The International Law Commission's Work on the Topic of The Settlement of Disputes to which International Organizations are Parties: The Need for a Meaningful Outcome

Rishi Gulati
Associate Professor in International Law, University of East Anglia, United Kingdom; Barrister, Victorian Bar, Australia.

Abstract

This article takes stock of the work of The International Law Commission (ILC) on the topic 'Settlement of Disputes to Which International Organizations Are Parties'. The article observes that the ongoing consideration of this Topic is highly timely given the increasing number of disputes to which IOs are now party, especially disputes between IOs and private persons. For the ILC's work to be meaningful, it is thus important that the final outcome not only include within its scope disputes between IOs and other conventional subjects of international law, namely, states and other IOs, but also disputes between IOs and private persons. Moreover, to protect and maintain the rule of law in disputes involving IOs, it is suggested that the ILC should set out in detail the due process elements of dispute resolution in its outcome document.

Keywords

international organizations – International Law Commission – dispute resolution – international rule of law – due process

1 Background

As the UN's independent body charged with the progressive development and codification of international law, the International Law Commission (ILC or the Commission) helps to make international law clearer and more accessible. One such area urgently requiring attention concerns the 'Settlement of Disputes to Which International Organizations are Parties' (the 'Topic' or the 'Project'). The Topic was proposed by Michael Wood and put on the long-term programme of work of the ILC in 2016.[1] In 2022, the Commission decided to place the Topic on its current programme of work appointing August Reinisch as Special Rapporteur.

The Special Rapporteur has delivered two reports so far. The first report set out preliminary issues, including on the scope of the Project, and the second report focuses on the theme of dispute resolution between international organizations (IOs) and other conventional subjects of international law.[2] Expectedly, initial work focused on certain core concepts. This includes the definition of an IO. As it stands, it has been defined as:

> an entity possessing its own international legal personality, established by a treaty or other instrument governed by international law, that may include as members, in

[1] M. Wood, 'The Settlement of International Disputes to Which International Organizations Are Parties' in *Yearbook of the International Law Commission 2016, vol. II (Part Two)* UN Doc. A/CN.4/SER.A/2016/Add.1 (Part 2), at 233 (annex I).

[2] See UN ILC, 'First Report on the Settlement of International Disputes to Which International Organizations Are Parties by August Reinisch, Special Rapporteur' (3 February 2023) UN Doc. A/CN.4/756 ('First Report'); UN ILC, 'Second Report on the Settlement of Disputes to Which International Organizations Are Parties by August Reinisch, Special Rapporteur' (1 March 2024) UN Doc A/CN.4/766 ('Second Report').

addition to States, other entities, and has at least one organ capable of expressing a will distinct from that of its members.[3]

It is immediately apparent that the Topic concerns public international organizations as opposed to other types of transnational institutions such as multinational corporations and non-governmental organizations.[4]

Given the diversity of IOs, and the varied ways in which they legally interact with other entities, the Commission is unlikely to produce a uniform outcome set out in draft articles. The ILC is seeking to develop guidelines which can be accessed and adopted by IOs in their dispute resolution legal infrastructure and practices.[5] This brief reflection argues that any future guidelines must address the most pressing challenges faced in practice, as well as emphasises the need to resolve disputes in line with due process standards. In doing so, the paper starts by outlining why the Project is highly timely (Section 2). I then make observations concerning the types of disputes the ILC is considering, i.e., disputes between IOs and other conventional subjects of international law (states and IOs), as well as disputes between IOs and private persons (Section 3). Finally, a brief comment on the role of national courts is also made (Section 4).

2 The Need to Tackle the Topic

Since its creation more than 75 years ago, the ILC has considered various topics on IOs,[6] with mixed success. Both, the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations,[7] and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,[8] have not entered into force due to a lack of participation.

In more recent times, using the ILC's Articles on State Responsibility as a spring-board, the Commission developed the 'Articles on the Responsibility of International Organizations' (ARIO) in 2011.[9] While many have welcomed the ARIO, others have argued that the ILC should not have embarked on that project for there is a lack of sufficient practice, which is necessary for the ILC to discharge its mandate of codifying and progressively developing the law in this area. One commentator pointed out:

---

[3] UN ILC, 'Settlement of International Disputes to Which International Organizations Are Parties: Titles and Texts of Draft Guidelines 1 and 2 Provisionally Adopted by the Drafting Committee' (15 May 2023) UN Doc. A/CN.4/L.983 UN ILC, at 1; see also, UN ILC, 'Titles and Texts of Draft Guidelines 1 and 2 Provisionally Adopted by the Drafting Committee' (15 May 2023) UN Doc. A/CN.4/L.983.

[4] IOs and other transnational institutions can face similar challenges. Solutions adopted by the former can aid the latter and vice versa: see generally, R. Gulati and P. Webb, 'The Legal Accountability of Transnational Institutions: Past, Present and Future' (2023) 34(3) King's Law Journal 411–424.

[5] 'First Report', at para. 27.

[6] Ibid., at para. 11: 'In the past, the Commission has not directly addressed questions concerning the settlement of disputes to which international organizations are parties. However, it has worked on topics related to dispute settlement and international organizations, in particular their status, relations with States, treaty-making and responsibility'.

[7] 21 March 1986, not yet in force; see, *Official Records of the United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations*, vol. II (United Nations 1986).

[8] 14 March 1975, not yet in force; see ibid.

[9] UN ILC, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' in *Yearbook of the International Law Commission 2011, vol. II (Part Two)* UN Doc. A/CN.4/SER.A/2011/Add.1 (Part 2).

