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

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Introduction

A. Work of the Commission on the topic and change of the title of the topic

1. In 2022, at the end of its seventy-third session, the International Law Commission decided to place the topic "Settlement of international disputes to which international organizations are parties" on its current programme of work and appointed Mr. August Reinisch as Special Rapporteur.[1] During its seventy-fourth session, in 2023, the Commission discussed the Special Rapporteur's first report[2] and provisionally adopted two draft guidelines, delimiting the scope of the topic and defining "international organizations", "disputes" and "dispute settlement".[3]

2. The Commission also decided to change the title of the topic from "Settlement of international disputes to which international organizations are parties" to "Settlement of disputes to which international organizations are parties"[4] in order to clarify that it intended to address all types of disputes to which international organizations are parties.[5]

B. Discussion in the Sixth Committee

3. During the debate in the Sixth Committee of the General Assembly on the report of the International Law Commission on the work of its seventy-fourth session, several very useful comments were made on the draft guidelines, the Commission's commentary and the Special Rapporteur's first report, focusing on the definition of international organizations and disputes.[6] The Special Rapporteur is grateful for the interest displayed by the 48 delegations that commented on the topic. He notes in particular that the change in the topic's title was received positively as a broadening of the topic, since most delegations considered the settlement of disputes of a private law character to be of high practical importance.[7] Some delegations were of the view that a discussion of such disputes entailed the need to address the jurisdictional immunity of international organizations[8] and might require "a delicate balance" to be found between such immunity and the legitimate expectation of individuals to have access to a remedy.[9] Some States expressly called for guidance in regard to labour disputes involving international organizations.[10] Only one delegation wanted to limit the scope of the topic to international disputes.[11]

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[1] 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.

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

[3] 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), para. 48.

[4] *Ibid.*, para. 46; see also para. 49, para. (7) of the commentary to guideline 1.

[5] *Ibid.* See also provisional summary record of the 3631st meeting (A/CN.4/SR.3631), p. 3.

[6] See "Consideration at the seventy-eighth session", available at https://www.un.org/en/ga/sixth/78/ilc.shtml.

[7] *Ibid.* (Argentina; Austria; Cameroon; Chile; Colombia; Czech Republic; Estonia (aligning with European Union); Germany; Greece; Indonesia; Iran (Islamic Republic of); Netherlands (Kingdom of the); Philippines; Poland; Portugal; Romania; Slovakia; Slovenia; Thailand; Türkiye; and European Union).

[8] *Ibid.* (Armenia; Estonia (aligning with European Union); Iran (Islamic Republic of); and European Union).

[9] *Ibid.* (Netherlands (Kingdom of the). See also Austria; Belarus; Cameroon; Czech Republic; India; Italy; Malaysia; Mexico; and Slovakia).

[10] *Ibid.* (Belarus; Cameroon; and Mexico).

[11] *Ibid.* (China).

4. The response from States in regard to the Commission's planned approach, namely, to elaborate on the actual practice of dispute settlement first and to then develop guidelines on this basis,[12] seems to have been broadly acceptable.[13] As noted by delegations, such "guidelines are mainly concerned with the availability and adequacy of means of dispute settlement for international parties, and not intended to elaborate procedural rules"[14] and they "are intended to restate the existing practices of international organizations concerning the settlement of their disputes and to develop recommendations for the most appropriate ways of handling them".[15] Some delegations called for an even more ambitious treaty approach,[16] while others suggested deferring this issue to a later stage of the work.[17]

5. A sizeable number of States also expressed interest in the elaboration of model clauses,[18] although some of them called for caution and restraint regarding such clauses to be used in contracts or national law instruments.[19]

6. States also commented on the first two draft guidelines that the Commission had provisionally adopted during its seventy-fourth session. In line with the general approval of the change of the name of the topic, most delegations welcomed the formulation of draft guideline 1 and the Commission's commentary, in which it explained that all types of disputes to which international organizations are parties are intended to be covered.[20] A few delegations seemed to prefer that the work on the topic focus on the international law aspects of such dispute settlement,[21] whereas one suggested excluding certain disputes between international organizations and member States relating to their annual contributions.[22] In addition, one delegation suggested a without prejudice clause concerning specific dispute settlement obligations of constituent instruments.[23] Some delegations requested clarification of the notion of "disputes of a private law character".[24]

7. With regard to the definitions contained in draft guideline 2 (a) and (b) and the reference in draft guideline 2 (c), the debate in the Sixth Committee reflected the discussion within the Commission. Some delegations raised the question of whether it was necessary to define the notion of "international organizations" in view of past definitions used by the Commission as "inter-governmental organizations"[25] or in the 2011 draft articles on the responsibility of international organizations,[26] fearing that

[12] A/78/10, para. 49, para. (8) of the commentary to guideline 1.
[13] See https://www.un.org/en/ga/sixth/78/ilc.shtml (Austria; Chile; Czech Republic; Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden); El Salvador; India; Guatemala; Romania; and Viet Nam).
[14] *Ibid.* (Philippines).
[15] *Ibid.* (United States of America).
[16] *Ibid.* (Belarus; Cameroon; and Russian Federation).
[17] *Ibid.* (Armenia; and Holy See).
[18] *Ibid.* (Cameroon; Chile; Czech Republic; Denmark (on behalf of the Nordic countries: Denmark Finland, Iceland, Norway and Sweden), Germany; Slovakia; Romania; and Holy See).
[19] *Ibid.* (Republic of Korea; and South Africa).
[20] A/78/10, para. 49, para. (7) of the commentary to guideline 1.
[21] See https://www.un.org/en/ga/sixth/78/ilc.shtml (Estonia (aligning with European Union); Republic of Korea; and European Union).
[22] *Ibid.* (Viet Nam).
[23] *Ibid.* (European Union).
[24] *Ibid.* (Czech Republic; India; Iran (Islamic Republic of); and Republic of Korea).
[25] Art. 2, para. 1 (i), Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, Treaty Series, vol. 1155, No. 18232, p. 331. See also https://www.un.org/en/ga/sixth/78/ilc.shtml (Iran (Islamic Republic of); and South Africa).
[26] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook of the International Law Commission, 2011*, vol. II (Part Two), paras. 87–88. See art. 2 (a), p. 49. See also General Assembly resolution 66/100 of 9 December 2011, annex. See further https://www.un.org/en/ga/sixth/78/ilc.shtml (Brazil; Cuba; Czech Republic; Greece; Russian Federation; Singapore; and Slovakia).

a "new" definition could lead to confusion.[27] Other States expressly appreciated the refinement of the definition from the 2011 draft articles on the responsibility of international organizations in draft guideline 2 (a).[28] Delegations also pointed to the fact that international organizations may not necessarily be established by an international legally binding instrument.[29] Some delegations sought clarification of whether the reference to "other entities" in draft guideline 2 (a) excluded private law persons.[30] Some delegations questioned the need to refer to organs expressing a separate will of the organization, which might be implicit in international legal personality,[31] whereas others considered it a crucially important element.[32]

8. While largely agreeing with draft guideline 2 (b), delegations raised pertinent questions regarding the notion of "dispute", such as whether refusal or denial must be explicit[33] and whether factual disagreements must relate to legal obligations.[34]

9. In regard to the reference to "means of dispute settlement" in draft guideline 2 (c), delegations emphasized the free choice of such means[35] and added other means, such as good offices.[36]

10. The Special Rapporteur is particularly grateful for these constructive comments and suggests their consideration by the Commission before the end of the first reading. The Commission may then decide whether to revise the draft guidelines as they were provisionally adopted or to postpone their revision to the second reading. At the same time, the Special Rapporteur took guidance from the comments made by States in the Sixth Committee when drafting the present report.

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

11. In December 2022, the Secretariat sent to States and relevant international organizations a questionnaire prepared by the Special Rapporteur.[37] In response, both international organizations and States provided highly valuable information, which the Special Rapporteur has used in drafting the present report and which will also support the elaboration of the third report. In accordance with the Commission's request,[38] 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.[39]

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[27] *Ibid.* (Colombia).
[28] *Ibid.* (Austria; Portugal; and United Kingdom of Great Britain and Northern Ireland).
[29] *Ibid.* (Austria; and Thailand).
[30] *Ibid.* (Argentina; Estonia (aligning with European Union); Greece; Iran (Islamic Republic of); Viet Nam; and European Union).
[31] *Ibid.* (Brazil; and France).
[32] *Ibid.* (Austria; Italy; Philippines; and Portugal).
[33] *Ibid.* (Ireland; Slovakia; and Türkiye).
[34] *Ibid.* (Singapore).
[35] *Ibid.* (Italy).
[36] *Ibid.* (Islamic Republic of Iran).
[37] "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.
[38] 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. 241.
[39] "Settlement of disputes to which international organizations are parties", Memorandum by the Secretariat (A/CN.4/764).

D. Structure of the present report

12. The present report focuses on international disputes to which international organizations are parties. In chapter I, the Special Rapporteur explains the focus on international disputes and provides an outlook to the third report, which will focus on non-international disputes. In chapter II, he aims to describe and summarize the rich variety of practice of dispute settlement. In chapter III, he addresses underlying policy issues and formulates recommendations. Chapter IV comprises the text of the suggested guidelines and in chapter V, he briefly outlines the future work on this topic.

I. Focus of the present report: international disputes

13. Disputes between international organizations, as well as between international organizations and States or other subjects of international law, arising under international law can be qualified as international disputes.[40] Nevertheless, the precise delimitation between international and non-international disputes to which international organizations are parties poses a number of difficulties.

14. Typical examples of international disputes would be disputes concerning the interpretation and application of headquarters agreements or other bilateral and multilateral treaties concluded by international organizations. Disputes of an international character may also stem from alleged violations of customary international law or other obligations under international law which, if proven, would entail international responsibility.[41]

15. On the basis of the information provided by States and international organizations in response to the Special Rapporteur's questionnaire, it appears that disputes between international organizations are very rare.[42] Reported examples are disputes relating to matters arising from unspecified "projects" between the Organization of African, Caribbean and Pacific States and the European Union[43] and "differences" concerning the implementation of operational activities on the basis of certain service agreements the Organisation for the Prohibition of Chemical Weapons has encountered with other international organizations.[44] Other bodies reported disputes with other international organizations without characterizing them,[45] or by merely referring to funding issues.[46]

16. Disputes between international organizations and States arise more frequently and often concern headquarters issues, in particular, questions relating to the status,

[40] 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").

[41] See Clyde Eagleton, "International organization and the law of responsibility", *Recueil des Cours*, vol. 76 (1950-I), pp. 319 et seq.; Bimal N. Patel, *Responsibility of International Organisations towards other International Organisations: Law and Practice of the United Nations, the World Bank, the European Union and the International Atomic Energy Agency* (New Delhi, Eastern Book Company, 2013).

[42] A/CN.4/764, chap. II, sect. B (1) (Austria; United Kingdom); chap. III, sect. B (1) (United Nations Office of Legal Affairs: "The Office of Legal Affairs is not aware of formal dispute settlement proceedings initiated between the United Nations and other international organizations resulting from a divergence of views or interests in connection with such cooperation"; World Food Programme); sect. B (2) (World Food Programme).

[43] *Ibid.*, chap. III, sect. B (1) (Organization of African, Caribbean and Pacific States).

[44] *Ibid.* (Organisation for the Prohibition of Chemical Weapons).

[45] *Ibid.* (United Nations Conference on Trade and Development; World Food Programme; World Trade Organization).

[46] *Ibid.*, chap. III, sect. B (2) (World Food Programme).

privileges and immunities of international organizations.[47] They can also concern other treaties, such as treaties dealing with withdrawal from an international organization.[48] Some States reported that they have not yet encountered any disputes with international organizations arising from treaty relations,[49] while others referred to few such disputes.[50] Similarly, some international organizations reported that they have not yet encountered any disputes with other international organizations or with States.[51] The United Nations reported that the majority of disputes of a public international law character relate to privileges and immunities under multilateral and bilateral agreements, including status-of-forces agreements and status-of-mission agreements for the Organization's peace operations.[52] In particular, in regional economic integration organizations disputes typically arise between such organizations and their member States concerning the scope of the organizations' conferred powers and the compliance of the members with the obligations under the respective founding treaties and binding rules adopted by the organizations.

17. Non-international law disputes occur because international organizations often also have domestic legal personality. Thus, they may be parties to disputes with individuals and legal persons arising from contractual relationships, governed by a specific national law or general principles of contract law. Similarly, tort or delictual disputes of a private law character are non-international disputes. The Special Rapporteur's third report will address those disputes.

18. Typical examples of non-international disputes are contractual disputes with service providers and suppliers stemming from the procurement activities of international organizations.[53] Similarly, lease agreements with private parties and various commercial agreements can lead to non-international disputes.[54]

A. Changing nature of disputes

19. The distinction between international and non-international disputes, although useful for analytical purposes, can pose challenges and complexities. On the one hand, these challenges and complexities derive from the fact that the nature of a dispute may sometimes depend upon the choice of international organizations and/or States. On the other hand, non-international disputes may involve a number of international law issues that could in turn give rise to an international dispute.

[47] *Ibid.*, chap. II, sect. A (Morocco); and sect. B (1) (Austria).

[48] *Ibid.*, chap. II, sect. B (1) (United Kingdom, referring to disputes between the European Union and the United Kingdom arising under the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *Official Journal of the European Union*, C 384, 12 November 2019, p. 1, and the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (Brussels and London, 30 December 2020), *Official Journal of the European Union*, L 149, 30 April 2021, p. 10).

[49] *Ibid.*, chap. II, sect. B (1) (Chile) and (2) (Chile).

[50] *Ibid.*, chap. II, sect. B (1) (Kingdom of the Netherlands).

[51] *Ibid.*, chap. III, sect. B (1) (Asian International Arbitration Centre; Common Fund for Commodities (not in the past 10 years); Eurasian Group on Combating Money Laundering and Financing of Terrorism; World Health Organization; World Intellectual Property Organization).

[52] *Ibid.* (United Nations Office of Legal Affairs).

[53] *Ibid.*, chap. II, sect. B (1) (Côte d'Ivoire).

[54] *Ibid.*, chap. III, sect. B (2) (United Nations Office of Legal Affairs) and sect. B (5), footnote 1 (United Nations Office of Legal Affairs).

1. Espousal of claims

20. The most important example of a non-international dispute that can be transformed into an international one resulting from a choice exercised by either international organizations or States is the espousal of a tort claim for personal injury or property damage through diplomatic or functional protection. Prominent examples are claims raised by international organizations against States for harming their officials or agents.[55] Similarly, the espousal of claims, through diplomatic protection being exercised against international organizations for harm caused to a national of a State, can be regarded as such a transformation, from a non-international into an international dispute.[56] Claims espoused by diplomatic or functional protection may then be settled through any means for the settlement of international disputes, in practice often negotiation, but also arbitration or adjudication. Nevertheless, one should be aware that "pure" tort claims may not always give rise to diplomatic or functional protection since both presuppose that the harm caused by States and/or international organizations constitutes an internationally wrongful act.

2. Choice of national or private law

21. The will of international organizations and/or States may equally affect the nature of a dispute when they choose to have their relationship governed not by international law, but by a national law or principles found in national law. Examples would be a deliberate choice of a "private" contractual relationship instead of a treaty relationship.[57] Albeit rare in practice, subjects of international law are generally considered to have such freedom of choice.[58] Disputes arising from such contractual relationships would then appear to be more of a non-international character, notwithstanding the fact that they concern international organizations and States.

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[55] M. J. L. Hardy, "Claims by international organizations in respect of injuries to their agents", *The British Yearbook of International Law*, vol. 37 (1961), pp. 516–526. See also para. 112 below.

[56] J. P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire Français de Droit International*, vol. 8 (1962), pp. 427–456; 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. See also para. 34 below.

[57] One can glean from the information provided on the website of the Permanent Court of Arbitration that the dispute, referred to as "contract-based arbitration", between the United Nations Office for Project Services and a municipality concerned a private law contract. *District Municipality of La Punta (Peru) v. United Nations Office for Project Services (UNOPS)*, Permanent Court of Arbitration, Case No. 2014-38, available at https://pcacases.com/web/view/109. This assumption is confirmed by the information provided by the United Nations Office for Project Services in response to the Special Rapporteur's questionnaire, in which it indicated that "[c]ommercial 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" (A/CN.4/764, chap. III, sect. B (2). See also the loan agreement in *ECOWAS Bank for Investment and Development v. Cross River State*, Community Court of Justice of the Economic Community of West African States, Judgment No. ECW/CCJ/JUD/01/21, 5 February 2021 (see para. 182 below).

[58] See para. (3) of the commentary to draft article 2 of the Draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook of the International Law Commission, 1982*, vol. II (Part Two), para. 63, para. (3) of the commentary to draft article 2 ("agreements concluded between organizations, between States and international organizations, or even between organs of the same international organization may be governed by some system other than general international law, whether the law peculiar to an organization, the national law of a specific country, or even, in some cases, the general principles of law"); see also draft articles on the law of treaties, *Yearbook of the International Law Commission, 1959*, vol. II, p. 95, para. (3) of the commentary to draft article 2 ("there may be agreements between States, such as … purely commercial transactions between Governments – the incidents of which may be regulated entirely by the appropriate system of private (i.e., national, not international) law").

B. International law aspects of disputes of a non-international character

22. Non-international disputes to which international organizations are parties, mostly with private individuals and/or legal persons often arising from contractual or delictual relations, may equally involve some genuine international law issues. Those international law issues include the duty of States to accord legal personality and to respect the jurisdictional immunity of international organizations as well as the obligation of international organizations to make dispute settlement for non-international disputes available. Violations of any of the relevant rules relating to these issues can give rise to an international dispute.

23. The existence of disputes of a non-international character to which international organizations are parties is premised upon the ability of international organizations to act as subjects of domestic law.[59] Such capacity to act at the domestic legal level is regularly provided for 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 domestic courts.[60] 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 domestic courts.[61] Lastly, treaty obligations to make available alternative means of dispute settlement in cases of certain non-international disputes between international organizations and private parties[62] 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, such a need to provide for means of settlement of disputes with private parties may also stem from human rights considerations.[63]

24. While the underlying dispute between an organization and a private party, regularly governed by a private law contract and/or tort law, will remain a non-international dispute, issues of an international character may arise in these contexts. For instance, a national court may not allow an international organization to pursue its claims against a private contractor because it does not recognize the

[59] See Tarcisio Gazzini, "Personality of international organizations", in Jan Klabbers and Asa Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Cheltenham, Edward Elgar Publishing, 2011), pp. 33–55; August Reinisch, "Accountability of international organizations according to national law", *Netherlands Yearbook of International Law,* vol. XXXVI (2005), pp. 119–167; Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity*, 6th ed. (Leiden, Brill Nijhoff, 2018), p. 1065.

[60] 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 vol. 90, p. 327; 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.

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

[62] 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 (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.

[63] 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. See also para. 115 below.

organization's domestic legal personality.[64] This may give rise 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.[65] To the extent that an international organization's immunity from legal process is recognized by domestic courts, such a decision may be challenged under international human rights law for not providing access to court and it may 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 its fundamental right of access to justice as a result of its courts' decisions to accord immunity.[66] 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, which imposes on an organization a duty to make available alternative means of dispute settlement.[67]

25. In spite of these challenges of precisely differentiating between international and non-international disputes to which international organizations are parties, it appears useful for the purposes of the present draft guidelines to use the existing categories of international disputes and non-international disputes. The present report addresses international disputes to which international organizations are parties, namely disputes arising under international law. Non-international disputes to which international organizations are parties will be dealt with in the third report.

C. Suggested guideline

26. "3. International disputes

"For the purposes of the present draft guidelines, international disputes to which international organizations are parties are disputes between international organizations as well as disputes between international organizations and States or other subjects of international law arising under international law."

II. The practice of settling international disputes to which international organizations are parties

27. The settlement of international disputes to which international organizations are parties can be achieved by any of the peaceful means of dispute settlement laid down in draft guideline 2 (c), referring to "negotiation, enquiry, mediation, conciliation,

[64] See United Kingdom, *Arab Monetary Fund v. Hashim and others (No. 3)*, Court of Appeal [1990] 2 All E.R. 769, not permitting the Arab Monetary Fund to bring legal proceedings before English courts (reversed in *Arab Monetary Fund v. Hashim and others (No. 3)*, House of Lords [1991] 1 All E.R. 871). Nevertheless, it should be mentioned that the United Kingdom was under no treaty obligation to recognize the domestic legal personality of the Arab Monetary Fund.

[65] A/CN.4/764, chap. II, sect. B (7) (Chile); chap. III, sect. B (11) (United Nations Office of Legal Affairs). See also the longstanding dispute between the Food and Agriculture Organization of the United Nations and Italy (paras. 36 and 67 below).

[66] See the attempt in European Court of Human Rights, *Waite and Kennedy v. Germany* [GC], No. 26083/94, 18 February 1999. See also Riccardo Pavoni, "Human rights and the immunities of foreign States and international organizations", in Erika de Wet and Jure Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights* (Oxford, Oxford University Press, 2012), pp. 71–113.

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

arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of resolving disputes."

28. The following analysis of treaties containing dispute settlement provisions, of pertinent cases and of the practice of international organizations and States demonstrates that international organizations rely on and use all such different means when settling their disputes. However, they do so with varying intensity and frequency. Non-adjudicatory means seem to be used more frequently than arbitration, and resort to international courts or tribunals is even rarer. The following subsections provide a detailed overview of disputes to which international organizations are parties and analyses how they have often been settled by recourse to the means referred to in draft guideline 2 (c). Far from claiming to be exhaustive, the overview is aimed at providing a representative picture of the means of dispute settlement legally available and actually used. The purpose of this extensive analysis is to fill a research gap and to allow the Commission to formulate a guideline reflecting actual practice.

A. Negotiation, consultation or other amicable settlement

29. Several privileges and immunities treaties and headquarters and seat agreements expressly provide for amicable dispute settlement as a first step preceding other forms of dispute settlement, usually arbitration.

30. An early, typical example of such a dispute settlement clause is found in the 1946 agreement between the United Nations and Switzerland, stipulating "negotiations" in case of "dispute" to precede arbitration.[68] Similarly, the 1947 agreement between the United Nations and the United States of America regarding the headquarters of the United Nations calls for disputes to be settled in the first place by "negotiation or other agreed mode of settlement".[69] In addition, the agreement between the International Labour Organization (ILO) and Switzerland calls for "direct conversations between the parties" in case of any "divergence of opinion",[70] and the 1995 agreement with the World Trade Organization (WTO) calls for "direct consultations between the parties" in case of any "difference of opinion".[71] Multilateral treaties on privileges and immunities and other headquarters agreements similarly provide for settling disputes by "consultation, negotiation or other agreed mode of settlement".[72]

[68] Art. VIII, sect. 27, Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council (Berne, 11 June 1946 and New York, 1 July 1946), United Nations, *Treaty Series*, vol. I, No. 8, p. 163.

[69] Art. VIII, sect. 21 a), Agreement regarding the Headquarters of the United Nations (Lake Success, 26 June 1947), United Nations, *Treaty Series*, vol. 11, p. 11.

[70] Art. 27, para. 1, *Procès-verbal*, Agreement, Arrangement for the execution of the Agreement, and Declaration concerning the legal status of the International Labour Organization after the dissolution of the League of Nations (Geneva, 11 March 1946), United Nations, *Treaty Series*, vol. 15, No. 103, p. 377.

[71] Art. 48, Agreement between the World Trade Organization and the Swiss Confederation to determine the legal status of the Organization in Switzerland (Berne, 2 June 1995), WT/GC/1, in World Trade Organization, *Basic Instruments and Selected Documents 1995: Protocols, Decisions, Reports* (Geneva, June 2002), p. 59, at pp. 76–77.

[72] See, e.g., art. 26, para. 2, Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea (New York, 23 May 1997), United Nations, *Treaty Series*, vol. 2167, No. 37925, p. 271; Art. 33, para. 2, Agreement between the Federal Republic of Germany and the International Tribunal for the Law of the Sea regarding the Headquarters of the Tribunal (Berlin, 14 December 2004), United Nations, *Treaty Series*, vol. 2464, No. 44269, p. 147.

31. Other treaties also provide for "amicable" dispute settlement to precede arbitration, such as some loan agreements entered into by international financial institutions.[73] Similarly, the standard dispute settlement clause of WTO in its agreements with international organizations or States provides for "best efforts to settle amicably any dispute" before it is submitted to arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[74]

32. In rare instances, negotiation is provided for as an exclusive form of dispute settlement, not as a prelude to arbitration. This is the case in an agreement between a United Nations agency and the World Health Organization (WHO).[75] In addition, the so-called Samoa Agreement between the European Union and the Organization of African, Caribbean and Pacific States, which will provide a new framework for cooperation between the two organizations,[76] also merely provides for consultation procedures in the joint Council of Ministers or a special joint committee thereof,[77] and no longer for consultations as a first step before triggering arbitration, as in the so-called Lomé and Cotonou agreements.[78]

33. Many international organizations,[79] but also States,[80] seem to prefer informal dispute settlement techniques, in particular negotiations, in cases of disagreement or disputes. In spite of this preference and arguably widespread use, there are relatively few publicly known cases of disputes in which settlement was attempted or actually reached in this way.

34. An early example 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

[73] A/CN.4/764, chap. III, sect. A (See the General Terms of Project Financing of the Islamic Development Bank, reported by Islamic Development Bank: "Except as otherwise indicated in a Loan Agreement, any dispute or controversy between the Bank and the Recipient and any claim by any party against the other party arising under a Loan Agreement will be settled amicably.")

[74] *Ibid.*, chap. III, sect. B (9) (World Trade Organization).

[75] *Ibid.* (World Health Organization: "The Parties will use their best efforts to promptly settle through direct negotiations any dispute, controversy or claim arising out of or in connection with this Agreement or any breach thereof. Any such dispute, controversy or claim which is not settled within sixty (60) days from the date either Party has notified the other Party of the nature of the dispute, controversy or claim and of the measures which should be taken to rectify it, will be resolved through consultation between the Executive Heads of each of the Parties.") See also United Nations Office of Legal Affairs (*ibid.*) (reporting that, with regard to United Nations agreements, "in a financial contribution agreement with a Member State Government, the amicable settlement clause may be sufficient, if the donor Government would not be involved in the implementation of the funded project").

[76] European Commission, "Samoa Agreement: EU and its member States sign new Partnership Agreement with the members of the Organisation of the African, Caribbean and Pacific States", press release, 15 November 2023, available at ec.europa.eu; OACPS, Press Release: "The Samoa Agreement is now a reality – the Organisation of African, Caribbean and Pacific States (OACPS) and European Union (EU) sign a new partnership agreement", press release, 15 November 2023, available at www.oacps.org.

[77] Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States, of the other part (Samoa, 15 November 2023), *Official Journal of the European Union*, L 2862, 28 December 2023, p. 1 (art. 101, para. 2: "Without prejudice to the procedures referred to in paragraphs 3 to 9 of this Article and Article 74(4), any question related to the interpretation of this Agreement may be resolved through consultations within the OACPS-EU Council of Ministers or, upon the Parties' agreement, a special subcommittee or any other appropriate mechanism reporting to the OACPS-EU Council of Ministers. The Parties shall present the relevant information required for a thorough examination of the matter, with a view to addressing it in a timely and amicable manner.").

[78] See paras. 72 et seq. below.

[79] A/CN.4/764, chap. III, sect. B (2)–(4).

[80] *Ibid.*, chap. II, sect. A (Morocco); sect. B (3) (Côte d'Ivoire; Oman); sect. B (5) (Chile).

Operation in the Congo, which led to a lump-sum payment and final settlement of claims.[81] An earlier example are the claims of the United Nations against Israel arising from the assassination of Count Bernadotte in 1948, which were ultimately solved through direct negotiations, leading to an exchange of notes.[82]

35. An example of the efforts of the United Nations to find a negotiated settlement of a dispute with a member State can be gleaned from the so-called *Cumaraswamy* case.[83] When the litigation against the United Nations Special Rapporteur in Malaysian courts became known, the Secretary-General of the United Nations and the Organization's Legal Counsel insisted, particularly through *notes verbales* to the Government of Malaysia and meetings with the Permanent Representative of Malaysia in New York, on the Special Rapporteur's functional immunity.[84] Subsequently, the Secretary-General appointed a special envoy who undertook an official visit to the capital of Malaysia and, when the Member State signalled interest in an out-of-court settlement, the United Nations Office of Legal Affairs "proposed the terms of such a settlement"[85] as an alternative to submitting the question for an advisory opinion. When such negotiations failed, the special envoy recommended that the Economic and Social Council request an advisory opinion from the International Court of Justice.[86]

36. That such requests can be avoided through successful negotiations is shown in the dispute between Italy and the Food and Agriculture Organization of the United Nations (FAO) over the jurisdictional immunity it enjoyed, or rather that Italian courts denied.[87] The dispute arose from a number of cases, such as *INPDAI v. FAO*.[88] Therein, Italian courts had denied FAO immunity from suit in actions by the landlord of buildings occupied by FAO. The FAO Council put "the immunity of FAO from legal process in Italy" on the agenda of its eighty-second session[89] and "requested the host Government to find a suitable method of solving the problem, in consultation with the landlords of the building, with a view to the settlement of the dispute out of court".[90] In 1984, FAO considered arbitration or requesting an advisory opinion from the International Court of Justice,[91] according to the Headquarters Agreement. Following a negotiated settlement, neither avenue was pursued.[92] The Italian courts respected the Organization's immunity from legal process and Italy fully adhered to

[81] Exchange of Letters constituting an agreement 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.

[82] 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). See also para. 112 below.

[83] 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. See also paras. 102 et seq. below.

[84] *Ibid.*, para. 10, citing para. 9 of the note by the Secretary-General (E/1998/94).

[85] *Ibid.*, citing para. 14 of the note by the Secretary-General (E/1998/94).

[86] *Ibid.*, citing para. 15 of the note by the Secretary-General (E/1998/94) ("The Secretary-General's Special Envoy therefore advised that the matter should be referred to the [Economic and Social] Council to request an advisory opinion from the International Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice.").

[87] FAO, Constitutional and general legal matters, *United Nations Juridical Yearbook* (UNJYB) (1984), pp. 101 et seq.

[88] 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.

[89] See FAO, Office of the Legal Counsel, Constitutional matters, UNJYB (1982), p. 113.

[90] *Ibid.*, p. 114.

[91] FAO, Constitutional and general legal matters, UNJYB (1984). See also para. 67 below.

[92] Reprinted in FAO, Constitutional and general legal matters, annex I, UNJYB (1986), p. 156.

the Convention on the Privileges and Immunities of the Specialized Agencies,[93] which contains not only an immunity provision, but also an obligation on the part of the Organization to make provision for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private character to which the Organization is a party.[94] In an exchange of notes, Italy and FAO agreed on such "modes of settlement of disputes" in accordance with that Convention.[95] The Italian courts subsequently recognized the Organization's absolute immunity.[96]

37. The differences of opinion between the European Molecular Biology Laboratory and its host State, Germany, concerning the organization's tax exemptions initially led to a signed "[s]ettlement resulting from the negotiations" in 1987.[97] However, when it became clear that not all the issues had been resolved, the parties proceeded to arbitration in *European Molecular Biology Laboratory (EMBL) v. Germany*.[98]

38. Another apparently unsuccessful attempt at settling a dispute between an international organization and a State occurred when the Permanent Court of Arbitration and the Netherlands failed to solve their dispute concerning the allocation of office space in the Peace Palace in The Hague. Nine rounds of consultations took place,[99] leading to the adoption of an Interpretative Declaration and Joint Conclusions in 2021.[100] Still, arbitral proceedings were instituted by the Permanent Court of Arbitration.[101]

39. An example of a dispute proceeding to formal negotiation is the recent formal request of the United Kingdom of Great Britain and Northern Ireland to hold consultations pursuant to article 738 of the Trade and Cooperation Agreement between the European Union and the United Kingdom,[102] concerning the association of the United Kingdom to certain European Union research programmes.[103]

40. In practice, disputes regularly appear to be settled successfully through negotiations and consultations among the disputing parties. This has been reported for disputes between international organizations.[104] According to the United Nations

[93] Convention on the Privileges and Immunities of the Specialized Agencies; FAO, Constitutional and general legal matters, UNJYB (1986), p. 147.

