statute of the United Nations Dispute Tribunal, General Assembly resolution 63/253 of 24 December 2008, annex I, as amended, art. 4, para. 9 ("A judge of the Dispute Tribunal who has, or appears to have, a conflict of interest shall recuse himself or herself from the case. Where a party requests such recusal, the decision shall be taken by the President of the Dispute Tribunal."); Rules of procedure of the United Nations Dispute Tribunal, General Assembly resolution 64/119 of 16 December 2009, annex I, as amended, art. 27 (conflict of interest), paras. 1 and 2, ("The term 'conflict of interest' means any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her. [2] A conflict of interest arises where a case assigned to a judge involves any of the following: (*a*) A person with whom the judge has a personal, familiar or professional relationship; (*b*) A matter in which the judge has previously served in another capacity, including as an adviser, counsel, expert or witness; (*c*) Any other circumstances that would make it appear to a reasonable and impartial observer that the judge's participation in the adjudication of the matter would be inappropriate.").

[754] See, e.g., "Code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal", General Assembly resolution 66/106 of 9 December 2011.

[755] See, e.g., Shetreet, *The Culture of Judicial Independence*; Lee, *Judiciaries in Comparative Perspective*; Hoong Phun (H.P.) Lee and Marilyn Pittard, eds., *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge, Cambridge University Press, 2018).

[756] See European Commission for Democracy through Law (Venice Commission), "Report on the rule of law", para. 60 ("The rights most obviously connected to the rule of law include … the right to be heard"); Human Rights Committee, general comment No. 32 (2007), para. 2 ("The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law."); Bingham, *The Rule of Law*, at p. 90.

[757] Art. 10, Universal Declaration of Human Rights ("Everyone is entitled in full equality to a fair and public hearing"); art. 14, International Covenant on Civil and Political Rights ("All persons shall be equal before the courts and tribunals. … a fair and public hearing"); art. 6, para. 1, European Convention on Human Rights ("a fair and public hearing within a reasonable time"); art. 8, para. 1, American Convention on Human Rights ("a hearing, with due guarantees and within a reasonable time").

derive from the broader principle of equality.[758] The principle of equality is also linked to the general principle of *audiatur et altera pars*.[759]

262. In its practical application, the principle of equality of arms entails, in particular, the right of each party to respond to submissions of the other and the right to equal treatment in regard to procedural issues such as timing, pleading, document production and evidentiary considerations.[760]

263. The principle of equality may also require steps to avoid factual inequality as a result of a lack of resources. For national court proceedings, legislation often provides for legal aid schemes, also permitting indigent claimants to pursue their rights.[761] International courts and tribunals have also created legal aid schemes and/or trust funds.[762] In arbitration, third-party funding is a frequent, although not uncontroversial, device to ensure equality of resources of the parties.[763]

264. In arbitration, the equal treatment of the parties is the overriding procedural obligation for arbitral tribunals and is explicitly found in many arbitration rules.[764] It is secured through

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[758] Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford, Oxford University Press, 2020), pp. 719–776; Omkar Sidhu, *The Concept of Equality of Arms in Criminal Proceedings under Article 6 of the European Convention on Human Rights* (Cambridge, Intersentia, 2017), pp. 75–116, at p. 95 *et seq*.

[759] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Cambridge University Press, 1953, reprinted 2006), p. 290 *et seq*. See also Charles T. Kotuby Jr. and Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford, Oxford University Press, 2017), p. 176.

[760] See Human Rights Committee, general comment No. 32 (2007), para. 13; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, at p. 209, para. 92; Institute of International Law, resolution on equality of parties before international investment tribunals, Institute of International Law, *Yearbook*, vol. 80 (2019), Session of the Hague, pp. 62 *et seq*., art. 8, para. 1 ("The equality of the parties includes the principle of the equality of arms, namely that: (a) Each party shall have the right to be heard on the submissions of the other (*audi alteram partem*); and, (b) Each party shall enjoy reciprocal treatment in the procedural timetable and in matters of pleading, production of documents and evidence.").

[761] Human Rights Committee, general comment No. 32 (2007), para. 10 ("While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it."). See also Mauro Cappelletti et al., "Access to justice: comparative general report", *Rabels Zeitschrift für ausländisches und internationales Privatrecht [The Rabel Journal of Comparative and International Private Law]*, vol. 40 (1976), pp. 669–717; Mauro Cappelletti, "Legal aid: modern themes and variations – part one – the emergence of a modern theme", *Stanford Law Review*, vol. 24 (1972), p. 347–386.

[762] Art. 6, para. 3 (c), European Convention on Human Rights, and European Court of Human Rights, Rules of Court (28 March 2024), chap. XII – Legal aid, rules 105–110; art. 10, para. 2, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, and African Court on Human and Peoples' Rights, Rules of Court (1 September 2020), rule 31; Rules of procedure of the United Nations Dispute Tribunal, art. 12 on representation; Organization and terms of reference of the Office of Administration of Justice (ST/SGB/2010/3), sect. 7 on the Office of Staff Legal Assistance. See also "The Office of Staff Legal Assistance", available at https://www.un.org/en/internaljustice/osla/ (accessed 10 March 2025).