> [T]he ILC never offered convincing legal reasons for extending state responsibility rules to international organizations. Since the paucity of practice was widespread in the ARIO, and the Commission had to justify the drafting of these provisions upon policy considerations, commentators and ILC members have questioned whether the topic should have been undertaken by the Commission in the first place.[10]

Indeed, approximately 15 years have passed since the development of the ARIO, and it seems most unlikely that they will be adopted as a treaty any time in the near-to-medium-term.[11] This does not mean that the ARIO are irrelevant. They are the only attempt at developing a regulatory framework for IO responsibility at the international level, even if the ARIO are destined to remain in draft form for a long time to come.[12]

Further, a highly vexed issue pertaining to IOs relates to their jurisdictional immunities before national courts. This topic is presently in the ILC's long-term work category,[13] and it does not seem it will be addressed any time soon despite a relatively large amount of practice available on the issue.[14] Thus, it may not be an overstatement to say that the ILC's decision to work on the topic of the settlement of disputes to which IOs are parties is a brave one, given a somewhat mixed record in this sphere. Even though a project relating to IOs presents some risks in terms of achieving an impactful outcome,[15] it is right that the ILC consider the Topic.

IOs are involved in more and more disputes because they are asked to perform an increasing number of activities. Naturally, this creates the potential for a much greater number of disputes involving IOs. Purely from a practical perspective then, it is obviously advisable to find ways and methods to resolve such disputes via peaceful means of dispute settlement. Given its expertise, reputation, independence and weight as a UN body, the ILC is best placed to help achieve this objective. But for its work to be meaningful and useful, the Project should address the most significant problems faced in the real-world, and embed due process aspects of dispute resolution in its outcome with specificity. This would mean that the ultimate product is of practical benefit to IOs, as well as consistent with the rule of law internationally.[16]

---

[10] See, N. Voulgaris, 'The International Law Commission and Politics: Taking the Science Out of International Law's Progressive Development' (2022) 33(3) European Journal of International Law 761–788, available at <https://doi.org/10.1093/ejil/chac051>.

[11] See the debate in the Sixth Committee during the UN General Assembly's 78th session: 'Sixth Committee (Legal) – 78th Session: Responsibility of International Organizations (Agenda item 85)' The United Nations General Assembly, available at <https://www.un.org/en/ga/sixth/78/int_organizations.shtml> (accessed 19 July2024); see also, UNGA, 'Responsibility of International Organizations: Compilation of Decisions of International Courts and Tribunals: Report of the Secretary-General' (28 April 2023) UN Doc. A/78/83.

[12] For a discussion regarding the ARIO, see generally, D. Sarooshi, *Responsibility and Remedies for the Actions of International Organizations* (Nijhoff 2015); also see, I. Brownlie and M. Ragazzi, *Responsibility of International Organizations* (Brill 2013).

[13] See 'Programme of Work' The International Law Commission, available at <https://legal.un.org/ilc/programme.shtml> (accessed 19 July 2024).

[14] For a discussion on IO immunities, see R. Gulati, *Access to Justice and International Organisations: Coordinating Jurisdiction Between the National and Institutional Legal Orders* (Cambridge University Press 2022), at 131–167.

[15] L. Gasbarri, '"Try Again, Fail Again, Fail Better": The International Law Commission is Back on International Organizations' (28 June 2023) EJIL:Talk, available at <https://www.ejiltalk.org/try-again-fail-again-fail-better-the-international-law-commission-is-back-on-international-organizations/>.

[16] In so far as international dispute resolution is concerned, the thin notion of the international rule of law demands that disputes are resolved independently, impartially, fairly, and with transparency: R. Gulati and P. Schoeffmann, 'UNCITRAL'S Work on Investor-State Dispute Settlement: Promoting the Rule of Law Internationally?' in R. Gulati et al. (eds), *The Elgar Companion to UNCITRAL* (Edward Elgar 2023) at 140–160.

3 Developing a Meaningful Product

If the ILC is to produce a useful outcome, it is important that it considers the issues presenting the most significant challenges in practice. The scope of the Project is crucial. In this respect, if one simply looks at its title: 'Settlement of Disputes to Which International Organizations are Parties', the impression is that the work is broadly framed with some inbuilt flexibility. According to this author, this is a desirable way to proceed for it is unwise to limit the types of issues the ILC will consider.[17] But how this flexibility is utilised will determine how meaningful the ILC's work ends up being. As is discussed below, it should be ensured that the ILC considers all types of legal disputes to which IOs are parties.

More specifically, IOs may be involved in disputes against (1) other IOs, (2) States (member and/or non-member States), or (3) natural or legal persons. The disputes in the former two categories tend to arise on the plain of public international law, and the ones in the latter category may arise under international or domestic law, assuming such a distinction is worth maintaining in the first place. Below, I make some observations on categories 1 and 2 (3.1) and category 3 (3.2), arguing that all of those three categories must be included in the ILC's agenda. It is also suggested that any future guidelines should embed rule of law aspects of dispute resolution with specificity.

3.1 Category 1 and 2 Disputes

It has been uncontroversial that the ILC will be considering disputes in categories 1 and 2 – disputes between IOs (not as common) and between IOs and States (arising occasionally) – for these disputes tend to arise on the plain of public international law.[18] As a matter of course, any work (including any future guidelines) that can help streamline and improve the legal infrastructure available to IOs to resolve their disputes will be of much practical benefit to IOs themselves, and aid in their better functioning more generally too.[19] Obviously, if IOs can resolve their disputes in a streamlined way that is compliant with due process standards, efficiency and accountability – both important values – are advanced simultaneously.