[94] Art. IX, sect. 31, Convention on the Privileges and Immunities of the Specialized Agencies.

[95] Reprinted in FAO, Constitutional and general legal matters, UNJYB (1986).

[96] *FAO v. Colagrossi*, Corte di Cassazione, 18 May 1992, No. 5942, *Rivista di Diritto Internazionale*, vol. 75 (1992), p. 407.

[97] "Settlement resulting from the negotiations between the Federal Republic of Germany and the European Molecular Biology Laboratory (EMBL) in Heidelberg on June 1, 1987", reprinted in *International Law Reports*, vol. 105 (1997), pp. 9 and 10.

[98] *European Molecular Biology Laboratory (EMBL) v. Germany*, Arbitration Award, 29 June 1990, *International Law Reports*, vol. 105 (1997), pp. 1–74. See para. 68 below.

[99] A/CN.4/764, chap. II, sect. B (3) (Kingdom of the Netherlands).

[100] Notawisseling houdende een interpretatieve verklaring inzake artikel 4 van het Verdrag inzake de zetel van het Permanente Hof van Arbitrage, The Hague, 11 and 18 March 2021, Dutch Treaty Series (*Tractatenblad* 2021, No. 46), also available at https://zoek.officielebekendmakingen.nl/trb-2021-46.pdfofficielebekendmakingen.nl/trb-2021-46.pdf.

[101] A/CN.4/764, chap. II, sect. B (2) (Kingdom of the Netherlands).

[102] Art. 738, para. 1, Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, *Official Journal of the European Union*, L 149, 30 April 2021 ("the Parties shall endeavour to resolve the matter by entering into consultations in good faith, with the aim of reaching a mutually agreed solution").

[103] A/CN.4/764, chap. II, sect. B (2) (United Kingdom).

[104] *Ibid.*, chap. III, sect. B (1) (United Nations Office of Legal Affairs: "International organizations routinely cooperate with one another, often based on appropriate contractual or administrative arrangements, including memorandums of understanding. Issues that arise in the implementation of such arrangements are dealt with amicably and through mutual consultations."); sect. B (2) (World Food Programme: "The rare disputes with international organizations have mainly involved international organizations acting as donors to WFP and concerned the interpretation and application of contribution agreements, especially provisions on costs to be funded by such international organizations' contribution. Given that these disputes have been resolved through informal consultation, there are no formal decisions or awards on such dispute settlements.").

Legal Counsel, "most disputes between the United Nations and its Member States are settled through diplomatic channels".[105] Negotiated solutions also imply that few instances of such non-adjudicatory dispute settlement are reported in detail.

41. In response to the Special Rapporteur's questionnaire, many States and international organizations confirmed that they usually settle their disputes,[106] in particular those concerning headquarters and host State issues, by negotiation.[107] In this respect, the host country committees[108] established for many international organizations often provide a useful forum for consultations to address privileges and immunities and related issues.[109]

B. Mediation and conciliation

42. It appears that mediation and conciliation[110] are less frequently provided for in agreements concluded by international organizations, although international organizations report that they are in use.[111]

43. One interesting example encompassing both forms of dispute settlement is the International Treaty on Plant Genetic Resources for Food and Agriculture, to which the European Union is a contracting party. It provides that "[i]f the parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party".[112] It further stipulates that, unless the parties to the dispute otherwise agree, "the dispute shall be submitted to conciliation".[113]

44. Examples of a form of mediation/conciliation may also be the stabilization and association committees[114] and cooperation councils[115] provided for in some European Union treaties with third States. Recourse to those committees and councils is often intended to precede arbitration.

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[105] Miguel de Serpa Soares, "Responsibility of international organizations", *Courses of the Summer School on Public International Law*, vol. 7 (Moscow, 2022), p. 125.

[106] A/CN.4/764, chap. II, sect. B (2) (Côte d'Ivoire; Oman); chap. III, sect. B (2) (UNCTAD; World Food Programme).

[107] *Ibid.*, chap. II, sect. B (2) (Austria) and sect. B (3) (Austria); chap. III, sect. B (2) (Organisation for the Prohibition of Chemical Weapons; United Nations Office of Legal Affairs),

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

[109] A/CN.4/764, chap. III, sect. B (2) (Organisation for the Prohibition of Chemical Weapons).

[110] See also General Assembly resolution 68/303 of 31 July 2014 on strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution.

[111] A/CN.4/764, chap. III, sect. B (2) (World Food Programme: "WFP agreements with States normally identify conciliation and arbitration as dispute settlement methods").

[112] Art. 22.2, International Treaty on Plant Genetic Resources for Food and Agriculture, Food and Agriculture Organization of the United Nations (Rome, 3 November 2001), United Nations, *Treaty Series*, vol. 2400, No. 43345, p. 303.

[113] *Ibid.*, art. 22.4 and annex II, part 2 (conciliation).

[114] See, e.g. art. 130, and protocol 7 (dispute settlement), art. 3, Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part (29 April 2008), *Official Journal of the European Union*, L 278, 18 October 2013, p.16.

[115] See, e.g., art. 104, Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part (signed 11 October 1999, entered into force 1 May 2005), *Official Journal of the European Union*, L 311, 4 December 1999, p. 3 ("(1) Each Party may refer to the Cooperation Council any dispute relating to the application or interpretation of this Agreement. (2) The Cooperation Council may settle any dispute by means of a decision. (3) Each Party shall be bound to take the measures involved in carrying out the decision referred to in paragraph 2. (4) In the event of it not being possible to settle the dispute in accordance with paragraph 2, either Party may notify the other of an appointment of an arbitrator; the other Party must then appoint a second arbitrator within two months of the appointment of the first arbitrator.").

45. While not much information is available about how frequently international organizations use mediation or conciliation in order to settle international disputes, they are in use. The confidentiality that governs mediation or conciliation makes them an attractive means of dispute settlement for international organizations because it allows them to avoid the publicity of disputes settled before an international court or tribunal. At the same time, like negotiation, mediation and conciliation depend on the disputing parties' consent. This rule may disadvantage the weaker party if the more powerful party withholds its consent, regardless of whether that is the international organization or its opponent.

46. In response to the Special Rapporteur's questionnaire, States and international organizations confirmed that they have either actually resorted to mediation and/or conciliation in order to settle their disputes or consider them to be useful methods for settling disputes.[116]

C. Enquiry or fact-finding

47. Where factual questions are in dispute, enquiry or fact-finding missions may also be an available means of dispute settlement, often in combination with negotiations.

48. In inter-State practice, commissions of enquiry or fact-finding commissions have been used.[117] Particularly in the field of humanitarian law, various fact-finding commissions are provided for. The best known example is the International Humanitarian Fact-Finding Commission, established pursuant to article 90 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),[118] which has formally investigated only once, to date, in 2017.[119]

49. Sometimes an enquiry is not mutually agreed upon. Rather, it may be an internal enquiry that leads to negotiations, as evidenced in a number of claims brought by the United Nations against member States for harm sustained in the course of its missions. Similarly, internal enquiries may also serve to assess claims brought against the Organization.

50. For example, there have been various enquiries in the context of harm suffered by the United Nations operating in the Gaza Strip because of the military operations of Israel. In February 2010, the United Nations accepted $10.5 million compensation from Israel for damage to United Nations facilities and staff in Gaza during the Israeli offensive against Hamas in 2009.[120] The demands of the United Nations were based

[116] A/CN.4/764, chap. II, sect. B (2) (Côte d'Ivoire); sect. B (5) (Chile); chap. III, sect. B (3) (World Trade Organization); sect. B (4) (World Trade Organization; Eurasian Group on Combating Money Laundering and Financing of Terrorism; Organisation for the Prohibition of Chemical Weapons); sect. B (7) (United Nations Office of Legal Affairs).

[117] Agnieszka Jachec-Neale, "Fact-finding", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. III (Oxford, Oxford University Press, 2012), pp. 1077–1084.

[118] Art. 90, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977) United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3.

[119] International Humanitarian Fact-Finding Commission, "OSCE Special Monitoring Mission was not targeted, concludes independent forensic investigation into tragic incident of 23 April 2017", available at https://www.ihffc.org/index.asp?mode=shownews&ID=831; see also Organization for Security and Co-operation in Europe, "Executive summary of the report of the independent forensic investigation in relation to the incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) patrol on 23 April 2017", 6 September 2017, available at https://www.osce.org/files/f/documents/1/e/338361.pdf.

[120] United Nations, "Israel compensates UN for damages during last year's Gaza offensive", news item, 22 January 2010, available at https://news.un.org/en/story/2010/01/327352.

on the findings of the Board of Inquiry set up by the Secretary-General in 2009.[121] A similar procedure was followed in 2015.[122]

51. The United Nations uses such internal boards of inquiry to review claims by United Nations personnel, Member States and third parties against the Organization.[123] Although they are confidential, the Secretary-General regularly decides to release summaries of the reports.[124]

D. Arbitration

52. Arbitration is a quasi-adjudicatory form of third-party dispute settlement that is generally available to both States and international organizations, as well as to private parties.[125] Arbitration is based on the consent of the parties. Such consent is crucial for the jurisdiction of an arbitral tribunal.[126] It also implies that the parties are relatively free to shape arbitration proceedings according to their preferences. This is most evident in genuine *ad hoc* arbitration, where the entire process must be established by the parties. In practice, litigants often opt for institutional rules, which they may adapt according to their needs.

53. While many inter-State arbitrations have been truly *ad hoc* in the past, more recently, arbitrations involving States to settle investment disputes or commercial disputes with private parties have been conducted according to institutional rules, ranging from those of UNCITRAL to the International Centre for Settlement of Investment Disputes, the International Chamber of Commerce, the London Court of International Arbitration, the Stockholm Chamber of Commerce, the Permanent Court of Arbitration and other rules.[127]

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[121] On 11 February 2009, the Secretary-General convened a Board of Inquiry with limited terms of reference to investigate attacks on United Nations personnel and buildings in the Gaza Strip. The Board's full report, which was not made public, was submitted to the Secretary-General on 21 April 2009. The Board found that the Israeli military had repeatedly breached the inviolability of the United Nations premises, had not made sufficient efforts to protect United Nations staff and civilians and, in a number of the cases examined, was responsible for damage to United Nations buildings and injuries and fatalities caused by Israeli attacks (e.g. a World Food Programme warehouse and three United Nations schools). See the letter dated 4 May 2009 from the Secretary-General addressed to the President of the Security Council, containing a 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 (A/63/855-S/2009/250).

[122] Pnina Sharvit Baruch and Keren Aviram, "Report of the UN Secretary-General Board of Inquiry on damage to UN facilities during Operation Protective Edge: balanced and unbiased", *INSS Insight*, No. 695 (7 May 2015) available at https://www.files.ethz.ch/isn/191189/No.%20695%20-%20Pnina%20and%20Keren%20for%20web.pdf; see also Agnieszka Jachec-Neale, "Protection of UN facilities during Israeli-Palestinian hostilities: a brief assessment of the UN Board of Inquiry findings", EJIL: Talk!, 17 June 2015, available at https://www.ejiltalk.org/protection-of-un-facilities-during-israeli-palestinian-hostilities-a-brief-assessment-of-the-un-board-of-inquiry-findings/.

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

[124] Letter dated 21 December 2016 from the Secretary-General addressed to the President of the Security Council, United Nations 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.

[125] This latter form of arbitration with private parties will be analysed in detail in the third report of the Special Rapporteur.

[126] Andrea M. Steingruber, *Consent in International Arbitration* (Oxford, Oxford University Press, 2012).

[127] See Karl-Heinz Böckstiegel, "States in the international arbitral process", *Arbitration International*, vol. 2 (1986), pp. 22–32; Chester Brown, "States as participants in international arbitration", in Stephan Kröll, Andrea K. Bjorklund and Franco Ferrari (eds.), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge: Cambridge University Press, 2023), pp. 424–438.

54. The 1996 Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States[128] were specifically designed to take into account the characteristics of such disputing parties. They were consolidated with the 1996 Optional Rules for Arbitration between International Organizations and Private Parties[129] in the 2012 Arbitration Rules of the Permanent Court of Arbitration,[130] allowing for "arbitration of multiparty disputes involving a combination of States, State-controlled entities, intergovernmental organizations, and private parties".[131]

55. The limited practice of arbitration as a means of dispute settlement of international disputes to which international organizations are parties[132] stems from the fact that arbitration clauses are not very frequently provided for and that agreements to submit an existing dispute to an arbitral tribunal appear to be rare. Furthermore, given that arbitration proceedings are usually conducted confidentially, knowledge about arbitrations is often not in the public domain.[133] The information obtained from States and international organizations in response to the Special Rapporteur's questionnaire, together with an analysis of scholarly works and the information provided by the Permanent Court of Arbitration,[134] has helped to show that there is quite a body of interesting practice in this regard.

56. Arbitration clauses are frequently found in headquarters agreements, sometimes in multilateral privileges and immunities treaties, and less frequently in constituent instruments of international organizations. Such clauses have given rise to cases of publicly known arbitration. In addition, there are a few cases of arbitration the existence of which is known, but about which details remain confidential. It can only be assumed that the actual dispute settlement practice of international organizations encompasses additional examples that are not publicly known. Apparently, there is no substantial practice of *ex post* agreements to submit an existing international dispute to arbitration.[135]

1. Arbitration clauses in constituent agreements of international organizations

57. The Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), apart from providing for seeking an advisory opinion from the International Court of Justice, provides for arbitration as one of the options of dispute settlement in case of disputes concerning the interpretation of its constituent treaty.[136] This clause formed the basis for the arbitral decision in the *UNESCO*

[128] Permanent Court of Arbitration, Optional Rules for Arbitration Involving International Organizations and States (1996).

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

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

[131] *Ibid*., p. 4.

[132] Cesare P.R. Romano, "International organizations and the international judicial process: an overview", in Laurence Boisson de Chazournes, Cesare P.R. Romano and Ruth Mackenzie (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (Ardsley, New York, Transnational Publishers, 2002), pp. 3–36, at p. 5.

[133] See Wood, "The settlement of international disputes", para. 20 ("[N]o general survey exists of arbitration clauses in international agreements to which an international organization is a party, or of arbitration pursuant to such clauses. To date, there seem to be only four arbitrations between an international organization and a State that are in the public domain.")

[134] See https://pca-cpa.org/en/cases/.

[135] A/CN.4/764, chap. III, sect. B (11). See, specifically, the response of the United Nations Office of Legal Affairs: "The Office of Legal Affairs is not aware of cases to date where the United Nations has agreed *ex post facto* to the use of such a third-party method of settling a dispute of a public international law character with a State or international organization.").

[136] Art. XIV, para. 2, Constitution of the United Nations Educational, Scientific and Cultural Organization (London, 16 November 1945), United Nations, *Treaty Series*, vol. 4, No. 52, p. 275 ("Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its rules of procedure.").

(Constitution) Case,[137] ruling against the possibility of re-electing members of the Executive Board if they are no longer members of their national delegations.[138] The underlying dispute was apparently between different member States and did not directly concern the Organization as a party, although it did concern a constitutional issue of the Organization.

58. A limited number of constituent agreements of international organizations contain arbitration as a method of dispute settlement, expressly encompassing disputes between the organizations and their member States. Such clauses were found in the constituent instruments of the original International Telecommunications Satellite Organization[139] and of the International Maritime Satellite Organization.[140]

59. The 1971 International Telecommunications Satellite Organization Agreement not only provided for arbitration,[141] but also contained very detailed rules for arbitration proceedings in a separate annex.[142] A similarly detailed annex containing "procedures for the settlement of disputes" was included in the International Maritime Satellite Organization Convention, making arbitration the fallback method of dispute settlement in case the parties did not agree on other means of dispute settlement.[143]

60. The articles of agreement of a number of international financial institutions provide for a limited role of arbitration in cases of disputes between the organizations and withdrawing members.[144] Interestingly, disputes concerning the interpretation of the constituent instruments are intentionally removed from arbitration and are made subject to the authoritative interpretation of the organs of the international financial institutions. Apparently, no practice of this form of arbitration has evolved.

2. Arbitration clauses in privileges and immunities agreements, as well as in headquarters, host and similar agreements

61. More frequently than in constituent treaties, arbitration is provided for in multilateral privileges and immunities agreements, as well as in bilateral headquarters or host agreements. Arbitration is also found in status-of-forces agreements.

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[137] *UNESCO (Constitution) Case*, Special Arbitral Tribunal, Award of 19 September 1949, *Annual Digest and Reports of Public International Law Cases: 1949*, Case No. 113, p. 331.

[138] *Ibid.*, p. 332.

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

[140] Convention on the International Maritime Satellite Organization (INMARSAT) (London, 3 September 1976), United Nations, *Treaty Series*, vol. 1143, No. 17948, p. 105.

[141] Art. XVIII (a), INTELSAT Agreement ("All legal disputes arising in connection with the rights and obligations under this Agreement … between INTELSAT and one or more Parties, if not otherwise settled within a reasonable time, shall be submitted to arbitration in accordance with the provisions of Annex C to this Agreement.")

[142] Annex C, INTELSAT Agreement, p. 52.

[143] Art. 31, INMARSAT Convention.

[144] Art. XVIII (c), Articles of Agreement of the International Monetary Fund (Washington, 27 December 1945), United Nations, *Treaty Series*, vol. 2, No. 20 (a), p. 39 ("Whenever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during liquidation of the Fund, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Fund, another by the member or withdrawing member, and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the International Court of Justice or such other authority as may have been prescribed by regulation adopted by the Fund. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto"); similarly, art. IX (c), Articles of Agreement of the International Bank for Reconstruction and Development, United Nations, *Treaty Series*, vol. 2, No. 20 (b), p. 134. See also art. 64, Articles of Agreement of the Islamic Development Bank (Jeddah, 12 August 1974), available at www.isdb.org.

62. An example of such a multilateral treaty is the Privileges and Immunities Agreement of the International Criminal Court, which stipulates arbitration as the method of settling disputes between States and between States and the Court if consultation, negotiation or other agreed modes of settlement fail.[145]

63. Arbitration is often provided for in headquarters agreements, apart from "binding" advisory opinions of the International Court of Justice. The most prominent example is the 1947 Headquarters Agreement between the United Nations and the United States, which provides in its section 21 that:

> "(a) Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.
>
> (b) The Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings. Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed by both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court."[146]

64. The scope of the obligation to arbitrate under this provision was addressed by the International Court of Justice in its advisory opinion in the *PLO Observer Mission Case*.[147] The General Assembly requested an advisory opinion from the Court on whether the United States, "as a party to the [United Nations-United States Headquarters Agreement, was] under an obligation to enter into arbitration in accordance with section 21 of the Agreement". The dispute arose from various measures taken by the legislator of the United States, aimed at forcing the closure of the Observer Mission of the Palestine Liberation Organization to the United Nations in New York. However, the request for the opinion did not concern the question of whether these measures violated the Headquarters Agreement, but only the narrower issue of whether they gave rise to a dispute triggering the obligation of the United States to arbitrate. The Court found that a "dispute exist[ed] between the United Nations and the United States concerning the 'interpretation or application' of the Headquarters Agreement".[148] It also held that the dispute had "not [been] settled by negotiation" or "other agreed mode of settlement", pursuant to section 21 of the Headquarters Agreement, thus activating the obligation to enter into arbitration.[149] Neither the United Nations Headquarters Agreement nor other United Nations agreements contemplating the establishment of an arbitral tribunal seem to have actually led to arbitration.[150]

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[145] Art. 32, Agreement on the Privileges and Immunities of the International Criminal Court (New York, 9 September 2002), United Nations, *Treaty Series*, vol. 2271, No. 40446, p. 3.

[146] Art. VIII, sect. 21, Agreement regarding the Headquarters of the United Nations.

[147] International Court of Justice, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, *Advisory Opinion*, *I.C.J. Reports 1988*, p. 12.

[148] *Ibid.*, para. 50.

[149] *Ibid.*, paras. 55 and 56.

[150] A/CN.4/764, chap. III, sect. B (2) (United Nations Office of Legal Affairs, footnote 2: "In one case involving a United Nations entity, an arbitration was initiated against a Member State in 1985 and an arbitration panel constituted through the Permanent Court of Arbitration, but the claim was subsequently withdrawn and the arbitration proceedings terminated accordingly.").

65. Modelled after the dispute settlement provision of the United Nations-United States Headquarters Agreement, numerous headquarters agreements of the specialized agencies provide for arbitration in cases of disputes between the organization and the host State. Examples include ILO,[151] the International Civil Aviation Organization (ICAO),[152] FAO,[153] UNESCO[154] and the United Nations Industrial Development Organization (UNIDO).[155] Furthermore, a number of agreements between international organizations and States providing for the creation of permanent offices contain similar arbitration clauses, such as the 2010 United Nations Development Programme (UNDP)-Malaysia Global Shared Service Centre Agreement.[156] The Permanent Court of Arbitration has also concluded numerous host country agreements, regularly stipulating "final and binding arbitration" under the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States.[157]

66. One of the few (known) cases where arbitration has been instituted on the basis of a dispute settlement clause contained in a headquarters agreement was the 2003 case concerning the *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*.[158] Like the United Nations-United States Headquarters Agreement, the UNESCO Headquarters Agreement provided that disputes concerning its interpretation or application had to be referred to arbitration.[159] This avenue was chosen in order to settle a dispute concerning the interpretation of article 22 (b) of the Headquarters Agreement,[160] specifically whether the term "officials" included retired officials and whether the terms "salaries and emoluments" included pension payments. After finding that the ordinary meaning of these terms would not lead to an interpretation granting such tax exemption, the tribunal confirmed this interpretation based on the intention of the parties and on subsequent practice. Although the award was binding upon the parties, it appears that France subsequently agreed to extend tax privileges to retired UNESCO staff.[161]

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[151] Art. 27, *Procès-verbal*, Agreement, Arrangement for the execution of the Agreement, and Declaration concerning the legal status of the International Labour Organization after the dissolution of the League of Nations.

[152] Art. VII, sect. 31, Agreement regarding the Headquarters of the International Civil Aviation Organization (Montreal, 14 April 1951), United Nations, *Treaty Series*, vol. 96, No. 1335, p. 155.

[153] Art. XVII, sect. 35, Agreement regarding the headquarters of the Food and Agriculture Organization of the United Nations (Washington, 31 October 1950), United Nations, *Treaty Series*, vol. 1409, No. 23602, p. 521.

[154] Art. 29, para. 1, Agreement (with annexes) regarding the Headquarters of UNESCO and the privileges and immunities of the Organization on French Territory (Paris, 2 July 1954), United Nations, *Treaty Series*, vol. 357, No. 5103, p. 3.

[155] Art. XIV, sect. 35, Agreement regarding the Headquarters of the United Nations Industrial Development Organization (New York, 13 April 1967), United Nations, *Treaty Series*, vol. 600, No. 8679, p. 93.

[156] Art. 14, Agreement between the Government of Malaysia and the United Nations Development Programme concerning the establishment of the UNDP Global Shared Service Centre (Kuala Lumpur, 24 October 2011), United Nations, *Treaty Series*, vol. 2794, No. 49154, p. 67.

[157] A/CN.4/764, chap. III, sect. B (9) (Permanent Court of Arbitration).

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

[159] Art. 29, para. 1, UNESCO Headquarters Agreement.

[160] Art. 22, UNESCO Headquarters Agreement ("Officials governed by the provisions of the Staff Regulations of the Organization … (b) shall be exempt from all direct taxation on salaries and emoluments paid to them by the Organization").

[161] See Geneviève Bastid Burdeau, "France", in August Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford, Oxford University Press, 2013), pp. 103–122, at p. 121.

67. The FAO Headquarters Agreement contains a similar dispute settlement clause including arbitration.[162] Its activation was contemplated in the course of the year-long dispute between FAO and its host country, Italy, over the jurisdictional immunity it enjoyed, or rather was denied, before the Italian courts.[163] In 1984, FAO considered arbitration as an alternative to requesting an advisory opinion from the International Court of Justice.[164] Following a negotiated settlement between the parties in 1986, neither avenue was pursued.[165]

68. Another case of arbitration between an international organization and a host State in the public domain, *European Molecular Biology Laboratory (EMBL) v. Germany*,[166] was based on a dispute settlement clause in a bilateral Headquarters Agreement, providing for arbitration in case of a dispute arising out of the interpretation or application of the Agreement.[167] In the late 1970s, differences of opinion arose as to the legal status and privileges of the Laboratory's Director-General and the tax exemptions of the Laboratory itself. The parties first tried to settle the dispute through negotiation. While this led to a signed "settlement resulting from the negotiations" in 1987,[168] it quickly became clear that not all issues had been resolved. Thus, the Laboratory's Director-General requested arbitration. On the merits, the arbitration tribunal decided that, since the EMBL Headquarters Agreement provided for fiscal exemptions only in respect of official activities of the Laboratory,[169] EMBL did not enjoy such fiscal privileges where meals and accommodation were supplied against payment[170] because the latter were not official activities.[171]

69. The Headquarters Agreement between the Kingdom of the Netherlands and the Permanent Court of Arbitration also provides for arbitration in case a dispute cannot be amicably settled.[172] After a series of unsuccessful consultations in 2021,[173] the Permanent Court of Arbitration instituted arbitration proceedings against the Kingdom of the Netherlands in respect of the allocation of office space in the Peace Palace.[174]

70. The status-of-forces agreements[175] the United Nations concludes with States for the purposes of stationing peacekeeping missions also routinely contain arbitration clauses for the settlement of disputes, as provided for in the model status-of-forces agreement between the United Nations and host countries.[176] Such arbitration clauses

[162] Art. XVII, sect. 35, FAO Headquarters Agreement.
[163] FAO, Constitutional and general legal matters, UNJYB (1984).
[164] *Ibid.*
[165] Reprinted in FAO, Constitutional and general legal matters, UNJYB (1986). See para. 36 above.
[166] *European Molecular Biology Laboratory (EMBL) v. Germany* (see footnote 98 above).
[167] Art. 37, Headquarters Agreement between the Government of the Federal Republic of Germany and the European Molecular Biology Laboratory (Bonn, 3 July 1975) *Bundesgesetblatt*, teil II, No. 41, p. 933.
[168] "Settlement resulting from the negotiations between the Federal Republic of Germany and the European Molecular Biology Laboratory (EMBL) in Heidelberg on June 1, 1987" (see footnote 97 above).
[169] Art. 7, para. 2, Headquarters Agreement ("When the Laboratory makes substantial purchases or uses substantial services, *strictly necessary for the exercise of its official activities*, in the price of which taxes or duties are included, appropriate measures shall be taken by the Federal Republic of Germany, whenever possible, to remit or reimburse the amount of such taxes or duties." [Emphasis added]).
[170] *European Molecular Biology Laboratory (EMBL) v. Germany* (see footnote 98 above), p. 68.
[171] *Ibid.*, pp. 43 et seq.
[172] Art. 16, para. 2, Agreement concerning the headquarters of the Permanent Court of Arbitration (The Hague, 30 March 1999), United Nations, *Treaty Series*, vol. 2304, No. 41068, p. 101.
[173] See para. 38 above.
[174] A/CN.4/764, chap. II, sect. B (2) (Kingdom of the Netherlands).
[175] See Terry D. Gill and others, *Leuven Manual on the International Law Applicable to Peace Operations* (Cambridge, Cambridge University Press, 2017), pp. 120–129.
[176] Report of the Secretary-General on model status-of-forces agreement for peacekeeping operations, document A/45/594, para. 53.

have been included in United Nations status-of-forces agreements since 1990.[177] Starting in 2005, they were slightly amended to make submission of a dispute to arbitration dependent on the impossibility of a negotiated settlement.[178] It should be noted, nevertheless, that disputes involving "a question of principle" concerning the Convention on the Privileges and Immunities of the United Nations are exempted from arbitration and subjected to the "binding" advisory opinions procedure under that Convention.[179] Identical provisions have also been included in status-of-mission agreements.[180] No arbitral practice on the basis of such arbitration clauses has been reported.

3. Arbitration clauses in other treaties

71. While the treaty practice of many international organizations, leaving aside headquarters agreements, is often rather limited, some international organizations, in particular regional economic integration organizations, have engaged in concluding a wide variety of economic and other treaties, mostly with third States.

72. In particular, the European Union has entered into many treaties with third countries which often provide for arbitration as a dispute settlement mechanism.[181] The Lomé and the Cotonou agreements with the African, Caribbean and Pacific Group of States have contained arbitration clauses for a long time.[182] In the multilateral Energy Charter Treaty, the European Union also agreed to arbitration.[183] In addition, in association agreements,[184] free trade agreements[185] and enlarged free trade

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

[178] *Ibid.* ("All other disputes between [the peacekeeping operation] and the Government concerning the interpretation or application of the present Agreement that are not settled by negotiation shall, unless otherwise agreed by the parties, be submitted to a tribunal of three arbitrators. The provisions relating to the establishment and procedures of the claims commission shall apply, *mutatis mutandis*, to the establishment and procedures of the tribunal. The decisions of the tribunal shall be final and binding on both parties.").

[179] *Ibid.* ("All differences between the United Nations and the Government arising out of the interpretation or application of the present arrangements which involve a question of principle concerning the Convention shall be dealt with in accordance with the procedure set out in Section 30 of the Convention.").

[180] *Ibid.*

[181] See Allan Rosas, "The European Union and international dispute settlement", in Boisson de Chazournes, Romano and Mackenzie, *International Organizations and International Dispute Settlement*, pp. 49–71, at p. 58 et seq.

[182] See, e.g., art. 352, Fourth ACP-EEC Convention (Lomé, 15 December 1989), *Official Journal of the European Union*, L 229, 17 August 1991; Art. 98, Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part (Cotonou, 23 June 2000), *Official Journal of the European Union*, L 317, 15 December 2000. See, however, the fact that the more recent Samoa Agreement no longer provides for arbitration.

[183] Art. 27, Energy Charter Treaty (Lisbon, 17 December 1994), United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95.

[184] See, e.g., art. 130, Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part (29 April 2008), *Official Journal of the European Union*, L 278, 18 October 2013, p. 16; art. 384, para. 1, Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (27 June 2014), *Official Journal of the European Union*, L 260, 30 August 2014 ("Where the Parties have failed to resolve the dispute by recourse to consultations as provided for in Article 382 of this Agreement, the Party that sought consultations may request the establishment of an arbitration panel in accordance with this Article.")

[185] Art. 14.4–14.7, Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (6 October 2010), *Official Journal of the European Union*, L 127, 14 May 2011.

agreements,[186] the European Union often includes arbitration clauses. In June 2020, the European Union invoked the dispute settlement clause in article 100 of the Association Agreement with Algeria and seized the Association Council with a dispute concerning protectionist trade measures introduced by Algeria in 2015.[187] Given that the Council was unable to resolve the dispute, the European Union initiated arbitration under the clause in March 2021.[188] Recently, an arbitration clause was inserted in the withdrawal agreement between the United Kingdom and the European Union[189] and in the European Union-United Kingdom Trade and Cooperation Agreement.[190]

73. Arbitration is also stipulated in some European Union treaties concluded with other organizations in the field of humanitarian relief and/or development aid. An example of the former is the agreement with the United Nations Relief and Works Agency for Palestine Refugees in the Near East, which provided for "arbitration in accordance with the Permanent Court of Arbitration's Optional Rules for Arbitration involving International Organisations and States".[191]

74. The 1996 Optional Rules for Arbitration Involving International Organizations and States also formed the basis for two parallel arbitrations before two three-member arbitral panels (composed of identical arbitrators) and both administered by the Permanent Court of Arbitration. Unfortunately, not much is known about the arbitrations between two international organizations conducted under the 1996 Rules. The two cases of *International Management Group v. European Union*[192] seem to have been brought to arbitration as a result of the General Conditions applicable to European Union Contribution Agreements.[193] It is possible that the cases are related to annulment proceedings before the General Court of the Court of Justice of the

[186] Arts. 29.1 et seq., Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (30 October 2016), *Official Journal of the European Union*, L 11, 14 January 2017.

