The third-party liability of international organisations: towards a ‘complete remedy system’ counterbalancing jurisdictional immunity

Henquet, T.S.M.

Citation

Henquet, T. S. M. (2022, June 7). *The third-party liability of international organisations: towards a ‘complete remedy system’ counterbalancing jurisdictional immunity*. Retrieved from https://hdl.handle.net/1887/3308350

Version:	Publisher's Version
License:	Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden
Downloaded from:	https://hdl.handle.net/1887/3308350

Note: To cite this publication please use the final published version (if applicable).

5 TOWARDS A 'COMPLETE REMEDY SYSTEM' FOR THIRD-PARTIES UNDER SECTION 29 OF THE GENERAL CONVENTION

5.1 Introduction

In addressing the first research question of this study, chapter 3 of this study has interpreted Section 29(a) of the General Convention, and appraised the UN's implementation thereof. It has done so in light of the international organisations law framework concerning third-party remedies. Notably, for 'modes of settlement' Section 29(a) of the General Convention to qualify as 'appropriate', they arguably must comply with (the essence of) Article 14 of the ICCPR; they must not be unduly burdensome, particularly for private claimants; and, they must not expose the UN to national court jurisdiction by undermining its immunity from jurisdiction. The implementation of Section 29(a) of the General Convention has moreover been assessed against the broader backdrop of the rule of law.

The conclusion reached in chapter 3 was that the implementation of Section 29(a) of the General Convention gives rise to a number of problems. To recall briefly, these are:

1. Only disputes of a 'private law character' under Section 29(a) qualify for dispute settlement. Arguably the main challenge with the current implementation of Section 29 is that the UN itself determines the character of third-party disputes, exposing itself to criticism that it violates the maxim that no one may be judge in their own case (*nemo iudex in causa sua*);
2. With respect to standing claims commissions for peacekeeping operations, two problems have been identified. First, the legal framework of these commissions, which have never been established, is problematic in several respects. Second, the UN Liability Rules promulgated in UNGA resolution 52/247 (1998), which make up the applicable law before such commissions, give rise to several legal questions; and
3. Arbitration under the UNCITRAL Arbitration Rules is not necessarily an 'appropriate' mode of settlement, as two problems arise. First, arbitration under those rules is potentially burdensome, particularly for private claimants. Second, more fundamentally, arbitration, including under the UNCITRAL Arbitration Rules, is subject to the supervision of national courts. That contrasts with the need to protect the independence of international organisations by avoiding the interference of national courts.

These problems indicate the need for a structural revision of the implementation of Section 29(a) of the General Convention. That is further amplified by the apparent absence of a 'system'[1516] amongst the various modes of settlement used to implement that provision.

A systematic revision of the implementation of Section 29(a) of the General Convention is necessary to ensure that that provision truly operates as the 'counterpart' to the UN's jurisdictional immunity, as it was originally conceived.[1517] Chapter 4 concluded that such a revision is warranted: the case for immunity is strong, but without alternative remedies courts may reject the immunity. And, immunity without such remedies contravenes the rule of law, thereby undermining the legitimacy of international organisations. It is therefore inevitable to counterbalance jurisdictional immunity through the further development of alternative remedies,[1518] notwithstanding the perceived reluctance of international organisations to do so.[1519] As signalled above (section 1.1), there is an urgent need for international law to develop so as to bolster the enforcement of third-party rights against international organisations.

In addressing the second research question of this study, the present chapter aims to design the essential features of 'a complete remedy system' for private parties,[1520] counterbalancing jurisdictional immunity, in third-party disputes against the UN and other international organisations.

[1516] Notwithstanding the reference by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel to a 'complete remedy system to private parties' in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 6.

[1517] As observed in connection with an early draft text that would culminate in the General Convention. See International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 219.

[1518] Cf. Daugirdas and Schuricht (2021), at 81; Johansen (2020), at 300; Schrijver (2015), at 335; Blokker and Schrijver (2015), at 356 ('Schrijver believes that in the case of the United Nations there is an urgent need to develop alternative remedies, with a view both to respect the by now well established right of citizens of access to courts and remedies and to guarantee the independence and discretionary freedom of the United Nations by securing continued respect for its immunity'); De Brabandere (2010), at 119. An alternative approach to the accountability of international organisations (not being the disregarding of their jurisdictional immunity, as discussed in chapter 4) would be to hold the *member states* of the international organisation responsible. However, as explained by Schrijver, amongst other objections: 'Such an approach would run counter to the idea behind the United Nations being a separate international legal person, the existence of which is aimed at maintaining or restoring international peace and security.' Schrijver (2015), at 336. On this alternative approach, see generally Barros (2019), as well as Hirsch (1995), chapters four and five. For an exploration of various alternative approaches to the accountability of international organisations, see Issue 1: Special issue: Forum: The Accountability of International Organizations, (2019) 16 *International Organizations Law Review* 1.

[1519] Klein (2016), at 1045 ('international organisations have not proven keen to even consider the creation of such mechanisms and display a considerable degree of resistance toward such evolutions.'). Daugirdas observes that the current list of alternative accountability mechanisms is 'rather short'. Daugirdas (2019), at 12 (referring to, amongst others, the 'World Bank Inspection Panel and similar mechanisms at other international financial institutions.' Ibid., fn. 2).

[1520] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para.

Building on the experience to date with the implementation of Section 29 of the General Convention, in developing solutions to the problems recalled above, this chapter proposes a combined and integrated approach. With the overall aim of facilitating the fair, efficient and transparent resolution of third-party disputes under Section 29(a) of the General Convention, the chapter proposes the establishment of a comprehensive dispute settlement mechanism: the Mechanism for the Settlement of Disputes of a Private Law Character ('Mechanism')'.[1521] Operating under the auspices of the Permanent Court of Arbitration, the Mechanism would be established by the UNGA in a resolution, and complemented by a new UN Convention: the 'United Nations Convention on the Settlement of Disputes of a Private Law Character (Convention)'. The Mechanism would facilitate alternative dispute resolution ('ADR') and, where amicable settlement fails, two-tiered arbitration (though not involving a full appeal instance).

In sum, as detailed in this chapter, the Mechanism's contentious limb would provide for arbitration in first instance before ad hoc tribunals and standing claims commissions. Disputes over the legal character of third-party disputes would be decided in preliminary proceedings. Arbitrations would be governed by the PCA Arbitration Rules 2012, modified as necessary, and amended to provide for expedited proceedings based on proposals developed by the UNSG. Further, there would be a standing Appellate Tribunal, which would be competent to dispose of appeals concerning (i) the legal character of third-party disputes and (ii) the interpretation and application of the UN Liability Rules by claims commissions, and (iii) review first instance awards on limited annulment grounds. That last function is central to the creation of a system of internationalised and 'self-contained' arbitration. Under that system, states and national courts are obliged to not interfere with arbitration under the Mechanism. Modelled after the ICSID Convention, the Convention would create obligations to that effect for its states parties.

This chapter is divided into two main parts. The first part (section 5.2) discusses the solutions proposed for each of the three problems recalled above. The second part (section 5.3) discusses the combined approach to these solutions through the Mechanism.

6, under the heading 'The remedy régime envisaged by the Convention and implemented by the United Nations'. In this respect, Rashkow notes that 'the Organization has consistently maintained over the years that its immunity is not a shield from responsibility to respond to credible claims of a private law character and that the Organization is obligated to make a dispute resolution modality available for such claims under Section 29 of the General Convention. See, e.g., United Nations Juridical Yearbook (1980), at 227–242.' Rashkow (2015), at 84, fn. 22.

[1521] The word 'mechanism' is intended to reflect both the contentious dispute settlement limb (essentially entailing two-tier arbitration) and the amicable settlement limb.

5.2 Proposed solutions

In proposing solutions for the abovementioned problems regarding the implementation of Section 29(a) of the General Convention, this section concerns the legal character of third-party disputes (subsection 5.2.1.), standing claims commission (subsection 5.2.2) and arbitration (subsection 5.2.3).

5.2.1 The legal character of third-party disputes

To recall, subsection 3.4.2 of this study interpreted the phrase 'private law character' in Section 29(a) of the General Convention. Complex and illusive, the phrase is prone to lead to differences in interpretation and application. This was brought to the fore particularly in the case studies conducted in this study. Notably, as seen, the dispute arising out of the Haiti cholera epidemic caused considerable controversy over the UN's determination that the dispute lacked a 'private law character'.

In reality, as seen in subsubsection 3.4.1.3 of this study, there currently are no viable alternatives to the UN (Secretariat) unilaterally determining the character of third-party disputes. To request the ICJ for an advisory opinion on the legal character of such disputes under Section 30 of the General Convention, whilst theoretically possible, would be rife with legal and political hurdles. Indeed, from a claimant's perspective, that process amounts to an 'illusory' remedy.[1522] Nor is it structurally feasible for the current dispute settlement modes under Section 29 to determine the legal character of a third-party dispute. This is because the very existence of these modes is often contingent on the determination of a dispute having a private law character. This is illustrated by the dispute concerning the Haiti cholera epidemic, as well as that concerning the Kosovo lead poisoning: the UN declined to establish a (standing) claims commission on the basis that the dispute lacked a private law character. On the same basis, more generally, the current formulation of the dispute settlement clause in SOFAs (discussed below) allows the UN to prevent the establishment of standing claims commissions for third-party claims in connection with peacekeeping operations.

It ought not to be left to UN Secretariat to decide unilaterally on the applicability of Section 29 of the General Convention, by determining, amidst political and financial pressures, the character of third-party disputes. The UN's views are indispensable to be able to reach an informed decision on the character of a third-party dispute—but that decision ought not to be its own. As submitted in subsubsection 3.4.1.3 of this study, this practice, whereby the UN effectively controls its own

[1522] Cf. *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 67: 'It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.'.

accountability, is particularly at odds with core notions of the rule of law and justice, and the UN's undertaking to comply with such notions.

The solution proposed is to establish an external body to determine the character of third-party disputes. That body would be the Mechanism. More specifically, where the UN (Secretariat) takes the position that a third-party dispute brought against it lacks a 'private law character' under Section 29 of the General Convention, it would raise a preliminary objection to the (subject-matter) jurisdiction of the tribunal or claims commission. The tribunal or commission would rule on the objection as a preliminary question, which ruling could be appealed to the Appellate Tribunal.[1523] The ruling on the legal character of the dispute would take the form of an award that is binding on the UN and the private party.

5.2.2 (Standing) claims commissions

5.2.2.1 A revised legal framework for standing claims commissions

To recall, as discussed in paragraph 3.4.3.1.3 of this study, the main problems with respect to the legal framework of standing claims commissions are the following:

(i) Paragraphs 54 and 55 of the MINUSTAH SOFA, which, as seen, is representative of modern-day SOFAs, convert the exemption from liability in the case of 'operational necessity' under UNGA resolution 52/247 (1998) into a limitation of the subject-matter jurisdiction of the commission;
(ii) The extent of the commission's leeway to determine its own procedures contrasts with arbitration rules generally, in which prescriptions concerning independence, impartiality, fairness, equality, and so forth, are common. Furthermore, the quorum requirement for the standing claims commission is overly broad and risks undermining the integrity of the commission's proceedings; and
(iii) The provision concerning the commission's establishment is incomplete, as it does not provide for a default appointment procedure for commission members other than the chairperson.

As a preliminary observation, it is submitted that there are good reasons to maintain the current set-up envisaged by the UN, that is, to establish a standing claims commission for each peacekeeping operation, as opposed to a single claims commission for all such operations jointly.[1524] Operation-specific

---

[1523] This 'gatekeeping process' would be a variation on the function of the former European Commission on Human Rights in determining the admissibility of cases before the ECtHR. The Commission was abolished with the entry into force of Protocol 11 to the ECHR in 1998.
[1524] Cf. Schrijver (2015), at 339 ('a standing claims commission, as envisaged in the provisions of the Model SOFA (1990), should be set up for each peace support operation. This commission should be permanent for the duration of the peace operation and should consist of at least three members: one to be appointed by the United Nations, one by the government of the state in which the mission is taking place, and a chairperson to be chosen jointly by

commissions may offer better access to third-party claimants, including in the case of hearings. Such commissions would also be better placed to familiarise themselves with the particular circumstances of the operation. From the perspective of host states, their ability to appoint a member to the commission may provide comfort that its interests, and possibly those of its nationals,[1525] are duly taken into account.

In addressing the problems sub (i) through (iii) above, it is proposed to reorganise Paragraphs 54 and 55 of the MINUSTAH SOFA by consolidating them into a single third-party dispute settlement clause in the SOFA. That provision would have a substantive and procedural component.

The substantive component of the third-party dispute settlement clause would simply provide that the settlement of third-party disputes shall be in accordance with UNGA resolution 52/247 (1998). Thus, 'operational necessity' would apply as an exemption from liability, as opposed to a limitation of the subject-matter jurisdiction of the commission (as is currently the case). Furthermore, the application of UNGA resolution 52/247 (1998) would include the temporal and financial compensation limitations thereunder. That would address the problem sub (i) above.

The procedural component of the third-party dispute settlement clause would set forth the sequencing of proceedings before the claims review board (including a reasonable time-frame for such proceedings) and the standing claims commission. That component would furthermore clarify the procedures governing the establishment and functioning of the claims commission. The problems sub (ii) and (iii) above would be addressed by declaring applicable the PCA Arbitration Rules 2012 (as modified, see below).

More specifically, the proposal is to integrate standing claims commissions into the Mechanism as first instance tribunals. As to the problem sub (ii) above, the lacuna in terms of procedural rules would be filled by the PCA Arbitration Rules 2012 (as modified).[1526] As a result, the current provisions in

---

these two members; or, if they fail to reach agreement on the chairperson, with the assistance of an independent authority (for example, the President of the General Assembly or the President of the International Court of Justice). This procedure would result in the establishment of an independent and standing body that can consider damage claims related to international peace missions.' [emphasis added]). But see Zwanenburg (2004), at 305 ('A real standing or central claims commission should be established that can receive claims against all peace support operations'); see idem Advisory Committee on Public International Law, 'Advies Inzake Aansprakelijkheid Tijdens Vredesoperaties' (No. 13, 2002), para. 5.4.5.

[1525] But see Schmalenbach (2016), para. 56 ('the host State (and thus its representative on the panel) does not necessarily advocate the interests of the complainant.').

[1526] See, e.g., Art. 17(1) of the PCA Arbitration Rules ('Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.'). The provision is identical to Art. 17(1) of the UNCITRAL Rules.

Paragraph 55 of the MINUSTAH SOFA specifically mandating the claims commission to determine its own procedures, and providing rules on quorum and decision-making, could be removed.

The composition of standing claims commissions would differ from the default first instance arrangement under the Mechanism. Under that arrangement, in principle, there would be a separate tribunal for each third-party dispute, with a sole arbitrator appointed by the parties. Conversely, in the case of peacekeeping operations, as seen, there would be one claims commission per operation, competent to deal with *all* third-party disputes related to the operation. One member of the claims commission would be appointed by the host state and the other by the UNSG, in continuation of the arrangement currently envisaged by the UN. For the predicate 'standing' to apply, claims commissions would be established upon the commencement of the operation. The SOFA would provide fixed time-periods for each of the UNSG and the Government of the host state to appoint their respective members.[1527] Similar to 'regular' first instance arbitration tribunals under the Mechanism, under Article 9(1) of the PCA Arbitration Rules 2012, the proposal is for the commission's chairperson to be appointed by the two members already appointed (not by the UNSG and the Government of the host State, as currently envisaged by the UN).[1528]

As to the problem sub (iii) above, the proposal is to amend the default appointment procedure in the arbitration clause in the SOFA so that it extends beyond the chairperson and includes *all* members of the commission.[1529] In line with Article 6 of the PCA Arbitration Rules 2012, the appointing authority would be the PCA Secretary-General.

5.2.2.2 The consistent interpretation and application of the UN Liability Rules

To recall, as discussed in subsubsection 3.4.3.2 of this study, the UN Liability Rules, which are intended to be applied by claims commissions, give rise to important questions. These questions concern, amongst others, the legal basis for the adoption of these rules, their legal nature and their scope of application. To resolve these questions authoritatively and allow the UN Liability Rules to mature into a third-party liability regime proper, these rules are in need of consistent interpretation and application. That is needed

---

[1527] In the absence of a SOFA, the appointment could be done under the default appointment procedure involving the PCA Secretary-General (see below).