Moreover, the Project also fills a gap in the ILC's work on IOs. It should not be overlooked that the ARIO did not deal with the theme of dispute resolution, focusing instead on the secondary rules on IO responsibility for alleged breaches of international law. If there exist no viable adjudicative mechanisms where disputes involving IOs can be resolved, then the ARIO largely become theoretical for there is no forum where IO responsibility can actually be effectively invoked. In fact, the ARIO are more likely to be used if questions of IO

---

[17] The ILC's mandate is to codify the rules of international law in fields where there already has been extensive practice and progressively develop international law 'on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed': see Arts 1 and 15 Statute of the International Law Commission, adopted by the General Assembly in Resolution 174 (II) of 21 November 1947, as amended by Resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981 ('ILC Statute').

[18] See generally the responses by States and IOs in the context of the work on the Topic contained in UN ILC, 'Memorandum by the Secretariat' (10 January 2024) UN Doc. A/CN.4/764; see also, 'Second Report', at paras 15-16.

[19] The functionalist perspective on IOs remains the dominant one: UN ILC, 'Second Report on the Second Part of the Topic of Relations Between States and International Organizations, by Mr. Abdullah El-Erian, Special Rapporteur' in *Yearbook of the International Law Commission 1978, vol. II (Part One)* UN Doc. A/CN.4/SER.A/1978/Add.l (Part 1), at 277, para. 104. Although, attempts have been made to counter this functionalist theory: see generally, J. Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26(1) European Journal of International Law 9–82.

responsibility are subjected to judicial scrutiny with greater frequency. For the Topic to focus on category 1 and 2 disputes is thus warranted, and constitutes low-hanging fruit.

Indeed, in 2016, when Michael Wood first suggested the Topic for the ILC's consideration, it appeared that the Commission would limit its work to 'international disputes', i.e., disputes between IOs and between IOs and States occurring purely on the plain of public international law.[20] The Topic was initially titled 'Settlement of *International* Disputes to Which IOs are Parties',[21] with the word 'international' in the title suggesting a focus on disputes between an IO and another conventional subject of international law.

With IOs having very limited access to international courts and tribunals, it is right for the ILC to consider the ways in which an IO's ability to resolve its 'international disputes' using both judicialised means (courts or arbitration) and non-judicialised ones (negotiation, conciliation, mediation, inquiry, etc) could be enhanced. More specifically, some prominent issues to consider here are not novel. For example, should IOs be granted access to the International Court of Justice (ICJ)? As of now, IOs do not have access to the ICJ in contentious cases.[22] The most prominent international judicial body is thus not open to them.[23] Expanding the ICJ's jurisdiction in contentious cases to include disputes involving IOs would need a change to its Statute, requiring considerable political will.

Greater use of international arbitral procedures is also an important part of the discussion. To some extent, international arbitration can already be used as a forum of choice by IOs. The Permanent Court of Arbitration (PCA) has adopted special rules on disputes involving IOs,[24] but arbitration can, of course, be administered by other arbitral institutions,[25] as well as on an *ad hoc* basis. Due to a lack of empirical data, it is difficult to determine how

---

[20] 'First Report', at para. 22.

[21] Emphasis added.

[22] Art. 34 Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) XV UNCIO 355.

[23] For completeness, the Court's advisory jurisdiction (including the mechanism of a binding advisory opinion) may be accessed by certain IOs: Art. 96 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) XV UNCIO 335, amendments in 557 UNTS 143, 638 UNTS 308 and 892 UNTS 119; Wood, 'The Settlement of International Disputes to which International Organizations are Parties', at paras 9–14; 'Second Report', at paras 97 and 133; for a list of relevant cases, see 'Organs and Agencies Authorized to Request Advisory Opinions' The International Court of Justice, available at <https://www.icj-cij.org/organs-agencies-authorized> (accessed 19 July 2024); especially in proceedings involving IOs, the jurisdiction of the ICJ has witnessed a relative decline due to the abolition of the Court's review function relating to judgments of the Administrative Tribunal of the International Labour Organisation and the old United Nations Administrative Tribunal: See Gulati, 'Access to Justice and International Organisations', at Section 1.4.3.

[24] 'Optional Rules for Arbitration Involving International Organizations and States' (1 July 1996) Permanent Court of Arbitration, available at <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-Between-International-Organizations-and-States-1996.pdf>; and 'Rules for Arbitration Between International Organizations and Private Parties' (1 July 1996) Permanent Court of Arbitration, see <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-Between-International-Organizations-and-Private-Parties-1996.pdf>.

[25] See especially, A. Reinisch, 'Arbitrating Disputes with International Organisations and Some Access to Justice Issues' (2023) 34(3) King's Law Journal 546–561, available at, <https://www.tandfonline.com/doi/full/10.1080/09615768.2023.2283236>.

often IOs actually use arbitration to resolve their disputes. It is most certainly more frequent than publicly available information may suggest.[26]

In the end, it is likely that both courts and international arbitral procedures will be accessed to resolve disputes involving IOs. Jurisdictional competition between courts and arbitration may actually be desirable for it provides IOs with access to a much greater range of dispute resolution options that may suit their particular needs.[27] Indeed, as it stands, Draft Guideline 5 provides that the 'means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely accessible for the settlement of disputes between international organizations or between international organizations and States'.[28]

Further, in what can only be described as a positive development, Draft Guideline 6 goes on to state that '[a]rbitration and judicial settlement shall conform to the requirements of independence and impartiality of adjudicators and due process'.[29] It would be beneficial if the Guidelines build on this proposition, embedding these very rule-of-law requirements tailored to disputes involving IOs with specificity. It goes without saying that adjudicative mechanisms should be independent, impartial and fair. It is especially worth stating that the value of transparency in dispute resolution involving IOs should not be ignored given the opaque nature of the current system.