[187] European Commission, Direction générale du Commerce, note verbale of 24 June 2020, Ref. Ares(2020)3283036, available at https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/c134dc2b-9679-4eb7-a03a-24aff9ffc354/detail (in French); Vicente Alves, "EU-Algeria trade relations: is EU-led liberalisation reinforcing economic stagnation?", European Student Think Tank, 7 March 2022, available at https://esthinktank.com/2022/03/07/in-context-eu-algeria-bilateral-relations-an-overview/ (accessed on 13 February 2024).

[188] European Commission, note verbale of 19 March 2021, Ref. Ares(2021)1981830, available at https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/8a59ef20-6cab-4a9c-a854-46e861f31318/details (in French).

[189] Art. 170, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *Official Journal of the European Union*, C 384, 12 November 2019.

[190] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (30 December 2020), *Official Journal of the European Union*, L 149, 30 April 2021, p. 10.

[191] Art. 9, Convention between the European Community and the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) concerning aid to refugees in the countries of the Near East (7 October 1999), *Official Journal of the European Union*, L 261, 7 October 1999.

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

[193] Art. 26.3, General Conditions applicable to European Union Contribution Agreements with International Organization for Humanitarian Aid Actions (2013), available at https://docs.pca-cpa.org/2019/07/General-Conditions-Applicable-to-EU-Contribution-Agreements-with-IOs-for-Humanitarian-Aid-Actions-2013.pdf ("Subject to the International Organisation's privileges and immunities … any dispute between the Parties arising from the interpretation or application of the Contribution Agreement that cannot be settled amicably shall be brought before the Permanent Court of Arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organisations and States in force at the date of the agreement.").

European Union concluded in early 2017 by the same organization against the European Commission.[194] This annulment case primarily concerned the replacement of the International Management Group by the German Agency for International Cooperation (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)) as a recipient of European Union development cooperation monies for Myanmar. The termination of the European Union's cooperation with the International Management Group was apparently triggered by an investigation opened by the European Anti-fraud Office, relating, among other issues, to the "legal nature of the applicant as an international organisation".[195] The annulment request was rejected as unfounded because the change of the development organizations was not considered to be unlawful.

75. Arbitration has also been provided for in other agreements between international organizations[196] and in model clauses used in agreements both with other international organizations and States.[197]

76. Some loan agreements between international financial institutions and States under international law provide for arbitration as a form of dispute settlement.[198] There does not appear to be any relevant practice that is publicly available.

77. The United Nations Convention on the Law of the Sea[199] provides for arbitration as a fallback if the contracting parties have not declared that they accept the International Tribunal for the Law of the Sea or one of the other prescribed means of settlement of disputes.[200] In such cases, arbitration may be a form of dispute settlement between members, which can include regional economic integration organizations, as is currently the case for the European Union. An example of such dispute settlement is the case of *Atlanto-Scandian Herring Arbitration*[201] between Denmark and the European Union, which was administered by the Permanent Court of Arbitration and concluded without an award. It was instituted by Denmark in

[194] *International Management Group v. European Commission*, Case T-29/15, 2 February 2017, ECLI:EU:T:2017:56. Available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=77309C90EE1CC226EF31691D68CEA4B0?text=&docid=187383&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3609950.

[195] *Ibid.*, see para. 6.

[196] See art. 13.4 of an agreement between WHO and the European Commission, reported by World Health Organization (A/CN.4/764, chap. III, sect. B (9): "b) in the absence of an amicable settlement pursuant to Article 13.1 above, any dispute, controversy or claim arising out of or in relation to this Agreement, or the existence, interpretation, application, breach, termination, or invalidity thereof, shall be settled by final and binding arbitration in accordance with the 2012 Permanent Court of Arbitration Rules for Arbitration").

[197] A/CN.4/764, chap. III, sect. B (9) (World Trade Organization: "Any dispute, controversy or claim, which was not solved amicably within sixty (60) days, shall be settled by arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in force as of the date of this Agreement.")

[198] See, e.g., art. X, sect. 10.04 (Settlement of disputes), *General Conditions applicable to the African Development Bank Loan and Guarantee Agreements (Sovereign Entities)* (African Development Bank, 2009), available at https://docs.pca-cpa.org/2016/02/African-Development-Bank-Fund-General-Conditions-applicable-to-Loan-Guarantee-and-Grant-Agreements-2009-Art-10.04.pdf; art. VII, sect. 7.04 (Arbitration), Asian Infrastructure Investment Bank, *General Conditions for Sovereign-backed Loans* (2016), available at https://docs.pca-cpa.org/2016/02/Asian-Infrastructure-Investment-Bank-General-Conditions-for-Sovereign-backed-Loans.pdf. See also the standard reference to arbitration in accordance with the International Islamic Centre for Reconciliation and Arbitration rules and procedures in the agreements of the Islamic Development Bank (A/CN.4/764, chap. III, sect. A, Islamic Development Bank).

[199] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. No. 31363, p. 3.

[200] *Ibid.*, annex VII.

[201] *Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)*, Permanent Court of Arbitration, Case No. 2013-30, Termination Order, 23 September 2014. See https://pcacases.com/web/view/25.

respect of the Faroe Islands pursuant to annex VII of the United Nations Convention on the Law of the Sea and concerned the interpretation and application of article 63 (1) of the Convention in relation to the allocation of sustainable catch quotas for the shared stock of Atlanto-Scandian herring.[202] In November 2013, Denmark initiated parallel dispute settlement proceedings under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.[203] However, in June 2014, the parties reached an understanding on the issue[204] and soon thereafter, jointly submitted requests to terminate both the arbitral and the WTO dispute settlement proceedings.[205]

4. *Ad hoc* and other arbitration practice involving international organizations

78. Already in the interwar period, *ad hoc* arbitration had been resorted to by States and international organizations, or rather international entities. In particular, some *ad hoc* arbitrations took place between States and various commissions set up pursuant to the peace treaties drawn up at the 1919–1920 Paris Peace Conference, after the First World War.

79. One such dispute arose between Germany and the Reparations Commission created pursuant to the Peace Treaty of Versailles.[206] It concerned the interpretation of article 260 of the Treaty of Versailles, which empowered the Reparations Commission to direct Germany to acquire "any rights and interests of German nationals in any public utility undertaking or in any concession operating in Russia, China, Turkey, Austria, Hungary and Bulgaria" or in any territory to be ceded by Germany, and to make due indemnification.[207] Germany and the Reparations Commission had different views about whether that article applied to ceded territories; which entities came within the scope of a "public utility company"; and the meaning and scope of the term "concession". In order to settle this dispute, they entered into a *compromis*, the Protocol of 30 December 1922 signed by the Government of Germany and the Reparations Commission. The sole arbitrator then decided on these questions, in a decision similar to an advisory opinion of the International Court of Justice.[208]

80. Another example is the case brought by Germany against the Governing Commission of the Saar Territory concerning financial obligations for pension payments.[209] While the Governing Commission of the Saar Territory was not an organ of the League of Nations or an international organization per se, as a five-member institution established pursuant to the Treaty of Versailles to administer a Western

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[202] Rosa María Fernández Egea, "Climate change and the sustainability of fishery resources in the North Sea: the trade dispute between the European Union and the Faroe Islands", *Journal of the Spanish Institute for Strategic Studies*, No. 4 (2014), pp. 303–322, at pp. 316–318.

[203] World Trade Organization, *European Union – Measures On Atlanto-Scandian Herring,* Request for the establishment of a panel by Denmark in respect of the Faroe Islands, document WT/DS469/2 (10 January 2014); see also Jacques Hartmann and Michael Waibel, "The 'mackerel war' goes to the WTO", EJIL: Talk!, 13 November 2013, available at https://www.ejiltalk.org/the-mackerel-war-goes-to-the-wto/ (accessed on 14 February 2024).

[204] European Commission, "Herring dispute between European Union and Faroe Islands nears end", press release, 11 June 2014.

[205] World Trade Organization, *European Union – Measures On Atlanto-Scandian Herring*, Joint communication from Denmark in respect of the Faroe Islands and the European Union, document WT/DS469/3 G/L/1058/Add.1 (25 August 2014).

[206] Art. 233 and annex II, Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919), *British and Foreign State Papers, 1919*, vol. CXII, London, HM Stationery Office, 1922, p. 1.

[207] *Ibid.*, art. 260.

[208] *Affaire des réparations allemandes selon l'article 260 du Traité de Versailles (Allemagne contre Commission des Réparations)*, UNRIAA, vol. I, pp. 429–528.

[209] *Pensions of officials of the Saar Territory (Germany v. Governing Commission of the Saar Territory)*, UNRIAA, vol. III, pp. 1553–1568.

territory of Germany in the years following the First World War, it fulfilled functions that were similar to those of an international organization. It was evidently considered able to enter into an arbitration agreement for settling a dispute concerning the interpretation of a treaty it had entered into with Germany.[210] The sole arbitrator, relying, *inter alia*, on the parties' agreement that German law was applicable, decided that the contested pension costs had to be borne by the Governing Commission.

81. Arbitration was also resorted to in a dispute concerning fiscal privileges between the United Kingdom, before it had joined the European Communities, including the European Atomic Energy Community (EURATOM), and that latter organization. The arbitration was conducted on the basis of an *ad hoc* agreement of the disputing parties to submit to arbitration.[211] In *Commission of Euratom v. UK Atomic Energy Authority*,[212] a sole arbitrator decided that EURATOM officials working in the United Kingdom had to pay taxes there, but could claim reimbursement from EURATOM under their conditions of service. The arbitrator further held that EURATOM was in turn entitled to reimbursement from the authorities of the United Kingdom.

82. Although no corresponding practice appears to exist, arbitration was also envisaged for compensation claims of United Nations agents for injuries incurred in the service of the United Nations on the basis of the Organization's right to functional protection for its agents. In connection with the *Reparation* case of the International Court of Justice,[213] the General Assembly presented a plan to pursue such claims against States primarily through negotiations and, if they proved unsuccessful, by resorting to arbitration.[214] The arbitration envisaged would be *ad hoc*.[215]

83. The Permanent Court of Arbitration also administers arbitration between international organizations and States conducted pursuant to the UNCITRAL Arbitration Rules or other arbitration rules. A practical example is the arbitration between the United Nations Office for Project Services (UNOPS) in Peru and a

[210] Art. 14, Agreement of Baden-Baden concerning German officials, 21 December 21 1925, cited in UNRIAA, vol. III, pp. 1553–1568, at pp. 1555 et seq.

[211] Exchanges of Notes Constituting an Agreement for the Settlement of a Dispute Concerning the Taxation Liability of the European Atomic Energy Community (EURATOM) Employees Working in the United Kingdom on the Dragon Project (Brussels, 11 July 1966), United Nations, *Treaty Series*, vol. 639, No. 9147, p. 99.

[212] *Taxation liability of Euratom employees between the Commission of the European Atomic Energy Community (Euratom) and the United Kingdom Atomic Energy Authority*, 25 February 1967, UNRIAA, vol. XVIII, p. 503.

[213] International Court of Justice, *Reparation for injuries suffered in the service of the United Nations*, *Advisory Opinion, I.C.J. Reports 1949*, p. 174.

[214] Report of the Secretary-General on reparation for injuries incurred in the service of the United Nations, document A/955, para. 21, in *Official Records of the Fourth Session of the General Assembly, Sixth Committee, Legal questions, annex to the summary records of meetings, 20 September–29 November 1949* (agenda item 51). See also "Comments on the question of the responsibility of States with regard to the reparation for injuries incurred by agents of international organizations, in particular the United Nations", UNJYB (1974), pp. 142–143.

[215] See "Comments on the question of the responsibility of States", UNJYB (1974), p. 143 ("The Secretary General also suggested that the United Nations should proceed to present claims for the deaths or injury of its agents in cases in which the responsibility of a State might appear to be involved … In the event of differences of opinion between the Secretary-General and the State concerned which could not be settled by negotiation, it would be proposed that the differences be submitted to arbitration. The arbitral tribunal would be composed of one arbitrator appointed by the Secretary-General, one appointed by the State involved, and a third to be appointed by mutual agreement of the two arbitrators, or, failing such agreement, by the President of the International Court of Justice.").

Peruvian municipality.[216] This was, according to the information on the website of the Permanent Court of Arbitration, a "contract-based" dispute that was brought before a three-member arbitral tribunal pursuant to the UNCITRAL Arbitration Rules, as originally adopted in 1976. Few details about the dispute appear to be publicly available. Apparently, the dispute concerned compliance with an agreement on development projects, which was signed with UNDP in 2004 and subsequently extended several times. In October 2007, in a memorandum of understanding, the parties entrusted UNOPS with the execution of various tasks which were financed by the municipality. Subsequently, disagreements arose between the city and UNOPS about the latter's compliance with its obligations regarding certain remodelling works.[217] In 2014, the parties commenced arbitration proceedings, but later took up settlement negotiations and empowered a municipal official to conduct extrajudicial conciliation.[218] The limited information available indicates that this case confirms that international organizations may also opt to subject their legal relationship with substate entities to private contract law.[219]

84. This overview of existing practice demonstrates that arbitration is a suitable form of independent third-party adjudication that has actually been used for settling international disputes to which international organizations are parties.

E. Judicial settlement

85. Given that the jurisdictional powers of international courts and tribunals are often limited, judicial dispute settlement is rarely available for settling disputes involving international organizations as parties. Most importantly, litigation before the International Court of Justice is not available to the United Nations, its specialized agencies or other international organizations since only States can be parties to contentious proceedings before it. However, in some regional organizations, mostly in regional economic integration organizations, judicial organs have been established with jurisdiction extending over claims by and against such organizations and/or their organs whereby disputes between the organization and its member States may be adjudicated.

86. This section of the report provides an overview of the role international courts and tribunals have played in the settlement of international disputes to which international organizations are parties. It starts with the role of the International Court of Justice in regard to the settlement of such disputes, then provides a brief overview of the practice and potential of other international courts and tribunals, in particular, the International Tribunal for the Law of the Sea and the dispute settlement system of WTO, before focusing on the role of human rights courts and judicial organs of regional economic integration organizations.

87. Only a few international organizations possess judicial organs with jurisdiction over disputes to which organizations are parties. The primary examples are regional economic integration organizations, such as the European Union and a number of African, Caribbean, Latin American and other organizations. Although often very specifically structured, they permit organizations to institute legal proceedings against their member States and vice-versa. The jurisdiction of such courts usually focuses on disputes concerning compliance with the constituent instruments of their respective organizations.

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

[217] Municipalidad de La Punta, Acuerdo de Concejo N° 002-020-2017 (12 October 2017), available at https://www.munilapunta.gob.pe/portalTransparencia/documentos/file1048.pdf (in Spanish).

[218] *Ibid.*

[219] See also footnote 57 above.

1. Role of the International Court of Justice

88. The paradigmatic example of an international court open only to States is the International Court of Justice, one of the five main organs of the United Nations. Neither the Charter of the United Nations nor the Statute of the International Court of Justice allow international organizations to be parties in contentious proceedings before it. Since they enable the General Assembly and the Security Council, as well as a number of authorized specialized agencies, to request advisory opinions from the Court, this procedure has been adapted to also serve in an indirect way as a means of judicial settlement of disputes to which international organizations are parties. A number of treaties provide that, in case of disputes between international organizations and States, the organization shall request from the Court an advisory opinion that the parties agree to accept as binding. These dispute settlement clauses have generated limited practice. Even beyond such specific provisions, organizations have had recourse to advisory opinions in settling disputes with States.

89. Although this practice demonstrates a creative way of overcoming the jurisdictional hurdle that prevents international organizations from directly accessing the International Court of Justice, it cannot compensate for the lack of jurisdiction in contentious proceedings. The exclusion of international organizations from the contentious jurisdiction of the Court has been criticized for a long time, and at various stages demands have been made to broaden the Court's jurisdiction to include international organizations.

i. No *ratione personae* jurisdiction before the International Court of Justice

90. Article 34 (1) of the Statute of the International Court of Justice provides that "[o]nly states may be parties in cases before the Court". The limited forms of cooperation between the Court and the "public international organizations" provided for in paragraphs 2 and 3 of Article 34, permitting them to present information to the Court, do not substitute for their inability to appear as parties in contentious cases.[220] This exclusion of international organizations as potential litigants is based on the decision made at the United Nations Conference on International Organization (San Francisco Conference) to adhere to the model of Article 34 of the Statute of the Permanent Court of International Justice.[221] It largely reflects the early twentieth-century approach of regarding States as the sole subjects of international law. This has been subject to criticism, calling for amendments in order to allow international organizations to have standing before the Court.[222]

ii. Indirect challenges to acts of international organizations in contentious inter-State proceedings before the International Court of Justice

91. While the Charter-conformity of acts of the United Nations has mostly been addressed in advisory proceedings,[223] such issues have also been raised in the context of contentious proceedings between States. The lack of standing of international organizations (both as applicant and respondent) before the International Court of

[220] The European Union applied in 2022 to the International Court of Justice for leave to submit its views in the *Ukraine v. Russian Federation* case. See International Court of Justice, "*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*: Information furnished by the European Union under Article 34, paragraph 2, of the Statute of the Court and Article 69, paragraph 2, of the Rules of Court", press release No. 2022/29, 18 August 2022; Alexander Melzer, "The ICJ's only friend in Ukraine v. Russia: on the EU's Memorial in the case of Ukraine v. Russia before the ICJ", Völkerrechtsblog, 7 October 2022, available at https://voelkerrechtsblog.org/the-icjs-only-friend-in-ukraine-v-russia/.

[221] Art. 34: "Only States or Members of the League of Nations can be parties in cases before the Court."

[222] See paras. 214 et seq. below.

[223] See paras. 105 et seq. below.

Justice has led States to test the availability of the Court as a judicial dispute settlement forum to indirectly challenge acts of the organization in contentious proceedings.

92. The most prominent case involving an indirect judicial review of Security Council resolutions is the so-called *Lockerbie* case.[224] Although brought by Libya against the United Kingdom and the United States on the jurisdictional basis of the Montreal Convention,[225] the dispute was not merely one between the States involved. It also concerned the exercise of the powers of the Security Council under Chapter VII of the Charter of the United Nations.[226] In the aftermath of the terrorist bombing of a United States civil passenger aircraft over the territory of the United Kingdom, the Security Council imposed a broad range of binding measures on Libya with a view to ensuring the extradition of the two Libyan nationals suspected of having planted the bomb on the aircraft.[227]

93. Libya challenged the legality of Security Council resolution 748 (1992),[228] which characterized the situation as constituting a "threat to international peace and security" pursuant to Article 39 of the Charter of the United Nations.[229] In its order

[224] International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom and United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3, at p. 14; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April1992, I.C.J. Reports 1992*, p. 114; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9, at p. 15; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J Reports 1998*, p. 115. See also Dapo Akande, "The International Court of Justice and the Security Council: is there room for judicial control of decisions of the political organs of the United Nations?", *International and Comparative Law Quarterly,* vol. 46 (1997), pp. 309–343; Carlos J. Argüello-Gomez, "Case analysis: some procedural and substantive aspects of the *Libya/Chad* case", *Leiden Journal of International Law,* vol. 9 *(*1996), pp. 167–183; Fiona Beveridge and Malcolm D. Evans, "The Lockerbie cases", *International and Comparative Law Quarterly*, vol. 48 (1999), pp. 658–663; Bernhard Graefrath, "Leave to the Court what belongs to the Court: the Libyan case", *European Journal of International Law,* vol. 4 (1993), pp. 184–205; John P. Grant, "Lockerbie trial", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. VI (Oxford, Oxford University Press, 2012), pp. 917–926; Vera Gowlland-Debbas, "The relationship between the International Court of Justice and the Security Council in the light of the *Lockerbie* case", *American Journal of International Law*, vol. 88 (1994), pp. 643–677; Gerald P. McGinley, "The I.C.J.'s decision in the Lockerbie cases", *Georgia Journal of International and Comparative Law,* vol. 22 (1992), pp. 577–607; Robert Shiels, "The end of the Lockerbie case", *Journal of Criminal Law*, vol. 74 (2010), pp. 27–30.

[225] Art. 14, Convention for the suppression of unlawful acts against the safety of civil aviation (Montreal, 23 September 1971), United Nations, *Treaty Series*, vol. 974, No. 14118, p. 177.

[226] The Court rejected the contention of the United States that the dispute was in fact exclusively one between Libya and the Security Council. See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections* (see footnote 224 above), p. 128, para. 36 ("The Respondent has also argued that, because of the adoption of those [Security Council] resolutions [748 (1992) and 883 (1993)], the only dispute which existed from that point on was between Libya and the Security Council").

[227] Security Council resolution 731 of 21 January (1992); Security Council resolution 748 (1992) of 31 March 1992; Security Council resolution 883 (1993) of 11 November 1993.

[228] Security Council resolution 748 of 31 March 1992.

[229] International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures* (see footnote 224 above), p. 126, para. 39 ("Libya recalls in this connection that it regards the decision of the Security Council as contrary to international law, and considers that the Council has employed its power to characterize the situation for purposes of Chapter VII simply as a pretext to avoid applying the Montreal Convention").

on preliminary measures, the Court considered that it could not "make definitive findings either of fact or of law on the issues relating to the merits"[230] and merely remarked that the contested Security Council resolution deserved *prima facie* adherence,[231] while stressing that it was "not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992)",[232] which may imply that subsequent scrutiny of its legality was not excluded.

94. As is well known, these issues were never resolved by the International Court of Justice, since the parties agreed to discontinue with prejudice the proceedings in 2003.[233] As part of a settlement between the parties, Libya agreed to pay compensation for the bombing of the aircraft over Lockerbie and agreed that a criminal trial should take place against the two individuals suspected of having planted the bomb in the aircraft.[234] In fact, the trial was held before a special Scottish Court sitting in the Netherlands between May 2000 and January 2001.[235] Libya subsequently compensated the victims and their dependents and accepted responsibility "for the actions of its officials".[236] The Security Council lifted its sanctions.[237]

95. Another International Court of Justice litigation that may have related to an indirect challenge against the acts of an international organization was the series of cases brought by the Federal Republic of Yugoslavia (Serbia and Montenegro) against a number of North Atlantic Treaty Organization (NATO) member States for the alliance's airstrikes directed against it in 1999. Since it was clear that NATO could not be sued before the International Court of Justice, proceedings against several of its member States were instituted in the *Legality of Use of Force* cases.[238] The Court

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[230] *Ibid.*, para. 41.

[231] *Ibid.*, para. 42 ("Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention").

[232] *Ibid.,* para. 43.

[233] International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Order of 10 September 2003, I.C.J. Reports, 2003*, p. 152.

[234] United Kingdom, The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 Statutory Instrument No. 2251; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Netherlands concerning a Scottish trial in the Netherlands (The Hague, 18 September 1998), United Nations, *Treaty Series*, vol. 2062, No. 35699, p. 81; see also Grant, "Lockerbie trial", para. 17.

[235] Scottish High Court of Justiciary, *Her Majesty's Advocate v. Al Megrahi* (31 January 2001), 2001, 40 ILM 582.

[236] See Grant, "Lockerbie trial", para. 36.

[237] Security Council resolution 1506 (2003) of 12 September 2003.

[238] *Legality of Use of Force (Yugoslavia v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom, United States of America) (Application Instituting Proceedings)* 1999 General List Nos. 105-114, filed with I.C.J. Registry (29 April 1999). See also Chester Brown, "Access to international justice in the legality of use of force cases", *Cambridge Law Journal*, vol. 64 (2005), pp. 267–271; Christine Gray, "Recent cases: legality of use of force (*Yugoslavia v. Belgium*) (*Yugoslavia v. Canada*) (*Yugoslavia v. France*) (*Yugoslavia v. Germany*) (*Yugoslavia v. Italy*) (*Yugoslavia v. Netherlands*) (*Yugoslavia v. Portugal*) (*Yugoslavia v. Spain*) (*Yugoslavia v. United Kingdom*) (*Yugoslavia v. United States of America*): provisional measures", *International and Comparative Law Quarterly*, vol. 49 (2000), pp. 730–736; Jeffrey S. Morton, "The legality of NATO's intervention in Yugoslavia in 1999: implications for the progressive development of international law", *ILSA Journal of International and Comparative Law*, vol. 9 (2002), pp. 75–101; Tobias Thienel, Andreas Zimmermann, "Yugoslavia, cases and proceedings before the ICJ", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. X (Oxford, Oxford University Press, 2012), pp. 1054–1064, at pp. 1057–1058, paras. 14 and 15.

dismissed all of them on jurisdictional grounds. With regard to Spain and the United States, it held that it manifestly lacked jurisdiction.[239] Concerning the other respondents, it found that Serbia and Montenegro, having been admitted to the United Nations on 1 November 2000, had not been a State Member of the United Nations at the time of the filing of the requests in 1999 and thus did not have access to the Court.[240] Nevertheless, one has to acknowledge that the claims were indeed directed against individual States and that it was not argued that NATO might have imposed an obligation on its member States to take military action.[241]

96. To date, the most important assertion of an implied power to review the legality of resolutions of United Nations organs in the course of contentious proceedings stems from the separate opinion voiced in the *Genocide* case between Bosnia and Serbia[242] by judge *ad hoc* Elihu Lauterpacht.[243] In its request for provisional measures, the applicant had sought, among other elements, a declaration from the Court that the Security Council resolution imposing an arms embargo on the entire territory of the former Yugoslavia[244] should not be construed so as to deprive it of its right to self-defence.[245] The Court merely affirmed that the respondent should take all

[239] International Court of Justice, *Legality of Use of Force* (*Yugoslavia v. Spain)*, *Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 761, para. 35; *Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 916, para. 29.

[240] See, for example, International Court of Justice, *Legality of Use of Force* (*Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 124, paras. 45 and 51; *Legality of Use of Force (Yugoslavia v. Germany), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 422, paras. 19 and 38.

[241] Peter H. F. Bekker, "Legality of use of force (Yugoslavia v. Belgium) (Yugoslavia v. Canada) (Yugoslavia v. France) (Yugoslavia v. Germany) (Yugoslavia v. Italy) (Yugoslavia v. The Netherlands) (Yugoslavia v. Portugal) (Yugoslavia v. Spain) (Yugoslavia v. United Kingdom) (Yugoslavia v. United States)", *American Journal of International Law*, vol. 93 (1999), pp. 928–933, at p. 928.

[242] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, *Order of 13 September 1993, I.C.J. Reports 1993*, p. 325. See also Peter H. F. Bekker, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide", *American Journal of International Law*, vol. 92 (1998), pp. 508-517; Laurence Boisson de Chazournes, "Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide", *Annuaire français de droit international*, vol. 39 (1993), pp. 514-539; Serena Forlati, "The legal obligation to prevent genocide: Bosnia v. Serbia and beyond", *Polish Yearbook of International Law*, vol. 31 (2011), pp. 189-205, at p. 197 et seq; Karin Oellers-Frahm, "Anmerkungen zur einstweiligen Anordnung des Internationalen Gerichtshofs im Fall *Bosnien-Herzegovina gegen Jugoslawien (Serbien und Montenegro*) vom 8. April 1993", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/ Heidelberg Journal of International Law*, vol. 53 (1993), pp. 638-656; William A. Schabas, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro)", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. I (Oxford, Oxford University Press, 2012), pp. 468-475; Alison Wiebalck, "Genocide in Bosnia and Herzegovina? Exploring the parameters of interim measures of protection at the ICJ", *The Comparative and International Law Journal of Southern Africa*, vol. 28 (1995), pp. 83-106; Stephan Wittich, "Permissible derogation from mandatory rules? The problem of party status in the *Genocide* case", *European Journal of International Law*, vol. 18 (2007), pp. 591-618.

[243] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 242 above), at p. 407 (separate opinion of Judge Lauterpacht).

[244] Security Council resolution 713 (1991) of 25 September 1991, para. 6 (deciding "that all States shall, for the purpose of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the [Security] Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia").

[245] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 242 above), at p. 328 (requesting "(*o*) that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United Nations Charter and in accordance with the customary doctrine of *ultra vires*").

measures within its power to prevent the commission of the crime of genocide and that the parties should avoid the aggravation of the dispute.[246] Judge Lauterpacht, however, explicitly addressed the question of "whether any challenge to the Security Council resolution is possible in the present context".[247] While agreeing with the Court's provisional measures, he suggested that the unequal effect of the arms embargo on the victims of aggression raised issues of its legality, which the Security Council should (re)consider.[248] Judge Lauterpacht thought that there must be a limited power of judicial review of Security Council acts by the International Court of Justice and that, even though the Council's resolutions generally enjoy precedence over other obligations under international law, that would not be the case in regard to *jus cogens* norms. He considered that "the Security Council resolution [imposing the arms embargo] can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*".[249] When discussing the legal consequences of such illegality, he suggested that instead of considering automatic invalidity,[250] the Court might refrain from "annulling" the resolution, but rather draw the issue to the attention of the Security Council for further action.[251]

iii. "Binding" advisory opinions of the International Court of Justice

97. While the International Court of Justice cannot serve as an adjudicatory forum for the settlement of disputes involving international organizations because of their lack of standing, it can perform that role in an indirect way. International organizations have the possibility to request advisory opinions, which the parties to a dispute may accept as "binding" in advance. Such clauses are inserted into treaties that envisage potential disputes involving international organizations. They are referred to as "compulsory", "decisive" or "binding" advisory opinion clauses.[252]

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[246] *Ibid.*, p. 349, para. 61.

[247] *Ibid.*, p. 439, para. 97 (separate opinion of Judge Lauterpacht).

[248] *Ibid.*, p. 447, para. 123 ("B. The Court should further have declared that, as between the Applicant and the Respondent, the imbalance in the supply of weaponry as a result of the embargo established by Security Council resolution 713 (1991) and the grave disadvantage under which the Applicant has thus been placed has a sufficient causal connection with the continuance of genocide in Bosnia-Herzegovina to raise the question of its compatibility with *jus cogens* and thus place in doubt its continuing validity in a manner calling for further consideration by the Security Council.")

[249] *Ibid.*, p. 441, para. 102.

[250] *Ibid.*, para. 103 ("One possibility is that, in strict logic, when the operation of paragraph 6 of Security Council resolution 713 (1991) began to make Members of the United Nations accessories to genocide, it ceased to be valid and binding in its operation against Bosnia-Herzegovina; and that Members of the United Nations then became free to disregard it.")

[251] *Ibid.*, para. 104 ("it would seem sufficient that the relevance here of *jus cogens* should be drawn to the attention of the Security Council, as it will be by the required communication to it of the Court's Order, so that the Security Council may give due weight to it in future reconsideration of the embargo").

[252] See Roberto Ago, "'Binding' advisory opinions of the International Court of Justice", *American Journal of International Law*, vol. 85 (1991), pp. 439-451; Guillaume Bacot, "Réflexions sur les clauses qui rendent obligatoires les avis consultatifs de la C.P.J.I et de la C.I.J.", *Revue générale de droit international public*, vol. 84 (1980), pp. 1027–1067; Paolo Benvenuti, *L'accertamento del dritto mediante i pareri consultivi della Corte Internazionale di Giustizia* (Milan, Giuffrè Francis Lefebvre, 1985); Charles N. Brower and Pieter H.F. Bekker, "Understanding 'binding' advisory opinions of the International Court of Justice", in Nisuke Ando and others (eds.), *Liber Amicorum Judge Shigeru Oda, vol. 1* (The Hague, Kluwer Law International, 2002), pp. 351-368; Christian Dominicé, "Request of advisory opinions in contentious cases?", in Boisson de Chazournes, Romano and Mackenzie, *International Organizations and International Dispute Settlement*, pp. 91–103; Hugh Thirlway, "Advisory opinions", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. I, pp. 97-106, at p. 98, para. 4.

