Questionnaire and background to the topic "Settlement of international disputes to which international organizations are parties"

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I. Introduction

1. At its 3582nd meeting, on 17 May 2022, the International Law Commission decided to include the topic "Settlement of international disputes to which international organizations are parties" in its programme of work and to appoint Mr. August Reinisch as Special Rapporteur.[1] This topic[2] was put on the long-term programme of work of the Commission in 2016.[3]

2. At the May 2022 meeting, the Chair of the Commission recalled paragraph 3 of the 2016 syllabus on the topic, which stated that "[i]t would be for future decision whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organization, might also be covered".[4] Considering the importance of such disputes for the functioning of international organizations in practice, it was presumed that the Special Rapporteur and the Commission would take such disputes into account.[5]

3. At its 3612th meeting, on 5 August 2022, the Commission requested its Secretariat to prepare a memorandum providing information on the practice of States and international organizations which may be of relevance to its future work on the topic and approved the Special Rapporteur's recommendation that the Secretariat contact States and relevant international organizations in order to obtain information and their views for the preparation of the memorandum.[6] Accordingly, this questionnaire seeks information from States and international organizations that may be of relevance to its future work on the topic "Settlement of international disputes to which international organizations are parties", for the purposes of the memorandum.

4. The following brief introduction serves as a background to the questionnaire below.

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/77/10), para. 238.
[2] *Yearbook ... 2016, vol. II (Part Two)*, Annex I, p. 233.
[3] *Ibid.*, p.22, para. 29.
[4] See footnote 2 above.
[5] See footnote 1 above.
[6] *Ibid.*, paras. 241 and 242.

II. Overview of disputes to which international organizations may be parties

5. In the past, international organizations have largely been considered to provide mechanisms for the settlement of disputes between States. However, with the increase of regulatory and operative activities of international organizations the likelihood that their actions are challenged by States and/ or other entities has considerably increased.

6. The settlement of disputes involving international organizations may concern mainly three different types: a) disputes between international organizations, b) disputes between international organizations and States and c) disputes between international organizations and private parties, including individuals and legal persons, such as corporations or associations.

7. In practice, there appear to be hardly any disputes between international organizations. States, both member and non-member States, occasionally have disputes with international organizations, often involving issues concerning headquarters or seat agreements. The most frequent types of disputes arising in practice are those where private parties raise claims against international organizations and, less often, where international organizations intend to bring legal action against private parties. The latter may be contractual disputes of international organizations and their service providers or other procurement related disputes or labour disputes between international organizations and their employees. In addition, there may be disputes involving victims of harmful activities attributable to international organizations who are in no contractual relationship with such organizations.

8. Such disputes of a private law character are not only increasing in frequency, they also often raise public international law issues, such as immunity from jurisdiction, access to justice, or diplomatic protection.

9. Methods of dispute settlement comprise all methods of the peaceful settlement of disputes, as contained in Article 33 of the Charter of the United Nations (ie, negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means), which are generally available in case of disputes involving international organizations.

10. In order to come to meaningful conclusions helpful to international organizations as well as States it is important that their actual dispute settlement practice is thoroughly analysed.

III. Past work of the Commission concerning international organizations: treaty law, privileges and immunities, responsibility

11. The topic "Settlement of international disputes to which international organizations are parties" complements previous work of the Commission concerning international organizations. After the successful adoption of the Vienna Convention on the Law of Treaties in 1969, the Commission embarked on working on the "Question of treaties concluded between States and international organizations or between two or more international organizations"[7] which, in 1986, led to the adoption of the Vienna Convention on the Law of Treaties II.[8] Between 1976 and 1992, the Commission worked on the topic of the "Status, privileges and immunities of international organizations, their officials, experts, etc."[9] While this topic has not been further pursued, the topic "Jurisdictional immunity of international organizations"[10] remains on the long-term programme of work of the Commission. Finally, the Commission's work from 2001 to 2010 led to the adoption of the Articles on "Responsibility of international organizations."[11]

12. The current topic addressing the question of dispute settlement in many respects complements and continues the work of the Commission on legal issues involving international organizations.

IV. Questionnaire

13. This questionnaire is addressed to both States and international organizations. It focuses on the dispute settlement practice of international organizations. Thus, it will be in first line international organizations which will be in a position to provide the relevant information. However, also States may often contribute valuable insights because they may have had disputes with international organizations or because they may have assisted third parties or international organizations in settling their disputes, e.g. by espousing their nationals' claims, by informally helping to settle, by providing adjudication or by other means.