In particular, unlike court procedures and processes, arbitration can be rather opaque. On the one hand confidentiality is said to be a great strength of arbitration, but on the other hand, where public interests are at stake, this opaqueness is undesirable. Hence, the investor-state-arbitration (ISA) regime where disputes significantly touch on public concerns, has increasingly embraced transparency in terms of public access to documents and hearings as well as the potential for public participation through written *amicus curiae* submissions.[30] This has led to the development of procedural standards (including through conventions) aiming to

---

[26] There has been some recent clarity on the statistics at least with respect to the PCA. The PCA states that it has 'administered all three types of disputes identified in the Commission's questionnaire, namely: (a) disputes between international organizations and private parties; (b) disputes between international organizations and States; and (c) disputes between international organizations [...] [D]isputes in group (a) are the most common. As of 25 April 2023, PCA has acted as registry for 49 claims brought by private parties against international organizations. PCA has administered two disputes falling within category (b), i.e., between States and international organizations, and three disputes falling within category (c), i.e., between international organizations. As of 25 April 2023, PCA has administered a total of 54 disputes involving international organizations across a variety of methods of dispute settlement, and acted as appointing authority in 34 disputes over the same period (and 21 in the last 10 years)': see UN ILC, 'Memorandum by the Secretariat' (10 January 2024) UN Doc. A/CN.4/764, at 53; also see 'Second Report', at paras 55–56 and 84.

[27] UN ILC, 'Settlement of Disputes to Which International Organizations Are Parties: Titles of Part One and Part Two, and Texts and Titles of Draft Guidelines 3, 4 and 5 as Provisionally Adopted by the Drafting Committee on 7 and 9 May 2024' UN Doc. A/CN.4/L.998, at 1, Draft Guideline 4, as it stands, provides: '[d]isputes between international organizations or between international organizations and States should be settled in good faith and in a spirit of cooperation by the means of dispute settlement […] that may be appropriate to the circumstances and the nature of the dispute'.

[28] Ibid., at 10.

[29] Ibid., at 12.

[30] M. Feldman, 'International Arbitration and Transparency' in S. Kröll, A.K. Bjorklund and F. Ferrari (eds), The Cambridge Compendium of International Commercial and Investment Arbitration (Cambridge University Press 2023) 1697–1722, at 1697; also see the chapters in R. Gulati et al. (eds), *The Elgar Companion to UNCITRAL* (Edward Elgar 2023), namely R. Gulati and P. Schoeffmann, 'UNCITRAL's Work in Investor-State Dispute Settlement: Promoting the Rule of Law Internationally?' 140–160 and J. Shelley, 'The Mauritius Convention and UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration' 161–176.

enhance the visibility of awards, as well as the documents generated during the arbitral process.[31]

Admittedly, international commercial arbitration (ICA) has been slower to adopt transparency standards. Relevantly for present purposes, arbitrations involving IOs are resolved within the framework of ICA. While confidentiality in ICA may be less problematic where both parties to a dispute are private, or public interests are not at issue, this is not the case where one of the parties to the dispute is a public entity or public interests are at stake. Here, the transparency rationale applying to ISA is in principle the same as any ICA. In respect of State participation in ICA, Feldman has pointed out:

> When state parties participate in [International Chambers of Commerce] arbitration – or in any other form of international commercial arbitration – many of the public interest elements […] in the context of investment treaty arbitration would apply with equal force. Specifically, in such cases: (i) adverse awards would be paid from public funds, (ii) claims can include allegations of state misconduct and/or corruption, and (iii) claims can arise from a state's exercise of public power […] Thus, there is a significant public interest in at least one category of international commercial arbitration cases: disputes in which a state or state entity is a disputing party.[32]

By analogy, when IOs are party to an arbitration, transparency is critical too. This is presently not the case. Access to awards is limited to non-existent. Such a state of affairs ought to be corrected as it creates a significant legitimacy deficit. IOs are international public authorities.[33] Rule of law considerations thus require that amongst other things, the Guidelines also focus on concerns around transparency with the attention that is warranted. Transparency in arbitrations involving IOs would also ensure that the law develops in a consistent and stable manner. This will benefit not just the disputing parties, but other IOs too. As the next section demonstrates, due process aspects of dispute resolution assume an even greater significance in category 3 disputes.

3.2 Category 3 Disputes

Whether the Commission will consider disputes between IOs and private persons (natural or legal persons) within the scope of the Topic has been somewhat controversial. Such disputes can arise in domestic law and are said to be of a 'private law character' (contract, tort, real or intellectual property, procurement, other types of commercial disputes, and so on), or can have an international law dimension (disputes between IOs and their staff members resolved using international administrative law, other global administrative law disputes, international human rights cases, etc).[34] As was stated earlier, in 2016, the impression given could have been that the Commission would focus on category 1 and 2 disputes. But as the first report of the Special Rapporteur observed:

---

[31] See Gulati and Schoeffmann, 'UNCITRAL's Work in Investor-State Dispute Settlement' and Shelley, 'The Mauritius Convention and UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration'.
[32] Feldman, 'International Arbitration and Transparency', at Section 55.4.2.1.
[33] See A. von Bogdandy, M. Goldmann, and I. Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2016) Max Planck Institute for Comparative Public Law & International Law Research Paper No. 2016-02, available at <https://ssrn.com/abstract=2770639> (accessed 19 July 2024), at 1381–1383.
[34] See Section 3.2.3 below.