98. The *locus classicus* of such a form of dispute settlement is found in the 1946 Convention on the Privileges and Immunities of the United Nations (General Convention). In its section 30, it provides that:

> "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."[253]

99. Corresponding provisions can be found in the 1947 Convention on the Privileges and Immunities of Specialized Agencies[254] and the Agreement on the Privileges and Immunities of the International Atomic Energy Agency.[255] In addition, some headquarters agreements provide for "binding" advisory opinions as method for the settlement of disputes between an organization and its host State.[256]

100. The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[257] also provides for "binding" dispute settlement through recourse to the advisory procedure of the International Court of Justice. In parallel to the limitation of dispute settlement to issues concerning *jus cogens*, as found in the 1969 Vienna Convention on the Law of Treaties,[258] the 1986 Convention provides that disputes concerning *jus cogens* or *jus cogens superveniens*[259] shall be brought before the International Court of Justice by requesting an advisory opinion[260] which "shall be accepted as decisive by all the parties to the dispute concerned".[261] If the International Court of Justice does not grant the request, the 1986 Convention envisages the submission of the dispute to arbitration.[262] In regard to other disputes concerning the invalidity, termination or suspension of treaties, it provides for a conciliation procedure detailed in an annex to the Convention.

101. Most of the above-mentioned clauses provide for the settlement of disputes involving an international organization that has been granted the power to request an advisory opinion from the International Court of Justice. In some instances, treaty drafters have attempted to broaden the reach of such clauses to also encompass international organizations that may not approach the Court directly. An example is

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[253] Art. VIII, sect. 30, Convention on the Privileges and Immunities of the United Nations.

[254] Art. IX, sect. 32, Convention on the Privileges and Immunities of the Specialized Agencies.

[255] Art. X, sect. 34, Agreement on the Privileges and Immunities of the International Atomic Energy Agency (Vienna, 1 July 1959), United Nations, *Treaty Series*, vol. 374, No. 5334, p. 147.

[256] See, e.g., art. XI, sect. 21, Agreement regulating conditions for the operation, in Chile, of the Headquarters of the United Nations Economic Commission for Latin America (Santiago, 16 February 1953), United Nations, *Treaty Series*, vol. 314, No. 4541, p. 49; art. XIII, sect. 26, Agreement relating to the Headquarters of the Economic Commission for Asia and the Far East in Thailand (Geneva, 26 May 1954), United Nations, *Treaty Series*, vol. 260, No. 3703, p. 35.

[257] Art. 66, para. 2 (b), (d), (e) and (f), Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986, not yet in force), *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Documents of the Conference)*, vol. II, document A/CONF.129/15.

[258] Arts. 53 and 64, Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[259] Art. 66, para. 2, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[260] *Ibid.*, art. 66, para. 2 (b).

[261] *Ibid.*, art. 66, para. 2 (e).

[262] *Ibid.*, art. 66, para. 2 (f).

found in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which concerns disputes involving a regional economic integration organization, in practice the European Union, as a treaty party of that Convention. If such a dispute cannot be settled, it permits the regional economic integration organization to ask the Economic and Social Council to request an advisory opinion, "which opinion shall be regarded as decisive".[263] This avenue was modelled upon the provisions in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations permitting organizations other than the United Nations and authorized specialized agencies to ask a State Member of the United Nations to request the General Assembly or the Security Council to make a request for an advisory opinion.[264]

102. The recourse to "binding" advisory opinions has generated only limited practice. In fact, only one opinion has been issued on this basis. The United Nations has resorted to the mechanism provided for under the General Convention in the so-called *Cumaraswamy* case,[265] involving a United Nations expert on mission and his status under the General Convention. The so-called *Mazilu* case,[266] also concerning a United Nations expert on mission, was brought as an "ordinary" request for an advisory opinion under Article 65 of the Statute of the International Court of Justice for jurisdictional reasons discussed below.[267]

103. The 1999 advisory opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*[268] arose from a dispute between the United Nations and Malaysia about whether a Special Rapporteur was entitled to jurisdictional immunity under the General Convention before the courts of Malaysia where lawsuits had been brought against him. Mr. Cumaraswamy, a Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, had been sued for defamation for statements made in an interview that cast doubt on the independence of the Malaysian judicial system. Since the Malaysian courts did not dismiss the actions, the United Nations triggered the procedure under section 30 of the General Convention[269] and submitted a request for an advisory opinion on whether Mr. Cumaraswamy was entitled to immunity from jurisdiction under section 22 of the General Convention.[270] The Court found that when "speaking the words quoted" in the published version of his interview, Mr. Cumaraswamy "was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 *(b)*, of the General Convention is applicable to

[263] Art. 32, para. 3, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988), United Nations, *Treaty Series*, vol. 1582, No. 27627, p. 95.

[264] Art. 66, para. 2 (d), Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[265] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 83 above).

[266] International Court of Justice, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177.

[267] See footnote 320 below.

[268] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 83 above). See also Peter H.F. Bekker, "Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights. Advisory opinion", *American Journal of International Law*, vol. 93 (1999), pp. 913-923; Alison Duxbury, "The privileges and immunities of United Nations' experts: the Cumaraswamy case", *Asia-Pacific Journal on Human Rights and the Law,* vol. 2 (2000), pp. 88-110; Rosemary Rayfuse, "Immunities of United Nations human rights Special Rapporteurs: who decides?", *Australian Journal of Human Rights*, vol. 7 (2001), p. 169-186; Chanaka Wickremasinghe, "Recent cases: difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights", *International and Comparative Law Quarterly*, vol. 49 (2000), pp. 724-730.

[269] *Ibid.*, p. 63, para. 1.

[270] *Ibid.*, p. 64, para. 1.

him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind".[271] The Court's determination that the Government of Malaysia had "the obligation to communicate [the] advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and [Mr.] Cumaraswamy's immunity be respected" was finally adhered to in 2001 when the defamation suits in Malaysia against the Special Rapporteur were withdrawn.[272]

104. The corresponding possibility under the Specialized Agencies Convention to request from the International Court of Justice an advisory opinion concerning the Convention's application and interpretation has not yet been activated. However, in the long-running dispute between FAO and Italy over the immunity from jurisdiction enjoyed by the Organization, a request for an advisory opinion was formulated.[273] Making the request was ultimately averted as a result of diplomatic negotiations between the Organization and Italy.[274]

iv. Advisory opinions of the International Court of Justice

105. In addition to "binding" advisory opinions, opinions may be requested from the International Court of Justice on legal questions more generally.[275] This includes situations where international organizations are parties to a dispute and where they may want to use the opinion as support for their legal positions. Article 96 of the Charter of the United Nations provides that:

> "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
>
> 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

106. Article 65 of the Statute of the International Court of Justice provides that:

> "1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.
>
> 2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question."

107. Of course, the possibility to request advisory opinions is limited. Pursuant to Article 96 of the Charter of the United Nations, only the General Assembly and the Security Council may request the Court to give an advisory opinion "on any legal

[271] *Ibid.*, p. 86, para. 56.

[272] K. Kabilan, "Last of defamation suits against UN Special Rapporteur to be withdrawn", Malaysiakini, 12 June 2001, updated 29 January 2008, available at https://www.malaysiakini.com/news/3421.

[273] FAO, Constitutional and general legal matters, UNJYB (1985), pp. 82 et seq. ("(a) Does section 16 of the headquarters Agreement concluded between FAO and the Italian Republic mean that in Italy FAO is immune from every form of legal process in all cases in which it has not expressly waived its immunity? (b) If the answer to (a) is negative, what are the specific exceptions to FAO's immunity from every form of legal process under section 16?").

[274] See paras. 36 and 67 above.

[275] See Hans Kelsen, *The Law of the United Nations* (New York, Frederick A. Praeger, 1950), p. 547; C. Wilfred Jenks, *The Prospects of International Adjudication* (London, Stevens, 1964); Kenneth James Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Leiden, A.W. Sijthoff, 1971); Michla Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (Baltimore, Johns Hopkins University Press, 1973); Dharma Pratap, *The Advisory Jurisdiction of the International Court* (Oxford, Clarendon Press, 1972).

question", whereas other United Nations organs or specialized agencies, if authorized by the General Assembly, may also request advisory opinions only "on legal questions arising within the scope of their activities".[276] In the *Nuclear Weapons Advisory Opinion*,[277] the International Court of Justice clarified the scope of this limitation. It held that the question of the legality of the use of nuclear weapons, raised in the request of WHO for an advisory opinion, did not arise "within the scope of [WHO] activities" as defined by its Constitution[278] and thus rejected the request by that Organization. Since a comparable limitation does not apply to the General Assembly, the Court upheld its jurisdiction over the Assembly's parallel request.[279]

108. In addition to the General Assembly and the Security Council, the Economic and Social Council,[280] the Trusteeship Council[281] and the Interim Committee of the General Assembly[282] are currently authorized to request advisory opinions. Until its abolishment in 1996, the Committee on Applications for Review of Administrative Tribunal Judgments[283] also had the power to request advisory opinions as a form of appeal from the administrative tribunals relevant to the United Nations system, the International Labour Organization Administrative Tribunal and the United Nations Administrative Tribunal. Practically all the specialized agencies have been authorized by the General Assembly to request advisory opinions.[284] There is an old debate as to whether the Secretary-General of the United Nations should also be authorized to request advisory opinions.[285] Nevertheless, few specialized agencies have requested advisory opinions. By far the most frequent requests have come from the General Assembly, which may also be explained by its unfettered right to request opinions "on any legal question" and the fact that such requests are not considered to constitute

[276] Art. 96, para. 2, Charter of the United Nations. See also the more limited authorization in regard to a form of potential dispute between international organizations found in art. IX, para. 2, of the Protocol concerning the Entry into Force of the Agreement between the United Nations and the International Labour Organization (New York, 19 December 1946), United Nations, *Treaty Series*, vol. 1, No. 9, p. 183, at p. 194 ("The General Assembly authorizes the International Labour Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies.")

[277] International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66.

[278] *Ibid.*, para. 26.

[279] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226.

[280] General Assembly resolution 89 (I) of 11 December 1946.

[281] General Assembly resolution 171 (II) of 14 November 1947.

[282] General Assembly resolution 196 (III) of 3 December 1948.

[283] Statute of the United Nations Administrative Tribunal as amended by the General Assembly in its resolution 957 (X) of 8 November 1955, art. 11; the Committee was abolished in 1996, pursuant to General Assembly resolution 50/54 of 11 December 1995.

[284] See International Court of Justice, "Organs and agencies authorized to request advisory opinions", available at https://www.icj-cij.org/organs-agencies-authorized. This list, on the website of the International Court of Justice, indicates that the following United Nations organs, specialized agencies and related organization are authorized to request advisory opinions (and lists the cases in which advisory opinions have been requested): UN Organs of the United Nations (General Assembly, Security Council, Economic and Social Council, Trusteeship Council, Interim Committee of the General Assembly); specialized agencies (FAO, ILO, International Bank for Reconstruction and Development, ICAO, International Development Association, IFAD, International Finance Corporation, International Monetary Fund, International Maritime Organization, International Telecommunication Union, UNESCO, UNIDO, WHO, WIPO, World Meteorological Organization); related organization (International Atomic Energy Agency).

[285] Stephen M. Schwebel, "Authorizing the Secretary-General of the United Nations to request advisory opinions of the International Court of Justice", *American Journal of International Law*, vol. 78 (1984), pp. 869–878.

"important questions" requiring a two-thirds majority. Requests for advisory opinions have thus been adopted by a simple majority of members present and voting.[286]

109. As a further result of the limitation to United Nations organs and specialized agencies, other international organizations are not in a position to request an advisory opinion from the Court. This implies that, should another international organization wish to obtain an advisory opinion, it would have to approach the organs of the United Nations authorized to do so.[287]

110. In the past practice of the United Nations, recourse to advisory opinions has been made in cases where no advance agreement of the disputing parties to accept the outcome as binding existed. Sometimes an advisory opinion has been sought by an international organization in order to strengthen its legal position. Such requests may not be restricted to internal issues of powers and competences, but also affect relations to Member and non-member States.

111. A good example is one of the early requests for an advisory opinion by the United Nations in the so-called *Bernadotte* case.[288] There, the General Assembly requested an opinion on the question of whether the United Nations could bring an international claim against a State considered to be responsible for the death of a United Nations mediator. While the focus of the opinion was, of course, the question of whether the United Nations had the (implied) power to bring such claims, it was also clear and acknowledged by the Court that the "questions are directed to claims against a State".[289] The United Nations intended to exercise "functional" protection for the injury suffered by one of its agents, a power that the Court considered to be

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[286] For instance, the decision to refer the issue of the legality of the threat or use of nuclear weapons was adopted by the General Assembly by a 78-43-38 vote. General Assembly resolution 49/75 K of 15 December 1994.

[287] See, e.g. art. 119, para. 2, Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3 ("Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.") The possibility of a "referral" to the International Court of Justice "in conformity with the Statute of that Court" has been interpreted to require that the Assembly of States Parties to the Rome Statute may ask the General Assembly, the Security Council or another organ of the United Nations authorized to do so to request an advisory opinion from the International Court of Justice, although such organ would not be obliged to comply with the request. See Paul C. Szasz and Thordis Ingadottir, "The UN and the ICC: the Immunity of the UN and its officials", *Leiden Journal of International Law*, vol. 14 (2001), pp. 867–885.

[288] *Reparation for injuries suffered in the service of the United Nations* (see footnote 213 above). See also Pierre d'Argent, "Reparation for injuries suffered in the service of the United Nations (Advisory Opinion)", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. VIII (Oxford, Oxford University Press, 2012), pp. 880-883, paras. 9-11; Luis García Arias, "El segundo dictamen del Tribunal Internacional de Justicia: La reparación por daños sufridos al servicio de las Naciones Unidas", *Revista Española de Derecho Internacional*, vol. II (1949), pp. 977-1005; Yuen-li Liang "Notes on legal questions concerning the United Nations: reparation for injuries suffered in the service of the United Nations", *American Journal of International Law*, vol. 43 (1949), pp. 460-478; Quincy Wright "Responsibility for injuries to United Nations officials", *American Journal of International Law*, vol. 43 (1949), pp. 95-104; Quincy Wright "The jural personality of the United Nations", *American Journal of International Law*, vol. 43 (1949), pp. 509-516; Jean-Flavien Lalive, "Some observations on the question of reparation for injuries suffered in the service of the United Nations", *Nordic Journal of International Law*, vol. 20 (1950), pp. 56-69; Francesco Falcone, *Riparazioni per danni subiti al servizio delle Nazione Unite* (Palermo, Ires, 1951); Ramses A. Wessel, "Legal status (personality), 1.1 Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, [1949] ICJ Rep 174", in Cedric Ryngaert and others (eds.), *Judicial Decisions on the Law of International Organizations* (Oxford, Oxford University Press, 2016), pp. 11-12.

[289] *Reparation for injuries suffered in the service of the United Nations* (see footnote 213 above), p. 177.

implied as necessary for the fulfilment of its functions, thus concluding that "it has capacity to maintain its rights by bringing international claims".[290]

112. In 1949, the General Assembly authorized the Secretary-General to press for a claim based on the Court's opinion.[291] According to the annual report of the Secretary-General, in April 1950, Israel was requested to formally apologize, to arrest the guilty party and to pay compensation in the amount of $54,628 as reparation for the monetary damage borne by the United Nations in connection with the death of Count Bernadotte.[292] Israel paid the compensation in 1950.[293]

113. To some extent, this advisory opinion laid the groundwork for the treaties regarding the protection of United Nations staff members, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[294] the Convention on the Safety of United Nations and Associated Personnel,[295] and the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel,[296] the latter having been specifically demanded in the Secretary-General's report entitled "An Agenda for Peace".[297]

114. That advisory opinions have been used in cases of disputes with member States is well illustrated in some of the most important implied powers cases before the International Court of Justice.

115. The Court's advisory opinion in the *Effect of Awards* case[298] technically concerned the legal effect of awards rendered by the United Nations Administrative

[290] *Ibid.*, p. 179.

[291] Reparation for injuries incurred in the service of the United Nations, General Assembly resolution 365 (IV) of 1 December 1949.

[292] General Assembly, "Annual report of the Secretary-General on the work of the Organization, 1 July 1949–30 June 1950", document A/1287, p. 124–125.

[293] 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", document S/1506 (confirming the payment and making a formal statement of "sincere regret" satisfying the General Assembly's requirement of a formal apology).

[294] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (with resolution 3166 (XXVIII) of the General Assembly of the United Nations) (New York, 14 December 1973), United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167; See also Michael C. Wood, "The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents", *International and Comparative Law Quarterly*, vol. 23 (1974), pp. 791-817.

[295] Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994), United Nations, *Treaty Series*, vol. 2051, No. 35457, p. 363.

[296] Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (New York, 8 December 2005), United Nations, *Treaty Series*, vol. 2689, No. 35457, p. 59; see also Evan T. Bloom, "Protecting peacekeepers: the Convention on the Safety of United Nations and Associated Personnel", *American Journal of International Law*, vol. 89 (1995), pp. 621-631; David Ruzie, "The security of locally recruited United Nations staff", *Australian International Law Journal*, vol. 12 (1999), pp. 202-213, at p. 203.

[297] "An Agenda for Peace", document A/47/277-S/24111, para. 66 ("innovative measures will be required to deal with the dangers facing United Nations personnel"). See also d'Argent, "Reparation for injuries suffered in the service of the United Nations, paras. 9-11.

[298] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (see footnote 63 above). See also Joanna Gomula, "The International Court of Justice and administrative tribunals of international organizations", *Michigan Journal of International Law*, vol. 13 (1991), pp. 83-121; Kenneth Keith, "Legal powers. 2.2 Effect of awards of compensation made by the United Nations Administrative Tribunal Advisory Opinion [1954] ICJ Rep 47", in Ryngaert, *Judicial Decisions on the Law of International Organizations*, pp. 80-90; Byung Chul Koh, "Administrative justice in the United Nations: an appraisal of its Administrative Tribunal", *International Review of Administrative Sciences*, vol. 31 (1965), pp. 210-216; Oliver J. Lissitzyn, "Effect of awards of compensation made by the United Nations Administrative Tribunal", *American Journal of International Law*, vol. 48 (1954), pp. 655-660; Bimal N. Patel, "Effect of awards of compensation made by the United Nations Administrative Tribunal", in Bimal N. Patel (ed.), *The World Court Reference Guide: Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice and the International Court of Justice (1922-2000)* (Brill Nijhoff, 2002), pp. 815-817.

Tribunal and incidentally addressed the issue of whether the General Assembly was empowered to establish such an administrative tribunal hearing disputes between the United Nations as employer and United Nations staff members as its employees. However, underlying the request was a dispute with some United Nations members that did not want to contribute to the budget needed to make payments in cases where the Administrative Tribunal had found that the United Nations had incurred liability. Since the United Nations Administrative Tribunal had held in a number of cases that various staff members who were nationals of the United States had been unlawfully terminated for being suspected of communist affiliations, the United States prompted the General Assembly to request an advisory opinion on whether the United Nations could refuse to implement a decision of that tribunal, suggesting that a subsidiary body of the General Assembly could not bind the main organ.[299] The International Court of Justice rejected that claim.[300] It held that the United Nations had the legal power to establish an administrative tribunal, a capacity which arose by "necessary intendment out of the Charter",[301] essential to ensure the efficient working of the Secretariat and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity.[302] Rejecting various arguments as to the perceived non-finality of the United Nations Administrative Tribunal judgments, the Court concluded "that the General Assembly [did not have] the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent".[303]

116. As a result, the judgments of the United Nations Administrative Tribunal had to be followed. The Tribunal had decided in favour of staff members in 10 cases concerning permanent appointments and 1 case concerning a temporary appointment, ordering reinstatement in four cases and payment of compensation in seven others. The Secretary-General decided not to reinstate the four applicants. They were subsequently also awarded compensation.[304] Most importantly though, not only did the General Assembly authorize payment of the awards,[305] it also set up a system of limited "appeals" against the United Nations Administrative Tribunal judgments in the form of requests for advisory opinions.[306]

117. The financial aspect, underlying the question of whether the main organs of the United Nations have the power to create subsidiary organs with certain powers, was even more prominent in the advisory opinion of the International Court of Justice in

[299] "Written statement of the United States of America", in *I.C.J. Pleadings, United Nations Administrative Tribunal, vol. 16, Effect of awards of compensation made by the United Nations Administrative Tribunals, Advisory Opinion,* 13 July 1954, pp. 131-165, at p. 135, available at https://www.icj-cij.org/sites/default/files/case-related/21/9035.pdf; Abdelaziz Megzari, *The Internal Justice of the United Nations: A Critical History 1945-2015* (Brill, 2015), pp. 130-152.

[300] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (see footnote 63 above), at p. 61 ("There can be no doubt that the Administrative Tribunal is subordinate in the sense that the General Assembly can abolish the Tribunal by repealing the Statute, that it can amend the Statute and provide for review of the future decisions of the Tribunal and that it can amend the Staff Regulations and make new ones. There is no lack of power to deal effectively with any problem that may arise. But the contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted.")

[301] *Ibid.*, p. 57.

[302] *Ibid.*

[303] *Ibid.*, p. 62.

[304] Gomula, "The International Court of Justice and administrative tribunals of international organizations", pp. 86–87.

[305] Keith, "Legal powers. 2.2 Effect of awards of compensation", at p. 88.

[306] See paras. 125 et seq. below.

the *Certain Expenses* case,[307] which focused on the power of the United Nations to establish the United Nations Emergency Force[308] and the United Nations Operation in the Congo,[309] two peacekeeping operations in Egypt and the Congo respectively. While peacekeeping is not provided for in the Charter of the United Nations, the Court concluded that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization".[310] In other words, it was covered by the Organization's implied powers.

118. An issue that many consider to be foundational of international organizations law was also underlying a dispute between Member States *inter se* and between the Organization and some of its Member States that questioned the power of the United Nations to engage in peacekeeping and considered such activities to be *ultra vires* of the powers of the United Nations. They did so – in the absence of a judicial challenging mechanism – through the power of the purse, namely, by withholding payments to the United Nations. This transformed the "constitutional" dispute into a financial dispute, or rather it added a financial aspect to the controversy over the powers of the United Nations. Since the United Nations did not have access to the International Court of Justice either, or to another dispute settlement mechanism, it reverted to the advisory opinion path. It sought, and ultimately obtained, a judicial declaration that peacekeeping was within the power of the United Nations. Thus, expenses for peacekeeping were expenses of the United Nations, which had to be paid by the Member States in assessed proportions. Hence, the technical issue before the Court – whether expenses in relation to peacekeeping operations qualified as "expenses of the Organization" in the sense of Article 17 of the Charter of the United Nations – related to a highly controversial dispute between the Organization and its Member States.[311]

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[307] International Court of Justice, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151. See also Chittharanjan Felix Amerasinghe, "The United Nations Expenses Case: a contribution to the law of international organization", *Indian Journal of International Law*, vol. 4 (1964), pp. 177-232; John Robert Cotton, "Financing peacekeeping – trouble again", *Cornell International Law Journal*, vol. 11 (1978), pp. 107-120; F.A.M. Alting von Geusau, "Financing United Nations peace-keeping activities", *Netherlands International Law Review*, vol. XII (1965), pp. 281-303; Leo Gross, "Expenses of the United Nations for peace-keeping operations: the advisory opinion of the International Court of Justice*", International Organization*, vol. 17 (1963), pp. 1-35; Stanley Hoffmann, "A world divided and a world court confused: the world court's advisory opinion on U.N. financing", in Robert S. Wood (ed.), *The Process of International Organization* (New York, Random House, 1971), pp. 137-155; James Fergusson Hogg, "Peace-keeping costs and Charter obligations: implications of the International Court of Justice decision on *Certain Expenses of the United Nations*", *Columbia Law Review*, vol. LXII (1962), pp. 1230-1263; A. Donat Pharand, "Analysis of the opinion of the International Court of Justice on certain expenses of the United Nations", *Canadian Yearbook of International Law*, vol. 1 (1963), pp. 272-297; K. R. Simmonds, "The UN assessments advisory opinion", *The International and Comparative Law Quarterly*, vol. 13 (1964), pp. 854-898; J.H.W. Verzijl, "International Court of Justice: Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)", *Netherlands International Law Review*, vol. X (1963), pp. 1-32; Jan Wouters and Jed Odermatt, "Legal powers, 2.3 Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), International Court of Justice, Advisory Opinion, [1962] ICJ Rep 151", in Ryngaert, *Judicial Decisions on the Law of International Organizations*, pp. 91-101.

[308] General Assembly resolution 1000 (ES-I) of 5 November 1956.

[309] Security Council resolution 143 (1960) of 14 July 1960.

[310] *Certain Expenses* (see footnote 307 above), at p. 168.

[311] See also Christian Dominicé, "Request of advisory opinions in contentious cases?", in Boisson de Chazournes, Romano and Mackenzie, *International Organizations and International Dispute Settlement*, pp. 91–103, at p. 91 ("some abstract constitutional questions may arise from and relate to a dispute between an international organization and some of its members, as happened when some members of the UN refused to pay their assessed contributions to the organization").

119. As in the *Certain Expenses* case, in other situations the underlying dispute may also be more among the members than between an organization and its members. However, since such intramember disputes may threaten the effective operation of international organizations, the latter usually have a direct interest in clarifying the contentious legal issue.

120. Another good example of such a situation[312] is the 1980 Advisory Opinion concerning the *Interpretation of the WHO-Egypt Agreement*,[313] in which the International Court of Justice made the well-known statement that "international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties".[314]

121. The case itself arose from a dispute concerning the prerequisites for moving the WHO Regional Office for the Eastern Mediterranean in Alexandria elsewhere. This was suggested by some WHO members who were dissatisfied with the Egypt-Israel Framework for Peace in the Middle East Agreed at Camp David. WHO feared a hasty transfer of the Regional Office and thus requested an advisory opinion from the International Court of Justice as to whether "the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt [are] applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt?"[315] In answering this question, the Court noted that this section of the WHO-Egypt Agreement[316] addressed the question of revision and that the true legal question under consideration was "[w]hat are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected?".[317] The answer the Court provided mainly consisted in finding a mutual good faith consultation and negotiation obligation with a view to ultimately managing "to effect an orderly and equitable transfer of the Office to its new site", if so decided.[318] Eventually, WHO decided not to leave Egypt, but relocated its Regional Office for the Eastern Mediterranean to Cairo.[319]

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[312] See also A/CN.4/764, chap. III, sect. B (1) (World Health Organization, characterizing the 1980 Advisory Opinion not as a case of a dispute between WHO and a member State, but as a "disagreement among member States concerning the conduct of WHO's operations").

[313] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J Reports 1980*, p. 73. See also Catherine Brölmann, "5.2 Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, [1980] ICJ Rep 73", in Ryngaert, *Judicial Decisions on the Law of International Organizations*, pp. 245-254; Christine Gray, "The International Court's advisory opinion on the WHO-Egypt agreement of 1951", *International and Comparative Law Quarterly*, vol. 32 (1983), pp. 534-541; Charles A. Wintermeyer Jr., "ICJ advisory opinion: 1951 WHO-Egypt treaty", *Denver Journal of International Law & Policy,* vol. 10 (1981), pp. 561-568.

[314] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, pp. 89–90.

[315] *Ibid.*, para. 1.

[316] *Ibid.*, para. 34 ("Section 37: The present Agreement may be revised at the request of either party. In this event the two parties shall consult each other concerning the modifications to be made in its provisions. If the negotiations do not result in an understanding within one year, the present Agreement may be denounced by either party giving two years' notice.")

[317] *Ibid.*, para. 35.

[318] *Ibid.*, pp. 94, 95, para. 49.

[319] World Health Assembly, "Relocation of the Regional Office for the Eastern Mediterranean from Alexandria to Cairo", Fiftieth World Health Assembly, Agenda item 25, WHA50.11, Eighth plenary meeting, 12 May 1997, A50/VR/8; World Health Organization, Regional Committee for the Eastern Mediterranean, "Relocation of the WHO Regional Office for the Eastern Mediterranean to the UN Common Premises project, to be located in the New Administrative Capital of Egypt, as proposed by the Government of Egypt", Sixty-ninth session, Provisional agenda item 11, October 2022, EM/RC69/25.

122. That advisory opinions may be sought as alternatives to "binding" advisory opinions is also well illustrated by the 1989 advisory opinion in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*.[320] It concerned the freedom to travel of Mr. Mazilu, a Romanian national who served as a Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which reported to the Commission on Human Rights of the United Nations. He had been declared by the Romanian authorities unfit to serve for health reasons and was thus prevented from travelling.

123. This request by the Economic and Social Council, although based on a "difference" between Romania and the United Nations in regard to the position of a Special Rapporteur under the General Convention,[321] was not brought under Section 30 of that Convention for the purpose of settling a dispute between them. Rather, it was brought as an "ordinary" advisory opinion. This was motivated by the fact that, when adhering to the General Convention, Romania had made a reservation to Section 30 to the effect that it would have to consent separately to a "binding" advisory opinion.[322] Indeed, Romania had objected to the jurisdiction of the Court based on its reservation. Nevertheless, the Court rejected that because it found that "the nature and purpose of the present proceedings are … that of a request for advice on the applicability of a part of the General Convention, and not the bringing of a dispute before the Court for determination".[323]

124. In substance, the Court clarified that persons to whom a mission had been entrusted by the United Nations were to be regarded as experts on mission under the General Convention and were thus entitled to enjoy the privileges and immunities provided for therein in order to independently exercise their functions during the entire period of their missions, whether or not they travelled. The Court also made clear that such privileges and immunities might be invoked against an expert's home State unless a reservation had been validly made. Thus, the Court found that Mr. Mazilu retained the position of Special Rapporteur and, consequently, should be recognized as an expert on mission within the meaning of Section 22 of the General Convention, both during the period he was travelling on mission and when he was in the country of his permanent residence, Romania.[324] After the issuance of the advisory

[320] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (see footnote 266 above); see also Maria Aristodemou, "Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations", *International and Comparative Law Quarterly*, vol. 41 (1992), pp. 695-701; Terry D. Gill, "Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations", *American Journal of International Law*, vol. 84 (1990), pp. 742–746.

[321] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (see footnote 266 above), para. 1, citing the Economic and Social Council request ("*Concludes* that a difference has arisen between the United Nations and the Government of Romania as to the applicability of the Convention on the Privileges and Immunities of the United Nations to Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.").

[322] *Ibid.*, para. 29 ("The instrument of accession [to the General Convention] contained the following reservation: 'The Romanian People's Republic does not consider itself bound by the terms of section 30 of the Convention which provide for the compulsory jurisdiction of the International Court in differences arising out of the interpretation or application of the Convention; with respect to the competence of the International Court in such differences, the Romanian People's Republic takes the view that, for the purpose of the submission of any dispute whatsoever to the Court for a ruling, the consent of all the parties to the dispute is required in every individual case. This reservation is equally applicable to the provisions contained in the said section which stipulate that the advisory opinion of the International Court is to be accepted as decisive.'").

[323] *Ibid.*, para. 35.

[324] *Ibid.*, paras. 55 and 59.

opinion in December 1989, Mr. Mazilu was released by Romania and, following the political changes in Eastern Europe in 1989 and 1990, he served as Vice-President of Romania from 1989 to 1990 and subsequently on various United Nations bodies.[325]

v. Advisory opinions as "appeals" against decisions of administrative tribunals

125. The advisory opinion procedure has also been used as a form of review or quasi-appeal of decisions of administrative tribunals, in particular, the International Labour Organization Administrative Tribunal and the United Nations Administrative Tribunal.[326] The creation of this "appellate" function through advisory opinions was a direct consequence of the *Effect of Awards* opinion.[327] As a reaction, the General Assembly set up a review procedure concerning awards of the United Nations Administrative Tribunal on the grounds of excess of powers, errors of law and fundamental errors of procedure.[328] This review procedure was resorted to only three times while it was available between 1955 and 1995.[329]

126. Even before the establishment of the two-tiered internal appeals mechanism of the United Nations with the United Nations Dispute Tribunal and the United Nations Appeals Tribunal,[330] this appellate function was eliminated for the United Nations Administrative Tribunal in 1995[331] and for the International Labour Organization

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[325] United Nations, "Dumitru Mazilu, of Romania, elected Chairman of UNCITRAL", press release, 11 June 1998, available at https://press.un.org/en/1998/19980611.bio3165.html.

