

(22-481) Settlement of international disputes to which international organizations are Parties.

1) What types of disputes/issues have you encountered?

UNDP has encountered disputes with staff and UN Volunteers (UNVs) regarding contentious employment grievances including disciplinary (misconduct) matters.

Regarding contractors and personnel (non-staff), UNDP has encountered disputes related to poor performance by contractors and consultants that may lead to termination of the contract as well as claims in relation to payments.

2) What methods of dispute settlement 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?

Staff-related disputes are managed through the UN Tribunals.

When it comes to contractors and non-staff personnel, UNDP tries to implement (to the extent possible) a mutually agreed termination of the contract -in most cases we are successful. The objective is to avoid arbitration as much as possible.

Over the last 15 years, UNDP has been involved in only four arbitrations, all of which involved vendors. In two cases, UNDP was successful before the arbitral tribunal. In one case, the government of the programme country of the project (under which the contract was entered into) took over the defense of the arbitration further to Article X of the Standard Basic Assistance Agreement (SBAA) (i.e., an indemnification provision) and prevailed in the arbitration brought by the contractor. In that case, UNDP obtained a full indemnity letter signed by the vice-president of the programme country. The last of the four cases is currently under arbitration and UNDP Office of Legal Services (OLS) has been liaising with UN Office of Legal Affairs (OLA) and has also engaged external counsel for representation. The government of the programme country is a named co-respondent.

This is the SBAA indemnification provision: *“Assistance under this Agreement being provided for the benefit of the Government and people of, the Government shall bear all risks of operations arising under this Agreement. It shall be responsible for dealing with claims which may be brought by third parties against the UNDP or an Executing Agency, their officials or other persons performing services on their behalf and shall hold them harmless in respect of claims or liabilities arising from operations under this Agreement. The foregoing provision shall not apply where the Parties and the Executing Agency have agreed that a claim or liability arises from the gross negligence or willful misconduct of the above-mentioned individuals.”*

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.

Where appropriate, UNDP pursues informal settlement through negotiation with staff members and UNVs. Informal settlement through negotiation result in about 6 settlements per year. Details of cases

before the UN Tribunals can be found in the public record of those judgements. For UNVs arbitration is set out in the Unified Conditions of Service applicable to UNV as part of the formal dispute resolution process, amounting to 3-4 cases a year.

For contractors and non-staff personnel, as indicated above, UNDP actively seeks to engage in negotiation towards an amicable settlement where possible.

4) Which methods of dispute settlement do you consider to be most useful? Please indicate the preferred methods of dispute settlement for different types of disputes/issues.

UNDP considers negotiation as the most useful method of dispute settlement for contractors and non-staff personnel.

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?

For UNVs, the last few years have seen a slight uptick in the number of cases taken to arbitration.

For contractors and non-staff personnel, the number of such disputes has been consistent.

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

No.

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

Interns are not covered by any dispute resolution mechanism. Procurement (bid) protests are also outside the scope of 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?

UNDP's standard contracts reference UNCITRAL as well as UN privileges and immunities under the 1946 Convention on the Privilege and Immunities of the United Nations.

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

Please find below the standard Settlement of Dispute clause in UNDP's General Terms and Conditions for Contracts for Goods and Services:

*"Any dispute, controversy, or claim between the Parties arising out of the Contract, or out of the breach, termination or invalidity thereof ("Dispute") shall be finally settled in the manner set out in this Article 25, which shall be binding on the Parties and shall be the exclusive mode of settlement of the Dispute in accordance with Article VIII, Section 29, of the Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15 (1946). **Amicable Settlement:** The Parties shall use their best efforts to amicably settle any Dispute. For that purpose, the Party asserting a claim shall provide to the other Party a detailed description of the Dispute, specifying the relief or remedy sought, together with a copy*