[1528] Cf. Schrijver (2015), at 339 ('This commission should be permanent for the duration of the peace operation and should consist of at least three members: one to be appointed by the United Nations, one by the government of the state in which the mission is taking place, and a <u>chairperson to be chosen jointly by these two members</u>'. [emphasis added]). The proposal would also correspond to the UN-Netherlands dispute settlement clause in Art. 44(2) of the IRMCT Headquarters Agreement: '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 party-appointed arbitrators can be trusted jointly to appoint a chairperson in disputes between the UN and a state, there is no compelling reason why that would be different in the case of third-party disputes.

[1529] Cf. Art. 44(2) of the IRMCT Headquarters Agreement.

to foster legal certainty, as required by the rule of law. Standing claims commissions could not achieve this in isolation.

The proposed solution is to extend the jurisdiction of the Appellate Tribunal so as to include errors in the interpretation and application of the UN Liability Rules under UNGA resolution 52/247 (1998).[1530] To be clear, this is not to re-introduce the appellate tribunal abolished as per the proposal in the 1997 Report.[1531] The reason for that proposal was that the appeal foresaw 'a very similar procedure and composition to that of the standing claims commission, and may in fact be seen as a duplication of the proceedings in the standing claims commission.'[1532]

The proposed Appellate Tribunal's jurisdiction would be significantly more limited: it would extend specifically to alleged errors in the interpretation and application of the UN Liability Rules by claims commissions. The proceedings before the Appellate Tribunal, following claims commission proceedings, would therefore not amount to a full reconsideration of the dispute.

5.2.3 Arbitration

5.2.3.1 Appropriate arbitration rules for third-party disputes

To recall, as seen in paragraph 3.4.3.1.3 of this study, the UNCITRAL Arbitration Rules are not necessarily appropriate for settling third-party disputes against the UN. This is because the arbitral tribunal's establishment and the arbitral procedures may be overly burdensome, notably by being time-consuming, resource-intensive and costly.

In acknowledging this, as seen, the UNSG, at the initiative of the UNGA,[1533] has made proposals concerning the settlement of contractual disputes with consultants and individual contractors. These proposals are set forth in the Expedited Arbitration Concept Paper and the Expedited Arbitration Implementation Proposal.[1534] As the following overview aims to illustrate (paragraph 5.2.3.1.1), these proposals provide a suitable basis for developing arbitration rules for settling third-party disputes generally (paragraph 5.2.3.1.2).

[1530] Cf. The expanded jurisdiction of the Appellate Tribunal under Art. 8.28 of CETA ('(a) errors in the application or interpretation of applicable law'). In the same sense, see Schrijver (2015), at 337 ('Within the United Nations, a 'Central Claims Commission' could be set up as a coordinating body for the claims commissions of individual peace operations. In the future, it could perhaps evolve into an appeal body.').

[1531] 1997 Report, para. 10, fn. 2.

[1532] Ibid.

[1533] UN Doc. A/RES/62/228 (2008), para. 66; UN Doc. A/RES/65/251 (2011), para. 55.

[1534] UN Doc. A/66/275 (2011), Annex II, and UN Doc. A/RES/67/265 (2012), Annex IV, respectively.

5.2.3.1.1 The UNSG's 'Expedited Rules' for arbitration of disputes with consultants and individual contractors

The Expedited Arbitration Concept Paper sets forth, in significant detail, the essential features of the proposed arbitration procedures:

> '• A two-stage process, consisting of an informal dispute resolution phase and an expedited arbitral proceeding in case the informal dispute resolution phase fails
> • Non-waivable time limits for filing arbitration claims
> • Sole arbitrator
> • Arbitrator to be chosen from a roster of arbitrators agreed upon by the Organization and the individual contractors/consultants (see para. 7 (d) below)
> • Limitation of arbitrator's fees
> • Elimination of an appointing authority, but exercise of certain functions of an appointing authority (e.g., selecting/appointing the arbitrator, deciding on a party's challenge to an arbitrator) by a neutral entity – The neutral entity could be an international dispute settlement institution (in which case both the Organization and the claimants would have to bear their respective share of the institution's administrative fees)
> • Transmittal of arbitration notices and other communications by electronic means, whenever feasible
> • Use of standard templates for the parties' submissions
> • Simplification and limitation of the number of pleadings and other submissions
> • Restrictions on the amendment of pleadings and submissions
> • Testimony of witnesses to be by written affidavit, unless the arbitrator decides that the testimony of a witness should be given orally (e.g., to enable the opposing party to cross-examine the witness)
> • Conferences and consultations among the arbitrator and parties on preliminary administrative and other matters to be by teleconference or videoconference
> • Exceptionally, a party may request a hearing to cross-examine a witness, or the arbitrator may order a hearing if necessary to resolve a substantial issue of fact or law; such hearings normally to be by teleconference or videoconference, to be restricted in scope, and not to exceed two days
> • In most cases, arbitrator's award to be based on the parties' written pleadings and submissions (documents-only process)
> • Arbitrator to issue the award within a specified time frame, e.g., 30 days
> • Any compensation awarded to be limited to economic loss and subject to a cap
> • Depending on the number of arbitrations that will be initiated against the Organization under the proposed simplified arbitration procedures, additional resources may be required to defend the Organization and minimize its legal liability.'[1535]

According to the Expedited Arbitration Concept Paper, the foregoing would be reflected in a 'new set of rules, called the Rules for Expedited Arbitration Procedures under United Nations Consultancy Contracts (hereinafter the "Expedited Rules")'.[1536] The Expedited Rules 'would be prepared, using the UNCITRAL Arbitration Rules as a framework. The Expedited Rules would be based on the provisions of the UNCITRAL Arbitration Rules, modified as necessary to incorporate the expedited procedures discussed herein.'[1537]

[1535] UN Doc. A/66/275 (2011), Annex II, para. 5.
[1536] Ibid., para. 6 (emphasis added).
[1537] Ibid. (emphasis added).

The Expedited Arbitration Implementation Proposal sets forth proposals regarding the implementation of a mechanism for expedited arbitration procedures, together with the related cost implications. The implementation of the mechanism would involve a model dispute settlement clause.[1538] Furthermore,

> 'a core element of the expedited arbitration procedures would be the neutral entity. The core functions of the neutral entity would be: (a) to vet arbitrators proposed for inclusion in the list of arbitrators; (b) to promulgate and maintain the list of arbitrators; (c) to appoint the arbitrators for arbitration cases under the expedited rules; (d) to consider and resolve challenges to arbitrators by parties to arbitration cases; and (e) to hold, manage and, as appropriate, disburse the deposits towards the arbitrator's fee and expenses to be paid by parties to an arbitration case. While the functions of the neutral entity would not include the full array of services typically provided by arbitral institutions, additional administrative functions for the neutral entity may also be considered.'[1539]

The neutral entity would be selected in accordance with the procurement rules.[1540] The entity's running costs would be borne by the UN, but any additional costs related to a particular arbitration would be shared between the UN and the claimant.[1541]

The UN would draw up an initial list of arbitrators, who would be vetted by the neutral entity. Arbitrators who are found to meet the requirements would be included on a list promulgated by the entity.[1542] For each arbitration, the neutral entity would appoint a single arbitrator from the list of arbitrators. This would be the arbitrator agreed upon by the parties. Absent such agreement, this would be the arbitrator ranked highest by the parties out of three arbitrators proposed by the neutral entity.[1543]

Fees and costs of the arbitrators would be split equally between the parties.[1544] The arbitrator's fee would be fixed and depend on the amount in dispute.[1545] That is,

> 'the amount of an arbitrator's compensation for a case would be fixed in amount, either as a fixed fee (where the case proceeds beyond the closure of the proceedings and commencement of the award period), or a percentage of the fixed fee (where the case is settled or otherwise terminated before that point but after the respondent has submitted its response to the claimant's request for arbitration).'[1546]

[1538] UN Doc. A/RES/67/265 (2012), Annex IV, para. 5-7.
[1539] Ibid., para. 8.
[1540] Ibid., para. 9.
[1541] Ibid., para. 10.
[1542] Ibid., para. 12. As to the requirements for inclusion on the list, 'an arbitrator would be required to have knowledge of commercial law and experience in international arbitration cases, including cases under the UNCITRAL Arbitration Rules; be familiar with the United Nations or other international organizations and the issues and functions particular to such an organization; be competent in at least English, French or Spanish; and be of good character. To the extent possible, there should be geographical diversity among the individuals on the list of arbitrators.' Ibid., para. 13.
[1543] Ibid., para. 16.
[1544] Ibid., para. 17.
[1545] Ibid., para. 18.
[1546] Ibid., para. 33.

The UN Office of Legal Affairs would prepare pleading templates.[1547] A case would be initiated by a claimant submitting a request for arbitration and statement of claim to the UN, together with an initial deposit of the arbitrator's fee.[1548]

5.2.3.1.2 Arbitration rules for third-party disputes: developing the UNSG's Expedited Rules based on the PCA Arbitration Rules 2012

The UNSG's proposals contain valuable elements for an arbitration process for third-party disputes generally, that is, beyond contractual disputes with consultants and individual contractors.[1549] In this respect, as to the amount in dispute, the UNSG's proposals 'do not presuppose a financial limitation'.[1550]

The UNSG's proposal is to develop the Expedited Rules on the basis of the UNCITRAL Arbitration Rules. That is understandable: a product of the UN, the UNCITRAL Arbitration Rules are the default, if not exclusive, set of arbitration rules used by the UN for the settlement of (third-party) disputes against it. This notwithstanding, the UNCITRAL Arbitration Rules are particularly appropriate for the settlement of commercial disputes.[1551]

In contrast, the PCA Arbitration Rules 2012,[1552] while based on the UNCITRAL Arbitration Rules, specifically cater for the requirements of disputes 'involving at least one State, State-controlled entity, or intergovernmental organization'.[1553] As to the changes made to the UNCITRAL Arbitration Rules,[1554] these were made in order to, amongst others,

---

[1547] Ibid., para. 24.
[1548] Ibid., para. 25.
[1549] This would correspond to a broader trend in arbitration to facilitate expedited proceedings. For example, Art. 8.23(5) of CETA provides: 'The investor may, when submitting its claim, propose that a sole Member of the Tribunal should hear the claim. The respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.' Art. 30 of the Rules of Arbitration of the International Chamber of Commerce and Appendix VI offer an 'expedited procedure providing for a streamlined arbitration with reduced scales of fees'. See <iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions> accessed 21 December 2021. Art. 5 of the 2016 Arbitration Rules of the Singapore International Arbitration Centre provides for an expedited procedure. See <siac.org.sg/our-rules/rules/siac-rules-2016> accessed 21 December 2021. The Arbitration Institute of the Stockholm Chamber of Commerce has developed the Expedited Arbitration Rules 2017. See <sccinstitute.com/our-services/expedited-arbitration> accessed 21 December 2021.
[1550] UN Doc. A/66/275 (2011), Annex II, para. 2.
[1551] The United Nations Commission on International Trade Law (UNCITRAL) which 'shall have for its object the promotion of the progressive harmonization and unification of the law of international trade'. See UN Doc. A/RES/2205(XXI) (1966), Section I (emphasis added). See also UN Doc. A/RES/68/109 (2013).
[1552] See generally B.W. Daly, E. Goriatcheva and H.A. Meighen, *A Guide to the PCA Arbitration Rules* (2014).
[1553] PCA Arbitration Rules (2012), Introduction, at 4.
[1554] The 2012 PCA Rules are furthermore based 'on four sets of PCA procedural rules from the 1990s'. See Daly, Goriatcheva and Meighen (2014), para. 1.02. These include the 1996 Optional Rules for Arbitration between International Organizations and Private Parties ('PCA International Organization/Private Party Rules'). Ibid., paras. 1.09-1.10. According to Daly, Goriatcheva and Meighen, 'it was . . . felt that the PCA's procedural offerings could be simplified by consolidating the party-specific PCA rules of the 1990s into a single set of rules that could apply to all the combinations of parties involved in PCA-administered proceedings.' Ibid., para. 1.12.

'(i) Reflect the public international law elements that may arise in disputes involving a State, State controlled entity, and/or intergovernmental organization;

(ii) Indicate the role of the Secretary-General and the International Bureau of the PCA'.[1555]

As to the PCA Arbitration Rules 2012 reflecting public international law elements (sub (i) above), an example is Article 35(1):

'The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall: . . .

(c) In cases involving intergovernmental organizations and private parties, have regard both to the rules of the organization concerned and to the law applicable to the agreement or relationship out of or in relation to which the dispute arises, and, where appropriate, to the general principles governing the law of intergovernmental organizations and to the rules of general international law. In such cases, the arbitral tribunal shall decide in accordance with the terms of the agreement and shall take into account relevant trade usages.'[1556]

This closely corresponds to the law that would be applied by the Mechanism (discussed below).

As to the role of the PCA Secretary-General and the PCA International Bureau (sub (ii) above), as explained by Daly, Goriatcheva and Meighen,

'the Rules also provide for the role of the PCA International Bureau and the PCA Secretary-General. Unlike the 2010 UNCITRAL Rules, which do not specify an administrative institution, the 2012 PCA Rules provide for the administration of arbitral proceedings by the PCA. Pursuant to Article 1(3) of the Rules, the PCA International Bureau acts as registry and secretariat, while the PCA Secretary-General is the appointing authority pursuant to Article 6.'[1557]

The roles of the International Bureau and the PCA Secretary-General correspond to their proposed roles in connection with the Mechanism.

Overall, the PCA Arbitration Rules 2012 appear to be particularly suitable for present purposes compared to the UNCITRAL Arbitration Rules. A further argument in favour of the former is that the latter are a product of the UN, which may be taken to contrast with the requirements of impartiality and independence in settling third-party disputes against the UN.

[1555] PCA Arbitration Rules (2012), Introduction, at 4. A third set of changes to the 2010 UNCITRAL Arbitration Rules is made in order to: 'Emphasize flexibility and party autonomy'.

[1556] According to Daly, Goriatcheva and Meighen: 'Adapted from the applicable law provisions of the 1990s PCA Rules and Art. 35 of the 2010 UNCITRAL Rules, Art. 35 of the 2012 PCA Rules is a unique provision, tailored to the specificities of disputes between the different combinations of parties—states, state-controlled entities, intergovernmental organizations, and private parties—that are expected to have recourse to the Rules.' Daly, Goriatcheva and Meighen (2014), para. 6.21 (fns. omitted). Regarding cases involving intergovernmental organizations and private parties, the reference is to Art. 33 of the PCA International Organization/Private Party Rules.

[1557] Daly, Goriatcheva and Meighen (2014), para 2.07.

Therefore, in addition to proposing to extend the scope of application of the Expedited Rules to third-party disputes in general, the proposal is to base those rules on the PCA Arbitration Rules 2012. This would still meet the UN's policy objective to base the Expedited Rules on the UNCITRAL Arbitration Rules, as the PCA Arbitration Rules 2012 are based on the latter.

That being said, the PCA Arbitration Rules 2012 would require modification, for one, to reflect the self-contained and internationalised nature of the arbitration under the Mechanism.[1558] This would involve the deletion of Article 1(2), according to which:

> 'Agreement by a State, State-controlled entity, or intergovernmental organization to arbitrate under these Rules with a party that is not a State, State-controlled entity, or intergovernmental organization constitutes a waiver of any right of immunity from jurisdiction in respect of the proceedings relating to the dispute in question to which such party might otherwise be entitled. A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed.'

Dispute settlement under the Mechanism would not detract from the jurisdictional immunity of international organisations; rather, the Mechanism would counter the immunity by providing adequate alternative recourse.

Concretely, the PCA Arbitration Rules 2012, modified as indicated above, would be taken as the basis for developing arbitration rules for the settlement of third-party disputes against the UN. This would involve the integration of the aforementioned elements of the UNSG's Expedited Rules (with further elements to reflect state of the art innovations in arbitration, as discussed below).

5.2.3.2 Neutral arbitration of third-party disputes: denationalised and self-contained arbitration

To recall, as discussed in subsubsection 3.4.3.1 of this study, because of its perceived neutrality, arbitration is the preferred mode for the settlement of third-party disputes, as an alternative to domestic litigation. However, rather than excluding national courts, arbitration, as a matter of course, is subject to court supervision. The role of national courts is to ensure the effectiveness and fairness of arbitration. The problem is that, in doing so, courts could potentially abuse their supervisory powers. They could do so in a variety of ways, for example, by annulling awards to the extent they are favourable to international organisations, or by frustrating the arbitration (by issuing anti-arbitral injunctions or revoking the authority of a tribunal), potentially pushing cases to the national courts. The supervisory role of national courts may therefore expose international organisations to interference by those courts.