[326] See Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague, Kluwer Law International, 2003), at pp. 346-349; Gomula, "The International Court of Justice and administrative tribunals of international organizations"; Rishi Gulati, "The internal dispute resolution regime of the United Nations", in Armin von Bogdandy, Rüdiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, vol. 15 (Leiden, Koninklijke Brill, 2011), pp. 489-538; Phyllis Hwang, "Reform of the administration of justice system at the United Nations", *The Law and Practice of International Courts and Tribunals*, vol. 8 (2009), pp. 181-224; Kaiyan Homi Kaikobad, *The International Court of Justice and Judicial Review: A Study of the Court's Powers with Respect to Judgements of the ILO and UN Administrative Tribunals* (The Hague, Kluwer Law International, 2000); 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", in Armin von Bogdandy and Rüdiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, vol. 12 (Leiden, Koninklijke Brill, 2008), p. 451; Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, 4th ed., vol. 2 (Leiden, Koninklijke Brill, 2006); Louis B. Sohn, "Broadening the advisory jurisdiction of the International Court of Justice", *American Journal of International Law*, vol. 77 (1983), p. 125; Michael Wood, "United Nations Administrative Tribunal, Applications for Review (Advisory Opinions)", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, January 2009.

[327] See paras. 115 et seq. above.

[328] General Assembly resolution 957 (X) of 8 November 1955, *Procedure for review of United Nations Administrative Tribunal judgements: amendments to the Statute of the Administrative Tribunal*, para. 1 (adding an article concerning cases in which an interested party objects to a judgment on the grounds "that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice").

[329] See Keith, "2.2 Effect of Awards of Compensation Made by the United Nations Administrative Tribunal Advisory Opinion, p. 89; Rishi Gulati, "The internal dispute resolution regime of the United Nations", pp. 489-538.

[330] General Assembly resolution 63/253 of 24 December 2008, "Administration of justice at the United Nations".

[331] General Assembly resolution 50/54 of 11 December 1995. See also Paolo Vargiu, "From advisory opinions to binding decisions: the new appeal mechanism of the UN system of administration of justice", *International Organizations Law Review*, vol. 7 (2010) pp. 261-275, at p. 262; Rishi Gulati, "The internal dispute resolution regime of the United Nations", p. 506.

Administrative Tribunal in 2016.[332] The main reason for its abolishment was the fact that only organizations were empowered to request advisory opinions "appealing" the decisions of the administrative tribunals, a procedural inequality that had been criticized by the International Court of Justice already in its first advisory opinion on *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*[333]

127. Still, the requests for advisory opinions made pursuant to this procedure are instructive as they demonstrate that they often also addressed disputes involving international organizations and member States and not merely the employment relationship with their staff.

128. For instance, the 1956 advisory opinion of the International Court of Justice in *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*[334] concerned employment terminations by UNESCO that were similarly politically motivated by United States anti-communist sentiments as those that had led to the *Effect of Awards* opinion.[335] The International Labour Organization Administrative Tribunal had first confirmed its jurisdiction regarding the non-renewal of the contracts and held that a number of staff terminations based on an informal agreement between the United States and the Director-General of UNESCO, implementing the so-called United States Loyalty Program, were unlawful.[336] The request to the International Court of Justice was made by the Executive Board of

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[332] Resolution of the International Labour Conference, 7 June 2016, concerning the Statute of the International Labour Organization Administrative Tribunal, document A/79/690, available at https://www.dev.un.org/management/sites/www.un.org.management/files/2016.06_ilc_resolution_amending_iloat_statute.pdf. See also August Reinisch, "The contribution of the ILO Administrative Tribunal to the development of staff dispute settlement within international organizations", in George P. Politakis, Tomi Kohiyama and Thomas Lieby (eds.), *ILO*100 – *Law for Social Justice* (Geneva, International Labour Office, 2019), pp. 439-460; Rishi Gulati, "An international administrative procedural law of fair trial: reality or rhetoric", *Max Planck Yearbook of United Nations Law*, vol. 21 (Leiden, Koninklijke Brill, 2018), pp. 265–266.

[333] International Court of Justice, *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of 23 October 1956, I.C.J. Reports 1956*, p. 77. See also Thomas Bruha, "Judgments of the Administrative Tribunal of the International Labour Organization (Advisory Opinion)", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, March 2009, available at www.mpepil.com/; René de Lacharrière, "Avis consultatif sur les *jugements du Tribunal administratif de l'O.I.T. sur requêtes contre l'U.N.E.S.C.O.*", *Annuaire français de droit international,* vol. 2 (1956), pp. 383-397; Luis Orcasitas Llorente, "Dictamen del Tribunal Internacional de Justicia de 23 de octubre de 1956 sobre validez de las decisiones adoptadas por el Tribunal Administrativo de la Organización Internacional del Trabajo en el recurso planteado por varios empleados de la U.N.E.S.C.O.", *Revista española de derecho internacional*, vol. X (1957), pp. 153-159; Leo Gross, "Participation of individuals in advisory proceedings before the International Court of Justice: question of equality between the parties", *American Journal of International Law,* vol. 52 (1958), pp. 16-40; M.J. Langley Hardy, "Jurisdiction of the Administrative Tribunal of the I.L.O.: the Advisory Opinion of the International Court of Justice of October 23, 1956", *International and Comparative Law Quarterly*, vol. 6 (1957), pp. 338-347; Jan H. W. Verzijl, "The International Court of Justice: judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.", *Netherlands International Law Review,* vol. 4 (1957), pp. 236-253.

[334] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.* (see footnote 333 above).

[335] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (see footnote 63 above).

[336] International Labour Organization Administrative Tribunal, *Re Duberg* (Judgment No. 17) (1955), *Re Leff* (Judgment No. 18) (1955), *Re Wilcox* (Judgment No. 19) (1955), *Re Bernstein* (Judgment No. 21) (1955); Brunson MacChesney, "Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the United Nations Educational, Scientific and Cultural Organization", *American Journal of International Law*, vol. 51 (1957), pp. 410–417.

UNESCO on the basis of article XII, paragraph 1, of the then valid Statute of the International Labour Organization Administrative Tribunal, permitting challenges to the decisions of that Administrative Tribunal "confirming its jurisdiction" or "vitiated by a fundamental fault in the procedure followed".[337] The Court concluded that the International Labour Organization Administrative Tribunal was competent to hear the complaints brought against UNESCO.[338] It also held that the "binding" effect of its advisory opinion provided for in article XII, para. 2, of the Statute[339] under the special "appeals" mechanism – although going "beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion" – was compatible with its powers under the Statute of the Court, reasoning that such binding effect was merely "a rule of conduct for the Executive Board" of UNESCO.[340] The Court further held that "[t]he principle of equality of the parties follows from the requirements of good administration of justice".[341] On this basis, it critically remarked that "the advisory proceedings which have been instituted in the present case involve a certain absence of equality between Unesco and the officials"[342] since only the Executive Board of UNESCO – and it alone – was given the right to challenge a judgment of the International Labour Organization Administrative Tribunal.[343]

129. In regard to the similarly unilateral right to seek an advisory opinion in the case of United Nations Administrative Tribunal judgments, a certain practical improvement was achieved by creating a Committee on Applications for Review of Administrative Tribunal Judgements,[344] empowered to request advisory opinions reviewing the United Nations Administrative Tribunal judgments also upon the request of staff members concerned. This procedure triggered the 1973 Advisory Opinion in *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*.[345] Therein, the Court concluded that the United Nations Administrative Tribunal had not failed to exercise the jurisdiction vested in it and had not committed a fundamental error in procedure which would have occasioned a failure of justice, as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements.[346]

130. The Committee on Applications for Review of Administrative Tribunal Judgements was empowered to act not only upon requests of staff members, but also of States. This right triggered the request for an advisory opinion in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*.[347] The United States had asked the Committee to make such a request because it considered

[337] Art. XII, para. 1, Statute of the International Labour Organization Administrative Tribunal ("In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.")

[338] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.* (see footnote 333 above), p. 101.

[339] Art. XII, para. 2, Statute of the International Labour Organization Administrative Tribunal ("The opinion given by the Court shall be binding.")

[340] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.* (see footnote 333 above), p. 84.

[341] *Ibid.*, p. 86.

[342] *Ibid.*, p. 85.

[343] *Ibid.*

[344] General Assembly resolution 957 (X) of 8 November 1955.

[345] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J Reports 1973*, p. 166.

[346] *Ibid.*, para. 101.

[347] International Court of Justice, *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325.

that the United Nations Administrative Tribunal had wrongfully compensated a retiring staff member for the injury sustained through the non-payment of a repatriation grant. The International Court of Justice held that the United Nations Administrative Tribunal had neither exceeded its jurisdiction or competence nor erred in law when interpreting the relevant Staff Regulations and Staff Rules. A similar finding was arrived at by the Court in its advisory opinion in *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*,[348] this time triggered by the staff member concerned.

131. The principles of "good administration of justice", addressed already in its 1956 and 1963 advisory opinions, were subsequently confirmed in the advisory opinion in *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*.[349]

132. In this case, the Court was requested by the International Fund for Agricultural Development (IFAD) to rule on the competence of the International Labour Organization Administrative Tribunal to hear a complaint brought against IFAD by a staff member of the Global Mechanism of the United Nations Convention to Combat Desertification. The Court found that the complainant was in fact a staff member of IFAD and that thus the jurisdiction of the International Labour Organization Administrative Tribunal had been correctly exercised.

vi. Assessment of the role of the International Court of Justice

133. To date, the role of the International Court of Justice in settling disputes to which international organizations are parties has been limited. The lack of standing of international organizations as parties in contentious cases has not been compensated by the limited alternative of requesting advisory opinions from the Court. Nevertheless, it must be recognized that the Court has used its advisory jurisdiction to pronounce on issues that were contentious between international organizations and other parties, in particular member States. The Court has also cautiously asserted its power of judicial review in regard to acts of international organizations, both in a series of advisory opinions and in contentious cases between States. Still, opening the Court's contentious jurisdiction to international organizations seems to remain a crucial reform issue.

2. Other international courts or court-like dispute settlement mechanisms

134. In some instances, international courts or tribunals designed to settle disputes among members of an international organization permit the settlement of disputes involving international organizations where they are enabled to fully participate as members. This is primarily the case in multilateral regimes where regional organizations have been transferred the relevant powers of their member States and thus assume responsibilities in the respective fields at the external level. The most prominent example is the European Union, which, in a number of areas, in particular trade, but also fishing policies, joined international organizations and thereby acquired access to dispute settlement.

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[348] International Court of Justice, *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987*, p. 18.

[349] International Court of Justice, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10. See also Dražen Petrović, "Wrong address? Advisory Opinion of the ICJ on the Judgment No. 2867 of the ILOAT upon a Complaint Filed against the International Fund for Agricultural Development", in Rüdiger Wolfrum, Maja Seršić and Trpimir M. Šošić (eds.), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Leiden, Brill Nijhoff, 2015), pp. 729-754.

135. In practice, the most important form of European Union participation in international dispute settlement is its role as a litigant in the WTO dispute settlement system. Nonetheless, the European Union has also participated in adjudicatory proceedings before the International Tribunal for the Law of the Sea.

i. International Tribunal for the Law of the Sea

136. The United Nations Convention on the Law of the Sea is open not only to States, but also to international organizations having competence over matters governed by the Convention.[350] Thus, international organizations can accede to it and can also participate in the dispute settlement options offered under the Convention. To date, the European Union is the only international organization that has become a party to the Convention.

137. That international organizations as parties to the United Nations Convention on the Law of the Sea can also be parties to disputes before the International Tribunal for the Law of the Sea is clarified in article 7 of annex IX to the 1982 Convention, which provides not only for the possibility to accept the Tribunal's jurisdiction in specific article 287 cases, but also affirms that "Part XV [on settlement of disputes] applies *mutatis mutandis* to any dispute between Parties to this Convention, one or more of which are international organizations".[351] This is confirmed by the Rules of the International Tribunal for the Law of the Sea, which provide for a duty to inform the Tribunal about the internal division of competences/powers between the organization and its members in case of a "dispute to which an international organization is a party".[352]

138. In practice, there are a few examples of the involvement of international organizations as parties to proceedings before the International Tribunal for the Law of the Sea. The European Union has been a party to a case before the Tribunal in case No. 7. In 2000, Chile and the European Community, both parties to the United Nations Convention on the Law of the Sea, requested the Tribunal to hear a dispute concerning the *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community)*.[353] However, the case was suspended shortly thereafter[354] and finally

[350] Art. 305 (1) (f) and annex IX, United Nations Convention on the Law of the Sea; see also annex IX, art. 1, United Nations Convention on the Law of the Sea ("For the purposes of article 305 and of this Annex, 'international organization' means an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters.")

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

[352] Art. 57, para. 1, Rules of the Tribunal, document ITLOS/8, 25 March 2021 ("In a dispute to which an international organization is a party, the Tribunal may, at the request of any other party or *proprio motu*, request the international organization to provide, within a reasonable time, information as to which, as between the organization and its member States, has competence in respect of any specific question which has arisen.")

[353] *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile /European Community), Order of 20 December 2000, ITLOS Reports 2000*, p. 148. See also Markus Rau, "Comment: the *Swordfish* case: law of the sea v. trade", *Heidelberg Journal of International Law*, vol. 62 (2002), pp. 37-42; Peter-Tobias Stoll and Silja Vöneky, "The *Swordfish* case: law of the sea v. trade", *Heidelberg Journal of International Law*, vol. 62 (2002), pp. 21-35.

[354] International Tribunal for the Law of the Sea, "Case on conservation of swordfish stocks between Chile and the European Community in the South-Eastern Pacific Ocean", press release (ITLOS/Press 45), 21 March 2001, and "Case between Chile and the European Community concerning the conservation of swordfish stocks in the South-Eastern Pacific Ocean", press release (ITLOS Press/102), 29 December 2005; P. Chandrasekhara Rao, "ITLOS: the first six years", in J.A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, vol. 6 (The Hague, Kluwer Law International, 2002), pp. 183-300, at p. 281.

removed from the Tribunal's list of pending cases in 2009.[355] To date, the European Union has not submitted to the Tribunal's compulsory jurisdiction pursuant to article 287, para. 1 (a), of the Convention.[356]

139. 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 over disputes involving the International Seabed Authority, which is an international organization through which the parties to the Convention "organize and control activities in the Area [established in the Convention], particularly with a view to administering the resources of the Area".[357] The Convention allows, among others, the parties to the Convention to challenge the Authority's acts and omissions.[358] Pursuant to these provisions, parties to the Convention may institute legal proceedings against the Authority.

140. The Statute of the International Tribunal for the Law of the Sea provides that the Tribunal is "open to entities other than States Parties in any case expressly provided for in Part XI [deep seabed mining] or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case".[359] According to Part XI of the Convention, "entities other than States Parties" qualified to be parties before the Seabed Disputes Chamber include the International Seabed Authority and the Enterprise (the organ of the International Seabed Authority that carries out activities in the Area directly, as well as the transporting, processing and marketing of minerals recovered from the Area).[360]

141. Article 191 of the Convention expressly empowers the Council and the Assembly, two organs of the International Seabed Authority, to request from the Seabed Disputes Chamber advisory opinions on "legal questions arising within the scope of their activities".[361] The Council of the International Seabed Authority requested the first advisory opinion from the chamber on *Responsibilities and obligations of States with respect to activities in the Area*.[362]

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[355] *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union), Order of 16 December 2009, ITLOS Reports 2008-2010*, p. 13.

[356] See also Case C-73/14, *Council of the European Union v. European Commission*, Opinion of Advocate General Sharpston, delivered on 16 July 2015, document ECLI:EU:C:2015:490, footnote 32 ("The EU has not yet chosen one or more of the means for the settlement of disputes concerning the interpretation or application of UNCLOS as laid down in Article 287 UNCLOS. In accordance with Article 7 of Annex IV to UNCLOS, that means that the EU is deemed to have accepted the arbitration procedure."); Permanent Court of Arbitration, in the Matter of the Atlanto-Scandian Herring Arbitration before an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Kingdom of Denmark in Respect of the Faroe Islands (Applicant) and the European Union (Respondent), Permanent Court of Arbitration, Case No. 2013-30, Procedural Order No. 1, 15 March 2014, p. 2 ("WHEREAS the Kingdom of Denmark has chosen the International Court of Justice as forum for settling disputes and the European Union has not made a choice under Article 287(1)").

[357] Art. 157, para. 1, United Nations Convention on the Law of the Sea.

[358] *Ibid.*, art. 187, sect. b (providing for jurisdiction of the Seabed Disputes Chamber in "disputes between a State Party and the Authority concerning: (i) acts or omissions of the Authority or of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith; or (ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power").

[359] Art. 20, para. 2, Statute of the International Tribunal for the Law of the Sea, annex VI, United Nations Convention on the Law of the Sea, p. 561.

[360] Art. 187, United Nations Convention on the Law of the Sea.

[361] *Ibid.*, art. 191 ("The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.").

[362] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10.

142. In addition, the International Tribunal for the Law of the Sea has rendered advisory opinions upon the request of international organizations other than the organs of the International Seabed Authority. While this power is not expressly foreseen in the Statute of the Tribunal, the Tribunal confirmed its existence in *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*.[363] Therein, the Tribunal upheld its jurisdiction over a request submitted by the Sub-Regional Fisheries Commission, an organization consisting of West African States. The request contained a number of questions relating to rights and obligations concerning fishing practices within the Exclusive Economic Zone of the member States of the Commission. According to the Tribunal, article 21 of its Statute,[364] referring to "matters", was wide enough to comprise advisory opinions[365] and article 138 of the Rules of the Tribunal[366] permitted it to render advisory opinions provided for in relevant agreements and requested by authorized bodies. In the case at hand, the Tribunal found that the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission[367] fulfilled both requirements.[368] Interestingly, the advisory opinion also revealed an underlying dispute between the members of the Commission and third parties, which included the European Union, since the latter was engaged in fishing practices off the West African coast. The Tribunal opined with respect to "activities of fishing vessels of the EU operating in the exclusive economic zone of an SRFC Member State under a fisheries access agreement with the EU",[369] that such treaty obligations became European Union obligations and thus "only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States".[370]

143. The advisory opinion procedure of the Tribunal may also be relevant to solving disputes concerning the "constitutionality" of proposed decisions of the Assembly, the International Seabed Authority's plenary organ. It gives one fourth of the members of the Authority the opportunity to request an advisory opinion from the Seabed Disputes Chamber of the Tribunal, pending which a proposal may not be put to a vote.[371]

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[363] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4.

[364] Art. 21, Statute of the International Tribunal for the Law of the Sea ("The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.")

[365] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (see footnote 363 above), paras. 54–61.

[366] Art. 138, Rules of the Tribunal ("1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion. 2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.")

[367] Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission, LEX-FAOC215451, 8 June 2012.

[368] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (see footnote 363 above), para. 61.

[369] *Ibid.*, para. 171.

[370] *Ibid.*, para. 173.

[371] Art. 159, para. 10, United Nations Convention on the Law of the Sea ("Upon a written request addressed to the President and sponsored by at least one fourth of the members of the Authority for an advisory opinion on the conformity with this Convention of a proposal before the Assembly on any matter, the Assembly shall request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion thereon and shall defer voting on that proposal pending receipt of the advisory opinion by the Chamber.")

ii. World Trade Organization dispute settlement

144. The dispute settlement of WTO, based on the General Agreement on Tariffs and Trade principles of "trade diplomacy" and reformed as "trade adjudication" after the Uruguay Round of Multilateral Trade Negotiations,[372] is laid down in a side agreement to the WTO agreement, the Dispute Settlement Understanding.[373] As confirmed by the WTO Appellate Body in the *Shrimp/Turtle* case, referring to articles 4, 6, 9 and 10 of the Understanding, such dispute settlement is open to all WTO "members".[374] Since membership in WTO does not require "statehood" but rather the existence of a "separate customs territory",[375] not only States, but also regional economic integration organizations can be members of this organization. Furthermore, the European Union, which was already regarded as a "contracting party" of the General Agreement on Tariffs and Trade,[376] had become a founding member of WTO in 1995.[377]

145. In practice, the European Union, which has taken over the external trade powers of its member States,[378] participates fully in WTO dispute settlement, both as claimant and respondent. There are numerous complaints brought by and against the European Union. As at 2023, the European Union had appeared as complainant in 110 cases and as respondent in 93 cases, while it had been a third party in 217 cases.[379] The WTO dispute settlement mechanism has thus been called "[b]y far the most important

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[372] Michael K. Young, "Dispute resolution in the Uruguay Round: lawyers triumph over diplomats", *International Lawyer*, vol. 29 (1995), pp. 389-409; Kendall Stiles, "Negotiating institutional reform: the Uruguay Round, the GATT, and the WTO", *Global Governance*, vol. 2 (1996), pp. 119-148.

[373] Understanding on Rules and Procedures Governing the Settlement of Disputes, in annex 2, Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994), United Nations, *Treaty Series*, vol. 1869, No. 31874, p. 3, at p. 401.

[374] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58 AB/R, 12 October 1998, para. 101 ("It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members 'having a substantial interest in a matter before a panel' may become third parties in the proceedings before that panel.") See also Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, 3rd ed. (Cambridge, Cambridge University Press, 2013), pp. 545-582.

[375] Art. XII, para. 1, Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994), United Nations, *Treaty Series*, vol. 1867, No. 31874, p. 154 ("Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO.") See also Matthew Kennedy, "Overseas territories in the WTO", *International and Comparative Law Quarterly*, vol. 65, 2016, pp. 741-761; Marios C. Iacovides, "Topoi of ambiguity: WTO membership without statehood – the case of separate customs territories", *Hague Yearbook of International Law*, vol. 32 (2019), pp. 103-133.

[376] Julija Brsakoska Bazerkoska, "The European Union and the World Trade Organization: problems and challenges", *Croatian Yearbook of European Law & Policy*, vol. 7 (2011), pp. 277-290, at p. 279; Jacques H. J. Bourgeois, "The European Court of Justice and the WTO: problems and challenges", in J.H.H. Weiler (ed.), *The EU, WTO and the NAFTA: Towards a Common Law of International Trade?* (Oxford, Oxford University Press, 2001), p. 71–p. 123.

[377] Art. XI, para. 1, Marrakesh Agreement establishing the World Trade Organization Agreement, p. 154 ("The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements … shall become original Members of the WTO.")

[378] Art. 207, Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 115, 9 May 2008, p. 140.

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

international dispute settlement mechanism to which the [European Union] has submitted itself".[380]

3. Regional human rights courts

146. The jurisdiction of regional human rights courts is usually limited to scrutinizing compliance with the relevant human rights instrument by the contracting parties of such treaties.

i. International organizations as respondents

147. Since international organizations are not usually 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 owing to the fact that the Union is not a party to either the African Charter on Human and Peoples' Rights or the Protocol establishing the Court.[381] Similarly, the now abolished European Commission of Human Rights[382] rejected the possibly of applications being submitted against the European Communities, as they were not a contracting party to the Convention for the Protection of Human Rights and Fundamental Freedoms[383] (European Convention on Human Rights).[384] Instead, cases have been brought against European Union member States.[385] 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.[386] 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.[387]

148. That international organizations generally cannot be respondents in complaint proceedings before human rights courts may change. After a first failed attempt in the 1990s,[388] the European Union intended to accede to the European Convention on Human Rights after an amendment to the Treaty of Lisbon amending the Treaty on

[380] Alan Rosas, "The European Union and international dispute settlement", in Boisson de Chazournes, Romano and Mackenzie, *International Organizations and International Dispute Settlement*, pp. 49–71, at p. 55.

[381] African Court on Human and Peoples' Rights, *Femi Falana v. The African Commission on Human and Peoples' Rights*, Application No. 019/2015, Order of 20 November 2015; *Atabong Denis Atemnkeng v. The African Union*, Application No. 014/2011, Judgment, 15 March 2013; *Femi Falana v. The African Union*, Application No. 001/2011, Judgment, 26 June 2012; see also the separate opinion by Judge Fatsah Ouguergouz, Application 001/2011, 26 June 2012, paras. 9, 10 and 12 (arguing that art. 5 of the Protocol establishing the Court only authorizes African intergovernmental organizations to file an application against a State party as complainants, not to become respondents).

[382] 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.

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

[384] *Confedération française démocratique du travail v. the European Communities,* European Commission on Human Rights, Application No. 8030/77, Decision of 10 July 1978.

[385] William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford, Oxford University Press, 2015), p. 948.

[386] 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.

[387] See, e.g., European Court of Human Rights, *Avotiņš v. Latvia* [GC], No. 17502/07, 23 May 2016.

[388] Court of Justice of the European Communities, *Accession of the Community to the European Convention on Human Rights*, Opinion 2/94, 28 March 1996, *European Courts Reports 1996*, pp. 1759 and 1763.

European Union and the Treaty establishing the European Community.[389] 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.[390] However, the qualms of 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[391] have blocked progress to date. Nevertheless, there are currently plans for finalizing the accession protocol.[392]

ii. International organizations as claimants

149. The only regional human rights court that expressly allows international organizations access as claimants in contentious proceedings is the African Court on Human and Peoples' Rights.[393] In addition to contracting States parties, it also permits the African Commission on Human and Peoples' Rights and "African Intergovernmental Organizations" to bring cases before it.[394] Apparently, no such international organizations have made use of this power. However, the question as to which entities qualify as "African Intergovernmental Organizations" was addressed in advisory proceedings brought by the African Committee of Experts on the Rights and Welfare of the Child, specifically asking whether, in addition to requesting advisory opinions, it could also bring a case in contentious proceedings.[395] The African Court on Human and Peoples' Rights denied this, holding that neither organs of an organization nor expert bodies could be classified as intergovernmental organizations.[396]

150. The African Commission on Human and Peoples' Rights has instituted proceedings against member States to address issues such as minority rights[397] and the right to a fair trial.[398] This corresponds to the function of the Inter-American Commission on Human Rights, which has the power to bring cases to the Inter-American Court of Human Rights,[399] and the now abolished European Commission on Human Rights,[400] which had the same competence in regard to the European Court of Human Rights.[401]

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[389] Art. 6, para. 2, Consolidated Version of the Treaty on European Union, *Official Journal of the European Union*, C 202, 7 June 2016, p. 13, at p. 19

[390] Art. 59, para. 2, of the Convention, as amended by 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), Council of Europe, *Treaty Series, No. 194*, art. 17.

[391] Opinion 2/13, *Request for an Opinion pursuant to Article 218(11) TFEU, made on 4 July 2013 by the European Commission* (18 December 2014).

[392] 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", document 46+1(2023)35FINAL, 30 March 2023. See also Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford, Hart, 2013).

[393] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Ouagadougou, 9 June 1998), document OAU/LEG/EXP/AFCHPR/PROT (III), available at www.au.int.

[394] *Ibid.,* art. 5.

[395] African Court on Human and Peoples' Rights, *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child*, Request No. 002/2013, Advisory Opinion, 5 December 2014, *African Court Law Reports, vol. 1 (2006–2016)*, p. 725, at para. 74.

[396] *Ibid.*, para. 100.

[397] African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgement, 26 May 2017.

[398] African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Libya*, Application No. 002/2013, Judgement, 3 June 2016.

[399] Art. 61, para. 1, American Convention on Human Rights (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123; art. 28, 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.

[400] See para. 147 above.

[401] Art. 19, Convention for the Protection of Human Rights and Fundamental Freedoms.

iii. Advisory opinions

151. A number of regional human rights courts provide for the possibility to request advisory opinions. For instance, the European Court of Human Rights "may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto".[402] However, the same provision limits this power to procedural questions since it excludes "any question relating to the content or scope of the [Convention] rights or freedoms".[403] That precise limitation makes it less likely that advisory proceedings will be used to deal with a potential infringement of Convention rights or freedoms. Rather, it could lead to proceedings addressing a procedural dispute between the Council of Europe and a member State. To date, this option to obtain advisory opinions has been rarely used. One request, held inadmissible, concerned the coexistence between the European Convention on Human Rights and another human rights instrument,[404] and two other requests related to the election of judges to the European Court of Human Rights.[405]

152. Other regional human rights courts are competent to issue advisory opinions on a broader range of issues. For instance, the Inter-American Court of Human Rights may provide opinions "regarding the interpretation of [the American] Convention [on Human Rights] or of other treaties concerning the protection of human rights in the American states" not only upon the request of States, but also by listed organs of the Organization of American States (OAS) "[w]ithin their spheres of competence".[406] While numerous OAS organs have been listed, to date only the Inter-American Commission on Human Rights has actually requested opinions from the Court, many of which dealt with State obligations under the American Convention on Human Rights.[407]

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[402] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 47, para. 1.

[403] *Ibid.*, art. 47, para. 2 ("Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.")

[404] European Court of Human Rights, *Decision on the competence of the Court to give an advisory opinion* [GC], 2 June 2004. The court declined to issue an opinion as it found that the request was "not within its competence" as it related to an issue that might be addressed in proceedings instituted before it.

[405] European Court of Human Rights, *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights* [GC], 12 February 2008; *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No. 2)* [GC], 22 January 2010.

[406] Art. 64, para. 1, American Convention on Human Rights ("The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.")

[407] Inter-American Court of Human Rights, Advisory Opinion OC-2/82 of September 24, 1982, "The effect of reservations on the entry into force of the American Convention on Human Rights (arts. 74 and 75)"; Advisory Opinion OC-3/83 of September 8, 1983, "Restrictions to the death penalty (arts. 4(2) and 4(4) American Convention on Human Rights)"; Advisory Opinion OC-8/87 of January 30, 1987, "Habeas corpus in emergency situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)"; Advisory Opinion OC-11/90 of August 10, 1990, "Exceptions to the exhaustion of domestic remedies (arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights)"; Advisory Opinion OC-14/94 of December 9, 1994, "International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 of the American Convention on Human Rights)"; Advisory Opinion OC-17/2002 of August 28, 2002, "Juridical condition and human rights of the child"; Advisory Opinion OC-27/21 of May 5, 2021, "Right to freedom of association, right to collective bargaining and right to strike and their relation to other rights, with a gender perspective"; Advisory Opinion OC-29/22 of May 30, 2022, "Differentiated approaches with respect to certain groups of persons deprived of liberty".

153. Interestingly though, some advisory opinions requested by States addressed powers of the Inter-American Commission on Human Rights and thus could be viewed as indirect forms of settling disputes between an international organization and States. These cases have addressed issues such as the competence of the Commission to assess the legality of domestic legislation,[408] the capacity of the Commission to alter certain reports considered final,[409] and the existence of an organ within the system empowered to exercise control of due process over proceedings before the Commission.[410] Regarding this last case, the Inter-American Court of Human Rights concluded that it (the Court) was competent to monitor respect for due process in the context of Commission proceedings.

154. The African Court on Human and Peoples' Rights can also render advisory opinions on any legal matter relating to the African Charter on Human and Peoples' Rights or any other relevant human rights instrument, as long as the subject matter of the request is not being considered by the African Commission on Human and Peoples' Rights.[411] An example of a case in which this condition was determinant was the Court's refusal to issue a decision at the request of the Pan African Lawyers' Union to assess the conformity of the suspension of the Southern African Development Community Tribunal[412] with the African Charter.[413]

155. According to the Protocol on the establishment of the African Court on Human and Peoples' Rights, opinions could be requested by the Organization of African Unity (the predecessor of the African Union), any of its organs, a member State or "any African organization recognized by the OAU".[414] The Court has clarified that the term "African organization" used in the Protocol includes both "non-governmental organisations and inter-governmental organisations".[415] It appears that to date, apart from one request by a State and two by organs of the African Union, only non-governmental organizations (NGOs) have made use of this mechanism.[416]

156. The African Court on Human and Peoples' Rights has also addressed a number of requests for advisory opinions submitted by African organizations recognized by the African Union.[417] In order for an organization to be considered "African", it must

[408] Advisory Opinion OC-13/93 of July 16, 1993, "Certain attributes of the Inter-American Commission on Human Rights" (arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights).