of the Contract and all relevant supporting documentation (“Notice of Dispute”). Neither Party may refer the Dispute to arbitration, prior to pursuing amicable settlement efforts and prior to the expiry of sixty (60) days from the date of the Notice of Dispute. However, the foregoing shall not preclude a Party to the Contract from referring a Dispute to arbitration if such Party seeks interim measures of protection under the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Arbitration Rules”). **Arbitration:** Either Party may refer a Dispute that has not been resolved amicably, to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining, subject to the provisions of this Article. The appointing authority shall be the Secretary-General of the Permanent Court of Arbitration. The Parties agree that the periods for the intervention of the appointing authority stipulated in Article 8, paragraph 1, and Article 9, paragraphs 2 and 3, of the UNCITRAL Arbitration Rules shall be sixty (60) days. Any agreement between the Parties or decision by the arbitral tribunal as to the place of arbitration or the venue of the proceedings shall mean only the physical location where the arbitral tribunal shall hold in-person meetings, including for its deliberations or hearings, pursuant to Article 18, paragraph 2, of the UNCITRAL Arbitration Rules. Such agreement or decision as to the place of arbitration shall not amount to the determination of a legal seat, shall not entail any submission to any country’s law and jurisdiction in connection with the arbitral proceedings and any resulting award(s), and shall not be construed as a waiver, express or implied, of the privileges and immunities of the United Nations, including UNDP. In interpreting the rights and obligations of the Parties under the Contract, the arbitral tribunal shall first apply the terms of the Contract and then apply generally recognized principles of international commercial law. Procedural matters shall be governed by the provisions of this Article 25 and the UNCITRAL Arbitration Rules. Where necessary, the Arbitral Tribunal may seek additional guidance from the generally accepted principles of procedure applied by international tribunals. The arbitral tribunal may exercise the powers envisaged in Article 27, paragraph 3, of the UNCITRAL Arbitration Rules in respect of documents, exhibits or other evidence that (i) the Parties agree are to be produced or (ii) which the arbitral tribunal, in view of the statements of claim and defense and the evidentiary record, considers relevant to the Dispute and material to its outcome. When apportioning costs pursuant to Article 42, paragraph 1, of the UNCITRAL Arbitration Rules, the arbitral tribunal shall consider the reasonableness of document production requests. In accordance with the UNCITRAL Arbitration Rules, the arbitral tribunal shall be empowered to order the return or destruction of goods or any property, whether tangible or intangible, or of any confidential information provided under the Contract, order the termination of the Contract, or order that any other protective measures be taken with respect to the goods, services, or any other property, whether tangible or intangible, or of any confidential information provided under the Contract, as appropriate. Unless otherwise expressly provided in the Contract, the arbitral tribunal shall have no authority to award: (1) punitive damages or damages for indirect or consequential losses; (2) interest other than simple interest and only at the Federal Reserve Bank of New York’s Secured Overnight Financing Rate prevailing at the time of the award. The arbitral tribunal shall have no authority to award any pre-award interest.”

This is the Settlement of Dispute clause in the SBAA:

“(1) Any disputes between the UNDP and the Government arising out of or relating to this Agreement which is not settled by negotiation or other agreed mode of settlement shall be submitted to arbitration at the request of either Party. Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairman. If within thirty days of the request for arbitration either Party has not appointed an arbitrator or if within fifteen 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 an arbitrator. The procedure of the arbitration shall be fixed by the arbitrators, and the expenses of the arbitration shall be borne by the Parties as assessed by the arbitrators. The arbitral award shall contain a statement of the reasons on which it is based and

shall be accepted by the Parties as the final adjudication of the dispute. (2) Any dispute between the Government and an operational expert arising out of or relating to the conditions of his service with the Government may be referred to the Executing Agency providing the operational expert by either the Government or the operational expert involved, and the Executing Agency concerned shall use its good offices to assist them in arriving at a settlement. If the dispute cannot be settled in accordance with the preceding sentence or by other agreed mode of settlement, the matter shall at the request of either Party be submitted to arbitration following the same provisions as are laid down in paragraph 1 of this Article, except that the arbitrator not appointed by either Party or by the arbitrators of the Parties shall be appointed by the Secretary-General of the Permanent Court of Arbitration.”

10) Does “other disputes of a private law character” 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?

The disputes we encounter are described in UNDP’s response to Question 1.

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?

UNDP does not waive UN privileges and immunities. Besides cases involving the Ombudsman, we have not agreed to any other third-party methods. We have cases of former non-staff personnel (particularly in Latin America) filing labor claims before national courts. In these cases, UNDP prepares a Note Verbale for the Ministry of Foreign Affairs and request its assistance to uphold UN privileges and immunities.