> The [T]opic [was earlier] referred to as 'Settlement of international disputes to which international organizations are parties'. This formulation leaves it open as to whether disputes of a private law character are included, but the reference to 'international' disputes might be understood as not comprising such disputes. The Commission has been aware of this apparent limitation, which stems from the original formulation of the 2016 syllabus on the topic. Thus, it stated in regard to 'disputes of a private law character' that '[c]onsidering 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.'[35]

The fact that the title of the Project has now been changed from settlement of 'international disputes' to which IOs are parties to settlement of 'disputes' to which IOs are parties is perhaps confirmation that the ILC intends to cover category 3 disputes too.[36] The Special Rapporteur said in the first report:

> In practice, disputes of a private law character form a highly important part of disputes to which international organizations are parties. They raise numerous issues of international law, such as jurisdictional immunity or the obligation to make provision for appropriate modes of settlement provided for in various treaties. As already recognized by the International Court of Justice in its advisory opinion in the Effect of Awards case, the need to provide for dispute settlement methods in case of disputes with private parties may also have human rights implications. On the basis of the previous work of the Commission and other bodies, as outlined above, it also seems that, in practice, the most pressing questions relate to the settlement of disputes of a private law character. Thus, the Commission rightly suggested that such disputes should be considered. The Special Rapporteur shares those views.[37]

Similarly, a perusal of the responses submitted by IOs and States to a questionnaire sent to them in connection with the Topic confirms that the most common disputes belong to category 3.[38] Moreover, on a related point, there is also a view held that any progress on the ARIO can only be made once the work on the Topic is completed. Noting the lacuna in the ARIO regarding disputes between IOs and private parties, the view of the representative of the Netherlands has been summarised as follows:

> [T]he articles on the responsibility of international organizations did not sufficiently address the settlement of disputes of a private law character brought against international organizations by natural and legal persons. Her delegation therefore proposed waiting for the outcome of the Commission's ongoing work on the topic 'Settlement of international disputes to which international organizations are parties'

[35] 'First Report', at para. 22.
[36] See 'Analytical Guide to the Work of the International Law Commission: Settlement of Disputes to Which International Organizations are Parties' The International Law Commission, available at <https://legal.un.org/ilc/guide/10_3.shtml> (accessed 19 July 2024).
[37] 'First Report', at paras 24–25.
[38] See UN ILC, 'Memorandum by the Secretariat' (10 January 2024) UN Doc. A/CN.4/764.

before giving further consideration to the topic of responsibility of international organizations.[39]

In sum, it is safe to conclude that there is little point in tackling the Topic if category 3 disputes are not included within its scope. Bearing this in mind, the Project addressing category 3 disputes is a positive development.[40] The real question, however, concerns the content of any future guidelines pertaining to this category. The issues of immediate relevance for the guidelines are: which disputes fall within this category (3.2.1); the place where such disputes are to be resolved (3.2.2); and the substantive standards adopted to resolve the merits (3.2.3).

3.2.1 Which Disputes Fall Within Category 3

For the purposes of the applicability of any future guidelines, it is strongly suggested that all disputes arising between IOs and private persons, whether natural or legal, ought to be within category 3. As the Topic's focus is on dispute resolution as such, there is nothing stopping the Commission from taking such an approach. However, this matter requires further comment.

It may seem odd that determining which disputes fall within category 3 requires clarification. But it does. This is due to a tricky interaction between IO immunities and access to justice concerns. IOs are generally granted jurisdictional immunities before national courts, making it difficult, if not impossible, for victims of IO conduct to approach national courts to seek justice.[41] To address this access to justice deficit, IOs are placed under an obligation to provide appropriate modes of dispute resolution to private persons they allegedly harm (access to justice obligation).[42]

Such an access to justice obligation can be rooted in direct treaty language: in a round-about way, it can be based on the operation of international human rights law (especially the right to a fair trial and rule of law requirements),[43] or it may be found in domestic constitutional guarantees.[44] It can, of course, be based on one or more of the aforementioned bases. There is,

---

[39] UNGA Sixth Committee, 'Summary Record of the 19th Meeting' (22 January 2024) UN Doc. A/C.6/78/SR.19, at para. 61; also see generally, A. von Bogdandy and M. Steinbruck Platise, 'ARIO and Human Rights Protection: Leaving the Individual in the Cold' (2012) 9(1) International Organisations Law Review 67–76.

[40] 'Second Report', at paras 2–3.

[41] This is the case even though IO immunities are limited by the notion of functionalism. For a discussion, see Gulati, *Access to Justice and International Organisations*, at 131–167.

[42] Ibid., at 7–38.

[43] See especially, *Waite and Kennedy v. Germany* [18 February 1999] ECtHR App No. 26083/94, at para. 67: 'The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial'; also see, 'Inter-American Juridical Committee Report. Immunities Of International Organizations' (16 August 2018) CJI/DOC.554/18 REV.2.

[44] For a recent analysis, see D. Burchardt, 'Transnational Procedural Guarantees – The Role of Domestic Courts' (2023) 34(3) King's Law Journal 562–578; also see Austria's response to the questionnaire contained in UN ILC, 'Memorandum by the Secretariat' (10 January 2024) UN Doc. A/CN.4/764, at 12, where the State cites the judgment of 'the Austrian Constitutional Court of 29 September 2022, in which the Court, for the first time, declared unconstitutional parts of a headquarters agreement that lacked provisions for the settlement of labour disputes through an independent mechanism, thus violating the employees' rights to a fair trial according to article 6 of the European Convention on Human Rights (Judgment No. SV 1/2021 -23). The Court decided that the

however, much confusion on the scope of the applicability of the access to justice obligation on IOs. This is due to problematic treaty language that may suggest that it operates only in respect of disputes of a private law character.