[409] Advisory Opinion OC-15/97 of November 14, 1997, "Reports of the Inter-American Commission on Human Rights" (art. 51 American Convention on Human Rights).

[410] Advisory Opinion OC-19/05 of November 28, 2005, "Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights" (arts. 41 and 44 to 51 of the American Convention on Human Rights).

[411] Art. 4, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

[412] See paras. 178 et seq. below for information on this Tribunal.

[413] *Advisory Opinion requested by the Pan African Lawyers' Union and Southern African Litigation Centre*, African Court on Human and Peoples' Rights, Request No. 002/2012, 15 March 2013.

[414] Art. 4, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

[415] *Advisory Opinion requested by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians*, African Court on Human and Peoples' Rights, Request No. 002/2015, 28 September 2017, para. 49; *Advisory Opinion Requested by the Socio-Economic Rights and Accountability Project (SERAP)*, Request No. 001/2013, 26 May 2017, para. 46.

[416] Chidi Anselm Odinkalu, "Advice without consent?: assessing the advisory jurisdiction of the African Court on Human and Peoples' Rights", *Human Rights Quarterly*, vol. 45 (2023), pp. 365-405, at pp. 386–387.

[417] *Advisory Opinion requested by the Pan African Lawyers' Union and Southern African Litigation Centre*, African Court on Human and Peoples' Rights, 15 March 2013; *Advisory Opinion requested by the Pan African Lawyers' Union on the right to participate in the Government of one's country in the context of an election held during a public health emergency or a pandemic, such as the COVID-19 crisis*, African Court on Human and Peoples' Rights, Request No. 001/2020, 16 July 2021.

be registered in an African country, have other branches in the continent and carry out activities beyond the country in which it is registered.[418] Moreover, a memorandum of understanding to establish cooperation between the African Union and the organization was deemed to be sufficient to establish recognition by the African Union.[419] It has been argued that this criterion applies not only to NGOs, but also to international organizations.[420]

157. An interesting example of such a request was the attempt of numerous Nigerian NGOs to establish the hierarchy of conflicting treaty obligations in the context of the country's status as a member of the African Union and a State party to the Rome Statute of the International Criminal Court.[421] The case was brought on the basis of the failure of Nigeria to execute the International Criminal Court warrant for the arrest of the President of the Sudan, Omar Al-Bashir, during his visits to the country. However, the African Court did not reach the stage of considering the merits of the request, noting that the authors had not specified the provisions of the African Charter on Human and Peoples' Rights or any other human rights instrument in respect of which they were seeking the advisory opinion.

158. Among cases brought by African Union organs, the African Court on Human and Peoples' Rights has addressed a request for an advisory opinion filed by the Pan-African Parliament regarding the interpretation of its protocol and its rules of procedure.[422] This request sought to establish if and how the principle of rotation was applicable to the election of the Bureau of the Parliament, following contradicting views held by the Southern Caucus of the Parliament and the Parliament itself. The Court found that it did not have jurisdiction to issue an opinion on the matter as the Parliament's protocol and its rules of procedure were not human rights instruments.

4. Regional economic integration organizations and their courts

159. Apart from the WTO and the International Tribunal for the Law of the Sea systems, the most prominent form of adjudication as a means for the settlement of disputes to which international organizations are parties is provided by courts of regional economic integration organizations. In practice, the best known and most widely used is the judicial system of the European Union, but other regional economic integration organizations also have courts that have jurisdiction over cases involving the organization. The following provides a non-exhaustive overview, illustrating the divergences and similarities of judicial dispute settlement available in various regional economic integration organizations. This overview focuses on international disputes. Many regional economic integration organization courts also have jurisdiction over non-international disputes, which will be addressed in the third report.

i. Judicial system of the European Union

160. The European Union's two-tiered court system, consisting of a General Court, serving as a court of first instance in some matters, and the Court of Justice of the European Union, is among the most elaborate international judicial dispute settlement systems. It enables the organization's member States to settle disputes between

[418] *Advisory Opinion requested by the Pan African Lawyers' Union on the right to participate in the Government of one's country in the context of an election held during a public health emergency or a pandemic, such as the COVID-19 crisis*, para. 23.

[419] *Ibid.*, para. 25.

[420] Odinkalu, "Advice without consent?", pp. 394–397.

[421] *Advisory Opinion requested by the Coalition for the International Criminal Court and others*, African Court on Human and Peoples' Rights, Request No. 001/2015, 29 November 2015.

[422] *Advisory Opinion requested by the Pan-African Parliament*, African Court on Human and Peoples' Rights, Request No. 001/2021, 16 July 2021.

themselves, but also facilitates the litigation of disputes between the organization, or rather its organs, and member States, and to some extent even private parties.

161. International disputes to which the organization is a party may be brought mainly through two procedural avenues, so-called annulment and infringement actions.[423]

162. Annulment actions enable the European Union's member States to challenge acts of the organs of the European Union (European Union secondary law) in so far as they infringe the organization's founding treaty and related rules (European Union primary law).[424] The outcome of such actions may be the invalidity of such acts of the organization.[425] In practice, the European Court of Justice has only rarely annulled legislative acts of the European Union.[426] However, it has quite routinely struck down administrative acts, in particular of the Commission in the context of competition or subsidies law, which will be discussed in the context of dispute settlement with private parties. In addition to annulment actions, there is also the possibility to bring so-called actions for failure to act in cases in which European Union organs are under a treaty obligation to act and have failed to do so.[427]

163. The second most important form of dispute settlement directly involving the organization is infringement actions, where the European Union, or rather its organs[428] and other member States, may bring the Union's members before the Court for violating European Union law.[429] In practice, inter-State litigation is very rare. Instead, States often informally refer such disputes to the Commission which then, as the "guardian" of the treaties, institutes proceedings against member States.

164. The jurisdiction of the Court of Justice of the European Union has also been extended to non-member States in treaties such as the Northern Ireland Protocol, permitting the European Commission to bring infringement proceedings against the United Kingdom for violating that Protocol.[430] Reportedly, the European Commission has initiated the pre-litigation stages of this process.[431] The European Commission instituted the first action in 2021, concerning, among other issues, the alleged lack of compliance of the United Kingdom with European Union trade rules.[432] It subsequently suspended the proceedings at the request of the United Kingdom to

[423] See Anthony Arnull, *The European Union and its Court of Justice*, 2nd ed. (Oxford, Oxford University Press, 2006), pp. 34 et seq.; Christian Adam and others, *Taking the EU to Court: Annulment Proceedings and Multilevel Judicial Conflict* (Cham, Springer Nature, 2020); Matteo Bonelli "Infringement actions 2.0: how to protect EU values before the Court of Justice" in *European Constitutional Law Review*, vol. 18 (2022), pp. 30-58; Koen Lenaerts, Kathleen Gutman and Janek Thomasz Nowak (eds.), *EU Procedural Law*, 2nd ed. (Oxford, Oxford University Press, 2023), pp. 175-234 and 275-410.

[424] Art. 263, Consolidated version of the Treaty on the Functioning of the European Union.

[425] *Ibid.*, art. 264.

[426] See, for an example of a successful annulment action: Court of Justice of the European Union, *Federal Republic of Germany v. the European Parliament and the Council of the European Union*, Case C-376/98, Judgment, 5 October 2000. See, for examples of rejections: Court of Justice of the European Union, *Grand Duchy of Luxembourg v. the European Parliament and the Council of the European Union*, Case C-176/09, Judgment, 12 May 2011; *Hungary v. the European Parliament and the Council of the European Union*, Case C-156/21, Judgment, 16 February 2022.

[427] Art. 265, Consolidated version of the Treaty on the Functioning of the European Union.

[428] *Ibid.*, art. 258.

[429] *Ibid.*, art. 259.

[430] Art. 12, para. 4, Protocol in Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *Official Journal of the European Union*, L 29, 31 January 2020, p. 102.

[431] A/CN.4/764, chap. II, sect. B (2) (United Kingdom).

[432] European Commission, "Withdrawal agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland", press release, 15 March 2021, available at: ec.europa.eu.

allow for negotiations.[433] Yet, in 2022, the European Commission decided not only to resume proceedings, but also to initiate further infringement actions against the United Kingdom,[434] after the United Kingdom unilaterally excluded the application of specific elements of the Protocol through the enactment of the Northern Ireland Protocol Bill.[435] It seems that none of the cases reached the European Court of Justice, as both the European Union and the United Kingdom agreed through the Windsor Framework, which sought to be a comprehensive solution to issues related to "Brexit"[436] concerning Northern Ireland, that the European Union would withdraw all legal actions instituted against the United Kingdom.[437]

ii. Judicial system of the European Economic Area

165. 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[438] – aims to extend many European Union policies to the broader European Economic Area. The agreement initially envisaged a common court with competence to adjudicate disputes between the then European Community and the EFTA States. It was eventually not provided for, since the European Court of Justice considered such a court to be incompatible with Community law because, when interpreting European Economic Area provisions that were identical in substance to corresponding rules of Community law, it might infringe upon the exclusive authority of the European Court of Justice to interpret Community (now European Union) law.[439] Instead, in the Agreement on the European Economic Area, the settlement of disputes between the European Union and an EFTA State is entrusted to the European Economic Area Joint Committee, which performs more diplomatic, conciliatory functions[440] than judicial ones.[441]

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[433] Billy Melo Araujo and Lisa Claire Whitten, "Judicial review and the Protocol on Ireland/Northern Ireland", Post-Brexit Governance NI – Explainer No. 5 (Queen's Mary University Belfast, April 2022), p. 5.

[434] European Commission, "Commission launches infringement proceedings against the UK for breaking international law and provides further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland", press release, 15 June 2022; and "Protocol on Ireland/Northern Ireland: Commission launches four new infringement procedures against the UK", press release, 22 July 2022.

[435] Ronan Cormacain, "Northern Ireland Protocol Bill: a rule of law analysis of its compliance with international law", Bingham Center for the Rule of Law, 17 June 2022, p. 5; European Commission, "Protocol on Ireland/Northern Ireland: Commission launches four new infringement procedures against the UK", press release, 22 July 2022.

[436] The decision by the United Kingdom of Great Britain and Northern Ireland to leave the European Union.

[437] Marcin Szczepański, "Windsor Framework: a new way forward for the Protocol on Ireland/Northern Ireland" European Parliamentary Research Service, April 2023, p. 8; United Kingdom, "Windsor Framework unveiled to fix problems of the Northern Ireland Protocol", press release, 27 February 2023; European Commission, "Windsor political declaration by the European Commission and the Government of the United Kingdom", general publications, 27 February 2023.

[438] Agreement on the European Economic Area, *Official Journal of the European Union*, L 1, 3 January 1994, p. 5.

[439] *Opinion delivered pursuant to the second subparagraph of Article 228(1) of the Treaty – Draft agreement between the European Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, Opinion 1/91 of the Court, 14 December 1991 (ECLI:EU:C:1991:490).

[440] Art. 111, para. 2, Agreement on the European Economic Area ("The EEA Joint Committee may settle the dispute. It shall be provided with all information which might be of use in making possible an in-depth examination of the situation, with a view to finding an acceptable solution. To this end, the EEA Joint Committee shall examine all possibilities to maintain the good functioning of the Agreement.")

[441] See Finn Arnesen and others (eds.), *Agreement on the European Economic Area: A Commentary* (Baden-Baden, Nomos, 2018), p. 872.

166. As envisaged in the Agreement on the European Economic Area,[442] a surveillance authority as well as a court were established by the EFTA States in a separate agreement.[443] This EFTA Court has, *inter alia*, jurisdiction in actions brought by EFTA member States against decisions of the EFTA Surveillance Authority[444] and for actions of non-compliance brought by the EFTA Surveillance Authority against member States.[445] The EFTA Court has been in operation for several years and has developed established jurisprudence on European Economic Area law, inspired by the European Court of Justice.[446]

iii. Central American Court of Justice

167. The Central American Court of Justice (Corte Centroamericana de Justicia), a "reconfigured" version of the Central American Court of Justice of 1907–1917,[447] is the judicial organ of the Central American Integration System (Sistema de Integración Centroamericana).[448] This Court has remarkably broad jurisdictional powers.[449]

168. The Central American Court of Justice has, *inter alia*, the power to hear cases for annulment of acts of the Central American Integration System instituted by member States (as well as private parties).[450]

169. The Court also has the authority to issue advisory opinions, which may be either non-binding[451] (*opiniones consultivas ilustrativas*) or binding on all Central American Integration System members[452] (*opiniones consultivas vinculantes*). An advisory opinion is binding if it concerns a Central American Integration System law issue[453] and can be requested by any member State or organ of the Central American Integration System. The Central American Court of Justice has rendered numerous advisory opinions addressing disagreements between Central American Integration System institutions and member States.[454] The Court has even affirmed that it has jurisdiction over Central American Integration System members that have not ratified

[442] Art. 108, Agreement on the European Economic Area.

[443] Art. 27, Agreement between the 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. See also Carl Baudenbacher, Per Tresselt and Þorgeir Örlygsson (eds.), *The EFTA Court: Ten Years On* (Oxford, Bloomsbury Publishing, 2005); EFTA Court (ed.), *The EEA and the EFTA Court: Decentred Integration* (Oxford, Bloomsbury Publishing, 2014).

[444] Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, art. 36.

[445] *Ibid.*, art. 31.

[446] *Ibid.*, art. 3. See also Arnesen and others (eds.), *Agreement on the European Economic Area*, pp. 1019–1051.

[447] Convention for the Establishment of a Central American Court of Justice, 2 *American Journal of International Law*, vol. 2 (1908), Supplement: Official Documents (Jan.–Apr. 1908), pp. 231-242.

[448] Art. 12, Tegucigalpa Protocol to the Charter of the Organization of Central American States (Panama City, 13 December 1991), United Nations, *Treaty Series*, vol. 1695, No. 8048, p. 382. See also Roberto Virzo and Andrea Insolia, "Central American Court of Justice", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, August 2017, para. 17, available at www.mpepil.com.

[449] Cesare P.R. Romano, "International organizations and the international judicial process: an overview", in Boisson de Chazournes, Romano and Mackenzie, *International Organizations and International Dispute Settlement*, pp. 3–36, at p. 16.

[450] Art. 22 (b), Convention on the Statute of the Central American Court of Justice (Panama City, 10 December 1992), United Nations, *Treaty Series*, vol. 1821, No. 31191, p. 279.

[451] Arts. 22 (d) and 23, Convention on the Statute of the Central American Court of Justice.

[452] *Ibid.*, arts. 22 (e) and 24.

[453] Virzo and Insolia, "Central American Court of Justice", para. 17.

[454] Salvatore Caserta and Mikael Rask Madsen, "The world's most powerful international court? The Central American Court of Justice and the quest for de facto authority", *American University International Law Review*, vol. 37 (2022), pp. 483-549, at pp. 518-520.

the Court's Statute (such as Costa Rica and Panama).[455] It has also rejected the possibility of unilaterally denouncing the constituent treaty of the Central American Parliament.[456] Some member States have expressed discomfort with both findings.[457]

170. The Central American Court of Justice of the Central American Integration System should not be confused with an equally denominated "Central American Court of Justice" envisaged by the Charter of the Organization of Central American States,[458] which was never actually set up. It was intended to have jurisdiction over inter-State disputes and to provide opinions on legislative matters of the member States at the request of the Executive Council and the Conference of Ministers of Foreign Affairs, organs of the Organization of Central American States.

iv. Court of Justice of the Andean Community

171. The Court of Justice of the Andean Community (Tribunal de Justicia de la Comunidad Andina)[459] may nullify acts and decisions of organs of the Andean Community, the Andean Council of Ministers for Foreign Affairs, the Commission of the Andean Community and its General Secretariat.[460] In addition to these annulment actions, actions for failure to act may equally be brought against the Community's organs.[461] Furthermore, the Community's General Secretariat, but also member States (art. 24) and even affected individuals and legal persons (art. 25) may bring actions against member States for non-compliance with Andean Community law.[462]

172. Among the triad of mechanisms, non-compliance cases against member States are predominant,[463] a substantial number of these cases, if not most, having been brought by the General Secretariat.[464] Annulment cases are second in frequency and are mostly instituted by member States to challenge acts of the General Secretariat[465] concerning topics ranging from trade to intellectual property.[466] Publicly available

[455] *Asociación de Agentes de Aduana de Costa Rica v. Costa Rica*, Central American Court of Justice, case No. 6-8-9-2008, Judgment, 20 October 2009 (in Spanish).

[456] *Central American Parliament v. Panamá*, Central American Court of Justice, case No. 2-26-03-2010, Judgment, 20 October 2010.

[457] Costa Rica, "Panama apoya a Costa Rica. Canciller Enrique Castillo, se reúne con su homólogo de Panamá, Roberto Henríquez", press release, 2 February 2012, available at https://www.rree.go.cr/?sec=servicios&cat=prensa&cont=593&id=910); Panama, "Sentencia de la Corte Centroamericana de Justicia", press release, 21 October 2010, available at https://mire.gob.pa/comunicado-sentencia-de-la-corte-centroamericana-de-justicia/ (in Spanish).

[458] Art. 2 (e), Charter of the Organization of Central American States (Panama City, 12 December 1962), United Nations, *Treaty Series*, vol. 552, No. 8048, p. 15.

[459] Treaty creating the Court of Justice of the Cartagena Agreement (Cartagena, 28 May 1979) *International Legal Matters*, vol. 18 (1979), p. 1203; Protocol of Cochabamba amending the Treaty creating the Court of Justice (Cochabamba, 28 May 1996).

[460] Arts. 17 et seq., Treaty Creating the Court of Justice of the Cartagena Agreement, as amended by the Cochabamba Protocol.

[461] Art. 37, Cochabamba Protocol.

[462] Art. 23, Cochabamba Protocol.

[463] Tribunal de Justicia Andino, "Historial de procesos recibidos y resueltos por el TJCA hasta el 14 de agosto de 2003", available at https://www.tribunalandino.org.ec/index.php/estadisticas (in Spanish).

[464] Rafael A. Porrata-Doria Jr, "Action to declare noncompliance: Court of Justice of the Andean Community of Nations", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, September 2021, paras. 32 and 38, available at: www.mpepil.com/.

[465] Hugo R. Gómez Apac and Amparo Sauñe Torres, "La acción de nulidad ante el Tribunal de Justicia de la Comunidad Andina", *Revista de Derecho de la Universidad de Piura,* vol. 17 (2016), pp. 383-411, at p. 409.

[466] Rafael A. Porrata-Doria Jr, "Nullity action: Court of Justice of the Andean Community of Nations" in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, August 2019, paras. 26-29, available at www.mpepil.com.

information shows that the Court has mostly refused to annul the challenged acts.[467] Member States can initiate an annulment action only if the contested act was not adopted with their affirmative vote.[468] Although rarely used, actions for failure to act are usually instituted against the General Secretariat.[469]

v. Southern Common Market dispute settlement system

173. The dispute settlement system in the Southern Common Market (Mercado Común del Sur/Sul (MERCOSUR/MERCOSUL)), governed by annex III to the Treaty of Asunción,[470] initially provided for the settlement of "[a]ny dispute arising between the States Parties as a result of the application of the Treaty".[471] The Treaty also provided that a "permanent dispute settlement system" should be adopted by 31 December 1994.[472] However, this system has not been implemented.[473] Rather, it was replaced by a new system established under the Olivos Protocol and accompanying instruments.[474]

174. The new system comprises the possibility for State parties only to access *ad hoc* arbitration after compulsory "direct negotiations"[475] or to submit their dispute to the Permanent Review Court.[476] In addition, the Permanent Review Court is tasked with issuing non-binding advisory opinions regarding the Treaty of Asunción and related protocols,[477] also at the request of different organs of MERCOSUR.[478] To date, only member States have used this mechanism.[479]

175. A decision adopted by the MERCOSUR Council envisages an optional framework for dispute resolution regarding agreements between MERCOSUR and States associated with MERCOSUR.[480] If negotiations and mediation do not work,

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[467] Gómez Apac and Sauñe Torres, "La acción de nulidad ante el Tribunal", p. 409.

[468] Art. 18, Cochabamba Protocol; Rafael A. Porrata-Doria Jr, "Andean Community of Nations, Court of Justice", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, July 2017, para. 8.

[469] *Peru v. General Secretariat*, Court of Justice of the Andean Community, 70-RO-2003, Judgement, 22 October 2003; *Peru v. General Secretariat*, Court of Justice of the Andean Community, 76-RO-2003, Judgement, 6 October 2003; *Peru v. General Secretariat*, Court of Justice of the Andean Community, 01-RO-2007, Judgement, 27 June 2007.

[470] Annex III, Treaty for the establishment of a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Asunción, 26 March 1991), United Nations, *Treaty Series*, vol. 2140, No. 37341, p. 257. See also Paula Wojcikiewicz Almeida, "MERCOSUR dispute settlement system" in Hélène Ruiz Fabri (ed.), *The Max Planck Encyclopedia of International Procedural Law*, August 2018, available at www.mpepil.com/.

[471] Annex III, para. 1, Treaty of Asunción.

[472] Annex III, para. 3, Treaty of Asunción.

[473] Paula Wojcikiewicz Almeida, "The Case of MERCOSUR", in Robert Howse and others (eds.), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge, Cambridge University Press, 2018), pp. 227-254, at p. 228.

[474] Olivos Protocol for the settlement of disputes in MERCOSUR (Olivos, 18 February 2002), United Nations, *Treaty Series*, vol. 2251, No. 37341, p. 243; Rules of the Olivos Protocol for the settlement of disputes in MERCOSUR (Asunción, 20 July 2022), document MERCOSUR/CMC/DEC. N° 05/22, annex.

[475] Art. 9, Olivos Protocol.

[476] Art. 23, Olivos Protocol.

[477] Art. 4, Rules of the Olivos Protocol.

[478] Art. 3, Olivos Protocol; arts. 3–14, Rules of the Olivos Protocol.

[479] Jorge Fernández Reyes, "La situación actual de las opiniones consultivas en el MERCOSUR", *Revista de la Secretaría del Tribunal Permanente de Revisión*, vol. 11 (2023), pp. 1–17, at p. 7.

[480] Régimen de solución de controversias para los acuerdos celebrados entre el MERCOSUR y los Estados Asociados en el ámbito del MERCOSUR (Settlement of disputes regime for agreements between MERCOSUR and MERCOSUR Associate States), annex, document MERCOSUR/CMC/DEC. Nº 49/10 (Foz de Iguazú, 16 December 2010).

this mechanism provides for *ad hoc* arbitration.[481] This framework has apparently not been used. Furthermore, there are discussions concerning the establishment of a MERCOSUR court of justice,[482] which may be competent for actions for annulment and actions for failure to act, as well as infringement actions.[483]

vi. Caribbean Court of Justice

176. The Agreement establishing the Caribbean Court of Justice provides, *inter alia*, for the Court's exclusive jurisdiction in "disputes between any Contracting Parties to this Agreement and the Community".[484] It seems that this possibility has not been used to date.[485] It also provides for the possibility of asking the Court for advisory opinions concerning the interpretation and application of the Treaty establishing the Caribbean Community,[486] interestingly both "at the request of Contracting Parties or the Community".[487] In March 2020, at the request of the Caribbean Community and some member States, the Court rendered its first and, to date only, advisory opinion on the question of whether a member State could opt out of a decision made by an organ of the Community and, if so, whether the principle of non-reciprocity would allow the member that opted out to keep the benefits of that decision. The Court replied affirmatively to both questions. [488]

177. In addition to such "original" jurisdiction addressing Caribbean Community law matters, the Court also has what is referred to as "appellate jurisdiction".[489] Thereby, the Court can serve as a court of last resort for criminal and civil matters in cases stemming from its member States.[490] This system is intended to replace the region's colonial ties to the London-based Judicial Committee of the Privy Council, which performed a similar role.[491] Currently, only four States have accepted this appellate jurisdiction of the Court.[492] Still, the Court has heard several cases through this mechanism.[493]

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[481] *Ibid.*, art. 4.

[482] See Werner Miguel Kühn Baca, "The draft protocol on the creation of the Court of Justice of MERCOSUR. A new milestone in the judicialisation of regional integration law", *Anuario Mexicano de Derecho Internacional*, vol. XVII (2017), pp. 405-442.

[483] Parlamento del MERCOSUR, Proyecto de Norma, Protocolo Constitutivo de la Corte de Justicia del MERCOSUR (Draft protocol establishing the MERCOSUR Court of Justice, document MERCOSUR/PM/PN 02/2010, 2010. See also Parlamento del MERCOSUR, "Estudio, Consideración y Aprobación del proyecto de Norma MERCOSUR/PM/PN 02/2010 Protocolo Constitutivo de la Corte de Justicia del MERCOSUR" (Review, consideration and approval of the draft protocol establishing the MERCOSUR Court of Justice) document MERCOSUR/PM/SO/REC.07/2017 (26 June 2017).

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

[485] Salvatore Caserta, *International Courts in Latin America and the Caribbean: Foundations and Authority* (Oxford, Oxford University Press, 2020), p. 176.

[486] Art. XIII, para. 1, Agreement establishing the Caribbean Court of Justice.

[487] *Ibid.*, art. XIII, para. 2.

[488] Caribbean Court of Justice, Advisory opinion No. OOJ2019/001 requested by the Caribbean Community, 18 March 2020.

[489] Art. III, para. 1, Agreement establishing the Caribbean Court of Justice.

[490] Caserta, *International Courts in Latin America and the Caribbean*, pp. 25-26.

[491] Dennis Byron and Christopher Malcolm, "Caribbean Court of Justice (CCJ)", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, July 2019, para. 8, available at www.mpepil.com.

[492] Caserta, *International Courts in Latin America and the Caribbean*, p. 26.

[493] See the overview in Salvatore Caserta and Mikael Madsen, "The Caribbean Court of Justice: a regional integration and postcolonial court", in Mikael Madsen, Karen J. Alter, Laurence R. Helfer and Mikael Rask Madsen (eds.), *International Court Authority* (Oxford, Oxford University Press, 2018), pp. 149-172, at p. 161.

vii. Southern African Development Community Tribunal

178. In the African context, the Southern African Development Community (SADC) created the Southern African Development Community Tribunal, endowed with wide jurisdictional powers, including "exclusive jurisdiction over all disputes between the States and the Community".[494] The Tribunal also had jurisdiction over cases brought by private parties and decided, among others, upon human rights and investment cases,[495] with human rights cases dominating its docket.[496] It should be noted that the Community itself was a party to proceedings before the Tribunal only in the context of internal employment disputes.[497]

179. The Tribunal was disbanded after several unfavourable rulings against Zimbabwe, most notably in the context of a series of human rights complaints by private parties concerning land reform in Zimbabwe.[498] Two tribunals of the International Centre for Settlement of Investment Disputes also decided upon the same factual background and equally ruled against Zimbabwe.[499] It is worth noting that the SADC Tribunal looked at the matter through human rights instruments, while the tribunals of the International Centre for Settlement of Investment Disputes ruled on the basis of three bilateral investment treaties that Zimbabwe had concluded with Germany, the Kingdom of the Netherlands and Switzerland, respectively.

180. The SADC Tribunal was first suspended in August 2010, following the assertion by Zimbabwe that it had not been legally constituted.[500] Concretely, Zimbabwe argued that the Agreement amending the Treaty of the Southern African Development Community,[501] and therefore the Protocol on the Tribunal, had not entered into force due to lack of respect for formal requirements. In August 2012, the summit of SADC Heads of State and Government resolved that "a new Protocol on the Tribunal should be negotiated".[502] This Protocol, signed in August 2014, but not yet in force,[503] confined the Tribunal's jurisdiction to inter-State disputes,[504] excluding not only cases brought by private parties, but also cases concerning acts of the SADC institutions.[505] Both the Constitutional Court of South Africa and the High Court of

[494] Art. 17, Protocol on the Tribunal of the Southern African Development Community and Rules of Procedure thereof (Windhoek, 7 August 2000), available at https://www.sadc.int/document/protocol-tribunal-and-rules-thereof-2000.

[495] Henok Asmelash, "The legacy of the SADC Tribunal in international investment law", in Hélène Ruiz Fabri and Edoardo Stoppioni (eds.), *International Investment Law: An Analysis of Major Decisions* (Bloomsbury Publishing, 2022), pp. 541-543.

[496] Erika de Wet, "The rise and fall of the Southern Africa Development Community: implications for dispute settlement in South Africa", *ICSID Review,* vol. 28 (2013), pp. 45-63, at pp. 47-48.

[497] Art. 18, Protocol on the Tribunal of the Southern African Development Community; de Wet "The rise and fall of the Southern Africa Development Community", p. 48.

[498] Southern African Development Community Tribunal, *Mike Campbell (Pvt) Ltd. and Others v. Republic of Zimbabwe*, Case No. 2/2007, Judgment, 28 November 2008; *Fick and Others v. Republic of Zimbabwe*, Case No. 01/2010, Ruling, 16 July 2010.

[499] International Centre for Settlement of Investment Disputes, *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, Case No. ARB/05/6, Award, 22 April 2009; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Case No. ARB/10/15, Award, 28 July 2015.

[500] See de Wet, "The rise and fall of the Southern Africa Development Community", pp. 52–54.

[501] Agreement amending the Treaty of the Southern African Development Community (Blantyre, 14 August 2001), United Nations, *Treaty Series*, vol. 3063, No. 52885, p. 328.

[502] SADC, "Final communiqué of the 32nd session of SADC Heads of State and Government, Maputo, Mozambique August 18, 2012", para. 24.

[503] Protocol on the Tribunal in the Southern African Development Community (18 August 2014), available at https://opil.ouplaw.com/display/10.1093/law-oxio/e559.013.1/law-oxio-e559?rskey=ojTQJc.

[504] *Ibid.*, art. 33.

[505] Henok Birhanu Asmelash, "Southern African Development Community Tribunal", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, February 2016, para. 16, available at www.mpepil.com/.

Tanzania have ruled against the involvement of both Governments in dissolving the SADC Tribunal. The Constitutional Court of South Africa found the participation of South Africa in this limitation of the SADC Tribunal's jurisdiction to be "unconstitutional, unlawful, and irrational",[506] while the Tanzanian High Court deemed the participation of Tanzania to be "inimical to the rule of law".[507] Furthermore, the Constitutional Court of South Africa directed the President to withdraw his signature from the 2014 Protocol.[508]

viii. Court of Justice of the Economic Community of West African States

181. The Court of Justice of the Economic Community of West African States (Community Court of Justice) was established pursuant to the 1991 Protocol on the Community Court of Justice.[509] It started to operate in 2002. The Court's jurisdiction has been described as "miscellaneous",[510] as it ranges from disputes concerning the interpretation of the Community's legislation to human rights cases.[511]

182. The Court may hear cases concerning the interpretation and the application of the Economic Community of West African States (ECOWAS) Treaty and the conventions and protocols of the Community,[512] the legality of instruments adopted by ECOWAS,[513] and any alleged failure by member States to perform their obligations under the ECOWAS Treaty and other norms.[514] The Authority of Heads of State and Government can also grant the Court jurisdiction to hear any dispute which is not explicitly provided for in the Treaty.[515]

183. Directly involving international organizations, the Community Court of Justice rendered a judgment on a debt-recovery case filed by the ECOWAS Bank for Investment and Development, an ECOWAS institution, against Cross River State, a state in Nigeria, on the basis of a choice of forum-clause contained in the underlying loan agreement.[516] The Court sided with the Bank and ordered Cross River State to pay the sum owed, plus interest at the rate of 6.5 per cent per annum.[517] Although the decision is not clear on this point, it appears that the loan agreement was not a treaty, but a contractual relationship.[518]

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[506] Constitutional Court of South Africa, *Law Society of South Africa and Others v. President of the Republic of South Africa and Others*, case No. CCT 67/18, Order, 11 December 2018.