Hence, international organisations may reserve their jurisdictional immunity in connection with arbitration, and they may decline to agree to a place of arbitration. However, as seen in paragraph

---

[1558] Art. 1(1) of the 2012 PCA Arbitration Rules reflects the potential for modification of these rules.

3.4.3.1.3 of this study, the uncertainty as to whether the jurisdictional immunity will in fact apply in a given case before a national court is unsatisfactory to both claimants and the international organisation.

The proposed solution is to design an arbitration system that adequately safeguards fairness and effectiveness, but excludes national court involvement. As discussed in paragraph 3.4.3.1.3 of this study, whilst it is exceptional for arbitration to be 'de-nationalised', this is in fact a key feature of arbitration under the ICSID Convention.[1559] As seen, that convention provides for 'internationalised' arbitration as part of a 'self-contained' system, that is, one that is disconnected from domestic jurisdictions. The rationale underlying the ICSID Convention is therefore the same as the objective of the UN, and international organisations generally, that is, to keep out of court in connection with arbitration.

Delaume explained the mechanics of the ICSID Convention in creating a 'self-contained' arbitration regime:

> 'Within the framework of the Convention and of the Regulations and Rules adopted for its implementation, ICSID arbitration constitutes a self-contained machinery functioning in total independence from domestic legal systems. The autonomous character of ICSID arbitration is clearly stated in Article 44 of the Convention, according to which:
>
> > Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question;
>
> and in Article 26 of the Convention, which provides: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."'[1560]

According to Schreuer: 'Art. 26 is the clearest expression of the self-contained and autonomous nature of the arbitration procedure provided for by the Convention.'[1561] Furthermore, as explained by Schreuer:

> 'The principle of noninterference is a consequence of the self-contained nature of proceedings under the Convention. The Convention provides for an elaborate process designed to make arbitration independent of domestic courts. Even in the face of an uncooperative party, ICSID arbitration is designed to proceed independently without the support of domestic courts. This is evidenced by the provisions on the constitution of the tribunal (Arts. 37–40), on proceedings in the absence of a party (Art. 45(2)), on autonomous arbitration rules (Art. 44), on applicable law (Art. 42(1)), and on provisional measures (Art. 47). It is only in the context of enforcement that domestic courts may

[1559] The International Centre for the Settlement of Investment Disputes was created under the ICSID Convention to facilitate the settlement of investment disputes through conciliation and arbitration. ICSID does not itself arbitrate such disputes—that is done by ad hoc tribunals constituted for each dispute. Schreuer (2013), para. 1.
[1560] Delaume (1983), at 784 (emphasis added).
[1561] Schreuer (2009), at 351, para. 1.

> enter the picture (Arts. 54–55). In addition, the arbitration process is also insulated from inter-State claims, by the exclusion of diplomatic protection (Art. 27).'[1562]

Said 'principle of noninterference', which is operationalised through various provisions of the ICSID Convention, boils down to the obligation of states and national courts to defer entirely to ICSID arbitration. The supervisory function normally performed by national courts is instead assumed by ICSID machinery. This includes the review of awards, the ultimate form of supervision over an arbitration. As explained by Blackaby et al., with respect to Article 52 of the ICSID Convention:

> 'If the application is for annulment of the award, then ICSID constitutes an ad hoc committee of three members to determine the application. If the award is annulled, in whole or in part, either party may ask for the dispute to be submitted to a new tribunal, which hears the dispute again and then delivers a new award'.[1563]

The proposed Convention would similarly operationalise the 'principle of noninterference' with respect to the Mechanism by imposing obligations on states similar to the ICSID Convention.

As Schreuer commented: 'ICSID has been a success, it is now the preferred forum for the settlement of investment disputes.'[1564] At the same time, however, years of experience with the ICSID Convention have also given rise to criticism. Thus, according to Schreuer:

> 'Support for investment arbitration in general and for ICSID in particular is not undivided. Some states have become weary of the possibility of being sued . . .
>
> . . . Some investors have become concerned about the complex nature, duration and cost of the procedure for the registration of requests for arbitration. In addition, the growing incidence of requests for annulment has raised concerns about the finality and cost of ICSID proceedings
>
> . . . Another concern is the consistency of the case law. Tribunals composed of different arbitrators are constituted for each case. Although most tribunals take careful note of earlier decisions, there are several areas in investment law that have developed divergent lines of authority.'[1565]

As explained by UNCTAD as to concerns concerning consistency:

> 'Existing review mechanisms, namely the ICSID annulment process or national-court review at the seat of arbitration (for non-ICSID cases), operate within narrow jurisdictional limits. It is noteworthy that an ICSID annulment committee may find itself unable to annul or correct an award, even after having identified "manifest errors of law". Furthermore, given that annulment committees – like arbitral tribunals – are created on an *ad hoc* basis for the purpose of a single dispute, they may also

---

[1562] Ibid., at 351-352, para. 3 (emphasis provided). Furthermore, as explained by Schreuer: 'It is beyond doubt that the exclusive remedy rule of Art. 26 also operates against domestic courts.' Ibid., at 386, para. 132, citing G.R. Delaume, 'ICSID Arbitration in Practice', (1984) 2 *International Tax & Business Lawyer* 58, at 68 ('If a court in a Contracting State becomes aware of the fact that a claim before it may call for adjudication under ICSID, the court should refer the parties to ICSID to seek a ruling on the subject.').
[1563] Blackaby et al. (2015), para. 10.14 (fn. omitted).
[1564] Schreuer (2013), para. 74.
[1565] Ibid., paras. 71-73 (emphasis added).

> arrive (and have arrived) at inconsistent conclusions, thus further undermining predictability of international investment law.'[1566]

Such concerns have resulted in a long-running debate about whether an appeal tribunal ought to be established for investor-state disputes.[1567]

Concerns over consistency, as well as other concerns,[1568] were echoed during the EU's negotiation of the 2016 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part ('CETA').[1569] Such concerns provided an impetus for the establishment of a new 'investment court system' ('ICS') in Chapter 8, Section F, of CETA. As explained by the European Parliamentary Research Service, the ICS

> 'departs substantially from the arbitration model. The ICS is made up of a <u>tribunal and appellate body</u>. As opposed to the arbitration framework, parties to the dispute will not be able to choose their tribunal members. These will instead be <u>selected on a rotational</u> basis from a group of judges, appointed for a specified period of time by the CETA Joint Committee. The ICS was inspired by the World Trade Organization Appellate Body, both for the selection and remuneration of judges . . . Because of the low number of cases and to contain the cost of establishing an ICS, CETA uses the [ICSID] <u>as an administrative secretariat</u>, charged with providing organisational and logistical assistance for the ICS proceedings.'[1570]

Under Article 8.27 of CETA, the Tribunal has 15 members (Paragraph 2), who are appointed by the CETA Joint Committee (composed of representatives of the EU and Canada[1571]) for a five-year term,

---

[1566] UNCTAD, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap' (IIA Issues Note, 2013), at 3-4 (fn. omitted). See also J.P. Charris Benedetti, 'The Proposed Investment Court System: Does it Really Solve the Problems?', (2019) *Revista Derecho Del Estado* 83, at 91 ('The problem of inconsistency derives from tribunals rendering contradictory decisions in cases involving similar sets of facts, parties and applicable [International Investment Agreements].').

[1567] UNCTAD (2013), at 8 ('An appeals facility implies a standing body with a competence to undertake substantive review of awards rendered by arbitral tribunals. It has been proposed as a means to improve consistency among arbitral awards, correct erroneous decisions of first-level tribunals and enhance the predictability of the law'); A.J. van den Berg, 'Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions', (2019) 34 *ICSID Review* 156.

[1568] Other criticism concerns, amongst others, questions over the impartiality of arbitrators due to their involvement in investor-state arbitration in various capacities, and the lack of transparency due to confidentiality of the arbitral proceedings. European Parliamentary Research Service, 'From Arbitration to the Investment Court System (ICS). The Evolution of CETA Rules' (PE 607.251, 2017), para. 2.3.

[1569] [2017] OJ L11/23. Provisionally entered into force on 21 September 2017, excluding, amongst others, Section F, 'Resolution of investment disputes between investors and states'. See Notice concerning the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, [2017] OJ L238/9.

[1570] European Parliamentary Research Service, 'From Arbitration to the Investment Court System (ICS). The Evolution of CETA Rules' (PE 607.251, 2017), at 1 (emphasis added). See also Reinisch (2016, 'Investment Court System for CETA'), at 764 ('Members of these tribunals are selected in a manner markedly different from that applying in traditional [investor-State arbitration] and clearly intended to minimize investor influence . . . a truly novel feature lies in the case-allocation mechanism similar to that found in some domestic judicial systems: the three Members of the Tribunal are to be appointed by the President of the Tribunal on a yet-to-be specified 'random and unpredictable' rotation system. This is clearly contrary to the traditional ISA approach where the disputing parties are free to select 'their' arbitrators, partly subject to the condition that they should not be nationals of disputing parties.' [fns. omitted]).

[1571] Art. 26.1(1) of CETA.

renewable once (Paragraph 5). Cases are heard by divisions of three members (Paragraph 6), appointed by the President of the Tribunal on a rotation basis, and ensuring the 'random and unpredictable' composition of the division (Paragraph 7).

As to the ICS Appellate Tribunal, under Article 8.28 of CETA, its members are to be appointed by the CETA Joint Committee (Paragraph 3).[1572] Appeals are heard by divisions consisting of three randomly appointed Members (Paragraph 5). The Appellate Tribunal's powers (Paragraph 2) extend beyond those of ICSID annulment panels. That is, the Appellate Tribunal

> 'may uphold, modify or reverse the Tribunal's award based on:
> (a) errors in the application or interpretation of applicable law;
> (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;
> (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).'

ICS's institutional design indeed represents a significant departure from arbitration practice in general (which raises questions as to the application of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'),[1573] discussed below).

Whilst investment arbitration may raise particular concerns regarding the consistency of awards,[1574] there too is a need for consistency in the settlement of third-party disputes against the UN. This militates in favour of a standing Appellate Tribunal, as opposed to *ad hoc* annulment panels under the ICSID Convention. Moreover, specifically to ensure the consistent interpretation and application of the UN Liability Rules, it is proposed to expand the jurisdiction of the Appellate Tribunal to include appeals against awards alleging errors in the interpretation and application of those rules. This is inspired by the expanded competence of the ICS Appellate Tribunal under Article 8.28(2)(a), cited above.

A further argument for curtailing the parties' leeway in selecting arbitrators is that, as discussed in paragraph 3.4.3.1.3 of this study, the establishment of arbitral tribunals can be overly burdensome, to the point of discouraging private parties from resorting to arbitration. From that perspective, too, there is merit in creating a standing Appellate Tribunal and confining the choice of first instance arbitrators to the Panel of Arbitrators. Such streamlining and simplifying of the arbitral process arguably enhances its 'appropriateness' in terms of Section 29 of the General Convention.

[1572] By decision of 29 January 2021, the CETA Joint Committee determined that the Appellate Tribunal will, in principle, have six members (Art. 2(1)), which number may be increased by multiples of three (Art. 2(2)). See <circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/122a87d2-a6da-482c-b295-8a76f8d8aa29/details> accessed 21 December 2021.
[1573] 330 UNTS 3.
[1574] For example, the complex corporate structures of claimants may invite parallel proceedings under various legal instruments.

5.3 The Mechanism for the Settlement of Disputes of a Private Law Character

In developing and implementing the solutions to the problems discussed above, as said, the aim is to adopt a combined and integrated approach for the implementation of Section 29(a) of the General Convention. This has given rise to the proposed Mechanism.

To recall, the proposed solutions would be combined into the Mechanism as follows:

- Where the UN contests the 'private law character' of a third-party dispute, at the request of the third-party claimant, the dispute's character would be determined in preliminary proceedings. The first instance decision may be appealed to the Appellate Tribunal;
- Problems concerning the legal framework of standing claims commissions, including regarding their establishment, would be resolved by amending the dispute settlement clause in SOFAs. This would include integrating such commissions (composed of three members) into the Mechanism, alongside arbitral tribunals (composed, in principle, of a sole arbitrator). To ensure the clarification and development of the UN Liability Rules by standing claims commissions, the Appellate Tribunal would be competent to dispose of appeals concerning the interpretation and application of those rules;
- The contentious dispute resolution process would be based on the PCA Arbitration Rules 2012, modified as necessary. Based in turn on the UNCITRAL Arbitration Rules, those rules cater for the specific requirements of disputes involving private parties and international organisations. To ensure the appropriateness and (cost-)effectiveness of the proceedings, the UNSG's Expedited Rules would be developed on the basis of, and integrated into, the PCA Arbitration Rules 2012; and
- The self-contained nature of the contentious dispute resolution process, aimed at avoiding interference by national courts, would involve states being obliged to defer entirely to the Mechanism for the settlement of third-party disputes. Obligations to that effect would result from the Convention, modelled after the ICSID Convention.

The foregoing are proposed solutions to problems regarding the settlement of third-party disputes through contentious proceedings. As a mandatory preliminary step, however, the Mechanism would provide for amicable settlement proceedings. That is in line with the UN's current practice to attempt to settle third party disputes; the Mechanism would continue that practice through a controlled process.

This section is structured in three main parts. First, it discusses the Mechanism's amicable and contentious disputes settlement prongs (subsection 5.3.1). As to the latter, it briefly recalls earlier proposals for the establishment of tribunals in connection with Section 29 of the General Convention. Then follows a discussion about the competence of the Appellate Tribunal, the composition of the

Mechanism's first level tribunals and the Appellate Tribunal, the applicable law and procedure, and the nature of the contentious proceedings. Next follows a discussion of the PCA and its suitability to administer the Mechanism. Second, the section discusses the Mechanism's establishment pursuant to an UNGA resolution, complemented by the Convention to operationalise the Mechanism's self-contained arbitration regime. It also discusses the main financial aspects of the Mechanism (subsection 5.3.2). Third, the section discusses the potential of making the Mechanism available to other international organisations (subsection 5.3.3).

5.3.1 Amicable and contentious dispute resolution under the auspices of the PCA

5.3.1.1 Amicable dispute resolution

To recall, as discussed in paragraph 3.4.3.1.3 of this study, in line with general international practice, third-party disputes with the UN are routinely the subject of negotiations or consultations. And, settlements are regularly reached.[1575] However, due to the absence of a structured settlement process, such settlements are not necessarily in the best interest of the parties.

The Mechanism would provide for a circumscribed amicable settlement phase prior to adversarial proceedings. This would be in line with the 2012 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International levels'.[1576] Having recognised, as seen, 'that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs',[1577] the declaration stated: 'We acknowledge that informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone . . . should enjoy full and equal access to these justice mechanisms.'[1578]

Indeed, as will be seen, ADR is reflected in the UN's practice for the settlement of staff disputes and contractual disputes. That practice, and other international practice and emerging trends in different dispute settlement contexts, provide useful input in designing a structured amicable settlement phase.

As will be seen, a brief overview of such practice and trends suggests the following elements for the design of an amicable settlement regime for present purposes: first, the amicable settlement phase should be limited in time; second, ADR should be available, on a voluntary basis.

[1575] Rashkow (2015), at 79. See also, e.g., 1995 Report, para. 7: 'The overwhelming majority of commercial agreements that have been entered into by the United Nations have been performed without the occurrence of any serious difficulty and, when problems have arisen, they have been resolved through direct negotiations in most instances. The United Nations has, therefore, had recourse to arbitral proceedings in only a limited number of cases to date.'.
[1576] UN Doc. A/RES/67/1 (2012).
[1577] Ibid., para. 2.
[1578] Ibid., para. 15 (emphasis added).