[763] See Can Eken, *Third-Party Funding in Investment Arbitration: A New Player in the System* (Cham, Springer, 2024); Mohamed F. Sweify, *Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal* (Cheltenham, Edward Elgar Publishing, 2023); Collin R. Flake, "Third party funding in domestic arbitration: champerty or social utility?", *Dispute Resolution Journal*, vol. 70 (2015), pp. 109–123; Valentina Frignati, "Ethical implications of third-party funding in international arbitration", *Arbitration International*, vol. 32 (2016), pp. 505–522; Derric Yeoh, "Third party funding in international arbitration: a slippery slope or levelling the playing field?", *Journal of International Arbitration*, vol. 33 (2016), pp. 115–122.

[764] Art. 17, para. 1, first sentence, UNCITRAL Arbitration Rules (2021); art. 13.1, Administered Arbitration Rules (2018), Hong Kong International Arbitration Centre; art. 5, para. 2, art. 22, para. 4, and art. 37, para. 2, International Chamber of Commerce Rules of Arbitration (2021); art. 14, Arbitration Rules (2020), London Court of International Arbitration; art. 17, paras. 4 and 5, and art. 23, para. 2, Arbitration Rules (2017), Stockholm Chamber of Commerce. See also Maxi Scherer

the supervisory power of national courts to refuse enforcement.[765] Under the regime of the International Centre for Settlement of Investment Disputes, violations of the equal treatment principle may amount to "a serious departure from a fundamental rule of procedure" and therefore provide a ground for the annulment of an award pursuant to article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[766]

265. In judicial proceedings, the principle of equality of arms is equally of crucial importance for due process.[767]

et al., "The principle of equal treatment in international arbitration", in Stefan Kröll, Andrea K. Bjorklund and Franco Ferrari, eds., *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge, Cambridge University Press, 2023), pp. 1227–1152.

[765] Art. V, para. 1 (b), Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (providing for a refusal to recognize and enforce awards in case "[t]he party … was otherwise unable to present his case").

[766] Art. 52, para. 1 (d), 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.

[767] See, e.g., European Court of Human Rights, *Delcourt v. Belgium*, No. 2689/65, 17 January 1970, para. 28 ("The principle of equality of arms … is only one feature of the wider concept of fair trial by an independent and impartial tribunal"); European Court of Human Rights, *Dombo Beheer B.V. v. The Netherlands*, No. 14448/88, Judgment, 27 October 1993, para. 33 ("Nevertheless, certain principles concerning the notion of a 'fair hearing' in cases concerning civil rights and obligations emerge from the Court's case-law. Most significantly for the present case, it is clear that the requirement of 'equality of arms', in the sense of a 'fair balance' between the parties, applies in principle to such cases as well as to criminal cases … as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."); Inter-American Commission on Human Rights, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129 (7 September 2007), para. 19 ("The IASHR has identified the principle of equality of arms as an integral part of the right to a fair trial"); see also "Equality of arms and related doctrines", in Joseph M. Jacob, *Civil Justice in the Age of Human Rights* (Aldershot, Ashgate, 2007), pp. 105–154.

266. The notion of a fair trial/due process also comprises additional elements,[768] such as the right to a public hearing,[769] the right to be judged within a reasonable time (right to a speedy trial),[770] the requirement to provide reasons[771] and the finality of judgments.[772]

[768] See Ricardo Lillo Lobos, *Understanding Due Process in Non-Criminal Matters: How to Harmonize Procedural Guarantees with the Right to Access to Justice* (Cham, Springer, 2022); Agustín Ruiz Robledo, "Due process", in Rainer Grote et al., eds., *The Max Planck Encyclopedia of Comparative Constitutional Law*, April 2022, available at www.mpeccol.com; Damir Banović, "Procedural justice", in Grote, *The Max Planck Encyclopedia of Comparative Constitutional Law*, June 2024, available at www.mpeccol.com; Mauro Cappelletti and Denis Tallon, *Fundamental Guarantees of the Parties in Civil Litigation: Studies in National, International and Comparative Law prepared at the request of UNESCO under the auspices of the International Association of Legal Science* (Milan, Giuffrè, 1973).

[769] Human Rights Committee, general comment No. 32 (2007), paras. 28 and 29; European Court of Human Rights, *Helmers v. Sweden*, No. 11826/85, 29 October 1991, para. 36 ("The Court fully recognises the value attaching to the publicity of legal proceedings"); Inter-American Court of Human Rights, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment, 5 August 2008, Series C, No. 182, para. 75 ("In this regard, the Court considers that Article 8(1) of the Convention does not imply that the right to a hearing must necessarily be exercised orally in all proceedings. The foregoing notwithstanding, the Court could consider that an oral procedure is one of the 'due guarantees' the State must afford the parties to certain kinds of proceedings."); African Commission on Human and Peoples' Rights, *Media Rights Agenda v. Nigeria*, Communication No. 224/98, 6 November 2000, para. 54 ("the Commission is constrained to find the exclusion of the same public in the actual trial unjustified and in violation of the victim's right to fair trial guaranteed under Article 7 of the Charter.").