[507] High Court of Tanzania, *Tanganyika Law Society v. Ministry of Foreign Affairs and Others*, case No. 23/2014, Judgment, 4 June 2019, p. 50, para. 1.

[508] Constitutional Court of South Africa, *Law Society of South Africa and Others v. President of the Republic of South Africa and Others* (see footnote 506 above), para. 97 (1.3).

[509] Protocol on the Community Court of Justice (Aruba, 6 July 1991), United Nations, *Treaty Series*, vol. 2375, No. 14843, p. 178, as amended by the Supplementary Protocol amending the Protocol on the Community Court of Justice (Accra, 19 January 2005), ECOWAS document A/SP.1/01/05. See also Alioune Sall, *La Justice de l'intégration: Réflexions sur les institutions judiciaires de la CEDEAO et de l'UEMOA* (Dakar, Credila, 2018).

[510] Solomon T. Ebobrah, "Court of Justice of the Economic Community of West African States (ECOWAS)", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, May 2019, para. 14, available at www.mpepil.com/.

[511] Art. 9, Protocol on the Community Court of Justice, as amended by the 2005 Supplementary Protocol.

[512] *Ibid.*, art. 9, para. 1 (a).

[513] *Ibid.*, art. 9, para. 1 (c).

[514] *Ibid.*, art. 9, para. 1 (d).

[515] *Ibid.*, art. 9, para. 8.

[516] *Ibid.*, art. 9, para. 6 ("The Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement.")

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

[518] See footnote 57 above.

184. The Community Court of Justice also heard a dispute between ECOWAS organs, the Parliament and the Council of Ministers together with the Executive Secretariat.[519] The dispute arose from the adoption by the Council of Ministers of a rule that, among other issues, sought to grant the Executive Secretary supervisory power over the Parliament. The Parliament sought to have the rule annulled. The respondents challenged the Parliament's *locus standi*. The case did not reach the merits stage because the Court found that the Parliament had failed to attempt amicable settlement, an admissibility condition provided for in the Revised Treaty of ECOWAS.[520]

185. The Community Court of Justice can also issue advisory opinions.[521] Requests for advisory opinions have been submitted to the Court by the President of the ECOWAS Commission[522] and by the Executive Secretary of ECOWAS.[523]

ix. East African Court of Justice

186. The common market tribunal of the East African Community, envisaged in the 1967 Treaty for East African cooperation to ensure the observance of law and the interpretation and application of the terms of the Treaty,[524] never became operational. However, its successor institution, the East African Court of Justice,[525] consisting of a first instance division and an appellate division, has rendered judgments in a number of cases, including a challenge to an election of Speaker of the East African Legislative Assembly by a member State on procedural grounds (disregard for quorum rules).[526] The Court asserted its jurisdiction, although not expressly, to hear human rights cases.[527]

187. The East African Court of Justice is empowered to give advisory opinions,[528] which it has done, *inter alia*, to solve a dispute between a member State and the

[519] Community Court of Justice, ECOWAS, *ECOWAS Parliament v. ECOWAS Council of Ministers and ECOWAS Executive Secretariat*, Judgment No. ECW/CCJ/JUD/02/05, 4 October 2005.

[520] Art. 76, para. 1, Revised Treaty of the Economic Community of West African States (ECOWAS) (Cotonou, 24 July 1993), United Nations, *Treaty Series*, vol. 2373, No. 42835, p. 233; Community Court of Justice, ECOWAS, *ECOWAS Parliament v. ECOWAS Council of Ministers and ECOWAS Executive Secretariat*, paras. 13-15.

[521] Art. 11, Protocol on the Community Court of Justice, as amended by the 2005 Supplementary Protocol.

[522] Community Court of Justice, ECOWAS, *Advisory Opinion requested by the President of the ECOWAS Commission on renewal of the tenure of Director General and Deputy Director General of GIABA*, case ECW/CCJ/ADV.OPN/ 01/ 08, Advisory Opinion No. 001/08, 16 June 2008; also, concerning the question of whether the President of the Commission could establish a commission of inquiry to investigate allegations of fraud, see *Advisory Opinion requested by the President of the ECOWAS Commission*, No. ECW/CCJ/ADV.OPN/01/16, 6 December 2016.

[523] See, for an opinion regarding the legality of the Speaker of the Parliament remaining in office during transitions of legislature, Community Court of Justice, ECOWAS, *Advisory Opinion requested by the Executive Secretary of ECOWAS relating to Article 23(11) of the Rules of Procedure of the Community Parliament and the provisions of Article 7(2) and 14 (2)(f) of the Protocol on the Community Parliament*, Advisory Opinion No. ECW/CCJ/ADV.OPN/01/05, 5 December 2005.

[524] Art. 32, Treaty for East African Cooperation (Kampala, 6 June 1967), United Nations, *Treaty Series*, vol. 1989, No. 34026, p. 3.

[525] Art. 9 (1) (e), Treaty for the Establishment of the East African Community (30 November 1999), United Nations, *Treaty Series*, vol. 2144, No. 37437 p. 255.

[526] East African Court of Justice, *Attorney General of the Republic of Burundi v. Secretary General of the East African Community*, Ref. No. 2/2018, Judgment, 2 July 2019, paras. 4 and 5; *Attorney General of the Republic of Burundi v. Secretary General of the East African Community*, Appeal No. 2/2019, Judgment, 4 June 2020, para. 5.

[527] Victor Lando, "The domestic impact of the decisions of the East African Court of Justice", *African Human Rights Law Journal*, vol. 18 (2018), pp. 463-485, at p. 467.

[528] Art. 36, Treaty for the Establishment of the East African Community.

Community Secretariat regarding compensation for the early termination of employment of a former Deputy Secretary General of the Community. The Court sided with Rwanda and concluded that there was not enough practice to establish that member States whose nationals had their contract terminated early should reimburse the Community for the relevant compensation.[529]

x. Court of Justice of the Common Market for Eastern and Southern Africa

188. The Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) created a Court of Justice with a mandate to "ensure the adherence to law in the interpretation and application of this Treaty".[530] The COMESA Court of Justice has two sections: a first instance division and an appellate division.[531] It has jurisdiction to provide judicial review of acts of the Council of Ministers[532] as well as to render preliminary rulings.[533] Furthermore, when certain conditions are fulfilled, the Secretary-General may refer a matter to the Court whenever he or she considers that a member State has failed to fulfil an obligation or infringed the treaty.[534]

189. At the request of COMESA, the Court of Justice issued an advisory opinion clarifying that the immunities held by the Common Market do not extend to commercial acts.[535] The organization had unsuccessfully argued that its immunities were absolute.

xi. Court of Justice of the Central African Economic and Monetary Community

190. The 1994 Treaty establishing the Central African Economic and Monetary Community (CEMAC)[536] established a Court of Justice, consisting of a judicial and an accounts chamber,[537] to ensure compliance with that Treaty and to verify the accounts of the Community.[538] The Court's jurisdiction and responsibilities are further specified through different legal instruments.[539]

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[529] East African Court of Justice, Advisory Opinion No. 1 of 2015, delivered 19 November 2015, para. 102.

[530] Art. 19, Treaty establishing the Common Market for Eastern and Southern Africa (Kampala, 5 November 1993), United Nations, *Treaty Series*, vol. 2314, No. 41341, p. 265.

[531] James Thuo Gathii, "The COMESA Court of Justice" in Howse and others (eds.), *The Legitimacy of International Trade Courts and Tribunals*, p. 317.

[532] Art. 24, para. 2, Treaty establishing the Common Market for Eastern and Southern Africa.

[533] *Ibid.*, art. 30.

[534] *Ibid.*, art. 25.

[535] Bedlu Asfaw Mehari, "COMESA court issues landmark advisory opinion", COMESA Court of Justice, 16 October 2015, available at https://comesacourt.org/blog/2015/10/16/comesa-court-issues-landmark-advisory-opinion/.

[536] Traite Instituant La Communaute Économique et Monetaire de l'Afrique Centrale (Treaty Establishing the Economic and Monetary Community of Central Africa, N'Djamena, 16 March 1994), available at www.beac.int.

[537] Louis Savadogo, "Central African Economic and Monetary Community (CAEMC/CEMAC)", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. II, pp. 18-22, at p. 20, para. 13.

[538] James Thuo Gathii and Harrison Otieno Mbori, "Reference guide to Africa's international courts, an introduction", in James Thuo Gathii (ed.), *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* (Oxford, Oxford University Press, 2020), pp. 300-344, at p. 335.

[539] See Art. 10 Traité révisé de la Communauté économique et monétaire de l'Afrique centrale (Revised Treaty establishing the Central African Economic and Monetary Community) (Libreville, 30 January 2009), available at www.cemac.int; Convention Governing the Community Court of Auditors (adopted 30 January 2009), available at www.cemac.int; Convention Governing the Community Court of Justice (adopted 30 January 2009), available at www.cemac.int; Additional Act Concerning the Statute of the Community Court of Justice Nr. 04/21- CEMAC-CJ-CCE-15 (18 August 2021), available at www.cemac.int.

191. Among other tasks, the Court exercises judicial control over acts issued by the Community,[540] decides upon disputes regarding non-compliance by member States with CEMAC law[541] and issues advisory opinions at the request of member States and CEMAC institutions and organs.[542]

xii. Court of Justice of the West African Economic and Monetary Union

192. Both the West African Economic and Monetary Union (WAEMU) and its Court of Justice were instituted by the Treaty on the West African Economic and Monetary Union, also known as the Treaty of Dakar.[543] The statute, composition, competences and rules of procedure of the WAEMU Court of Justice were further established by additional acts.[544]

193. The Union's Commission may institute proceedings before the Court against any member State for violating WAEMU law.[545] Moreover, any binding act adopted by Union organs and institutions may be contested before the Court by member States, the WAEMU Council, the WAEMU Commission and even private parties.[546] Under this mechanism, a case was filed by Senegal,[547] challenging a decision taken by the WAEMU Commission instructing Senegal to withdraw a regulation adopted without WAEMU authorization.[548] Senegal discontinued proceedings before the Court could decide on the case, reportedly for diplomatic reasons.[549]

194. The WAEMU Court of Justice has rendered numerous advisory opinions, mostly regarding the interpretation of WAEMU law.[550] In addition, organs and institutions of the Union, as well as member States, may request the Court to advise on the compatibility of an international agreement with the WAEMU Treaty,[551] although the consequences of a finding of incompatibility are not specified.[552]

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[540] Art. 23, Convention governing the Community Court of Justice.

[541] *Ibid.*, art. 23.

[542] *Ibid.*, art. 34.

[543] Art. 16, Treaty on the West African Economic and Monetary Union (10 January 1994), available at www.uemoa.int. See also Sall, *La Justice de l'intégration*.

[544] Art. 38, Treaty on the West African Economic and Monetary Union; Protocole Additionnel n°1 relatif aux Organes de contrôle de l'UEMOA (10 January 1994); Acte Additionnel n° 10/96 portant statuts de la Cour de Justice de l'Union Economique et Monetaire Ouest Africaine (10 May 1996); Règlement n°1 1/96/CM portant Règlement des procédures de la Cour de Justice de l'UEMOA (Rules of procedure of the WAEMU Court of Justice) (5 July 1996).

[545] Art. 15, para. 1, Rules of Procedure of the West African Economic and Monetary Union Court of Justice.

[546] *Ibid.*, art. 15, para. 2; Ousseni Illy, "The WAEMU Court of Justice", in Howse and others, *The Legitimacy of International Trade Courts and Tribunals*, p. 356; WAEMU Court of Justice, *Société des Ciments du Togo, SA, v. WAEMU Commission*, Case No. 01/2001, 20 June 2001.

[547] WAEMU Court of Justice, *Senegal v. WAEMU Commission*, Case No. 01/2017, Judgment, 21 February 2017.

[548] "UEMOA/Cour de Justice: Audience ordinaire publique dossier Etat du Sénégal C/ Commission de l'UEMOA", available at https://www.uemoa.int/fr/uemoacour-de-justice-audience-ordinaire-publique-dossier-etat-du-senegal-c-commission-de-luemoa; Eleanor M. Fox and Mor Bakhoum, *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa* (Oxford, Oxford University Press, 2019), p. 146.

[549] Fatou Gueye, "Uemoa : Macky annule le recours de Wade interdisant la commercialisation de l'huile de palme de la Côte d'Ivoire au Sénégal", SENEGO, 25 February 2017, available at https://senego.com/uemoa-macky-annule-le-recours-de-wade-interdisant-la-commercialisation-de-lhuile-de-palme-de-la-cote-divoire-au-senegal_444018.html.

[550] Illy, "The WAEMU Court of Justice", p. 359.

[551] Art. 15, para. 7, Rules of procedure of the West African Economic and Monetary Union Court of Justice.

[552] Illy, "The WAEMU Court of Justice", p. 359.

195. It is to be noted that WAEMU and ECOWAS overlap in mandate, all members of WAEMU also being part of ECOWAS. This overlap has consequences for the jurisdiction of both courts.[553] Following a decision of the WAEMU Council of Ministers to demonetize a circulating currency,[554] an individual brought a case involving property rights to the ECOWAS Court against the Niger and the Central Bank of Western African States. The ECOWAS Court declined to exercise its jurisdiction, given the "exclusive jurisdiction accorded to the WAEMU court of justice" to hear disputes regarding the non-contractual liability of WAEMU.[555] However, the WAEMU Court declared itself incompetent as the action, based on the provision granting the WAEMU Court jurisdiction to entertain disputes regarding the non-contractual liability of WAEMU, was instituted against the Niger and not against an organ of the Union.[556]

xiii. "Dormant" judicial entities

196. A number of dispute settlement institutions have been created without having been activated. For instance, the Nuclear Energy Agency Tribunal of the Organisation for Economic Co-operation and Development has jurisdiction to hear claims of members against the organization's decisions or failure to adopt them.[557] It may also entertain reparation claims by nuclear undertakings of the member States (including private entities)[558] that have suffered any exceptional damage by reason of an inspection carried out by the organization.[559] Although judicial appointments have been made to this Tribunal since 1969, to date no cases have been brought before it.[560]

197. Another example of an inactive judicial institution is the judicial organ of the Arab Maghreb Union, established by the Treaty instituting the Arab Maghreb Union.[561] This judicial organ is empowered to rule on disputes arising from the interpretation and implementation of instruments concluded within the framework of the Union, at the request of both the Presidential Council and member States.[562] This Court is apparently also inoperative.[563]

198. Nevertheless, both examples demonstrate the possibility of being used as adjudicatory forms of settling disputes to which international organizations are parties.

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[553] Ousseni Illy, "Court of Justice of the West African Economic and Monetary Union", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, May 2019, para. 45, available at www.mpepil.com/.

[554] *Ibid.*, para. 46.

[555] Court of Justice of the Economic Community of West African States, *El-Hadji Tidjani Aboubacar v. Banque Centrale des Etats de l'Afrique de l'Ouest and Niger*, Judgment No. ECW/CCJ/APP/13/08, 9 February 2011.

[556] WAEMU Court of Justice, *El Hadji Aboubacar v. Niger*, Judgment No. 01/2013, 16 January 2013, p. 6.

[557] Art. 13 (a), Convention on the establishment of a security control in the field of nuclear energy (Paris, 20 December 1957), United Nations, *Treaty Series*, vol. 2952, No. 51315, p. 265.

[558] *Ibid.*, art. 1 (a) (i) (referring to "undertakings established by two or more Governments or by nationals of two or more countries on the initiative or with the assistance of the Agency").

[559] *Ibid.*, art. 13 (d).

[560] See Nuclear Energy Agency Tribunal homepage, available at https://www.oecd-nea.org/jcms/pl_19941/european-nuclear-energy-tribunal.

[561] Treaty instituting the Arab Maghreb Union (Marrakesh, 17 February 1989), United Nations, *Treaty Series*, vol. 1546, No. 26844, p. 151.

[562] *Ibid.*, art. 13.

[563] Ignacio de la Rasilla, "Failed international courts and tribunals", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, June 2023, para. 23, available at www.mpepil.com/; Gathii and Mbori, "Reference guide to Africa's international courts", p. 344.

F. Suggested guideline

199. The overview of the practice of settling international disputes to which international organizations are parties has demonstrated that in fact, the entire range of "means of dispute settlement" envisaged by draft guideline 2 (c) are used. While international organizations and States seem to prefer consensual forms of dispute settlement, falling short of binding third-party adjudication in practice, the confidential nature of such mechanisms makes any firm empirical assessment of the frequency of their use difficult. However, the information provided by States and international organizations confirms this assumption. The overview has also shown that adjudicatory forms of dispute settlement are less frequently employed, mainly because international courts or tribunals either do not exist or often possess only limited jurisdiction and because arbitral tribunals are only exceptionally consented to as dispute settlement mechanisms. At the same time, the overview has demonstrated that international organizations and States have often ingeniously and creatively coped with the jurisdictional limitations of international courts or tribunals. They made use of them in order to advance the actual settlement of international disputes. Draft guideline 4 is intended to reflect the current, actual practice.

200. "4. Practice of dispute settlement

> "International disputes to which international organizations are parties are settled by the means of dispute settlement laid down in draft guideline 2 (c). In practice, negotiation and other means of dispute settlement, falling short of binding third-party adjudication, are widely used. Arbitration and judicial settlement are often not provided for and are therefore resorted to less frequently."

III. Policy issues and suggested recommendations

201. While chapter II presented the empirical background of the various means of dispute settlement actually used, the intention in this chapter is to suggest recommendations that should be followed for the purpose of settling disputes to which international organizations are parties. They are not meant to reflect legal obligations or to replace such obligations where they may be contained in various legal instruments, as discussed in chapter II. Rather, they stem from underlying policy considerations that are discussed and made explicit if adopted.

A. Choice of dispute settlement means and effective settlement of legal disputes

202. Like States, international organizations are free to choose the means of dispute settlement they want to use.[564] In general, the "customary methods recognized by international law for … the settlement of claims" available to States, as enshrined in Article 33 of the Charter of the United Nations and reflected in draft guideline 2 (c), are also at the disposal of international organizations to settle disputes to which they are parties.[565] The overview of actual practice above has shown that independent third-party adjudication in the form of arbitration or judicial dispute settlement is often not available. This clearly limits the choice of dispute settlement means and also reduces the negotiation position of States as well as international organizations because it may often give an advantage to the more powerful party, whether the organization or the State involved.

[564] Wood, "The settlement of international disputes", para. 6, footnote 9.

[565] *Reparation for injuries suffered in the service of the United Nations* (see footnote 213 above), p. 177.

203. Especially in the context of legal disputes, independent and impartial third-party adjudication offers the advantage of settling disputes according to rules and principles without regard to the position of the parties to the dispute – a notion well captured by the image of the blindfolded *justitia*.[566] There are strong policy reasons for favouring independent and impartial third-party adjudication as the preferred form of dispute settlement due to rule of law considerations. These rule of law considerations will form the background of the suggested recommendations.

1. Rule of law considerations

204. The concept of the rule of law has developed at the national level. Its relevance at the international level, namely, in regard to States and international organizations, is strongly supported by the 2012 declaration of the high-level meeting of the General Assembly on the rule of law at the national "and international" levels,[567] as well as the resolutions on the same topic that the General Assembly has adopted annually[568] since "rule of law" was put on its agenda in 2006.[569]

205. Traditionally, the rule of law focus of the United Nations was on the "paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations," as expressed by the General Assembly in 1970 in its Declaration on Principles of Friendly Relations.[570] With a view to dispute settlement, the General Assembly has repeatedly sought to strengthen the role of the International Court of Justice, by demanding compliance with the Court's judgments,[571] by commending the

[566] See also, on the ambiguity of this allegorical representation, Ernst von Moeller, "Die Augenbinde der Justitia", *Zeitschrift für christliche Kunst*, vol. 18 (1905), pp. 107-122 and 141-152; Lodovico Zdekauer, *L'idea della giustizia e la sua imagine nelle arti figurative* (Macerata, Bianchini, 1909); Erwin Panofsky, *Studies in Iconology: Humanistic Themes in the Art of the Renaissance* (New York, Harper Torchbook, 1967); John Rawls, *A Theory of Justice* (Cambridge, Massachusetts, Harvard University Press, 1971); Otto Rudolf Kissel, *Die Justitia: Reflexionen über ein Symbol und seine Darstellung in der bildenden Kunst* (Munich, Beck, 1984); Robert Jacob, *Images de la justice: Essai sur l'iconographie judiciaire du Moyen Âge à l'âge classique* (Paris, Le Léopard d'Or, 1996); Paulo Ferreira da Cunha, *Arqueologias jurídicas. ensaios juridico-humanísticos e jurídico-políticos* (Porto, Lello, 1996); Adriano Prosperi, *Giustizia bendata: Percorsi storici di un'imagine* (Turin, Einaudi, 2008); Valérie Hayaert, *Lady Justice: An Anatomy of Allegory* (Edinburgh, Edinburgh University Press, 2023), pp. 70 et seq.

[567] "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.

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

[569] "The rule of law at the national and international levels", General Assembly resolution 61/39 of 4 December 2006.

[570] See "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[571] See "United Nations Millennium Declaration", General Assembly resolution 55/2 of 8 September 2000, para. 9 (The General Assembly resolving to "strengthen respect for the rule of law in international as in national affairs and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice, in compliance with the Charter of the United Nations, in cases to which they are parties").

Court's contribution to the rule of law and by calling for wider acceptance of the jurisdiction of the International Court of Justice.[572]

206. In national legal systems, the concept of the rule of law does not have a clearly defined and generally accepted meaning, which is also reflected in the partly divergent terminology used, speaking of "*prééminence du droit*" ("*état de droit*", "*primauté de droit*" or "*règle de droit*"), "*stato di diritto*", "*estado de derecho*", "*estado de direito*", "法治" (*fa zhi*), "верховенство права" (*verkhovenstvo prava*), "*Rechtsstaatlichkeit*" or the rule of law. Still commonalities emerge.[573] Some legal traditions may emphasize equality and procedural aspects, such as access to justice and the right to a fair procedure,[574] while others focus on the (formal) legality of State action.[575] Some concepts envisage the rule of law as a "thin" formal one, stressing the limits of the exercise of State powers, whereas "thick" conceptualizations of the rule of law include substantive elements of justice and human rights.[576]

207. In order to elaborate commonly shared elements of the rule of law, reference is usually made to the Secretary-General's 2004 *Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,*[577] which focuses on national rule of law requirements and contains the often-quoted conceptualization, pursuant to which:

> "The 'rule of law' is a concept [that] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law,

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[572] See "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. 31 ("We recognize the positive contribution of the International Court of Justice, the principal judicial organ of the United Nations, including in adjudicating disputes among States, and the value of its work for the promotion of the rule of law; we reaffirm the obligation of all States to comply with the decisions of the International Court of Justice in cases to which they are parties; and we call upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute. We also recall the ability of the relevant organs of the United Nations to request advisory opinions from the International Court of Justice.") See also "Peaceful settlement of disputes", Working Paper prepared by Sir Michael Wood, document A/CN.4/641 (reproduced in *Yearbook of the International Law Commission, 2011*, vol. II (Part 1), p. 247), para. 8 ("encouraging States to accept dispute settlement procedures would be broadly welcomed as a contribution to rule of law at the international level").

[573] Simon Chesterman, "Rule of Law" in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, July 2017, paras. 10-11.

[574] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution*, Pt. II (London, Macmillan, 1885); 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", *Nomos*, vol. 50 (2011), pp. 3-31; Ernst-Ulrich Petersmann, "International rule of law and constitutional justice in international investment law and arbitration", *Indiana Journal of Global Legal Studies*, vol. 16 (2009), pp. 513-533.

[575] As expressed in the notion of the "Rechtsstaat". See Hans Kelsen, *Pure Theory of Law*, 2nd ed. (Berkeley, University of California Press, 1970); Jens Meierhenrich, "*Rechtsstaat* versus the rule of law", in Jens Meierhenrich and Martin Loughlin (eds.), *The Cambridge Companion to the Rule of Law* (Cambridge, Cambridge University Press, 2021), pp. 39-67.

[576] See, on the rule of law in general, Lon L. Fuller, *The Morality of Law* (New Haven, Yale University Press, 1964); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Clarendon Press, 1979), pp. 210-229; Jeremy Waldron, *The Law* (London, Routledge, 1990); Tamanaha, *On the Rule of Law*.

[577] See "*Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies*" (S/2004/616).

> accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[578]

208. The General Assembly's 2012 declaration on the rule of law[579] also contains various rule of law elements, particularly of a procedural nature. With a view to dispute settlement, the following core elements may be identified therein:

(a) Access to dispute settlement, as expressed in "the right of equal access to justice for all";[580]

(b) Judicial independence and impartiality, identified as "an essential prerequisite for upholding the rule of law";[581]

(c) Due process and a fair trial, referred to as "an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice".[582]

209. Many rule of law requirements, in particular in regard to dispute settlement, also have validity at the international level.[583] This was confirmed by the General Assembly in its 2012 declaration on the rule of law, in which it stated that "the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities".[584] It is also acknowledged by the General Assembly in its annual resolutions.[585]

210. Furthermore, the International Court of Justice has highlighted a number of core procedural rules that relate to the good administration of justice, which can be regarded as expressions of the rule of law.[586] A very detailed pronunciation on the requirements of due process and a "fair hearing" is found in the 1973 Advisory Opinion of the International Court of Justice in *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*,[587] in which it held:

> "[C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and

[578] *Ibid.*, para. 6. Reaffirmed in "*Report of the Secretary-General* on delivering justice: programme of action to strengthen the rule of law at the national and international levels" (A/66/749), para. 2.

[579] General Assembly resolution 67/1 of 24 September 2012.

[580] *Ibid.*, para. 14.

[581] *Ibid.*, para. 13.

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

[583] See Philip J. Allott, *Towards the International Rule of Law: Essays in Integrated Constitutional Theory* (London, Cameron May, 2005); Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (The Hague, Martinus Nijhoff, 1998); Simon Chesterman, "An international rule of law?", *American Journal of Comparative Law*, vol. 56 (2008), pp. 331-361; Kenneth J. Keith, "The international rule of law", *Leiden Journal of International Law*, vol. 28 (2015), pp. 403-417; Robert McCorquodale, "Defining the international rule of law: defying gravity?", *International and Comparative Law Quarterly*, vol. 65 (2016), pp. 277-304; Jeremy Waldron, "The rule of international law", *Harvard Journal of Law & Public Policy*, vol. 30 (2006), pp. 15-30.

[584] General Assembly resolution 67/1 of 24 September 2012, para. 2.

[585] See, most recently, e.g., "The rule of law at the national and international levels", General Assembly resolution 77/110 of 7 December 2022, ninth preambular paragraph ("*Convinced* that the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and its Member States").

[586] See para. 242 below.

[587] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (see footnote 345 above).

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".[588]

211. Although these judicial pronouncements stem from cases addressing the procedural rights of staff members before administrative tribunals, the underlying elements relating to the rule of law, of the "the good administration of justice", are generally relevant to any form of dispute settlement.

2. Access to dispute settlement

212. Access to justice is a core requirement of the rule of law at the national level.[589] It follows from the rule of law notion that no one is above the law and that disputes should be settled by fair adjudication.

213. Whether access to justice is equally well established at the international level may be somewhat more debatable. Access to justice is considered to be a right in most national legal systems, which could qualify it as a candidate for a general principle of law. However, access to justice is not easily transposable to the international level. Particularly in the light of the requirement of consent for dispute settlement at the international level, the right of access to dispute settlement – widely found in national law – cannot be regarded a general principle of law.[590] However, the fact that the jurisdiction of international courts and tribunals is usually consent-based does not alter the fact that, as a matter of policy, access to independent third-party dispute settlement is of equally valid concern for the international rule of law.[591] Thus, demanding access to such a dispute settlement would be a valid rule of law claim for subjects of international law as well. Therefore, "extending the participation of international organizations to dispute settlement procedures" is closely linked to the rule of law.[592]

214. In the light of the limited access of international organizations to dispute settlement, in general, and to the International Court of Justice, in particular, it is not surprising that there have been repeated calls for broader access of the United Nations

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[588] *Ibid.*, para. 92.

[589] Francesco Francioni, "The rights of access to justice under customary international law", in Francesco Francioni (ed.), *Access to Justice as a Human Right* (Oxford, Oxford University Press, 2007), pp. 1-55, at p. 3; Tom Bingham, *The Rule of Law* (London, Penguin, 2010), p. 85; André Nollkaemper, *National Courts and the International Rule of Law* (Oxford, Oxford University Press, 2011), pp. 53 et seq.; William Lucy, "Access to justice and the rule of law", *Oxford Journal of Legal Studies*, vol. 40 (2020), pp. 377-402.

[590] A/78/10, para. 49, para. (5) of the commentary to draft conclusion 6 on general principles of law ("the right of access to courts that invariably exists across national legal systems … cannot be transposed to international courts and tribunals because it would be incompatible with the fundamental principle of consent to jurisdiction in international law, which underlies the structure and functioning of international courts and tribunals").

[591] See "*Report of the Secretary-General* on delivering justice" (A/66/749), para. 14 ("One of the central features of the rule of law at the international level is the ability of Member States to have recourse to international adjudicative mechanisms to settle their disputes peacefully, without the threat or use of force.") See also Anne Orford, "A global rule of law", in Meierhenrich and Loughlin, *The Cambridge Companion to the Rule of Law*, pp. 538-566; Hermann Mosler, "The international society as a legal community", *Recueil des Cours*, vol. 140 (1974), pp. 1 et seq.; Jeremy Waldron, "Are sovereigns entitled to the benefit of the international rule of law?" International Law and Justice Working Paper 2009/3 (Institute for International Law and Justice, New York University School of Law, 2009).

[592] Boisson de Chazournes, Romano and Mackenzie, *International Organizations and International Dispute Settlement*, pp. xvii–xxiii, at p. xix.

and its specialized agencies, as well as international organizations generally, to the Court, including to its contentious jurisdiction for rule of law reasons.[593]

215. These calls led to reform proposals in the General Assembly under the agenda item "Review of the Role of the International Court of Justice".[594] In response to a 1971 survey, the majority of States that responded replied positively to a question on "the possibility of enabling intergovernmental organizations to be parties before the Court".[595] In 1995, the President of the International Court of Justice stressed the importance of giving international organizations access to the contentious procedure before the Court.[596] Subsequently, between 1997 and 1999, the General Assembly's Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization considered concrete proposals by States to enlarge the contentious jurisdiction of the Court to international organizations. However, these plans were suspended.

216. The end of the political debate, though, did not prevent an intensive exchange of views in the 1980s and 1990s,[597] which were generally positive to overcome what was perceived as an "anomaly"[598] in modern international law – the limitation of the contentious jurisdiction of the International Court of Justice to States. In 2023, the President of the International Court of Justice noted the decade-long calls to extend Article 34 to permit international organizations access to the Court in order to "align the scope of the Court's jurisdiction with the contemporary role of international organizations".[599]

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[593] James Crawford, "The International Court of Justice, judicial administration and the rule of law", in D.W. Bowett (ed.), *The International Court of Justice: Process, Practice and Procedure* (London, British Institute of International and Comparative Law, 1997), p. 120 (Article 34 of the Statute of the International Court of Justice "seems to raise a serious problem with regard to the rule of law at the international level. An international organisation which is subject to the rule of law should have some ultimate legal process by which individual Member States can be held accountable to it. Similarly there should be some process by which the organisation could be held accountable to its Member States").

[594] Report of the Secretary General on a review of the role of the International Court of Justice (A/8382).

[595] Wood, "The settlement of international disputes", para. 15.

[596] International Court of Justice, President of the Court, Judge Mohammed Bedjaoui, addressing the 30th meeting of the fiftieth session of the General Assembly on 12 October 1995, *I.C.J. Yearbook (1995-1996)*, p. 268 ("Today, when inter-governmental organizations have grown up, it is important to give them access to contentious procedure.")