5.3.1.1.1 A brief overview of international practice and trends

Amicable settlement seems to be gaining prominence in the field of investment disputes between private parties and states under bilateral investment treaties ('BITs'). According to a 2012 OECD working paper:

> 'Almost 90% of the treaties with ISDS provisions require that the investor respect a cooling-off period before bringing a claim. Often, an investor must respect this waiting period regardless of whether it brings the dispute to domestic courts or before an international arbitral tribunal . . . Most treaties require or suggest that the disputes be subjected to non-confrontational settlement procedures during this period
>
> *Preliminary non-confrontational dispute settlement procedures*
>
> . . . Mandatory preliminary procedures have now become almost the norm among the treaties that provide for dispute settlement through international arbitration: 81% of the treaties that provide for [investor-state dispute settlement] through international arbitration require such procedures, while another 8% of the treaties suggest that parties should use them . . . Parties are often, but not always, under the obligation to use these procedures to try to settle the dispute during cooling-off periods.
>
> Over 30 different designations of these preliminary procedures have been found in the treaties, plus some very rare descriptions that occur only once in the sample. A large, but slightly declining majority of them require parties in dispute to attempt to settle the dispute "amicably". Many treaties, and an increasing share in the total, are more specific and order that settlement through "negotiations" or "consultations" be attempted. Other methods of settlement such as conciliation and mediation are also mentioned in treaties, albeit very rarely.'[1579]

The situation is similar under CETA. According to Article 8.19(1): 'A dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the claim has been submitted'. Under Article 8.22(1)(b) of CETA, a claim may only be submitted if, among other things, 'the investor . . . allows at least 180 days to elapse from the submission of the request for consultations'.

There seems, therefore, to be an emerging norm in the settlement of investment disputes to the effect that such disputes may be submitted to arbitration only upon the expiry of a certain time-period, up to six months.[1580] Negotiations or consultations are to be attempted during that period.[1581] The aim is to

---

[1579] J. Pohl, K. Mashino and A. Nohen, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (OECD Working Papers on International Investment, 2012/02) <dx.doi.org/10.1787/5k8xb71nf628-en> accessed 21 December 2021, at 17-18 (emphasis added).

[1580] Ibid., at 17 ('Most often, it is set to 6 months, but many treaties set a shorter period of 3, 4 or 5 months. Other periods, such as 7, 12, and 18 months, occur occasionally.' [fns. omitted]).

[1581] An example of a mandatory, time-limited, amicable settlement period in a different context is Art. 44 of the IRMCT Headquarters Agreement: '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.' (emphasis added).

avoid, where possible, expensive, resource-intensive and time-consuming arbitration, whilst amicable settlement may also better preserve a business relationship.

Whereas, as seen, according to the 2012 OECD working paper, BITs 'very rarely' mention conciliation and mediation as amicable settlement techniques, a more recent study concluded that there is nonetheless an emerging trend to include those techniques in BITs:

> 'The recent reforms of treaties signed by States, either in the form of an investment chapter of an FTA or as stand-alone BITs, show that mediation/conciliation is slowly getting attention and traction in treaty language. The UNCTAD Report for 2019 identifies a number of treaties signed in 2018, which do exactly that. A review of these provisions show [*sic*] that the most advanced text is probably the agreement between the EU and Vietnam (not yet in force), which includes a full Annex on mediation.'[1582]

Similarly, according to Article 8.20(1) of CETA: 'The disputing parties may at any time agree to have recourse to mediation.' To this end, rules for mediation may be adopted by the Committee Services and Investment pursuant to Article 8.44(3)(c) of CETA.

Mediation and conciliation are ADR techniques that involve the intervention of a third person in an amicable settlement process.[1583] In general terms, 'international conciliation' has been defined by the Institut de droit international as:

> 'a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or on an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties, with a view to its settlement, such aid as they may have requested.'[1584]

Pursuant to Article 6(1)(c) of the ICSID Convention, and in furtherance of Chapter III of the ICISD Convention, in 1967, the ICSID Administrative Council adopted 'rules of procedure for conciliation'

[1582] C. Kessedjian et al., 'Mediation in Future Investor-State Dispute Settlement Academic Forum on ISDS' (Academic Forum on ISDS, Concept Paper 2020/16, 2020), at 3 (fns. omitted). See likewise A. Ubilava, 'Mandatory Investor-State Conciliation in New International Investment Treaties: Innovation and Interpretation' (*Kluwer Mediation Blog*, 2020) <mediationblog.kluwerarbitration.com/2020/09/05/mandatory-investor-state-conciliation-in-new-international-investment-treaties-innovation-and-interpretation/> accessed 21 December 2021 ('Unlike the older bilateral investment treaties (BITs) and even some newer investment chapters in Free Trade Agreements (FTAs), the newest generation of such international investment agreements (IIAs) often have express references to mediation and conciliation.' [hyperlink removed]).

[1583] See generally Collier and Lowe (1999), at 27-31.

[1584] Institut de droit international, 'International Conciliation' (Session of Salzburg, 1961), Article 1. See also the description of conciliation by J.-P. Cot, *International Conciliation* (1972), 9, cited in Collier and Lowe (1999), at 29 ('intervention in the settlement of an international dispute by a body having no political authority of its own, but enjoying the confidence of the parties to the dispute, with the task of investigating every aspect of the dispute and of proposing a solution which is not binding on the parties.').

('ICSID Conciliation Rules') for the settlement of investment disputes.[1585] There is only a limited number of reported conciliation cases under the ICSID Conciliation Rules.[1586]

In 1980, UNCITRAL followed suit with the adoption of conciliation rules in the broader context of international commercial relations ('UNCITRAL Conciliation Rules').[1587] In 1996, the PCA, with the approval of its Administrative Council, established Optional Conciliation Rules ('PCA Optional Conciliation Rules'). The PCA Conciliation Rules are particularly relevant for present purposes insofar as they 'are intended for use in conciliating disputes in which one or more of the parties is a State, a State entity or enterprise, or an international organization.'[1588] Just as the PCA Arbitration Rules 2012 are based on the UNCITRAL Arbitration Rules, the PCA Optional Conciliation Rules are based on the UNCITRAL Conciliation Rules. Changes reflect, amongst others, 'the availability of the Secretary-General of the Permanent Court of Arbitration to assist in appointing conciliators and of the International Bureau to furnish administrative support (art. 4, para. 3 and art. 8).'[1589]

Moreover, the PCA Optional Conciliation Rules provide for an 'integrated system'. That is, as explained in the introduction to those rules:

> 'A significant feature of the PCA Optional Conciliation Rules is that they are part of an integrated PCA dispute resolution system that links the procedures for conciliation with possible arbitration under the various PCA Optional Arbitration Rules. This is useful because if a dispute is not resolved

---

[1585] The ICSID website describes conciliation as 'a cooperative, non-adversarial dispute resolution process. The goal of the Conciliation Commission is to clarify the issues in dispute between the parties and to endeavor to bring about agreement on mutually acceptable terms. To that end, a Conciliation Commission may request relevant documents, hear witnesses, make site visits and issue recommendations to assist the parties in reaching mutually acceptable terms to resolve their dispute. Parties to conciliation proceedings are expected to cooperate in good faith with the Commission and seriously consider its recommendations.' <icsid.worldbank.org/services/mediation-conciliation/conciliation/overview> accessed 21 December 2021. The ICSID website provides the following background information regarding the ICSID Conciliation Rules: 'The original Conciliation Rules were adopted on September 25, 1967 and were effective as of January 1, 1968. These were published with non-binding explanatory notes. The Conciliation Rules have subsequently been amended three times. The first amendment was approved and took immediate effect on September 26, 1984. The second amendment was approved on September 29, 2002 and was effective on January 1, 2003. The current Conciliation Rules were approved by written vote of the Administrative Council in 2006 and were effective from April 10, 2006.' <icsid.worldbank.org/services/mediation-conciliation/conciliation/overview> accessed 21 December 2021, (hyperlinks omitted).

[1586] Kessedjian (2020), at 9.

[1587] Conciliation Rules of the United Nations Committee on International Trade Law, adopted on 23 July 1980, recommended by the UNGA in resolution 35/52 (1980) for use regarding disputes arising in the context of international commercial relations. According to the UNCITRAL website, the 'Conciliation Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship. The Rules cover all aspects of the conciliation process, providing a model conciliation clause, defining when conciliation is deemed to have commenced and terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress.' <uncitral.un.org/en/texts/mediation/contractualtexts/conciliation> accessed 21 December 2021.

[1588] PCA Optional Conciliation Rules, Introduction, at 151.

[1589] Ibid.

> by conciliation, parties may wish to move promptly to final and binding arbitration. Therefore, these Rules provide several important safeguards that apply in the event that arbitration, or recourse to judicial means, follows an unsuccessful conciliation.'[1590]

Insofar as there is a conceptual difference between 'mediation' and 'conciliation',[1591] this concerns the task of the third person, that of a conciliator being to 'make an impartial elucidation of the facts and to put forward proposals for a settlement'.[1592] However, as explained in the introduction to the PCA Optional Conciliation Rules:

> 'In modern international practice, the word 'mediation' is sometimes used to designate a process that is very similar to the procedures for 'conciliation' described in these Rules. In such cases, these Rules can also be used for mediation, it being necessary only to change the words 'conciliation' to 'mediation' and 'conciliator' to 'mediator.'[1593]

As part of a broader international trend in favour of ADR, the distinction between mediation and conciliation indeed seems to be fading. Thus, for example, the 2018 United Nations Convention on International Settlement Agreements Resulting from Mediation, whose scope of application is limited to 'commercial disputes',[1594] broadly defines 'mediation' as

> 'a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.'[1595]

A similarly broad definition of 'mediation' is set forth in the 2008 EU Directive on 'Certain Aspects of Mediation in Civil and Commercial Matters' ('EU Mediation Directive'),[1596] concerning the settlement of cross-border disputes.

[1590] Ibid., at 153.

[1591] Art. 33 of the UN Charter suggests they are distinct techniques: 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.´ (emphasis added).

[1592] Collier and Lowe (1999), at 29.

[1593] PCA Optional Conciliation Rules, Introduction, at 152.

[1594] 2018 United Nations Convention on International Settlement Agreements Resulting from Mediation, UN Doc. A/RES/73/198 (2018), Annex, (not yet in force) ('Singapore Convention on Mediation'), Art. 1(1).

[1595] Art. 2(3) of the Singapore Convention on Mediation. See Ubilava (2020) ('This Singapore Convention on Mediation does not differentiate between mediation and conciliation or any other dispute resolution mechanism resulting in settlements, as long as the procedure that resulted in such settlement agreements complies with the definition of Article 2(3)').

[1596] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, [2008] OJ L136/3. According to its Art. 3(a), '"Mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.'.

Of note, the foregoing instruments require third-party intervention—whether called 'mediation' or 'conciliation'—to be 'impartial', with several adding the requirement of 'independence'.[1597]

As to the resolution of staff disputes at the UN, 'staff members are strongly encouraged to make every effort to resolve the dispute informally'.[1598] To this end, the UN facilitates various forms of third-party involvement in support of such efforts through the Integrated Office of the United Nations Ombudsperson and Mediation Services.[1599] According to the UN:

> 'Ombudsmen and mediators can be a key resource to assist staff members who are seeking guidance as to where to take their concerns and how to take their grievances forward, or are weighing the implications of raising their concerns. Informal resolution services are available before, during, or in place of a formal complaint, while providing an alternative to litigation with opportunities to transform potentially volatile situations into ones of mutual understanding.'[1600]

As reported by the UNSG in 2008: 'Non-staff personnel, including consultants, individual contractors and individuals under service contracts, may . . . seek the services of the Office of the Ombudsman, which, in a number of instances, has assisted the parties in reaching mutually acceptable solutions.'[1601]

Furthermore, Article 17.1 of the UN's General conditions of contract (contracts for the provision of goods and services) (rev. April 2012):

> 'AMICABLE SETTLEMENT: The Parties shall use their best efforts to amicably settle any dispute, controversy, or claim arising out of the Contract or the breach, termination, or invalidity thereof. Where the Parties wish to seek such an amicable settlement through conciliation, the conciliation shall take place in accordance with the Conciliation Rules then obtaining of the United Nations Commission on International Trade Law ("UNCITRAL"), or according to such other procedure as may be agreed between the Parties in writing.'

Of note, as the UN website explains with respect to staff disputes: 'Mediation is a voluntary process and so gaining agreement by both parties to participate in the mediation process is vital, as mediation cannot take place if one party declines to take part.'[1602] Similarly, as explained in the Introduction to the PCA Optional Rules for Conciliation: 'A primary principle that is expressed throughout these Rules is that

---

[1597] See, e.g., Art. 7(1) of the UNCITRAL Conciliation Rules and the PCA Optional Conciliation Rules ('The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute'. [emphasis added]); Art. 3(b) of the EU Mediation Directive ('Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way'. [emphasis added]); Art. 5(1)(f) of the Singapore Convention on Mediation ('The competent authority of the Party to the Convention where relief is sought under Art. 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that: . . . There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.' [emphasis added]).
[1598] <un.org/en/internaljustice/overview/resolving-disputes-informally.shtml> accessed 21 December 2021.
[1599] Ibid.
[1600] Ibid.
[1601] UN Doc. A/62/748 (2008), para. 18.
[1602] <un.org/en/internaljustice/overview/resolving-disputes-informally.shtml> accessed 21 December 2021.

initiating and continuing conciliation is entirely voluntary'.[1603] Likewise, with respect to investment disputes,

> 'the newest generation of such international investment agreements (IIAs) often have express references to mediation and conciliation. However, even when they do, almost all IIAs only make such third-party procedures voluntary; foreign investors and host states would have to agree later and separately to try mediation.'[1604]

Similarly, the definition of 'mediation' in Article 3(a) of the EU Mediation Directive' explicitly includes the 'voluntary basis' of the process.

To render ADR mandatory might cause tension with the right of 'access to justice', as enshrined in Article 14 of the ICCPR and Article 6 of the ECHR. In this light, Article 5(2) of the EU Mediation Directive provides (emphasis added):

> 'This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.'[1605]

Therefore, a balanced approach regarding ADR in relation to binding dispute settlement seems to be called for. This is reflected in the objective of the EU Mediation Directive, which pursuant to Article 1 of the directive is 'to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings' (emphasis provided).

5.3.1.1.2 Elements of an ADR regime for third-party disputes against the UN

The following elements emerge from the foregoing for the design of an amicable third-party dispute settlement regime.

First, under the Mechanism, a claim by a private party against the UN would only be admissible in contentious proceedings upon the conclusion of an amicable settlement phase of limited duration. If

---

[1603] PCA Optional Conciliation Rules, Introduction, at 152.
[1604] Ubilava (2020) (hyperlink removed), adding that 'it seems that only two treaties . . . both signed in 2019 – provide instead for mandatory conciliation as a pre-condition to arbitration. However, under both treaties, conciliation becomes mandatory only for the claimant investor, not for the respondent state.'.
[1605] According to a European Parliament report on the implementation of the EU Mediation Directive, 'although compulsory mediation would promote the use of mediation as an alternative to in-court-dispute resolution, such a development would be contrary to the voluntary nature of mediation and would affect the exercise of the right to an effective remedy before a court or tribunal as established in Art. 47 of the Charter.' European Parliament, 'Report on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive')' (2016/2066(INI, 2017) <europarl.europa.eu/doceo/document/A-8-2017-0238_EN.pdf> accessed 21 December 2021.

negotiations or consultations could continue without limitation, the right of access to justice under Article 14 of the ICCPR would be impaired.

Second, in line with an overall international trend in favour of ADR, third-party assistance—whether called 'mediation' or 'conciliation'—should be available during the amicable settlement phase. To be clear, this would include the settlement phases following proceedings before the claims review board (for claims arising out of peacekeeping operations) and the Tort Claims Board (for claims arising at UN headquarters district).[1606] The PCA Optional Conciliation Rules would provide a particularly suitable basis for developing ADR rules for present purposes.

Third, ADR is to be impartial and independent. In this respect, an ADR service internal to the UN may be appropriate for the informal settlement of staff disputes insofar as an employment relationship is an 'internal affair' (much like the UNDT and the UNAT are internal to the UN). However, when it comes to third-party claims against the UN, internal UN mediators may not satisfy the requirements of impartiality and independence. Like the Panel of Arbitrators (discussed elsewhere in this chapter), a panel of mediators could be established and administered by the PCA. This would mirror the approach regarding arbitration and conciliation under the ICSID Convention.

However, that is not to say that an *internal* review of a third-party claim would not be warranted prior to dispute settlement (that is, first, ADR and, where necessary, contentious proceedings). Such internal review is already partially institutionalised at the UN, namely, through claims review boards and the Tort Claims Board. Consideration could be given to making such initial internal consideration of third-party claims part of general practice with respect to third-party claims.[1607] That might assist the organisation in adopting a considered position regarding a claim, including during settlement discussions, and a request for mediation by a claimant.