In particular, Article VIII, Section 29 of the General Convention which enshrines the UN's immunities regime,[45] provides that 'The United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party'.[46] The words 'appropriate modes' deal with questions of forum, and the phrase 'private law character' goes towards classifying the dispute in a substantive sense. Issues of forum and applicable law are distinct conceptual questions and should be considered separately.

For the moment, the focus is on questions of forum. In this respect, according to the UN, how a dispute is characterised seemingly determines whether or not it has an obligation to provide appropriate modes of dispute resolution to a private person. In short, the argument is that appropriate modes need only be provided in private law claims, and the obligation is not triggered in respect of public law ones.[47] This interpretation is highly problematic. The wording of the General Convention implicitly referring to the public–private distinction is unfortunate.

As several recent mass claims against IOs have demonstrated (the Srebrenica and Haiti cholera cases against the UN, the lead poisoning case against the United Nations Mission in Kosovo, and the Jam case against the International Finance Corporation)[48], the same set of facts can raise claims that may be classifiable as arising in private law (such as in contract or tort) or in public/public international law (such as in international human rights law, international humanitarian law, or even the law of the IO concerned).[49] Determining with precision how such claims are to be characterised is thus a subjective and uncertain exercise.

---

relevant provisions shall not be applied any more after 30 September 2024, giving the Government a time frame of two years to negotiate an amendment of the headquarters agreement' with the concerned IO.

[45] Convention on the Privileges and Immunities of the United Nations (opened for signature 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 ('General Convention'); also see R. Gulati, 'Convention on the Privileges and Immunities of the United Nations, 13th February 1946 (1 UNTS 15, 1 UST 1418)' (2016) 73 Oxford International Organizations, available at <http://opil.ouplaw.com/view/10.1093/law-oxio/e28.013.1/law-oxio-e28?rskey=4tJ2gf&result=9&prd=OXIO>.

[46] Note, contractual cases should not present a challenge in terms of characterisation. Disputes arising out of contracts freely entered into between two or more parties, where the status of any of the parties as a public entity ought to be irrelevant to the characterisation of the legal relationship, are clearly of a private law character. Here, one must focus on the nature of the transaction as opposed to its purpose: Gulati, *Access to Justice and International Organisations,* at Section 5.5.

[47] See UN ILC, 'Memorandum by the Secretariat' (10 January 2024) UN Doc. A/CN.4/764, at 66: 'Consistent with article VIII, section 29 (a), of the General Convention, the United Nations makes a distinction between claims of a private law character and claims of a public law character. The latter category of claims falls outside the scope of article VIII, section 29, of the General Convention […] When determining whether a claim is of a private law character and thus falls within the scope of article VIII, section 29, of the General Convention, the United Nations assesses the nature of and the circumstances in which the alleged act or omission occurred and not merely the nature of the alleged conduct as described in the claim. A claim alleging tortious or delictual conduct, for example, does not automatically make it one of a private law character.' Even if this statement is taken at its highest, it does not follow that the UN's (or a similarly situated IO) obligation to provide for appropriate modes of dispute settlement may not arise due to other legal bases, such as human rights obligations; also see the discussion in 'Second Report', at para. 21.

[48] These cases are discussed in Gulati, *Access to Justice and International Organisations,* at Sections 1.4.1.1 and at 131–167 (Chapter 4).

[49] Ibid., at Section 5.5.2.1.

In fact, the most common disputes IOs face are employment claims. Even these can be susceptible to different characterisations. Claims pursued by IO 'staff members' are characterised as administrative law claims resolved using international administrative law, whereas disputes between IOs and consultants performing work for IOs are often framed as commercial ones.[50] It is thus apparent that similar material circumstances may give rise to alternative causes of action, with a party choosing to characterise its claims based on subjective factors, such as its preferred forum's subject matter jurisdiction (shoehorning a claim), and the remedies that ultimately may be obtained. There is nothing unusual about parties doing so.

Therefore, an effort to determine the blurry distinction between the public and private may end up being futile.[51] In the end, for the operation of the access to justice obligation, what ought to matter is not how a participant in a dispute chooses to classify a claim, but whether the procedural bar of approaching a national court is preventing access to justice from being realised. As I have considered elsewhere, an IO's obligation to provide for 'appropriate modes' or 'reasonable alternative means' of dispute resolution to private parties is surely not just limited to so called private law claims.[52] The reason for the imposition of such an obligation on IOs is to ensure a fair trial for private persons wishing to raise claims against IOs, where such persons are unable to approach national courts due to IO immunities.[53] By and large, IO immunities bar all types of claims being raised against IOs before national courts, whether they are characterised as public or private.[54]

Logically then, the access to justice obligation, which is ultimately an aspect of the rule of law at the international level, ought to have a broad import, applying with respect to both so-called private or non-private claims. Therefore, any future guidelines should not hesitate to clarify that category 3 disputes include all disputes between IOs and private persons, regardless of their character. As was said, given the ILC's limited focus, without prejudice to how Article 29 of the General Convention is interpreted by some parties, there is no reason why the Commission cannot include guidelines on all types of disputes arising between IOs and private persons.