[597] See Jenks, *The Prospects of International Adjudication*; Philippe Couvreur, "Développements récents concernant l'accès des organisations intergouvernementales à la procédure contentieuse devant la Cour Internationale de Justice", in Emile Yakpo and Tahar Boumedra (eds.), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague, Kluwer Law International, 1999), pp. 293-323; Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge, Grotius Publications, 1991), pp. 61-65; Ignaz Seidl-Hohenveldern, "Access of international organizations to the International Court of Justice," in A.S. Muller, D. Raič and J.M. Thuránszky (eds.), *The International Court of Justice* (The Hague, Kluwer Law International, 1997), pp. 189-203; Paul C. Szasz, "Granting international organizations *ius standi* in the International Court of Justice," in Muller, Raič and Thuránszky (eds.), *The International Court of Justice*, pp. 169-188; Jerzy Sztucki, "International organizations as parties to contentious proceedings before the International Court of Justice?," in Muller, Raič and Thuránszky (eds.), *The International Court of Justice*, pp. 141-167; Tullio Treves, "International organizations as parties to contentious cases: selected aspects", in Boisson de Chazournes, Romano and Mackenzie, *International Organizations and International Dispute Settlement*, pp. 37–46.

[598] Robert Y. Jennings, "The International Court of Justice after fifty years", *American Journal of International Law*, vol. 89 (1995), pp. 493–505, at p. 504 et seq.

[599] Speech of Judge Joan E. Donoghue, President of the International Court of Justice, to the Sixth Committee of the General Assembly, 25 October 2023, available at https://www.icj-cij.org/statements-by-the-president, p. 5. She herself endorsed only a more "modest" amendment, which would "permit regional integration organizations to appear as parties in contentious proceedings before the Court in respect of matters for which their member States have transferred competence to them." *Ibid.*, p. 6.

217. The International Law Commission has noted the problem of limited access to justice for international organizations several times. The inadequacy of available dispute settlement options for international organizations, in particular in regard to responsibility issues, has been acknowledged by the Commission's Working Group on the responsibility of international organizations.[600] It is also evidenced by the fact that the Commission's long-term programme of work continues to include the topics "Arrangements to enable international organizations to be parties to cases before the International Court of Justice"[601] and "Status of international organizations before the International Court of Justice".[602] In a 2011 working paper on peaceful settlement of disputes, it was suggested that there was a need to "reinforce procedures for the settlement of disputes", in particular those to which international organizations are parties, and that the Commission should consider the topic "Improving procedures for dispute settlement involving international organizations".[603]

218. Other bodies tasked with the codification and development of international law have also repeatedly called for wider availability of adjudicatory dispute settlement involving international organizations. In 1957, the Institute of International Law adopted a resolution on judicial redress against the decisions of international organs,[604] which focused on private parties, but also considered redress claims of member States.[605] It acknowledged that the establishment of forms of judicial redress would require treaty action.[606] It apparently considered such calls justified, recognizing that "judicial control of the decisions of international organs must have as its object the assurance of respect for rules of law which are binding on the organ or organization under consideration".[607] In 1995, the Institute also addressed some aspects of the settlement of disputes between international organizations and member States in the context of its work on the legal consequences for member States of the non-fulfilment by international organizations of their obligations toward third parties.[608] It recommended not only the development of rules concerning the liability of member States for obligations of international organizations, but also suggested providing for arbitration or other binding forms of dispute settlement between organizations and member States.[609]

219. Similar calls for the wider use of adjudication of international disputes to which international organizations are parties have been made by the International Law

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[600] *Yearbook of the International Law Commission, 2002*, vol. II (Part Two), para. 486.

[601] "Report of the International Law Commission on the work of its twentieth session, 20 May–2 August 1968", document A/7209/Rev.1, *Yearbook of the International Law Commission, 1968*, vol. II, at p. 233.

[602] "Report of the International Law Commission on the work of its twenty-second session, 4 May–10 July 1970", *Yearbook of the International Law Commission, 1970*, vol. II, at p. 268, para. 138. See also "Long-term programme of work: review of the list of topics established in 1996 in the light of subsequent developments", Working paper prepared by the Secretariat, document A/CN.4/679 (reproduced in *Yearbook of the International Law Commission, 2016*, vol. II (Part One)), para. 58.

[603] Wood, "Peaceful settlement of disputes", paras. 16 and 20 (b).

[604] Institute of International Law, resolution on judicial redress against the decisions of international organs, Institute of International Law, *Annuaire*, vol. 47 (1958), Session of Amsterdam (1957), Part II, p. 488. Also available from www.idi-iil.org.

[605] *Ibid.*, para. IV a) ("the indication of States, international organs or organizations, collectivities or private persons to which means of redress would be available").

[606] *Ibid.*, para. I, second sentence.

[607] *Ibid.*, para. II.

[608] Institute of International Law, resolution on the legal consequences for member States of the non-fulfilment by international organizations of their obligations toward third parties, *Yearbook*, vol. 66 (1996), Session of Lisbon (1995), p. 445.

[609] *Ibid.*, art. 12 ("Where liability of member States is provided for, the Rules of the organization should provide for international arbitration or other mechanisms leading to a binding decision to resolve any dispute arising between the organization and a member State or between member States over the liability of the latter *inter se* or to put the former in funds.")

Association. In its 1966 resolution on international arbitration, based on a report of its Committee on the Charter of the United Nations, the Association specifically drew attention "to the availability of international arbitral tribunals for the settlement of a variety of international disputes, including: (a) International disputes which cannot be submitted to the International Court of Justice … [and] (c) Disputes between States and international organizations"[610] and recalled "its previous resolutions supporting greater use of international arbitration for the settlement of international disputes".[611] These calls were echoed in the Association's "Recommended rules and practices on liability/responsibility of international organisations," elaborated by its Committee on Accountability of International Organisations and endorsed in its 2004 resolution.[612] These rules and recommended practices are contained in an extensive report,[613] which also addressed questions of dispute settlement, proposing, *inter alia*, the insertion of arbitration clauses in agreements of international organizations both with States and non-State entities.[614] Additionally, the report advocated for a greater role of the International Court of Justice by suggesting a more extensive use of advisory opinions from the International Court of Justice[615] and an amendment of Article 34 of its Statute, giving standing to international organizations.[616]

3. Recommendations

220. 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. This could be achieved by providing for arbitration clauses in treaties in a more extensive manner, as well as by encouraging international organizations and States to agree on arbitration also in situations where a dispute has already arisen.[617]

221. In this context, it is worth mentioning that some arbitration institutions have formulated draft arbitration clauses for this purpose. For instance, the Permanent Court of Arbitration has annexed a model arbitration clause for treaties and other agreements to its Arbitration Rules 2012,[618] which consolidated and integrated the

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[610] International Law Association, resolution on the Charter of the United Nations (international arbitration), *Report of the Fifty-second Conference held in Helsinki, 14–20 August 1996*, p. xii, para. 1.

[611] *Ibid.*

[612] International Law Association, resolution on the accountability of international organisations, *Report of the Seventy-first Conference held in Berlin, 16-21 August 2004*, p.13.

[613] *Ibid.*, "Accountability of international organisations", Final report, pp. 164-234.

[614] *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.")

[615] *Ibid.*, p. 231 ("IO-s should be allowed to take the initiative to request the International Court of Justice to deliver an Advisory Opinion on any legal question arising in the context of differences and disputes between States and IO-s concerning the non-contractual liability of the IO or its legal responsibility.")

[616] *Ibid.*, p. 233 ("Article 34 of the Statute should read: States and International Organisations, duly authorised by their constituent instrument, may be parties in cases before the Court.") See also Karel Wellens, *Remedies against International Organisations* (Cambridge, Cambridge University Press, 2002).

[617] See also the report of the Working Group on the United Nations Decade of International Law (A/C.6/47/L.12), para. 15 (referring to a "proposal urging a wider use of the Permanent Court of Arbitration for the settlement of disputes between States as well as disputes between States and international organizations"). See also Wood, "The settlement of international disputes", para. 18 ("Arbitration is potentially a useful tool for the settlement of international disputes to which international organizations are parties. It not only avoids the difficulties of standing that arise before the International Court of Justice, but it also presents the parties with a flexible system that, if needed, can maintain confidentiality.")

[618] Permanent Court of Arbitration, Arbitration Rules 2012, annex.

1996 Optional Rules for Arbitration Involving International Organizations and States.[619] The Permanent Court of Arbitration model clause provides as follows:

> "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 ... ."

222. Guidance can also be received from existing arbitration clauses, such as those contained in headquarters agreements and comparable treaties, as discussed above.[620]

223. The broader availability of judicial settlement would, of course, be more difficult to achieve. It would require, in most instances, an amendment of the existing jurisdictional limitations of international courts or tribunals. Furthermore, it would involve the creation of new international courts or tribunals that might either become the judicial organs of organizations or be separate institutions offering dispute settlement to existing organizations.[621]

224. Suggestions to amend the Statute of the International Court of Justice have been made at the United Nations level in the past. The Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization considered, among others, proposals by Guatemala[622] and Costa Rica[623] to provide access to international organizations to contentious proceedings before the Court. Costa Rica suggested amending Article 34, paragraph 1, of the Statute, as follows:

> "States and public international organizations, so authorized by their constituent instruments, may be parties in cases before the Court."[624]

225. Corresponding amendments including "public international organizations, so authorized by their constituent instrument[s]" were suggested to Articles 35, 36 and 40 of the Statute and an additional Article 96 *bis* of the Charter of the United Nations was proposed, as follows:

> "The United Nations and its specialized agencies may at any time be authorized by the General Assembly to be parties in cases before the International Court of Justice and to accept the jurisdiction of the Court in any of the manners established in Article 36 of the Statute of the International Court of Justice."[625]

226. Amending the Statute of the International Court of Justice so as to allow international organizations access to contentious proceedings or establishing new judicial institutions, open to international organizations as parties to disputes before them, would in itself not be sufficient to actually widen the availability of judicial dispute settlement. Given the required consent to the jurisdiction of international courts or tribunals, such action must be coupled with the increased submission to the Court's jurisdiction in treaties and other instruments. Thus, similar to arbitration clauses, treaties should contain dispute settlement clauses submitting potential disputes to the International Court of Justice, if its amended Statute would so allow,

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[619] Permanent Court of Arbitration, Optional Rules for Arbitration Involving International Organizations and States (1996).
[620] See paras. 61 et seq. above.
[621] See the overview of the courts of the regional economic integration organizations above, paras. 159 et seq.
[622] Documents A/AC.182/L.95 and A/AC.182/L.95/Rev.1.
[623] Document A/AC.182/L.97.
[624] *Ibid.*, p. 1.
[625] *Ibid.*, p. 3.

and/or to international courts established with jurisdiction over disputes to which international organizations are parties.

B. Suggested guideline

227. "5. Access to arbitration and judicial settlement.

"Arbitration and judicial settlement should be made available and more widely used for the settlement of international disputes to which international organizations are parties."

C. Dispute settlement and the rule of law

228. Dispute settlement means of an adjudicatory character not only have to be available, they also have to conform to rule of law standards.

229. Core rule of law requirements for good "administration of justice" are: (a) the independence and impartiality of arbitral or judicial institutions; and (b) respect for due process through safeguarding the principle of the equality of the parties in the course of adjudicatory proceedings.[626] These two core requirements are clearly addressed in the General Assembly's 2012 declaration on the rule of law.[627] Useful guidance on the understanding of the United Nations of adjudicatory independence, albeit with an emphasis on criminal justice, can be derived from the 1985 Basic Principles on the Independence of the Judiciary[628] and the 2001 Bangalore Principles of Judicial Conduct.[629]

1. Independence and impartiality

230. The independence and impartiality of adjudicators is a crucial rule of law requirement for the proper administration of justice.[630] Arbitration rules as well as

[626] See, e.g., Robert Kolb, *The International Court of Justice* (Oxford, Hart Publishing, 2013), pp. 1119-1138.

[627] General Assembly resolution 67/1 of 24 September 2012.

[628] Basic Principles on the Independence of the Judiciary, document A/CONF.121/22/Rev.1, 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 (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2.

[629] Bangalore Principles of Judicial Conduct, document E/CN.4/2003/65, annex, adopted by the Judicial Group on Strengthening Judicial Integrity, The Hague, 25–26 November 2001, recognized by the Economic and Social Council as a further development and as complementary to the Basic Principles on the Independence of the Judiciary in its resolution 2006/23 on strengthening basic principles of judicial conduct (E/2006/INF/2/Add.1), para. 2.

[630] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (see footnote 345 above), para. 92 (identifying "the right to an independent and impartial tribunal established by law" as an element of the right to a "fair hearing"); "Bangalore Principles of Judicial Conduct", annex, fifth preambular paragraph ("WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law"); *ibid.*, 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", document 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"). See also Hélène Ruiz-Fabri and Jean-Marc Sorel (eds.), *Indépendance et impartialité des juges internationaux* (Paris, Pedone, 2010); Giuditta Cordero-Moss (ed.), *Independence and Impartiality of International Adjudicators* (Cambridge, Intersentia, 2023); Theodor Meron, "Judicial independence and impartiality in international criminal tribunals", *American Journal of International Law*, vol. 99 (2005), pp. 359–369, at p. 359; Chiara Giorgetti et al., "Independence and impartiality of adjudicators in investment dispute settlement: assessing challenges and reform options", *Journal of World Investment & Trade*, vol. 21 (2020), pp. 441-474, at p. 442.

institutional rules of judicial bodies contain certain qualification requirements for adjudicators, relating both to knowledge in the field[631] and the core standards of independence and impartiality.[632]

231. The independence and impartiality of adjudicators are secured through several mechanisms in arbitration practices. Procedural rules regularly provide for disclosure obligations,[633] allowing the parties to make an assessment regarding 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, in which case they either resign or recuse themselves from a particular case. This is procedurally supported by options to challenge adjudicators if parties are concerned about the independence or impartiality of adjudicators.[634] Different procedures apply in regard to such challenges. Some arbitration rules provide for a

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[631] Art. 2, Statute of the International Court of Justice ("The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."); art. 2, para. 1, Statute of the International Tribunal for the Law of the Sea (members shall be "independent" and must be "elected from among persons enjoying the highest reputation for fairness and integrity"); art. 4, para. 1, Statute of the Inter-American Court of Human Rights (La Paz, 31 October 1979), ILM, vol. 19 (1980), p. 634 ("The Court shall consist of seven judges, nationals of the member states of the OAS, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them as candidates."); art. IV, para. 11, Agreement establishing the Caribbean Court of Justice ("In making appointments to the office of Judge, regard shall be had to the following criteria: high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society."). See also Institute of International Law, resolution on the position of the international judge, Institute of International Law, *Yearbook*, vol. 74, Session of Rhodes (2011), p. 124, art. 1 ("The quality of international courts and tribunals depends first of all on the intellectual and moral character of their judges … States shall … also ensure that judges possess the required competence and that the court or tribunal is in a position effectively to deal with issues of general international law.")

[632] Art. 6, para. 7, UNCITRAL Arbitration Rules (2010) and Permanent Court of Arbitration, art. 6, para. 3, 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"); Art. 2, Statute of the International Court of Justice ("The Court shall be composed of a body of independent judges"); Art. 20, Statute of the International Court of Justice ("Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously."); art. 2, para. 1, Statute of the International Tribunal for the Law of the Sea ("The Tribunal shall be composed of a body of 21 independent members"); art. 21, para. 4, European Convention on Human Rights ("During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office"); art. 17, para. 1, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("The independence of the judges shall be fully ensured in accordance with international law.")

[633] UNCITRAL Arbitration Rules (2010) 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 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.

[634] UNCITRAL Arbitration Rules (2010) 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 Tribunal* (Leiden, Brill, 2015).

third independent authority ruling on challenges,[635] others empower the remaining arbitrators to do so.[636] In addition, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 permits national courts to refuse recognition and/or enforcement of awards rendered by tribunals comprising arbitrators not sufficiently independent and/or impartial.[637]

232. In judicial proceedings, procedures to ensure independence or impartiality usually require judges to request their own disqualification.[638] In the case of the International Court of Justice and the International Tribunal for the Law of the Sea, the matter shall be settled by the decision of the Court, that is, the other judges.[639] A similar practice is followed by other international courts and tribunals.[640]

233. Inter-State arbitration and international adjudication do not provide for the kind of annulment,[641] set aside, or other national court control[642] that is current in commercial and investment arbitration. This implies that internal control over the independence and impartiality of adjudicators, often secured through the decisions of the other adjudicators, is even more important.

234. Independence primarily refers to the relationship between an adjudicator and the parties or their counsel, thus demanding an absence of structural, personal, financial or other close connection to them, whereas impartiality relates more to the views and opinions held by an arbitrator, thus requiring a lack of bias.[643]

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[635] UNCITRAL Arbitration Rules (2010) and Permanent Court of Arbitration, art. 13, para. 4, Arbitration Rules 2012 ("a decision on the challenge by the appointing authority"); art. 10.1, Arbitration Rules (2020), London Court of International Arbitration ("The LCIA Court may revoke any arbitrator's appointment"); art. 19, para. 5, Arbitration Rules, Stockholm Chamber of Commerce ("If the other party agrees to the challenge, the arbitrator shall resign. In all other cases, the Board [of directors of the Stockholm Chamber of Commerce] shall take the final decision on the challenge.")

[636] Art. 58, 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 ("The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be").

[637] Art. V, para. 1, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), United Nations, *Treaty Series*, vol. 330, No. 4739, p. 38 (relied upon for a refusal to recognize and enforce awards in case of incorrectly composed tribunals).

[638] See, e.g., art. 24, para. 1, Statute of the International Court of Justice ("If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President."); rule 35, Rules of Procedure and Evidence of the International Criminal Court; art. 19, para. 2, Statute of the Inter-American Court of Human Rights.

[639] Arts. 16, para. 2, 17, para. 3, and 24, para. 3, Statute of the International Court of Justice; art. 7, para. 3, Statute of the International Tribunal for the Law of the Sea.

[640] See, e.g., art. 23, para. 3, European Convention on Human Rights; rules 4, para. 1, and 7, European Court of Human Rights, Rules of Court; art. 71, American Convention on Human Rights; arts. 18, para. 2, and 19, paras. 2 and 3, Statute of the Inter-American Court of Human Rights; arts. 41 and 46, Rome Statute; arts. 2, 4 and 6, Statute of the Court of Justice of the European Union; arts. 17 and 19, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; rule 8, African Court on Human and Peoples' Rights, Rules of Court; rule 8, Rules of Procedure of the African Commission on Human and Peoples' Rights (2020).

[641] See e.g. art. 52, para. 1, Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted").

[642] See art. 34, para. (2) (a) (iv), UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, General Assembly resolutions 40/72 of 11 December 1985 and 61/33 of 4 December 2006.

[643] 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.")

235. 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 in International Arbitration[644] or various codes of conduct.[645] 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.

236. In adjudication, the statutes of international courts and tribunals and their rules of procedure similarly aim to secure 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[646] or by excluding a judge's participation in case of conflicts of interest.[647] In addition, the 2004 Burgh House Principles on the Independence of the International Judiciary[648] and other soft law instruments provide guidance.[649] They may also address issues specific to the judicial function, such as security of tenure, terms of office, extrajudicial activities and others.

2. Due process – equality of parties

237. 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.[650] It is considered to derive from the broader

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[644] 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).

[645] See, e.g., UNCITRAL "Draft code of conduct for arbitrators in international investment dispute resolution and commentary".

[646] Art. 16, para. 1, Statute of the International Court of Justice ("No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature."); rule 4, para. 1, European Court of Human Rights, Rules of Court ("In accordance with Article 21 § 4 of the Convention, 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.")

[647] See, e.g., art. 17, paras. 1 and 2, Statute of the International Court of Justice ("1. No member of the Court may act as agent, counsel, or advocate in any case. 2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.")

[648] "The Burgh House Principles on the Independence of the International Judiciary", adopted in 2004 by the International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals.

[649] See Anja Seibert-Fohr, "Codes of conduct for international judges" in Hélène Ruiz Fabri (ed.), *The Max Planck Encyclopedia of International Procedural Law*, December 2018, available at www.mpepil.com/.

[650] See Institute of International Law, resolution on the equality of parties before international investment tribunals, *Yearbook*, vol. 80 (2018–2019), Session of The Hague (2019), pp. 1–11 (referring in the preamble to "the principle of equality of the parties [as] a fundamental element of the rule of law that ensures a fair system of adjudication"); European Commission for Democracy through Law (Venice Commission), "Report on the Rule of Law", para. 60 ("The rights most obviously connected to the rule of law include … (3) the right to be heard"); Serena Forlati, "Equality before courts and tribunals – the case for a comparative approach", in Daniele Amoroso and others (eds.), *More Equal than Others?* (The Hague, T.M.C. Asser Press, 2022), pp. 231-236; Thomas W. Wälde, "Procedural challenges in investment arbitration under the shadow of the dual role of the State: asymmetries and tribunals' duty to ensure, pro-actively, the equality of arms", *Arbitration International*, vol. 26 (2010), pp. 3-42, at p. 11 ("Equality of arms is one of the fundamental concepts of adjudication. It is, throughout comparative laws on civil or administrative procedure, international law in general and investment arbitration in particular, recognised as a key component of the principle of 'procedural fairness', 'integrity of process' or 'good administration of justice'' which tribunals have to apply").

principle of equality.[651] The principle of equality is also linked to the general principle of *audiatur et altera pars*.[652]

238. In adversarial proceedings, one speaks of equality of arms when referring to the equality of parties, implying that the parties should have a reasonable opportunity to present their case, including evidence, under conditions that do not place them at a substantial disadvantage vis-à-vis each other.[653] However, equality of arms requires not only equal opportunities, but also the balancing of unfair advantages.[654] Thus, the equality of parties has a formal aspect providing equal opportunity to all parties and a substantive one contributing to the overall fairness and justice of the proceedings.[655]

239. 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.[656] Even if the applicable procedural rules may differ, all parties are entitled to a fair trial before all international tribunals and all tribunals must ensure fairness through the equality of arms of the parties and the equal opportunity of the parties to make their case in regard to facts and evidence.[657]

240. The principle of equality may also require steps to avoid factual inequality as a result of a lack of resources. International courts and tribunals have thus created legal aid schemes and/or trust funds.[658] In arbitration, third party funding is a frequent

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[651] Serena Forlati, "Fair trial in international non-criminal tribunals", in Arman Sarvarian and others (eds.), *Procedural Fairness in International Courts and Tribunals* (London, British Institute of International and Comparative Law, 2015), pp. 108-109; Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford, Oxford University Press, 2021), pp. 719-771; Robert Kolb, "General principles of procedural law", in Andreas Zimmermann and others (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford, Oxford University Press, 2019), p. 969.

[652] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Cambridge University Press, reprinted 2006), p. 290; Peter Hamacher, *Die Maxime audiatur et altera pars im Völkerrecht* (Vienna, Springer, 1986). 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.

[653] Forlati, "Fair trial in international non-criminal tribunals", p. 108; Raymundo Tullio Treves, "Equality of arms and inequality of resources", in Savarian and others (eds.), *Procedural Fairness in International Courts and Tribunals*, p. 155.

[654] Robert Kolb, "General principles of procedural law", p. 969.

[655] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts, Harvard University Press, 1977), pp. 22 and 26, as cited in Treves, "Equality of arms and inequality of resources", p. 156.

[656] See Permanent Court of International Justice, *Territorial Jurisdiction of the International Commission of the River Oder*, Order, 15 August 1929 (Series A, No. 23) (Evidence), p. 45 ("the Parties must have an equal opportunity reciprocally to discuss their respective contentions"). In regard to arbitration, see Institute of International Law, resolution on the equality of parties before international investment tribunals, 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.") In regard to adjudication, see also Kolb, *The International Court of Justice*, pp. 1121 et seq; Nienke Grossman, "Legitimacy and international adjudicative bodies", *George Washington International Law Review*, vol. 41 (2009), pp. 107-180, at pp. 124-129 and 162-164.

[657] Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Leiden, Martinus Nijhoff, 2005), pp. 13-14.

[658] Terms of Reference, Guidelines and Rules of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice (A/47/444, annex); Permanent Court of Arbitration Financial Assistance Fund for Settlement of International Disputes, Terms of Reference and Guidelines (as approved by the Administrative Council on 11 December 1995), available at https://pca-cpa.org/en/about/faf/; General Assembly resolution 55/7 of 30 October 2000, annex I, International Tribunal for the Law of the Sea Trust Fund: Terms of Reference; Statute on the Establishment of the Legal Aid Fund of Human Rights Organs of the African Union (31 January 2016).

device to ensure equality of resources of the parties as it impacts the principle of the equality of the parties. In case the arbitral or judicial institution does not provide funding by neutral entities that do not have an interest in the outcome of the proceedings, parties resorting to third party funding must disclose this fact under equality of arms considerations.[659]

241. In arbitration, the equal treatment of the parties is the overriding procedural obligation for arbitral tribunals and is explicitly found in many arbitral rules.[660] It is secured through the supervisory power of national courts to refuse enforcement.[661] 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 the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[662]

242. In the procedural rules of international courts and tribunals, the equality of the parties is often less explicitly provided for. However, it usually governs the entire procedure as a higher-ranking constitutional and procedural principle to achieve procedural fairness.[663] Moreover, rules on equality of the parties are sometimes also contained in directives adopted in the course of the proper administration of justice.[664]

243. The Statute of the International Court of Justice explicitly, albeit rather indirectly, mentions the principle of the equality of parties and several provisions

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[659] Treves, "Equality of arms and inequality of resources", p. 164.

[660] Art. 17, para. 1, UNCITRAL Arbitration Rules (2010) ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case"); 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; arts. 17 (4) and (5) and 23 (2), Arbitration Rules, Stockholm Chamber of Commerce. See also Maxi Scherer, Dharshini Prasad and Dina Prokic, "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. 1127–1152.

[661] Art. V, para. 1 (b), Convention on the Recognition and Enforcement of Foreign Arbitral Awards (providing for a refusal to recognize and enforce awards in case "[t]he party … was otherwise unable to present his case").

[662] Art. 52, para. 1 (d), Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

[663] See, for an overview of different courts and tribunals, Grossman, "Legitimacy and international adjudicative bodies", p. 124; Savarian and others (eds.), *Procedural Fairness in International Courts and Tribunals*.

[664] See, e.g., European Court of Human Rights, "Practice directions: Third-party intervention under Article 36 § 2 of the Convention or under Article 3, second sentence, of Protocol No. 16" (issued by the President of the Court on 13 March 2023, in accordance with rule 32 of the Rules of Court), para. 43 ("If a third party is, exceptionally, granted leave to take part in a hearing, such leave is usually subject to the condition that the third party's oral submissions must not last longer than ten minutes. If two or more third parties (in particular, Contracting States) are granted leave to take part in a hearing, they may be requested to designate one or two speakers to make oral submissions on behalf of all of them jointly. All these conditions are imposed with a view to ensuring respect for the procedural equality of the parties, which must not be upset by the grant of leave to a third party to take part in a hearing.") See also rule 44, para. 3 (a) of the Rules of Court, on third-party intervention ("Once notice of an application has been given to the respondent Contracting Party under Rules 51 §1 or 54 §2 (b), the President of the Chamber may, in the interest of the proper administration of justice, as provided in Article 36 §2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing.")

safeguard the equality of parties.[665] In its case law, the International Court of Justice has emphasized "that the equality of the parties to the dispute must remain the basic principle for the Court"[666] and that such equality stems from the procedural rules of the Court.[667] As early as 1956, in its advisory opinion in *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, the principle of equality of the parties was considered to follow from "the requirements of good administration of justice".[668] In its 1973 Advisory Opinion in *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*,[669] the Court stressed "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" as "elements of the right to a fair hearing".[670] In practice, the Court often has to ensure a balance between the parties in practical ways in cases of non-appearance of a party or unexpected procedural requests.[671]

244. Concerning the International Tribunal for the Law of the Sea, neither the United Nations Convention on the Law of the Sea, the Statute of the International Tribunal for the Law of the Sea, nor the Rules of the Court expressly mention the principle of the equality of parties. Still, the principle of equality governs the proceedings before that Tribunal at all stages and many procedural rules safeguard the balance between the parties.[672] In its jurisprudence, the Tribunal has also referred to the principle of equality of arms. For instance, in the preliminary objections phase of the *M/V Norstar* case, Panama, as applicant, argued that the Court should reject additional preliminary objections made by Italy because they were made too late and therefore did not give it sufficient opportunity to reply in accordance with fundamental principles of procedure, including equality of arms.[673] The Court held that the procedure complied with the equality of arms principle because the additional argument of Italy did not constitute new objections and both parties were allocated additional time to comment during oral hearings.[674]

245. This overview has demonstrated that the procedural rule of law guarantees of due process to be accorded before independent and impartial adjudicators are deeply ingrained in the practice of international arbitration and adjudication. It provides a solid basis for the recommendation that means of adjudicatory dispute settlement

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[665] Art. 35, para. 2, Statute of the International Court of Justice ("The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court"); other relevant provisions in the Statute of the International Court of Justice that seek to ensure the equality of the parties are Article 31 (judges *ad hoc*), Article 40 (notifications), Article 42 (representation of parties by agents) and Article 43 (delivery of written pleadings). In addition, rule 31 of the Rules of the Court (14 April 1978) provides for special agreements between the President of the Court and the parties about the order and number of written pleadings and the time allowed for speeches.

[666] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, para. 31.

[667] *Ibid.* ("The provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions.")

[668] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.* (see footnote 333 above), p. 86 ("The principle of equality of the parties follows from the requirements of good administration of justice"); confirmed in *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (see footnote 349 above), para. 47.

[669] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (see footnote 345 above).

[670] *Ibid.*, p. 209, para. 92.

[671] See Kolb, *The International Court of Justice*, pp. 1124 et seq.

[672] Rules of the Tribunal, arts. 44, 45, 51, 54, paras. 4 and 5, 55, 66 and 69–88.

[673] International Tribunal for the Law of the Sea, *M/V "Norstar" (Panama v Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at para. 49.

[674] *Ibid.*, paras. 52-53.

made available for the settlement of disputes to which international organizations are parties should conform to the requirements of the rule of law.

D. Suggested guideline

246. "6. Dispute settlement and rule of law requirements

"The means of adjudicatory dispute settlement made available should conform to the requirements of the rule of law, including the independence and impartiality of adjudicators and due process."

IV. Proposed guidelines

247. The following guidelines are suggested to be adopted by the Commission in regard to international disputes to which international organizations are parties:

"3. International disputes

"For the purposes of the present draft guidelines, international disputes to which international organizations are parties are disputes between international organizations as well as disputes between international organizations and States or other subjects of international law arising under international law."

"4. Practice of dispute settlement

"International disputes to which international organizations are parties are settled by the means of dispute settlement laid down in draft guideline 2 (c). In practice, negotiation and other means of dispute settlement, falling short of binding third-party adjudication are widely used. Arbitration and judicial settlement are often not provided for and are therefore resorted to less frequently."

"5. Access to arbitration and judicial settlement

"Arbitration and judicial settlement should be made available and more widely used for the settlement of international disputes to which international organizations are parties."

"6. Dispute settlement and rule of law requirements

"The means of adjudicatory dispute settlement made available should conform to the requirements of the rule of law, including the independence and impartiality of adjudicators and due process."

V. Future programme of work

This second report has focused on "international" disputes to which international organizations are parties. In his third report in 2025, the Special Rapporteur intends to analyse in detail the practice of the settlement of "non-international" disputes to which international organizations are parties, that is, mostly disputes between international organizations and private parties arising under a law other than international law. This will include disputes of a "private law character". Based on the analysis of practice, he will suggest further guidelines. In developing this part of the topic, the Special Rapporteur will be guided by the information provided by States and international organizations in response to the questionnaire,[675] which has already proven most helpful for the present report.

[675] See para. 11 above.