5.3.1.2 Contentious proceedings: first instance tribunals and the standing Appellate Tribunal

5.3.1.2.1 Earlier proposals and precedent

The proposed Mechanism, including two levels of tribunals, results from the combination of solutions to the problems in the implementation of Section 29 of the General Convention. However, the proposed establishment of a tribunal for the settlement of third-party disputes against the UN in fact pre-dates the

[1606] Subject to the Tort Claims Board's continued existence.
[1607] Schrijver has suggested 'an Ombudsperson with purely advisory authority'. Schrijver (2015), at 338. Consideration could be given to including such an ombudsperson at these initial stages of the dispute settlement process. See Boon and Mégret (2019), at 6 (referring to 'old calls for the ombudsman position to have an external dimension'). See generally Johansen (2020), para. 3.2.3. ('Ombudspersons').

adoption of the General Convention. Back in 1943, in pressing 'for the early consideration of some of the administrative aspects of the creation of adequate world institutions,'[1608] Jenks argued:

> 'In the postwar world there should be a single World Administrative Tribunal which should exercise jurisdiction over [complaints alleging the nonobservance of the conditions of appointments of officials]. It should also be competent in cases in which some official act performed on behalf of an international institution is alleged to violate a private right; in cases in which international institutions are involved in legal relationships governed by municipal law, such as disputes relating to real estate, building contracts, printing contracts, and such matters; and in any cases involving the private affairs of officials in respect of which an international should be thought preferable to a national jurisdiction. Such a tribunal should have jurisdiction over all existing and future international institutions and their staffs.'[1609]

The 'single World Administrative Tribunal' envisaged by Jenks would have a general jurisdiction, extending beyond staff disputes, to which all international organisations would be subject.

Jenks' proposal was largely reflected in Article 18(2) of the ILO's 'suggested text of proposed resolution' in 1945:

> '(2) The International Labour Organisation shall make provision for the determination by an appropriate international tribunal of:
>
> (a) disputes arising out of contracts to which the Organisation is a party which provide for the reference to such a tribunal of any disagreement relating thereto;
>
> (b) disputes involving any official of the Office who by reason of his official position enjoys immunity from the jurisdiction of the tribunal which would otherwise have cognizance of the matter in the case of which such immunity has not been waived by the Director;
>
> (c) disputes concerning the terms of appointment of members of the staff and their rights under the applicable staff and pension regulations.'[1610]

However, as the proposed Article 18(2) evolved into Section 29 of the General Convention, the reference to a 'tribunal' was replaced by the broad formula of 'appropriate modes of settlement'. And, contrary to Article 18(2), staff disputes are not mentioned in Section 29 of the General Convention.

As to the exclusion of staff disputes from Section 29, notwithstanding the multitude of administrative tribunals, Jenks' proposal that several organisations would be subject to the jurisdiction of a single

---

[1608] Jenks (1943), at 93.

[1609] Ibid., at 104 (emphasis added). The citation continues as follows: 'In the interest of a proper integration of the world judicial institutions of the future, the World Administrative Tribunal should have an organic relationship with the Permanent Court of International Justice. The Court might well be made responsible for the appointment of the members of the Tribunal and be competent to decide cases involving points of principle likely to have a far-reaching influence on the status and development of world institutions which are referred to it by the Tribunal.'.

[1610] International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 223 (emphasis added). The scope of this provision seems to be less broad than that of the jurisdiction of the 'single World Administrative Tribunal' proposed by Jenks, which would extend to violations of 'a private right' and 'cases in which international institutions are involved in legal relationships governed by municipal law'.

tribunal has to an extent become reality: the ILOAT's jurisdiction has been recognised by, currently, 58 international organisations,[1611] whilst the jurisdiction of the UNDT and UNAT, respectively, extends to several organisations beyond the UN Secretariat, Funds and Programmes.[1612]

As to the formula 'appropriate modes of settlement' under Section 29, writing in 1961, Jenks noted that it had been adopted in relation to several other international organisations;[1613] these include the Specialized Agencies,[1614] NATO,[1615] OAS,[1616] and ICAO.[1617] Jenks commented:

> 'As yet effect has been given to the obligation to provide for "appropriate modes of settlement" by a combination of settlement by negotiation with arbitration clauses rather than by arrangements with any firm institutional content. The principal exception is that the Statute of the Administrative Tribunal of the ILO was amended in 1946 to give the tribunal jurisdiction in respect of "disputes arising out of contracts to which the International labour Organisation is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution". A substantial number of contracts conferring such jurisdiction have been concluded but as of 1960 this extended jurisdiction has not been exercised. One of the difficulties of the matter is that a third party is apt to regard the Administrative Tribunal of an international organisation as a body subject to its influence rather than an impartial court. While the experience of the matter in which the Administrative Tribunals of international organisations have operated in respect of matters arising between such organisations and their staffs appears to show that such fears are unjustified, they are understandable. The whole matter is still in an early stage of development and the provision of firm institutional arrangements for dealing with such cases would appear to be primarily a matter of time.'[1618]

The ILOAT's 'extended jurisdiction' over contractual disputes, which arises under Article II(4) of the ILOAT Statute,[1619] has remained of little practical relevance. Jenks may have correctly surmised that this is because of the perceived lack of impartiality of internal tribunals in the settlement of contractual disputes with third-parties.[1620] That would militate in favour of an *external* tribunal, along the lines of

---

[1611] <ilo.org/tribunal/lang--en/index.htm> accessed 21 December 2021.

[1612] For the ILOAT, see <ilo.org/tribunal/membership/lang—en/index.htm> accessed 21 December 2021. For the UNDT and the UNAT, see <un.org/en/internaljustice/overview/who-can-use-the-system.shtml> accessed 21 December 2021.

[1613] Jenks (1961), at 44.

[1614] Art. 31 of the Specialized Agencies Convention.

[1615] Art. 24 of the Ottawa Agreement.

[1616] Art. 12 of the OAS Agreement on Privileges and Immunities.

[1617] Art. 33 of the ICAO Headquarters Agreement. See also section 1.2 of this study.

[1618] Jenks (1961), at 44 (fn. omitted, emphasis added). Cf. Blatt (2007), at 104 ('Bereits vor Unterzeichnung der VN-Charta und des ÜVIVN wurde die Errichtung eines World Administrative Tribunals vorgeschlagen, das mit einer umfassenden Zuständigkeit zur Behandlung aller denkbaren Klagen Privater gegen sämtliche Internationale Organisationen ausgestattet sein sollte, und noch Anfang der 1960er Jahre schien die Bildung einer entsprechenden Gerichtsbarkeit innerhalb der jeweiligen Institutionen nur eine Frage der Zeit'. [fn. omitted]).

[1619] That is, 'disputes arising out of contracts to which the International Labour Organization is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution'.

[1620] For the same reason, it might be problematic to expand the jurisdiction of the UN's administrative tribunals, as suggested by Schrijver (2015), at 338 ('It might be possible in the long term to expand the jurisdiction of the new United Nations Appeals Tribunal, so that it functions as a specialised court for claims of an administrative and civil law character against the United Nations.'). It is noted that the UNGA has suggested to explore such an expansion as an option for the settlement of contractual disputes with non-staff personnel. UN Doc. A/RES/64/233 (2010), para. 9 under (d). The UNSG, however, expressed the concern that this 'at this stage would be detrimental

the Mechanism, as proposed in this study. In this respect, as seen, Jenks considered the 'provision of firm institutional arrangements' to be 'primarily a matter of time'. Indeed, the matter has remained alive; for example, Schrijver recommended

> 'the establishment of standing claims commissions for international peace operations, the appointment of an Ombudsperson and, in the long term, the establishment of a 'Central Claims Commission' or a separate tribunal that could deal with claims against the United Nations and its functionaries for acts committed by or on behalf of the organization.'[1621]

In furtherance of such recommendations,[1622] the next paragraph discusses in further detail the first instance tribunals and Appellate Tribunal, which together make up the contentious limb of the proposed Mechanism.

5.3.1.2.2 Two-tiered arbitration

To recall, the proposal is for first instance tribunals to be established in the event of 'disputes arising out of contracts or other disputes of a private law character' that cannot be resolved amicably. These tribunals would, in principle, be composed of a single arbitrator, selected by the parties from a panel of arbitrators, or appointed by the Secretary-General of the PCA, as default appointment authority. As to standing claims commissions, they would differ from 'regular' first instance tribunals notably in that they would be composed of three members and be established at the outset of each peacekeeping operation. Furthermore, there would be a standing Appellate Tribunal whose members (possibly including the Mechanism's President) would be appointed by the UNGA.

After discussing the Appellate Tribunal's competence, the present paragraph addresses the composition of the first instance tribunals and the Appellate Tribunal. It then turns to discuss the applicable law and procedure.

---

to the new system. In particular, the terms and conditions applicable to staff members and the principles of administrative law, which underpin the Staff Regulations and Staff Rules and the administrative framework of the United Nations, do not apply to non-staff personnel.' UN Doc. A/65/373 (2010), paras. 179 and 182.

[1621] Schrijver (2015), at 341 (emphasis added). See also the proposal by Ferstman for 'a two-tiered system: allowing local claims review boards to decide on a wider array of claims up to a certain financial threshold and established [*sic*] a centralised, independent claims mechanism to deal with more complex or costly claims.' Ferstman (2019), at 67.

[1622] See also the conclusions reached by Johansen (2020), at 301 ('There is no single recipe for how [reform at the international level] could be carried out, and I certainly do not purport to have a comprehensive reform plan. That said, it seems necessary to have at least some court-like mechanism that can issue binding decisions – it is in particular that which is lacking. This could be achieved by establishing internal courts, for example modelled after the international administrative tribunals that deal with disputes between IOs and their staff.' [emphasis added]).

The competence of the Appellate Tribunal

Under the Mechanism's contentious limb, there would be no full reconsideration of the dispute on appeal. Rather, in balancing fairness and efficiency, the scope of the Appellate Tribunal's basic competence would be limited to reviewing first instance awards on limited grounds. That competence would be expanded specifically so as to include appeals against first instance decisions concerning the legal character of disputes. That would be warranted by the complexity of such decisions, as well as their significance for both the UN and private parties. The Appellate Tribunal's competence would furthermore be expanded so as to include appeals concerning the interpretation and application of the UN Liability Rules (and possibly 'general principles of law, including international law' in contractual disputes, see below). That would foster the, much-needed, consistent development of the law in this area.

As an alternative to the Appellate Tribunal's aforementioned expanded competence, or possibly in combination with such competence, consideration could be given to the Appellate Tribunal giving 'preliminary rulings' to first instance tribunals and claims commissions. The proceedings relating to such rulings could be modelled after the practice of the European Court of Justice.[1623]

Composition of first instance tribunals and the Appellate Tribunal

As to the composition of first instance tribunals, the selection of arbitrators would involve two steps, along the lines of the UNSG's Expedited Arbitration Rules and Articles 12-16 of the ICSID Convention. First, the UNGA would establish a Panel of Arbitrators. In selecting arbitrators for the panel, input could be sought from the Office of Legal Affairs of the UN Secretariat.[1624] The Mechanism's statute would set forth the requirements for arbitrators. To this end, the UNSG's Expedited Arbitration Implementation Proposal provides a useful starting point. It states that

> 'an arbitrator would be required to have knowledge of commercial law and experience in international arbitration cases, including cases under the UNCITRAL Arbitration Rules; be familiar with the United Nations or other international organizations and the issues and functions particular to such an organization; be competent in at least English, French or Spanish; and be of good character. To the extent possible, there should be geographical diversity among the individuals on the list of arbitrators.'[1625]

[1623] Art. 267 of the Treaty on the Functioning of the European Union, [2012] OJ C326/47.

[1624] In identifying candidates, consideration could be given to members of the Permanent Court of Arbitration. However, that is subject to whether those members meet the requirements for present purposes. It is moreover noted that the members of the Court are appointed by the PCA's 122 Contracting Parties <pca-cpa.org/en/about/introduction/contracting-parties/> accessed 21 December 2021, whereas the UN's membership is currently made up of 193 states <un.org/en/about-us> accessed 21 December 2021.

[1625] UN Doc. A/RES/67/265 (2012), Annex IV, para. 13.

Before being placed on the Panel of Arbitrators, candidates would be vetted by the PCA.[1626]

The second step in the establishment of a tribunal would be taken once a dispute has arisen and amicable settlement has failed. The parties—that is, the UN and the private claimant—would have the opportunity to agree on an arbitrator from the Panel of Arbitrators. Failing such an agreement, the PCA Secretary-General would proceed with the appointment of the tribunal through the list procedure as foreseen in the Expedited Rules (see above). Contrary to Article 40 of the ICSID convention, and so as not to undermine the UNGA's role in establishing the Panel of Arbitrators, it may be preferable to not allow arbitrators to be selected outside the Panel of Arbitrators (except for members of standing claims tribunals appointed by host states).[1627]

It may be necessary to allow for expanding the composition of the tribunal from one to three members where this is warranted, for example, by the complexities of the case, the number of claimants, or the amount in dispute. In this respect, consideration could be given to designing a system along the lines of Article 10(9) of the UNDT Statute, according to which

> 'the President of the United Nations Appeals Tribunal may, within seven calendar days of a written request by the President of the Dispute Tribunal, authorize the referral of a case to a panel of three judges of the Dispute Tribunal, when necessary, by reason of the particular complexity or importance of the case.'

Moving to the Appellate Tribunal, contrary to first instance tribunals and claims commissions, it would be a standing tribunal. Its members would meet the requirements stipulated in the proposed UNGA resolution, with additional requirements to ensure seniority and expertise.[1628] The number of members of the Appellate Tribunal would remain to be determined. It is proposed that this be an uneven number, which is common in arbitration so as to avoid a tied result.[1629] To provide context, the UNAT and ILOAT are each composed of seven judges,[1630] and the WTO Appellate Body has the same number of

---

[1626] In the case of the UNDT and the UNAT, the 'Internal Justice Council' is involved in the search for suitable candidates. UN Doc. A/RES/62/228 (2008), para. 37(a). Consideration could be given to expanding the mandate of the Council (and amending its name accordingly) so as to include the search for arbitrators, possibly in consultation with the PCA.

[1627] The UNGA would be able to amend the Panel of Arbitrators.

[1628] The members of the Appellate Tribunal, like those of standing claims commissions, would require the necessary expertise to be able to rule on questions concerning the interpretation and application of the UN Liability Rules.

[1629] As seen, on 29 January 2021, the CETA Joint Committee decided, pursuant to Art. 8.28.7 of the CETA, that the Appellate Tribunal, in principle, will have six members (Art. 2(1)), which number may be increased by multiples of three (Art. 2(2)). Divisions of the Appellate Tribunal constituted to hear a case will be composed of three members (Art. 2(5)). See <circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/122a87d2-a6da-482c-b295-8a76f8d8aa29/details> accessed 21 December 2021.

[1630] Art. 3(1) of the UNAT Statute and Art. III(1) of the ILOAT Statute. Furthermore, under Art. 4(1) UNDT Statute, the UNDT is composed of three full-time judges and six half-time judges.

members.[1631] Inter-state arbitration tribunals are typically composed of five arbitrators,[1632] whereas dispute settlement clauses between international organisations and states often provide for three arbitrators.[1633]

The Appellate Tribunal could possibly be divided into divisions. This may be appropriate, as a rule, in disposing of requests for review of first instance awards. Conversely, and notwithstanding the need for efficiency, it may be that appeals concerning the legal character of disputes are best decided *en banc*, in view of the complexity and significance of the matters at issue. Furthermore, to ensure the consistent development of the UN Liability Rules, appeals concerning the interpretation and application of these rules equally may best be disposed of in the same way.[1634]

Applicable law and procedure

As to the substantive law governing third-party disputes against the UN, as discussed in subsubsection 3.4.1.2 of this study, it varies depending on the dispute in point. Much has been said about the UN Liability Rules, governing third-party disputes arising out of peacekeeping operations. These rules would, in first instance, be applied by standing claims commissions. Furthermore, to ensure the consistent clarification and development of these rules, the Appellate Tribunal would be competent to hear and decide appeals alleging error in the interpretation and application of the UN Liability Rules.