---

[50] See R. Gulati, 'Advancing International Administrative LAW: A Four-Point Agenda' The Federation of International Civil Servants, available at <https://ficsa.org/fileadmin/user_upload/Advancing_International_Administrative_Law_-_a_four-point_agenda.pdf>.

[51] For a discussion on the private-public distinction in international dispute resolution, see generally, B. Hess, 'The Private-Public Divide in International Dispute Resolution: The 2017 Hague Lecture' (2018) 388 Recueil des Cours 49–266.

[52] See especially Gulati, *Access to Justice and International Organisations,* at Section 1.4.4.

[53] Indeed, this point is reflected in several responses by States to the questionnaire sent in connection with the work on the Topic. For example, Chile stated, 'The foregoing does not preclude failure to comply with the fundamental obligation to respect the rights at play in conflicts between an organization and a third party, such as the rights to due process and effective judicial protection. This matter pertains to the international development of human rights and the constitutional protection of fundamental rights, as opposed to the immunities of international organizations, which are assumed as international obligations. The difficulty lies in achieving compliance with the international obligations in dispute, i.e. recognizing the immunities from jurisdiction established at treaty level, while also protecting the human or fundamental rights of third parties': UN ILC, 'Memorandum by the Secretariat' (10 January 2024) UN Doc. A/CN.4/764, at 9–10.

[54] Although, for some IOs, immunity in respect of so called commercial activity may no longer be available, at least in some jurisdictions. The commercial v non-commercial distinction in respect of claims involving IOs is a highly problematic one: see the discussion in Gulati, *Access to Justice and International Organisations,* at 150–158.

For completeness, it should be pointed out that the General Convention, or similar arrangements, only apply to IOs who are subject to such a treaty regime. For IOs not bound to such a regime, the public-private distinction may be irrelevant in any event. And finally, regardless of how the access to justice obligation on IOs is operationalised, in one way or another, it exists. So, even where a General Convention style regime is applicable, the access to justice obligation is not just based on such treaties, but may also be rooted in international human rights law. Thus, any alleged limitation on the operation of the access to justice obligation founded on the former does not prevent its broader import through the latter.

3.2.2 Where Should Category 3 Disputes be Resolved

As is now evident, the question of the place or forum where category 3 disputes are to be resolved is impacted by the jurisdictional immunities granted to IOs. This means that for the most part, national courts are not a viable forum to resolve such disputes. Practically speaking, it is then alternative dispute resolution mechanisms that do or should do the bulk of the work in resolving disputes between IOs and private parties. Indeed, seeking to comply with their access to justice obligation, IOs do create alternative dispute resolution mechanisms (DRMs) for private parties from time to time.

IOs may establish international courts or tribunals themselves (international administrative tribunals are a good example),[55] international arbitral mechanisms may be resorted to, or other types of DRMs (sanctions boards, ombudsman mechanisms, inspection panels, etc.) can also be created.[56] As long as a forum is independent, impartial and fair, it ought not to matter what particular mode of dispute settlement is chosen. In this respect, the ILC could be agnostic, with any future guidelines simply emphasising the need to provide some form of DRM in all category 3 disputes.[57]

On questions of forum though, the existence of a DRM is not enough. Meaningful access to justice requires that the quality of the DRM be consistent with international standards. It is one thing to provide access to a forum, but yet another to ensure the good administration of justice.[58] In substance, the word ‘good’ in this context refers to the same thing as the terms ‘appropriate’, ‘reasonable’, or ‘adequate’ dispute resolution mechanisms.[59] Regardless of the forum chosen or what it may be called, what matters is if the chosen forum is able to deliver justice independently, impartially, fairly and transparently; in other words, in line with the right to a fair trial and broader rule of law requirements.[60]

It suffices to say that if the chosen forum is a permanent court or tribunal, it must be set up in a way that it is able to provide a fair trial expected from a modern judicial institution. If the choice of forum is arbitration, then the arbitral procedure should be able to deliver justice in compliance with human rights standards, especially noting the need for affordability,

---

[55] As Chukwuemeke Okeke has noted, the only judicial protection created at the institutional level for private parties affected by IO conduct are ‘administrative tribunals whose jurisdiction is limited to the adjudication of disputes between international organizations and their personnel': E. Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press 2018), at 292.

[56] For an analysis, see Gulati, *Access to Justice and International Organisations*, at 70–130.
[57] Note, DRMs are often not provided, such as in the context of peacekeeper sexual abuse: see, Ibid.
[58] Ibid., at Section 1.4.3.
[59] Ibid.
[60] Ibid., at 39–69.

transparency and enforceability of awards.[61] Especially in respect of category 3 disputes where factual inequalities between IOs and individuals may be stark, detailed guidelines by the ILC on the characteristics that make a forum adequate could be most useful. The emphasis placed by the Special Rapporteur in his second report on rule of law considerations vis-à-vis category 1 and 2 disputes is to be particularly welcomed.[62] This is a strong indication that such matters will be looked at even more closely in category 3 disputes where such considerations are of immediate applicability.

3.2.3 Issues of Substantive Law

Once questions of forum are addressed, a crucial aspect of dispute resolution concerns applicable law. In this respect, a distinction must be drawn between the content of the applicable law, and which law applies in a given dispute as such (international, national or institutional). Determining the former is a mammoth task and it will be unrealistic to expect the ILC to focus on such matters. It is on the latter issue where clarification could be provided. These matters would require considering not just public international law questions, but also private international law questions which the ILC can choose to look at.[63]

On questions of applicable law, which the Commission will consider at a later stage,[64] there seems to be an assumption that disputes involving IOs either arise at the national or the international level, with the former in private law and the latter in public or public international law. Of course, if any such assumption is made, it should be questioned. No such strict dichotomy can and should be made. The same set of facts can give rise to alternative causes of action in domestic or international law which in theory, can be raised at a domestic or an international forum, of course subject to questions of an adjudicative body's personal and subject matter jurisdiction.

