The Organisation of African, Caribbean and Pacific States

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?

Most of the disputes I have encountered related to staff matters.

Other disputes relate to matters arising from projects between the OACPS and the EU. There have also been political disputes between OACPS Member States.

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?

Article 33 of the Georgetown Agreement, which governs the OACPS, states that "Member States shall endeavour peacefully to resolve all disputes concerning the interpretation or application of the Agreement and other instruments set up under the OACPS in a timely manner, through dialogue, consultation, and negotiation in keeping with Article 33 (1) of the Charter of the United Nations".

Following this, there is always an attempt to resolve each dispute by alternative dispute mechanisms. If this fails, disputes concerning staff matters often end up in the Administrative Tribunal of the International Labour Organisation for resolution. Disputes the OACPS and external project management units end up in the Belgian courts if they cannot be resolved with ADR methods. Political disputes between Member States are resolved by ADR mechanisms. If this is not successful, the case is referred to the International Court of Justice.

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.

Alternative Dispute Resolution (ADR) is the most important dispute settlement mechanism for the OACPS, i.e., negotiation by way of conciliation, mediation, arbitration and enforcement of an arbitral award through the enforcement system of a state.

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).

Alternative Dispute Resolution mechanisms are the most useful to resolve conflicts between OACPS Member States. By such non-confrontational dispute resolution procedures, face can be preserved, and commercial relationships maintained. For staff and project matters ADR methods are less successful.

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 the last 10 to 15 years, there have been no observable changes in the type or frequency of disputes, nor the modes of dispute settlement.

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

In cases when Alternative Dispute Resolution procedures are not successful, it is often due to the parties unwilling to understand the other party's position and to reach an amicable solution or compromise.

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

In practice, there are no disputes outside the scope of the 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?

These provisions do not apply to the OACPS.

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

Yes, Article 33 of the Georgetown Agreement, which governs the OACPS, states that "Member States shall endeavour peacefully to resolve all disputes concerning the interpretation or application of the Agreement and other instruments set up under the

OACPS in a timely manner, through dialogue, consultation, and negotiation in keeping with Article 33 (1) of the Charter of the United Nations".

Also, when recruiting external consultants, the contract contains a standard clause on dispute avoidance and settlement, which means that the first stage in settling a dispute is through consultation. If consultation fails, mediation is used as a second stage to resolve the issue and if that does not succeed then the parties will request for arbitration.

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?

No.