As to contractual disputes, as seen, as explained by the UNSG, the UN's

> 'practice is to avoid wherever possible reference to any specific law of application, especially any system of national law, and to consider the governing law of the contract to be found in general principles of law, including international law, as well as in the terms of the contract itself.'[1635]

The 'terms of the contract' would include General Terms and Conditions of Contract which may be annexed to, and form an integral part of, the contract.[1636] As to 'general principles of law, including international law', the contents of this source of law may be ambiguous and prone to divergent

---

[1631] <wto.org/english/thewto_e/glossary_e/appellate_body_e.htm> accessed 21 December 2021.
[1632] Daly, Goriatcheva and Meighen (2014), para. 4.26.
[1633] See, e.g., Art. 44(2) of the IRMCT Headquarters Agreement.
[1634] Cf. Art. 10(2) of the UNAT Statute ('Where the President or any two judges sitting on a particular case consider that the case raises a significant question of law, at any time before judgement is rendered, the case may be referred for consideration by the whole Appeals Tribunal. A quorum in such cases shall be five judges.').
[1635] 1985 Supplement to the 1967 Study, at 155. Likewise, in the context of grievances by consultants and individual contractors, the UNSG stated in 2008: 'With respect to the law applicable to arbitral claims, the Organization reviews such claims in the light of the applicable contractual terms as well as general principles of international law. As an intergovernmental Organization with 192 Member States, the United Nations takes the view that its contracts and agreements should not be subject to the laws of any one jurisdiction, but should respect general principles of international law. Therefore, the General Conditions do not include a choice of law provision but stipulate that the "decisions of the arbitral tribunal shall be based on general principles of international commercial law".' UN Doc. A/62/748 (2008), para. 22.
[1636] <un.org/Depts/ptd/about-us/conditions-contract> accessed 21 December 2021.

interpretations by different tribunals. The question arises of whether the Appellate Tribunal would be sufficiently able to clarify any such ambiguity through the limited powers of review foreseen in the proposed arrangement. It may be that the same approach is in fact warranted as the one proposed with respect to the UN Liability Rules. That is, consideration could be given to expanding the Appellate Tribunal's competence to hearing and deciding appeals alleging error in the interpretation and application of 'general principles of law, including international law' in contractual disputes.

In terms of procedure, the first instance tribunals, including Standing Claims Commissions, would apply the PCA Arbitration Rules 2012, as amended, amongst others, by incorporating the UNSG's Expedited Rules. Further modifications could be made as necessary to ensure that the arbitration rules reflect state of the art innovations in relevant areas.[1637] One such area concerns 'transparency', one dimension of which is 'procedural transparency',[1638] which 'concerns the way international courts and tribunals apply and enforce international legal norms.'[1639] That has come to the fore particularly in the area of investor-state dispute settlement, as it directly involves public interests.[1640] In the area of investment arbitration, transparency generally boils down to the disclosure of information to third-parties and the participation of such parties in arbitral proceedings.[1641] The 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are a notable product of developments in that area.[1642] But, the debate concerning transparency is not limited to investment arbitration. Indeed, several arbitration organisations have 'initiated projects to foster greater transparency and overall confidence in the system and its outcomes.'[1643]

There are good arguments, it is submitted, for the UN's third-party dispute settlement regime to follow the transparency trend in arbitration. First, like investor-state disputes resolution, third-party claims against the UN are likely to involve public interests (if only because the UN is publicly funded). Second, but for the UN's immunity from jurisdiction, disputes against the UN would be heard by domestic courts in proceedings that are, in principle, public. If dispute resolution under Section 29 of the General

---

[1637] Examples include 'consolidation' of proceedings, cf. Art. 22A of the LCIA Arbitration Rules <lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%201> accessed 21 December 2021; composite requests, cf. Art. 1.2 of the LCIA Arbitration Rules; 'mass claims processes', regarding which the PCA has particular expertise <pca-cpa.org/en/services/arbitration-services/mass-claims-processes/> accessed 21 December 2021.
[1638] G. Ruscalla, 'Transparency in International Arbitration: Any (concrete) Need to Codify the Standard?', (2015) 3 *Groningen Journal of International Law* 1, at 2.
[1639] Ibid., at 2.
[1640] Ibid., at 3. See also Art. 8.36 of CETA ('transparency of proceedings').
[1641] Ibid., at 2.
[1642] UN Doc. A/68/17 (2013), Annex I, adopted by decision of 11 July 2013. See also UN Doc. A/RES/68/109 (2013).
[1643] D. Schimmel et al., 'Transparency in Arbitration' (Practice Note, 2018) <foleyhoag.com/-/media/files/foley%20hoag/publications/articles/2018/transparency%20in%20arbitration_practical%20law_mar2018.ashx> accessed 21 December 2021, at 1.

Convention is to be truly a counterpart for the UN's immunity from jurisdiction, it should be no less transparent than court proceedings. Third, and perhaps most significantly of all, Article 14 of the ICCPR entitles claimants to a hearing (by a 'competent, independent and impartial tribunal established by law') that is not only fair, but also 'public'.

A further procedural issue arises in connection with the determination of the legal character of third-party disputes. Insofar as that determination involves the interpretation and application of Section 29 of the General Convention, it concerns the General Convention's states parties. It would be appropriate, therefore, to make allowance for those states, as well as possibly other interested parties, to make submissions in the proceedings.

The nature of the proceedings: self-contained arbitration

The Convention, as seen, is intended to provide for a 'self-contained' arbitration regime, which excludes national court involvement. That regime would be modelled after the core provisions of the ICSID Convention that operationalise the 'principle of non-interference', as referred to by Schreuer.[1644] These notably, but not exclusively, include the following, in relevant part:

> 'Article 26
> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.'[1645]
>
> 'Article 44
> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.'
>
> 'Article 52
> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;

[1644] Schreuer (2009), at 351-352, para. 3.
[1645] According to Schreuer: 'Art. 26 is the clearest expression of the self-contained and autonomous nature of the arbitration procedure provided for by the Convention . . . The principle of noninterference is a consequence of the self-contained nature of proceedings under the Convention. The Convention provides for an elaborate process designed to make arbitration independent of domestic courts. Even in the face of an uncooperative party, ICSID arbitration is designed to proceed independently without the support of domestic courts. This is evidenced by the provisions on the constitution of the tribunal (Arts. 37–40), on proceedings in the absence of a party (Art. 45(2)), on autonomous arbitration rules (Art. 44), on applicable law (Art. 42(1)), and on provisional measures (Art. 47). It is only in the context of enforcement that domestic courts may enter the picture (Arts. 54–55). In addition, the arbitration process is also insulated from inter-State claims, by the exclusion of diplomatic protection (Art. 27).' Ibid., at 351-352, paras. 1 and 3. Furthermore, as explained by Schreuer: 'It is beyond doubt that the exclusive remedy rule of Art. 26 also operates against domestic courts.' Ibid., at 386, para. 132, citing Delaume (1984), at 68: 'If a court in a Contracting State becomes aware of the fact that a claim before it may call for adjudication under ICSID, the court should refer the parties to ICSID to seek a ruling on the subject.'.

(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.'[1646]

'Article 53
(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention'

'Article 54
(1) Each state party shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state'.

Similar provisions would be included in the proposed Convention, obliging its states parties to refrain from interfering in dispute settlement under the Mechanism.

Under the Convention, the term 'award' would be defined so as to include a final preliminary ruling regarding the character of a third-party dispute. As a result, where a first instance tribunal or, in the event of an appeal, the Appellate Tribunal rules that a dispute lacks a private law character, that ruling would be *res judicata* and must be recognised by national courts as precluding subsequent proceedings against the international organisation.

The exclusivity of the Mechanism under the Convention would be a legal basis, additional to jurisdictional immunity, for courts to decline to adjudicate cases against international organisations. Consequently, international organisations would enjoy stronger legal protection against domestic interference. This deference to a dispute settlement mechanism with exclusive competence[1647] resembles the situation regarding the settlement of non-contractual disputes with the EU. Under Article 268, in conjunction with Articles 274 and 340, of the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice of the EU has exclusive jurisdiction in such disputes. In this respect, as explained by Wessel in the broader context of the immunities of the EU,

'the immunities of the European Union have never been given much attention in academic literature. <u>One reason may be that, because of the extensive (and often exclusive) jurisdiction of the Court of Justice of the EU, issues can or must often be solved at that level</u>. Whereas most international organizations lack a judicial forum for individuals to bring claims, the EU's well-developed legal

[1646] As a whole, the post-award remedies under the Convention are set forth in Arts. 49 to 52.
[1647] Cf. Art. 26 of the ICSID Convention, which provides in relevant part: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration <u>to the exclusion of any other remedy.</u>' (emphasis added).

> order allows any natural or legal person, whatever his nationality or residence, to institute proceedings against a decision addressed to him or which is of direct and individual concern.'[1648]

Returning to the Convention, under its self-contained regime, it is of little relevance whether the first instance tribunals (including standing claims commissions) and the Appellate Tribunal, and the proceedings before them, qualify as arbitration or judicial adjudication.[1649] Conversely, the former qualification is essential to ensure the application of the New York Convention.

The New York Convention as a backup legal framework

With over 160 states parties, the New York Convention is 'one of the key instruments in international arbitration'.[1650] It applies, in principle,[1651] in UNCITRAL arbitrations against the UN in the current set-up. Pending the proposed Convention's entry into force and, subsequently, with respect to non-states parties, the New York Convention is to continue to apply as a backup legal framework for the Mechanism. In designing the Mechanism, care should be taken to ensure the requirements under the New York Convention are met.

The New York Convention's key provision is Article III, which provides in relevant part: 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.'

Article V of the New York Convention allows states to refuse the recognition and enforcement of awards on limited grounds. There is accordingly a potential for interference by states, such that, for present

---

[1648] R.A. Wessel, 'Immunities of the European Union', in N.M. Blokker and N. Schrijver (eds.), Immunity of International Organizations (2015), 137 at 159 (emphasis added). As explained by Wessel, furthermore: 'The situation that the Union is a party to a dispute taking place within one its Member States is foreseen by the treaty, and in fact a role of the national courts is not excluded. This absence of full jurisdictional immunity results in a special situation which is highly exceptional for international organizations. Art. 274 of TFEU provides: 'Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.' Ibid., 143.

[1649] Regarding '[w]hat constitutes an international court', see generally Johansen (2020), at 78ff.

[1650] <newyorkconvention.org> accessed 21 December 2021. Cf. Van den Berg (2019), at 1 (underscoring 'the importance of [the New York Convention and the ICSID Convention] for international arbitration. Each convention has more than 150 Contracting States, and both have been thoroughly tested in numerous court decisions interpreting and applying their provisions.' [fn. omitted]).

[1651] Art. I(3) allows a state, amongst others, to 'declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.' (emphasis added). Several states have made such a declaration, <newyorkconvention.org/countries> accessed 21 December 2021. The 'commercial reservation' would exclude several, but not all, third-party disputes with the UN.

purposes, the New York Convention is 'second best' to the ICSID Convention and the proposed Convention.

As explained by Blackaby et al., insofar as an award is recognised under the New York Convention,

> 'the purpose of recognition on its own is generally to act as a shield. Recognition is used to block any attempt to raise in fresh proceedings issues that have already been decided in the arbitration that gave rise to the award of which recognition is sought.'[1652]

More specifically:

> 'Recognition on its own is generally a defensive process. It will usually arise when a court is asked to grant a remedy in respect of a dispute that has been the subject of previous arbitral proceedings. The party in whose favour the award was made will object that the dispute has already been determined. To prove this, it will seek to produce the award to the court, and will ask the court to recognise it as valid and binding upon the parties in respect of the issues with which it dealt. The award may have disposed of *all* of the issues raised in the new court proceedings and so put an end to those new proceedings as *res judicata*—that is, as matters in issue between the parties that in fact have already been decided. If the award does not dispose of all of the issues raised in the new proceedings, but only some of them, it will need to be recognised for the purposes of issue estoppel, so as to prevent those issues with which it does deal from being raised again.'[1653]

As a result, once a national court has recognised an arbitral award, it is precluded from hearing the matter on grounds of *res judicata*. This effectively offers international organisations protection against national court interference, in addition to their jurisdictional immunity.[1654]

Such protection also results from Article II of the New York Convention:

> '1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration
>
> . . .
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

The recognition of an arbitration agreement by a national court therefore involves a court denying itself jurisdiction over the dispute against the international organisation.

[1652] Blackaby et al. (2015), para. 11.23.
[1653] Ibid., para. 11.20 (emphasis in original, fn. omitted).
[1654] The enforcement of an award under the New York Convention does not preclude an international organisation from relying on its immunity from execution.

Turning to the design requirements of the Mechanism in order for the New York Convention to operate as a 'backup' legal framework, this turns largely, though not exclusively, on the method of composition of tribunals. Similar issues have arisen with respect to other (prospective) tribunals. These include the ICS under CETA,[1655] the IUSCT,[1656] the prospective 'International Tribunal for Investments (ITI)',[1657] and the prospective appeal mechanism for investor-state disputes.[1658]

As to the ICS, as seen, its arbitration panels are appointed by states parties, while its divisions are designated internally for each case. As Reinisch explained:

> 'The crucial legal issue is whether a third-party dispute settlement institution with permanent "tribunal members" is more a court or can still qualify as an arbitral tribunal. Usually, the distinctive element is exactly the permanency and the method of appointment: Judges are appointed for a certain period of time and for an undefined number of disputes, whereas arbitrators are appointed by the disputing parties for a specific dispute. Further, the lack of an appeals possibility and greater party autonomy in shaping the procedure are considered to be hallmarks of arbitration vis-à-vis adjudication through courts. Sometimes, additionally the "compulsory" jurisdiction of courts is contrasted with the "voluntary" acceptance of arbitration, though the ICJ with its requirement of a separate acceptance of the Court's jurisdiction demonstrates quite ably that this distinction is probably more valid in domestic legal systems.'[1659]

In discussing the ITI, which would be 'composed of tenured (or semi-tenured) members',[1660] Kaufmann-Kohler and Potestà detail the requirements under the New York Convention. Accordingly, a national court requested to recognise an ITI award,

> 'would in particular ask itself the following questions: (a) Is the decision an "award" under the NYC?; (b) Is there an "agreement in writing" under Articles II and V(1)(a) of the Convention?; (c) If there were one, would the presence of a built-in appeal pose any problems under the NYC?'[1661]

Regarding the first point referred to by Kaufmann-Kohler and Potestà in the foregoing citation, as explained by Reinisch with respect to the ICS, the

> 'issue will be whether national courts in New York Convention Contracting States, where recognition and enforcement may be sought in the future, will consider ICS awards as awards made by an arbitral

---

[1655] See generally A. Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration', (2016) 19 *Journal of International Economic Law* 761, with reference to a draft of CETA dated 29 February 2016 (CETA was signed on 30 October 2016).
[1656] Ibid., at 767 (The IUSCT's judges are 'appointed by two states to decide an undetermined number of disputes also between nationals of one state and the other state.').
[1657] See generally G. Kaufmann-Kohler and M. Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap' (Geneva Center for International Dispute Settlement, 2016) <ssrn.com/abstract=3455511> accessed 21 December 2021.
[1658] See generally Van den Berg (2019).
[1659] Reinisch (2016, 'Investment Court System for CETA'), at 766 (fns. omitted).
[1660] Kaufmann-Kohler and Potestà (2016), para. 79.
[1661] Ibid., para. 145.

body. The whole purpose of the New York Convention is the enforcement of arbitral awards as opposed to foreign judicial decisions.'[1662]

The matter turns on the interpretation of, in particular, Article I(2) of the New York Convention: 'The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.'