Moreover, as IOs possess their own international personality, disputes involving IOs are ones where three legal orders can in fact interact, namely, national, international, and institutional, with each of those orders possessing their own regulatory capacities and limitations. Accordingly, a dispute involving an IO could attract the application of international law, national law, institutional law, or even a combination of the above.[65]

Thus, questions of applicable law in disputes involving IOs can be particularly challenging. Any future guidelines by the Commission could address some of the most important and pressing concerns in this respect, i.e.: whether or not freedom of contract or party autonomy should be limited when IOs contract with weaker parties;[66] which subject matters

---

[61] In Ibid., at Section 3.3, it was argued that the current way in which arbitration is used in many category 3 claims is ineffective and inconsistent with fair trial norms. This is confirmed by responses of several IOs to the questionnaire sent to them in connection with the Topic: UN ILC, 'Memorandum by the Secretariat' (10 January 2024) UN Doc. A/CN.4/764, at 89–90 (especially responses by the Food and Agriculture Organisation and the PCA); in this respect, also see, Reinisch, 'Arbitrating Disputes with International Organisations and Some Access to Justice Issues'; R. Gulati et al., 'International Arbitration in Claims against International Organisations' (2020) 3 AIIB Yearbook of International Law 141–157.

[62] See especially 'Second Report', at paras 228–229.

[63] Art. 1(2) ILC Statute.

[64] As has been said, the 'Commission would inevitably at some point have to deal with the question of the applicable law', albeit it is not clear which aspects will be scrutinised: UN ILC, 'Statement of the Chair of the Drafting Committee' (31 May 2024) UN Doc. A/CN.4/L.998/Add.1, at 3.

[65] For a discussion, see Gulati, *Access to Justice and International Organisations*, at Section 5.5.

[66] Such as employees.

are or should be governed by the law of the IO itself; the type of choice of law clauses IOs do or could enter into in their contractual relationships; whether the rules of private international law need adjustment in claims against IOs in tortious disputes; and to what extent IOs are bound by international human rights and international humanitarian law.[67] Admittedly, addressing such questions could result in the Project being bogged down in somewhat difficult terrain. A conscious decision by the Commission not to engage with some of the aforementioned questions may be thus understandable. Ultimately, it could be left to IOs, as well as courts and arbitral bodies, to deal with issues of applicable law in disputes where an IO is a party.

4 The Role of National Courts?

What role national courts ought to play in disputes where IOs are parties is the elephant in the room. Again, this issue is especially relevant to category 3 disputes as national courts are unlikely to play a role in adjudicating category 1 and 2 disputes.[68] The subject of IO immunities is in the long-term work programme of the Commission, so only three brief observations of immediate relevance to the Topic are warranted.

First, where IOs fail to provide appropriate modes of dispute settlement to private parties, while some national courts are willing to take jurisdiction on access to justice grounds, many others refuse to do so.[69] It is important to clarify when international law allows a national court to take jurisdiction over an IO in this particular circumstance. In other words, what an IO must do to provide appropriate modes of dispute settlement. Any future guidelines by the Commission clarifying what actually constitutes an appropriate mode of dispute resolution could thus greatly help set the parameters in this sphere (see also discussion at section 3.2.2 above).

Second, as immunity from adjudication can operate differently from immunity from enforcement,[70] the Commission could provide some guidance on the type of contractual clauses, or rules and procedures that could be adopted to ensure that decisions or awards rendered in claims involving IOs are enforceable. An important aspect of due process is that such decisions or awards can actually be enforced or else they are effectively worthless. Finally, there is nothing stopping an IO and another disputing party from expressly agreeing to resolve their dispute before a competent national court. As I canvassed elsewhere, national courts are perfectly capable of resolving claims involving IOs expertly.[71] Accordingly, the Commission could also provide guidance on the use of national courts where an IO is willing to access them as a preferred forum to resolve a particular dispute, or a category of disputes, instead of creating or providing an alternative forum.

---

[67] Some of these questions are contentious: C. Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press 2017), at 13–42.

[68] Where functional immunities of IOs do not apply, or a waiver is forthcoming, a competent national court can naturally adjudicate claims against IOs within category 3.

[69] See generally, Gulati, *Access to Justice and International Organisations,* at 131–167.

[70] See, E. De Brabandere, 'Measures of Constraint and the Immunity of International Organisations' in Ruys et al. (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 327–349.

[71] Gulati, *Access to Justice and International Organisations*, at Section 5.5.2.

5 Conclusion

That the ILC is embarking upon the Project is praiseworthy. It is to be welcomed that the Commission will consider all types of disputes to which IOs are parties, including disputes between IOs and private persons. In this respect, the Commission should clarify that IOs must provide appropriate modes of dispute settlement to private persons they allegedly harm, regardless of the so-called character of a dispute. Moreover, the rule of law framing in the development of the guidelines is also to be welcomed. The true test will be the specificity with which the guidelines are developed. Finally, there is only a limited amount that can presently be done on the role of national courts given the scope of the Topic. Overall, the Commission has a golden opportunity to lay down comprehensive guidelines that IOs can adopt in their dispute resolution practices. It is a statement of the obvious that success would depend on the level of participation IOs and States are willing to offer during the course of the Topic's consideration, and eventually, the adoption of any future guidelines into institutional rules and practices.