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[7] See General Assembly resolution 2501 (XXIV) of 12 November 1969. See also *Yearbook ... 1970, vol. II (Part Two)*, p. 310, para. 89

[8] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986), A/CONF.129/15.

[9] At its twenty-ninth session (1977), Special Rapporteur Mr. Abdullah El-Erian presented his preliminary report on the second part of the topic (*Yearbook ... 1977, vol. II (Part One)*, p. 139). At its forty-fourth session (1992), the Commission decided not to pursue consideration of the topic (*Yearbook ... 1992, vol. II (Part Two)*, paras. 359–362). The decision was endorsed by General Assembly resolution 47/33 of 25 November 1992.

[10] *Yearbook ... 2006, vol. II (Part Two)*, Annex II, p. 201.

[11] See the draft articles on the responsibility of international organizations, *Yearbook ... 2011, vol. II (Part Two)*, p. 40-46, para. 87.

14. International organizations and States are requested to provide details and reasons to their responses.

V. Questions:

1) What types of disputes/issues (cf. paras. 6 and 7 above) have you encountered?

In recent years, the Kingdom of the Netherlands has encountered a dispute between an international organization and the State, as well as a dispute between an international organization and a private party (legal person).

2) What methods of dispute settlement (cf. para. 9 above) have been resorted to in cases of disputes with other international organizations, states or private parties? Please provide any relevant case law, or a representative sample thereof. If you cannot provide such information for confidentiality reasons, could you provide any such decisions or awards in redacted form, or a generic description/digest of such decisions?

a) Dispute between an international organization and the State

In a dispute between the Kingdom of the Netherlands and the Permanent Court of Arbitration, the latter initiated an arbitration procedure against the Kingdom in respect of the application of the Agreement concerning the Headquarters of the Permanent Court of Arbitration (PCA). The dispute concerns the allocation of office space to the PCA by the Carnegie Foundation in the Peace Palace.

On the basis of the Headquarters Agreement, the Netherlands has the obligation to take whatever reasonable action, within its power, to adequately accommodate the PCA with its premises necessary for the exercise of its official activities.

In light of this obligation, the Secretary-General of the PCA has requested to consult with the Netherlands on the basis of the dispute settlement mechanism as provided for in the Headquarters Agreement. These consultations have led to the adoption of an Interpretative Declaration and Joint Conclusions. The Interpretative Declaration was published in the Dutch Treaty Series (Trb. 2021, 46). Several proposals to make arrangements between the PCA, the Netherlands and the Carnegie Foundation for the allocation of office space in the Peace Palace subsequently failed.

On 12 January 2022 the PCA has notified the Kingdom of the Netherlands of the start of arbitration proceedings against the Kingdom. The PCA is of the view that the Kingdom has not fulfilled its obligations under the Headquarters

Agreement by failing to agree on the PCA's request in respect of three specific rooms in the Peace Palace. The Kingdom on the other hand, is of the view that it has respected its obligations under the Headquarters Agreement, since the PCA has sufficient space at its disposal and a structural solution cannot only be reached in the manner as preferred by the PCA. The arbitration proceedings are in line with the dispute settlement provisions of the Headquarters Agreement and the arbitration rules applicable to a dispute between the Kingdom and the PCA in respect of the latter's headquarters.

b) Dispute between an international organization and a private party

In a dispute between the North-Atlantic Treaty Organisation (NATO) and the Supreme group of entities (a private actor) proceedings were initiated before a Dutch district court and subsequently the Court of Appeal (case ECLI:NL:GHSHE:2019:4464).

The case concerns a claim for alleged non-payments under certain contracts entered into between the parties for the supply of fuel. The NATO entities against whom the claims were brought were Shape (headquartered in Belgium) and Allied Joint Force Command Headquarters Brunssum (JFCB) (located in the Netherlands). JFCB was acting on behalf of SHAPE and concluded certain contracts with Supreme regarding the supply of fuel to SHAPE for NATO's mission in Afghanistan carried out for the International Security Assistance Force (ISAF). Supreme invoked the jurisdiction of Dutch courts for alleged non-payment under the contracts. The NATO entities asserted immunities based on their status as international organisations. The Court of Appeal held that SHAPE's interest in immunity from execution prevailed over the Supreme companies' interest in the recovery of their claim and was not contrary to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

A second related procedure came before the Dutch Supreme Court (case ECLI:NL:HR:2019:292, an automated translation of the Supreme Court's decision can be found here). In this procedure, the Dutch Supreme Court made a reference for a preliminary ruling to the European Court of Justice (case C-186/19). Observations were submitted in this procedure on behalf of the Netherlands Government.