In the case of the ICS, Reinisch concluded that 'it appears that the proper view should be that ICS remains predominantly a form of arbitration and that in spite of its name and some judicial features ICS tribunals will render arbitral awards.'[1663] In reaching that conclusion, Reinisch considered:

> 'The *travaux préparatoires* of the Convention indicate that even a permanent dispute settlement institution can be regarded as arbitration and that what was crucial was the '*voluntary* nature of arbitration, based on "will" or "agreement" of the parties, as opposed to any type of adjudication based on "compulsory", or "mandatory" jurisdiction, imposed on the parties "regardless of their will".'
>
> Thus, even where the parties may not be able to appoint 'their' arbitrators, they must still be able to freely consent to such dispute settlement. Otherwise, it would lose its character as arbitration.'[1664]

Similarly, as explained by Kaufmann-Kohler and Potestà with respect to awards rendered by the ITI,

> 'there would be good reason to qualify the ITI as a "permanent arbitral body" under the Convention, both under the "ordinary meaning" of Article I(2), and under an "evolutionary interpretation" of the phrase which would take account of developments in international law and arbitration since 1958. However, this does not seem of primary importance. What matters – as it clearly results also from the *travaux* – is the consensual basis of the adjudicator's jurisdiction, which would be clearly met for the ITI . . .
>
> . . . That said, while not strictly needed, UNCITRAL may, after the adoption of the ITI Statute, consider issuing a "recommendation", similar to the one it made in connection with the interpretation of Article II(2) and Article VII(1) of the NYC. Such a recommendation would be aimed at clarifying that the ITI falls within the ambit of the NYC, as a "permanent arbitral body" under Article I(2) or otherwise. It would certainly provide comfort to domestic courts faced with the enforcement of ITI awards and would likely improve consistency in the interpretation by courts.'[1665]

[1662] Reinisch (2016, 'Investment Court System for CETA'), at 783 (emphasis added).
[1663] Ibid., at 783. Indeed, according to Reinisch: 'While this risk certainly exists, it seems to the present author that the better arguments militate in favour of regarding ICS as a form of arbitration and the outcome of ICS dispute settlement as constituting enforceable awards.' Ibid., at 786.
[1664] Ibid., at 767. The fn. following this passage refers to Kaufmann-Kohler and Potestà (2016), para. 152.
[1665] Kaufmann-Kohler and Potestà (2016), paras. 154-155 (fn. omitted). The UNCITRAL recommendation referred to is the 'Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the [New York Convention], adopted by the [UNCITAL] on 7 July 2006 at its thirty-ninth session. See UN Doc. A/61/17, Annex II, (2006). The recommendation entails the following: 'Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards, 1. Recommends that Article II, paragraph 2, of the [New York Convention], be applied recognizing that the circumstances described therein are not exhaustive; 2. Recommends also that Article VII, paragraph 1, of the [New York Convention], should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.' The UNGA expressed its 'appreciation' to UNCITRAL regarding

Turning to the proposed Mechanism, the submission of a dispute to a first instance tribunal or the Appellate Tribunal arguably is no less consensual than its submission to an ad hoc UNCITRAL tribunal under the current set-up.[1666] Furthermore, the Mechanism would leave somewhat more leeway to the parties to compose first instance tribunals than the ICS or the ITI. That is, the Mechanism's first instance tribunals would, in principle, be appointed by the third-party claimant and the UN from the Panel of Arbitrators.

But then again, there would be no such leeway with respect to standing claims commissions, which would be established by the UNSG and the host state of a peacekeeping operation. Moreover, the Appellate Tribunal would be a standing tribunal whose members are appointed by the UNGA. Therefore, along the lines suggested by Kaufmann-Kohler and Potestà, it may be advisable to seek a recommendation by UNCITRAL—a subsidiary body of the UNGA—[1667] that the contentious limb of the Mechanism 'falls within the ambit of the NYC, as a "permanent arbitral body" under Article I(2) or otherwise'.[1668]

A separate issue arises with respect to the limitation of the scope of application of the New York Convention under Article I(1) (emphasis added) to

> 'arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.'

In the case of 'self-contained arbitration', such as under the ICSID Convention and the proposed Convention, there is no place of arbitration. In that connection, the question arises whether 'a-national' awards would fall within the scope of Article I(1) of the New York Convention or purposes of recognition. According to Kaufmann-Kohler and Potestà, that

> 'was heavily discussed in the past, but seems to have lost much of its appeal in more recent days. First, a number of courts have indeed applied the Convention to a-national awards . . . Further, it seems beyond dispute, and rightly so, that "delocalized" awards of at least one particular type, those made under the ICSID Convention, can be enforced under the NYC regime, if recognition/enforcement are sought in a non-ICSID Contracting State. The authors of this paper see no convincing reason why a de-localized ITI arbitration regime akin to the ICSID regime should be treated differently.'[1669]

---

the recommendation and requested the Secretary-General 'to make all efforts to ensure that . . . the recommendation becomes 'generally known and available.' See UN Doc. A/RES/61/33 (2006), paras. 2 and 3.

[1666] Although it could be said that due to the jurisdictional immunity of international organisations, claimants in reality have little choice but to consent to arbitration.

[1667] UNCITRAL was established in A/RES/2205(XXI) (1966).

[1668] See likewise Kaufmann-Kohler and Potestà (2016), para. 155, with respect to the ITI. See likewise Reinisch (2016, 'Investment Court System for CETA'), at 768, with respect to the ICS under CETA.

[1669] Kaufmann-Kohler and Potestà (2016), para. 157 (fns. omitted).

The same may apply to a-national awards from the Mechanism's first instance tribunals and the Appellate Tribunal. As such awards would only become a-national upon entry into force of the Convention, the Mechanism's statute, as promulgated by the UNGA, could stipulate that until then, awards shall be deemed to be rendered in the Netherlands. Apart from being the host state of the PCA, the Netherlands has significant experience with international courts and tribunals generally, including the IUSCT. Moreover, having enacted a modern arbitration law, the Netherlands is generally a trusted arbitration venue.

The second point referred to by Kaufmann-Kohler and Potestà, as referred to above, concerns the term 'arbitration agreement' under Article II(2). According to that provision: 'The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.' In the case of arbitration of third-party disputes against the UN, the arbitration clause may be included in a contract (such as in the case of contractual disputes with consultants and individual contractors) or in a *compromis*.

But, an arbitration agreement between a third-party and the UN may also come into existence in other ways. First, in submitting a claim to a standing claims commission, the claimant would accept the UN's offer of arbitration expressed in the SOFA,[1670] thus entering into an arbitration agreement. The same applies when an investor enters into an arbitration agreement with a state of investment by submitting a claim to an investment tribunal under a BIT.

Second, where a private party holds the UN liable in tort but the UN denies the private law character of the claim, the controversy would be decided by the Mechanism. Here, too, an arbitration agreement would come into existence insofar as the submission of the claim entails the claimant's acceptance of the UN's standing offer of arbitration under the Mechanism's statute.[1671]

According to Kaufmann-Kohler and Potestà, writing with respect to the ITI:

> 'It is well-accepted that the consensual method based on arbitration without privity meets the writing requirement under the [New York Convention] . . .

[1670] This would necessitate a further amendment of the SOFA, along the lines of the formulation commonly found in BITs. For example, according to Art. 9(2) of the Agreement on Promotion and Protection of Investments Between the Government of the Kingdom Of Bahrain and the Government of the Kingdom of The Netherlands, signed on 5 February 2007: 'If the dispute has not been settled within a period of three months from the date either party to the dispute requested amicable settlement, that Contracting Party irrevocably consents that the dispute may be submitted at the request of the national concerned to' arbitration (emphasis added). Similarly, Art. 8.25(1) of CETA provides: 'The respondent consents to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section.'.

[1671] Like the SOFA, the UNGA resolution would expressly state that the UN consents that the dispute may be submitted to the Mechanism.

> . . . This notwithstanding, the ITI Statute could expressly state that (i) consent achieved through the combination of the state's offer with the investor's submission of a claim to the dispute settlement mechanism "shall satisfy the requirements of Article II of the NYC for an 'agreement in writing"'.[1672]

As seen, the same could be provided with respect to the Mechanism.[1673]

The third, and final, point referred to by Kaufmann-Kohler and Potestà concerns the compatibility of an appeals facility with the New York Convention. According to Reinisch, as seen, 'the lack of an appeals possibility' is considered to be amongst the 'hallmarks of arbitration vis-à-vis adjudication through courts.'[1674] It is submitted that it is not likely that the design of the Mechanism's contentious limb, consisting of first instance tribunals *and* a standing Appellate Tribunal, would undermine the application of the New York Convention. To begin with, the Appellate Tribunal is not competent to reconsider the dispute in full. Rather, it has powers of review like ICSID annulments panels. The Appellate Tribunal's powers would only extend further in limited cases (regarding the character of third-party claims, and the interpretation and application of the UN Liability Rules). In any event, as explained by Kaufmann-Kohler and Potestà, 'as long as the overall process can be regarded as arbitration . . . no issue related to the presence of a built-in appeal would arise under the NYC.'[1675]

In sum, there appear to be good arguments that the arbitration under the Mechanism would be covered by the New York Convention, as a backup legal framework to the proposed Convention. That said, as Van den Berg concluded with respect to a potential future appeal mechanism for investor-state dispute settlement:

> 'The New York Convention raises a whole host of issues: definition of an arbitral award; what a permanent arbitral body is; whether an a-national award fall [*sic*] under the Convention; whether there is a residual application to ICSID awards; whether investment arbitration falls under the commercial reservation; whether the definition of an arbitration agreement in writing is fulfilled; when an award made at first instance is 'binding' under the Convention; and whether the grounds for refusal of enforcement can be waived. Appropriate and careful treaty design appears to be a challenge for the drafters. To draft legally suitable and workable solutions is a daunting task.'[1676]

Notwithstanding the differences between, on the one hand, the Mechanism and, on the other, the appeal mechanism discussed by Van den Berg, the importance of '[a]ppropriate and careful treaty design', as underscored by Van den Berg, is to be borne in mind in designing the Mechanism.

[1672] Kaufmann-Kohler and Potestà (2016), paras. 159-160.
[1673] The matter could also be added to the interpretation requested of UNCITRAL. In this regard, UNCITRAL's aforementioned 2006 recommendation is helpful: 'Recommends that Article II, paragraph 2, of the [New York Convention], be applied recognizing that the circumstances described therein are not exhaustive' (emphasis added).
[1674] Reinisch (2016, 'Investment Court System for CETA'), at 766.
[1675] Kaufmann-Kohler and Potestà (2016), para. 164.
[1676] Van den Berg (2019), at 33 (fn. omitted).

5.3.1.3 The Permanent Court of Arbitration

The Mechanism would need to be administered expertly and efficiently. The UN Secretary General's Expedited Rules Concept Paper favoured an outside institution administering the arbitration proceedings for contractual disputes with consultants and individual contractors. It did so for good reasons, that is, 'having an outside institution administer the arbitration would de-link the neutral entity from the Organization and eliminate any perception of partiality.'[1677] This reasoning would apply equally to the administration of proceedings, both amicable and contentious, as part of the Mechanism.

Of the various international dispute settlement institutions, the PCA's unique background and mandate would make it ideally suited to administer the Mechanism. As described by Daly, Goriatcheva and Meighen:

> 'Established in 1899 during the first Hague Peace Conference, the PCA is the world's oldest intergovernmental organization dedicated to facilitating the peaceful resolution of international disputes . . .
>
> . . . Originally focused on arbitration and other forms of dispute resolution between states, the PCA now offers a broad range of services for the resolution of disputes involving various combinations of states, state-controlled entities, intergovernmental organizations, and private parties. These services include arbitration, conciliation, factfinding commissions, good offices, and mediation.'[1678]

In addition to 'regularly providing administrative services in support of parties and arbitrators conducting arbitral proceedings under the PCA's auspices',[1679] the PCA has significant experience with a broad variety of specialised international dispute settlement regimes. More specifically, it has acted as registry in all but one arbitration under Annex VII to the 1982 United Nations Convention on the Law of the Sea.[1680] The PCA also 'frequently provides administrative support in disputes between investors and States arising under the Energy Charter Treaty, conducted under the UNCITRAL Arbitration Rules'.[1681] Furthermore, there is a PCA Steering Committee on International Mass Claims Processes, which 'was established in response to the proliferation of mass claims systems in recent years'.[1682] Moreover, the PCA 'has been regularly included as the forum for dispute resolution under bilateral and multilateral treaties, contracts, and other instruments concerning natural resources and the environment,

---

[1677] UN Doc. A/66/275 (2011), Annex II, para. 26.
[1678] Daly, Goriatcheva and Meighen (2014), paras. 1.03-1.04 (fn. omitted).
[1679] Such services may involve 'serving as the official channel of communications and ensuring safe custody of documents. The PCA can also provide such services as financial administration, logistical and technical support for meetings and hearings, travel arrangements, and general secretarial and linguistic support. In addition, a staff member of the International Bureau may be appointed as registrar or administrative secretary for a case and carry out administrative tasks at the direction of the arbitral tribunal.' <pca-cpa.org/en/services/arbitration-services/case-administration> accessed 21 December 2021.
[1680] <pca-cpa.org/en/services/arbitration-services/unclos/> accessed 21 December 2021.
[1681] <pca-cpa.org/en/services/arbitration-services/> accessed 21 December 2021.
[1682] <pca-cpa.org/en/services/arbitration-services/mass-claims-processes/> accessed 21 December 2021. Regarding mass torts involving the UN, see generally Ferstman (2019).

and offers specialized rules for arbitration and conciliation of these disputes.'[1683] Lastly, the PCA's International Bureau acts as secretariat to the standing Arbitral Tribunal for the Bank for International Settlements.[1684]

In a video message on the PCA's website, UN Secretary-General Guterres underscored the importance of conciliation and arbitration, and recognised the PCA's significance and its strong ties to the UN.[1685] To administer the Mechanism for the settlement of third-party disputes against the UN would fit with the PCA's extensive experience in the settlement of international disputes.

The PCA's particular suitability for present purposes is underscored by its Optional Conciliation Rules and its Arbitration Rules 2012. As seen, these sets of rules provide a solid basis for the development of procedural rules for the settlement of third-party disputes against the UN in amicable, respectively, contentious proceedings. This is particularly so as both sets of rules are specifically intended for use in disputes in which one or more of the parties is a State (entity or enterprise), or an international organization.[1686] Moreover, as seen, the PCA Optional Conciliation Rules 'are part of an integrated PCA dispute resolution system that links the procedures for conciliation with possible arbitration'.[1687]

Furthermore, both sets of rules envisage an active role for the PCA Secretary-General and the PCA's International Bureau (as the PCA Secretariat is known), which the Secretary-General heads.[1688] In addition to assisting in appointing conciliators,[1689] the Secretary-General serves as appointing authority for arbitral tribunals.[1690] As for the International Bureau, it provides administrative assistance to conciliations,[1691] and acts as registry and secretariat in arbitrations.[1692]

The PCA's involvement with the Mechanism would moreover result in a large measure of legal protection for arbitrators and participants to the arbitral proceedings, there being no need to establish the Mechanism as an international organisation for that reason. According to Article 16 ('Exclusion of

---

[1683] <pca-cpa.org/en/services/arbitration-services/> accessed 21 December 2021.

[1684] <pca-cpa.org/en/services/arbitration-services/bis/> accessed 21 December 2021.

[1685] <pca-cpa.org/en/home> accessed 12 December 2021 ('The Permanent Court of Arbitration has supported the efforts of tribunals around the world. But it has also fostered conciliation . . . In today's complex and volatile world, arbitration and conciliation are underutilised, yet they are indispensable. As a permanent observer of the United Nations General Assembly, the Court is ideally placed to promote the rule of law . . . I look forward to strengthening ties between our two organisations').

[1686] PCA Optional Conciliation Rules, Introduction, at 151; PCA Arbitration Rules 2012, Introduction, at 4.

[1687] PCA Optional Conciliation Rules, Introduction, at 153.

[1688] The PCA's organisational structure furthermore includes 'an Administrative Council that oversees its policies and budgets' and 'a panel of independent potential arbitrators known as the Members of the Court'. See <pca-cpa.org/en/about> accessed 21 December 2021 (hyperlinks removed).

[1689] Art. 4(3) of the PCA Optional Conciliation Rules.

[1690] Art. 6 of the PCA Arbitration Rules 2012.

[1691] Art. 8 of the PCA Optional Conciliation Rules.

[1692] Art. 1(3) PCA Arbitration Rules 2012.

liability') of the PCA Arbitration Rules 2012 (which would be retained in the proposed arbitration rules): 'The parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.'

The waiver of claims in this provision is unqualified. That is a change to Article 16 of the UNCITRAL Arbitration Rules, under which the waiver does not apply to 'intentional wrongdoing'.[1693]

The legal protection of arbitrators, and other participants to the proceedings, is further buttressed through the PCA Headquarters Agreement, between the PCA and the Netherlands,[1694] as its host state, and various 'Host Country Agreements' with states parties to the PCA's founding treaties.[1695] Under such agreements—in addition to the PCA, its Secretary-General and its staff—arbitrators and other participants in arbitral proceedings, including notably witnesses, enjoy a broad range of privileges and immunities.[1696]

The PCA's preparedness to undertake the administration of the Mechanism may depend on the approval of its Administrative Council. As to the UN, to be able to invite the PCA to administer the Mechanism, the UN would need to consider its procurement rules. The UNSG's Expedited Rules Concept Paper provided for a 'competitive procurement exercise' for the selection of an international dispute settlement institution to administer arbitral proceedings for disputes with consultants and individual contractors.[1697] If it came to such an exercise, the PCA can be expected to do particularly well in the technical evaluation.