[770] See the express references in art. 6, para. 1, European Convention on Human Rights; art. 8, para. 1, American Convention on Human Rights; art. 14, para. 3 (c), International Covenant on Civil and Political Rights; art. 7, para. 1 (d), African Charter on Human and Peoples' Rights. See also, e.g., Human Rights Committee, general comment No. 32 (2007), para. 35; European Court of Human Rights, *Di Pede v. Italy*, No 15797/89, 26 September 1996, para. 27 ("The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities"); European Court of Human Rights, *Menéndez García and Álvarez González v. Spain*, Nos. 73818/11 and 19420/12, Judgment, 15 March 2016, para. 18; *Suárez Rosero v. Ecuador* (see footnote 668 above), para. 72; Inter-American Court of Human Rights, *Muelle Flores v. Peru*, Judgment, 6 March 2019, Series C, No. 375, para. 154; African Commission on Human and Peoples' Rights, *Odjouoriby Cossi Paul v. Benin*, Communication No. 199/97, 4 June 2004, para. 28 (concerning an appeal in a civil case: "The African Commission is of the view that this undue prolongation of the case at the level of the Appeal Court is contrary to the spirit and the letter of above-mentioned Article 7.1.d."). See also Schmitt, *Access to Justice and International Organizations*, p. 115.

[771] European Court of Human Rights, *Hadjianastassiou v. Greece*, No. 12945/87, Judgment, 16 December 1992, para. 33 ("The national courts must … indicate with sufficient clarity the grounds on which they based their decision."); sect. A, para. 2 (i), African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) ("The essential elements of a fair hearing include … an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions"); African Commission on Human and Peoples' Rights, *Interights, ASADHO and Madam O. Disu v. Democratic Republic of Congo*, Communications No. 274/03 and No. 282/03, Decision, 5 November 2013, para. 68 ("[O]n the issue of violation of Article 7(1)(a), the Commission is of the opinion that the right protected by this provision makes it mandatory for the courts to assign reasons for their judgments."). See also Giacinto della Cananea, "The giving reasons requirement", in *Due Process of Law Beyond the State: Requirements of Administrative Procedure* (Oxford, Oxford University Press, 2016), pp. 61–82; Frederick Schauer, "Giving reasons", *Stanford Law Review*, vol. 47 (1995), p. 633–660.

[772] See, e.g., European Court of Human Rights, *Brumărescu v. Romania* [GC], No. 28342/95, 28 October 1999, para. 61 ("The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question."); European Court of Human Rights, *Ryabykh v. Russian Federation*, No. 52854/99, 24 July

3. Recommendations

267. The procedural rule of law guarantees of due process to be accorded before independent and impartial adjudicators are deeply ingrained in the practice of arbitration and adjudication. They provide a solid basis for the recommendation that means of adjudicatory dispute settlement made available for the settlement of disputes between international organizations and private parties have to conform to the requirements of the rule of law and human rights law.

H. Suggested guideline

268. "11. Dispute settlement and procedural rule of law as well as human rights requirements

> "The means of adjudicatory dispute settlement made available shall conform to procedural rule of law as well as human rights requirements, including the independence and impartiality of adjudicators and due process."

IV. Proposed guidelines

269. The following guidelines are suggested to be adopted by the Commission in regard to international disputes to which international organizations are parties:

> "7. Disputes between international organizations and private parties
>
> "This Part addresses disputes between international organizations and private parties."
>
> "8. Resort to means of dispute settlement
>
> "Disputes between international organizations and private parties 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."
>
> "9. Jurisdictional immunity of international organizations
>
> "The jurisdictional immunity of international organizations, serving the purpose of ensuring their independent functioning, should be respected."
>
> "10. Access to justice
>
> "Arbitration, judicial settlement or other reasonable alternative means of dispute settlement shall be made more widely accessible for the settlement of disputes between international organizations and private parties."
>
> "11. Dispute settlement and procedural rule of law as well as human rights requirements
>
> "The means of adjudicatory dispute settlement made available shall conform to procedural rule of law as well as human rights requirements, including the independence and impartiality of adjudicators and due process."

V. Future programme of work

270. This third report has focused on disputes between international organizations and private parties. Based on the information provided by States and international organizations in response to the questionnaire,[773] as well as other available information, it analysed in detail

2003, paras. 51 and 52 ("One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question … Legal certainty presupposes respect for the principle of *res judicata* …, that is the principle of the finality of judgments.").

[773] See para. 9 above.

the practice of settling such disputes. It also developed recommendations for their settlement, taking into account the free choice of the most appropriate means of dispute settlement, the need to secure the independent functioning of international organizations, the right of access to justice of private parties and the rule of law and human rights requirements in regard to adjudicatory forms of dispute settlement. It is suggested that the draft guidelines contained in this third report be adopted by the Commission and presented to the Sixth Committee of the General Assembly for comments. The draft guidelines should be finalized in 2027 after a second reading.