The Dutch Supreme Court has rejected the appeal of Supreme by stating that the Court of Appeal's conclusions in respect of SHAPE's immunity were well founded (case ECLI:NL:HR:2021:1956).

3) In your dispute settlement practice, for each of the types of disputes/issues arising, please describe the relative importance of negotiation, conciliation or other informal

consensual dispute settlement and/or third-party dispute resolution, such as arbitration or judicial settlement.

In the case as set out under 2) a), it was important to have consultations in respect of the application of the Headquarters Agreement ahead of the more formal arbitration proceedings as provided for in the Headquarters Agreement. Nine rounds of consultations took place in which issues of interpretation and application were extensively discussed. The consultations also led to the adoption of an Interpretative Declaration which potentially could have avoided the start of the arbitration procedure.

4) Which methods of dispute settlement do you consider to be most useful? Please indicate the preferred methods of dispute settlement (cf. para. 9 above) for different types of disputes/issues (cf. paras. 6 and 7 above).

It would depend on the case at hand which method of dispute settlement would be most useful, but in respect of disputes between an international organization and the State, consultations, followed by arbitration would seem adequate for the settlement of disputes/issues. At the same time, the Netherlands is of the view that arbitration by one arbitrator or by a tribunal of three arbitrators, with two of them appointed by the parties, is vulnerable when it comes to complex cases or cases that are politically or diplomatically sensitive.

For disputes between an international organization and a private party, consultations might be less useful because there might be a perceived imbalance between the international organisation on the one hand and the private party on the other hand. In such cases, arbitration or judicial settlement might proof more useful.

5) From a historical perspective, have there been any changes or trends in the types of disputes arising, the numbers of such disputes and the modes of settlement used?

In respect of disputes to which international organizations are parties, the Netherlands has not identified any changes or trends in the types of disputes arising, the numbers of such disputes and the modes of settlement used.

6) Do you have suggestions for improving the methods of dispute settlement (that you have used in practice)?

The Kingdom of the Netherlands currently has no suggestions for improving the methods of dispute settlement.

7) Are there types of disputes that remain outside the scope of available dispute settlement methods?

The Kingdom of the Netherlands is not aware of any types of disputes that remain outside the scope of available dispute settlement methods.

8) Does your organization have a duty to make provision for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character under the 1946 Convention on the Privileges and Immunities of the United Nations, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, or an equivalent treaty? How in practice has your organization interpreted and applied the relevant provisions?

Not applicable.

9) Are there standard/model clauses concerning dispute settlement in your treaty and/or contractual practice? Please provide representative examples.

In host state agreements to be negotiated between an international organisation and the Kingdom of the Netherlands, the Kingdom uses the following model clauses concerning dispute settlement:

Settlement of disputes with third parties
[IO] shall make provisions for appropriate modes of settlement of:
a) disputes arising out of contracts and other disputes of a private law character to which the [IO] is a party; and
b) disputes involving any person referred to in this Agreement who, by reason of his or her official position or function in connection with the [IO], enjoys immunity, if such immunity has not been waived by the Secretary-General [of the IO].

Settlement of differences on the interpretation or application of this Agreement or supplementary arrangements or agreements
1. All differences arising out of the interpretation or application of this Agreement or supplementary arrangements or agreements between the Parties shall be settled by consultation, negotiation or other agreed mode of settlement.
2. If the difference is not settled in accordance with paragraph 1 of this Article within three months following a written request by one of the Parties to the difference, it shall, at the request of either Party, be referred to a Tribunal of three arbitrators. Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairperson of the Tribunal. If, within thirty days of the request for arbitration, a Party has not appointed an arbitrator, or if, within fifteen (15) days of the appointment of two arbitrators, the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint the arbitrator referred to. The Tribunal shall determine its own procedures, provided that any two arbitrators shall constitute a quorum for all purposes, and all decisions shall require the agreement of any two arbitrators. The expenses of the

Tribunal shall be borne by the Parties as assessed by the Tribunal. The arbitral award shall contain a statement of the reasons on which it is based and shall be final and binding on the Parties.

10) Does "other disputes of a private law character" (see 8) above) encompass all disputes other than those arising from contracts? If not, which categories are not included? What has been the practice of your organization in determining this? What methods of settlement have been used for "other disputes of a private law character" and what has been regarded as the applicable law?

Not applicable.

11) Have you developed a practice of agreeing ex post to third-party methods of dispute settlement (arbitration or adjudication) or waiving immunity in cases where disputes have already arisen and cannot be settled otherwise, e.g. because no treaty/contractual dispute settlement has been provided for?

The Kingdom of the Netherlands has not developed such a practice.