However, a competitive procurement exercise may not in fact be required on two grounds. First, the UN's Financial Regulations and Rules may allow the UNSG to dispense with such an exercise. UN Financial Regulation 5.13 provides:[1698] 'Tenders for goods and services shall be invited by advertisement, except where the Secretary-General deems that, in the interests of the Organization, a departure from this regulation is desirable.'

Financial Rule 105.16(a) details this as follows:

> 'The Under-Secretary-General for Management may determine for a particular procurement action that using formal methods of solicitation is not in the best interest of the United Nations: (i) When there is no competitive marketplace for the requirement, such as where a monopoly exists, where

[1693] Daly, Goriatcheva and Meighen (2014), paras. 4.72-4.74.
[1694] See also Exchange of Notes constituting an Agreement supplementing the Agreement concerning the Headquarters of the Permanent Court of Arbitration, 6 June 2012. See Daly, Goriatcheva and Meighen (2014), paras. 4.76-4.78.
[1695] Ibid., para. 4.79.
[1696] Ibid., paras. 4.76-4.79.
[1697] UN Doc. A/66/275 (2011), Annex II, para. 26.
[1698] UN Doc. ST/SGB/2013/4 (2013).

> prices are fixed by legislation or government regulation or where the requirement involves a proprietary product or service'.[1699]

Arguably, due to the PCA's uniqueness there is no 'competitive marketplace'. As a result, it would not be 'in the best interest of the United Nations' to use formal methods of solicitation in the case in point. Second, in any event, having approved the UN's Financial Regulations, the UNGA would be empowered to override the procurement regime under the Financial Regulations and Rules.

Lastly, to engage the PCA for purposes of administering the Mechanism, the UN and PCA would conclude an agreement. The agreement would concern matters such as financial matters, reporting and dispute settlement (between the UN and the PCA).

5.3.2 Establishment and legal framework of the Mechanism

Having clarified certain essential aspects of the Mechanism, this subsection discusses its establishment. That would involve a resolution by the UNGA, complemented by a Convention to establish the 'self-contained' arbitration regime. A further component of the Mechanism's establishment, as seen, would be the conclusion of the agreement between the UN and the PCA.[1700]

The overall objective of these arrangements would be comprehensively to 'make provisions for appropriate modes of settlement of . . . disputes arising out of contracts and other disputes of a private law character' in accordance with Section 29 of the General Convention. That provision dictates the scope of the UNGA resolution and the Convention. As a result, the Mechanism would not be competent to settle disputes that lack a private law character, that is, disputes regarding the UN's 'performance of constitutional functions'. That said, as seen, the Mechanism would have the power to rule on its own jurisdiction ('Kompetenz-Kompetenz'),[1701] including notably by determining the legal character of disputes before it.

5.3.2.1 The UNGA resolution

The proposed UNGA resolution would be the continuation of the UNGA's involvement with the implementation of Section 29 of the General Convention. To recall, in the era starting with the 1995 Report, the UNGA, upon receiving the 1996 Report and 1997 Report, promulgated the UN Liability

---

[1699] Ibid.

[1700] In addition, contracts concluded by the UN would include an arbitration clause referring to the mechanism, in lieu of the customary UNCITRAL arbitration clause. Furthermore, SOFAs would include an amended third-party dispute settlement clause, as discussed above.

[1701] Cf. Art. 23(1) of the PCA Arbitration Rules 2012 ('The arbitral tribunal shall have the power to rule on its own jurisdiction'); Art. 2(6) of the UNDT Statute and Art. 2(8) of the UNAT Statute ('In the event of a dispute as to whether the . . . Tribunal has competence under the present statute, the . . . Tribunal shall decide on the matter.').

Rules in resolution 52/247 (1998). In 2012, the UNGA initiated the dialogue with the UNSG about expedited arbitration of contractual disputes with consultants and individual contractors.

To establish the Mechanism through an UNGA resolution would underscore that it is the UN that gives effect to its obligation under Section 29(a) of the General Convention 'to make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character'. The Mechanism, as a whole, would qualify as a comprehensive 'mode of settlement' in terms of that provision.

The purposes of the proposed UNGA resolution would be to:

(i) establish the Mechanism by adopting its statute, included in an annex to the resolution. The UNGA used the same legislative technique with respect to the UNDT and the UNAT: in resolution 63/253 of 24 December 2008,[1702] the UNGA decided to adopt the tribunals' statutes set out in Annexes I and II, respectively.[1703] In that resolution, in addition to adopting the statutes, the UNGA set out the date as of which the tribunals became operational, approved the proposed conditions of service of the tribunals' judges, and decided on a review of the statutes at a later stage. The tribunal's statutes deal with such matters as competence, composition, administrative arrangements, rules of procedure, receivability, evidence and interim measures. Similar topics would be addressed in the proposed UNGA resolution and in the Mechanism's statute;

(ii) approve the engagement of the PCA and, as necessary, waive the procurement requirements (discussed above); and

(iii) adopt the proposed Convention and open it for accession by States.

The UNGA would adopt the proposed UNGA resolution on a report of the Sixth (Legal) Committee. That Committee's involvement is warranted by the legal complexities of the matters at issue. The UNGA followed the same routing in adopting the General Convention.[1704]

[1702] Reissued for technical reasons and dated 17 March 2009. The resolution was adopted on a report from the Fifth Committee. See UN Doc. A/63/642 (2008). The UNGA had allocated the matter to both that committee and the Sixth Committee. Ibid., para. 1. However, here is no reference in UN Doc. A/63/642 (2008) to any involvement of the Sixth Committee.
[1703] UN Doc. A/RES/63/253 (2008), para. 26. Both statutes have subsequently been amended several times. For the UNDT Statute, see UN Doc. A/RES/69/203 (2014); UN Doc. A/RES/70/112 (2015); A/RES/71/266 (2016); and A/RES/73/276 (2018). For the UNAT Statute, see A/RES/66/237 (2011); A/RES/69/203 (2014); A/RES/70/112 (2015); and A/RES/71/266 (2016).
[1704] See, e.g., UN Doc. A/C.6/37 (1946). The draft convention that would become the General Convention was contained in document UN Doc. A/C.6/28 (1946). By contrast, UN Doc. A/RES/52/247 (1998), concerning the UN Liability Rules, emerged from the Fifth (Administrative and Budgetary) Committee, as did the statutes of the UNDT and UNAT.

5.3.2.2 The Convention

To create a self-contained, de-nationalised, arbitration regime, the Convention would be a necessary complement to the UNGA resolution. In this respect, the UNGA lacks the power to impose obligations on states.[1705] These obligations would implement the principle of 'non-interference', explained by Schreuer.[1706] The relevant provisions would be based on the ICSID Convention, as listed above. Notably, these provisions would include the obligation to accept tribunal awards as binding, except as provided for in the Convention,[1707] and to recognise and enforce an award 'as if it were a final judgment of a court in that State'.[1708] A state would accept such obligations by becoming a party to the Convention.

Further, the proposed Convention would complement the General Convention. The former would not in any way detract from the latter,[1709] including in particular its Article II on privileges and immunities.[1710] In that connection, one might consider the alternative of amending the General Convention by incorporating therein the provisions of the proposed Convention. However, the General Convention's general nature would contrast with the specific contents of the proposed Convention. Furthermore, any efforts to amend the General Convention with respect to the implementation of Section 29 might give rise to a broader overhaul of the treaty.[1711] That would likely delay, and possibly complicate, the comprehensive implementation of Section 29 along the lines currently proposed. It would therefore not seem advisable to pursue an amendment of the General Convention by integrating therein the contents of the proposed Convention.

Another alternative would be to integrate the contents of the proposed Convention into a general convention regarding privileges and immunities. Insofar as Section 29 of the General Convention was conceived to be the counterpart to the UN's jurisdictional immunity, these topics could arguably be dealt with jointly in one treaty.

[1705] Only the UNSC has binding powers over member states, under Chapter VII of the UN Charter. This requires there to be a threat to or breach of the peace, or an act of aggression. That is unlikely to be the case generally when it comes to the private law liability of the UN, However, in the case of a peace enforcement action, the UNSC might deem it appropriate to impose obligations on states with regard to tribunal awards, which would be binding on states under Art. 25 of the UN Charter.

[1706] Schreuer (2009), at 351-352, para. 3.

[1707] Cf. Art. 53 of the ICSID Convention.

[1708] Cf. Art. 54 of the ICSID Convention.

[1709] Though Section 36 of the General Convention contemplates the possible conclusion of 'supplementary agreements adjusting the provisions of' the General Convention.

[1710] Section 30 of the General Convention would also continue to apply. Under that provision, the ICJ could conceivably rule on the interpretation and application of Section 29. However, as discussed elsewhere in this study, it has never done so. In the result, though the ICJ potentially retains the final word, the risk of competing decisions with those of the Mechanism would be minimal.

[1711] Art. 35 of the General Convention contemplates the possibility of a 'revised General Convention'.

As seen in chapter 4 of this study, the proposal for a general convention on privileges and immunities for international organisations, in connection with the need for alternative recourse, goes back decades. To recall, in 1936, Åke Hammarskjöld concluded that a 'réglementation générique est dans l'air et que la tendance dominante y est favorable".'[1712] Hammarskjöld was concerned about the lack of access to justice occasioned by jurisdictional immunity: 'Il y a là sans doute une lacune; et une lacune qui—surtout combinée avec la tendance à confondre immunités diplomatiques et immunités internationales—a beaucoup entravé le développement de cette dernière institution.'[1713]

As seen, in 2006, Gaja, at the time a member of the ILC, produced a paper up in connection with the topic 'Jurisdictional immunity of international organizations' as part of the 'long-term programme of work since the forty-fourth session of the Commission (1992)'.[1714] According to the paper:[1715]

> 'The recent adoption through UNGA resolution 59/38 of the UN Convention on Jurisdictional Immunities of States and Their Property gives the opportunity for the Commission to reconsider whether it should undertake a study of the jurisdictional immunity of international organizations.'[1716]

As part of a general overview of the topic, and reminiscent of Hammarskjöld's 1936 article, Gaja's paper stated:

> 'Immunity of [international organizations] has to be studied in the context of remedies that are available for bringing claims against an organization, according to the rules of that organization or to arbitration agreements. There is a need to avoid the risk of a denial of justice.'[1717]

The paper further includes a number of headings. The first is entitled 'Major issues raised by the topic', one of which is: 'Protection of the rights of natural and legal persons in relation to jurisdictional immunities of international organizations. In particular, the role of alternative means of settling disputes.' The other headings in the paper are: 'Applicable treaties, general principles or relevant legislation or judicial decisions'; 'Existing doctrine'; and 'Advantages of preparing a draft convention'. Under that final heading, according to the paper:

> 'Given the number of instances in which treaties concerning immunities of international organizations do not apply and given also the general character of most treaty provisions, it would be in the interest of all concerned that the rules of international law governing immunities of international organizations should be more easily ascertainable. Due consideration should be made, where appropriate, to the need for progressive development. The increased importance of economic activities of international organizations, often in direct competition with the private sector, add urgency to the matter.

[1712] Hammarskjöld (1936), at 194.
[1713] Ibid., at 186.
[1714] UN Doc. A/61/10 (2006), para. 260, sub (m).
[1715] Ibid., Annex B, 'Jurisdictional immunity of international organizations', at 455-458.
[1716] Ibid., para. 1.
[1717] Ibid., para. 7.

> Should the topic be retained, it would lend itself to the preparation of a draft convention. This would apply alongside the Convention on jurisdictional immunities of States and their property.'[1718]

To date, the topic 'Jurisdictional immunity of international organizations' has remained on the ILC's long-term programme of work.[1719]

Also included on the ILC's long-term programme of work is the topic 'Settlement of international disputes to which international organizations are parties',[1720] in regard to which, as seen, a paper was prepared by Sir Michael Wood.[1721] According to the paper, the settlement of third-party disputes against international organisations would be outside the scope of that topic.[1722] That said, Wood's paper does state:

> 'Dispute settlement concerning such matters has to take account of the immunities enjoyed by international organizations, as well as the latter's obligation to make provisions for appropriate modes of settlement under certain treaties. It is quite common for provision to be made for special procedures, including arbitration, to cover such cases. The Council of Europe's Committee of Legal Advisers on Public international law (CAHDI) has on its agenda an item on "Settlement of disputes of a private character to which an international organisation is a party"'.[1723]

As to the CAHDI, during its 60th meeting (March 2021), the topic 'Settlement of disputes of a private character to which an International Organisation is a party' was included on the agenda as part of its ongoing activities, under the heading 'Immunities of states and international organisations'.[1724]

Clearly, then, the topic of immunity from jurisdiction of international organisations in conjunction with the settlement of private law disputes against international organisations, has attracted the attention of the ILC and the CADHI. The suggestion by Gaja in 2006 for a general convention on the jurisdictional immunity of international organisations—though dismissed by at least one author—[1725] may yet be considered.[1726]

[1718] Ibid., para. 11.
[1719] <legal.un.org/ilc/status.shtml> accessed 21 December 2021.
[1720] Ibid. See generally Reinisch (2018).
[1721] UN Doc. A/71/10 (2016), Annex A, at 387-399.
[1722] 'The present paper focuses primarily on disputes that are international, in the sense that they arise from a relationship governed by international law. It does not cover disputes involving the staff of international organizations ("international administrative law"). Nor does it cover questions arising out of the immunity of international organizations. It 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.' Ibid., para. 3.
[1723] Ibid., para. 3, fn. 7 (emphasis added).
[1724] <coe.int/en/web/cahdi/-/60th-meeting-strasbourg-24-25-march-2021?inheritRedirect=true> accessed 21 December 2021.
[1725] Webb (2015).
[1726] Cf. Reinisch (2016, 'Introduction'), para. 9 ('Suggestions to adopt a more generic convention on the privileges and immunities of international organizations in general have been discussed in the . . . ILC . . . between the 1960s and the 1990s, but not further pursued.' [fns. omitted]).

Meanwhile, and whilst subsequent integration into a comprehensive legal framework is conceivable, the proposed Convention might be pursued on its own. This would expedite the coming into being of a comprehensive arrangement for the implementation of Section 29 of the General Convention.

5.3.2.3 Financial implications

Any involvement of states and the UNGA with the implementation of Section 29 to date seems to have been driven largely by financial concerns in connection with the UN's liability. This is evidenced by the UN Liability Rules having emerged out of the Fifth (Administrative and Budgetary) Committee. And, the discussions in recent years about expedited arbitration for contractual disputes with consultants and individual contractors focused significantly on cost implications.

Justice has a price. But, to provide for adequate recourse under Section 29 of the General Convention is to invest in the UN's independence, as such recourse protects against national court interference. And, it is to invest in enhancing the UN's legitimacy.[1727] Conversely, the absence of such recourse may cause reputational damage and decrease the organisation's legitimacy. This may in turn impair its effectiveness and thereby undermine the member states' investment in the organisation.[1728] From that perspective, it may be cost-effective to invest in alternative recourse. Reputational damage appears to have been at issue for the UN in proposing a $400 million response package for the Haiti cholera epidemic.[1729] However, in so doing the UN did not resolve the lingering legal controversy over its liability.[1730] Yet, leaving aside that little funding has reportedly been received,[1731] to offset reputational damage it seems indispensable to resolve such controversies by investing in alternative recourse.

The Mechanism would be designed and operated in such a way as to minimise expenses. Thus, through its broad experience in administering a variety of dispute settlement processes, the PCA would be able to render services efficiently. Furthermore, as per the proposal in the Expedited Arbitration Implementation Proposal, the arbitrator's fees would be fixed, depending on the amount in dispute in a

---

[1727] Cf. Daugirdas and Schuricht (2021), at 81 ('Recognizing this [customary international law obligation on international organizations to provide effective remedies] is, of course, not costless. It may expose international organizations to increased pressures and demands for compensation, and it might allow international organizations to water down the content of their obligations. The authors of this chapter are not blind to these costs. But we believe that the risks and costs of the status quo are even greater.').

[1728] Daugirdas (2019), at 12 ('a bad reputation can impose significant costs').

[1729] <news.un.org/en/story/2016/12/546732-uns-ban-apologizes-people-haiti-outlines-new-plan-fight-cholera-epidemic-and> accessed 21 December 2021. See generally Daugirdas (2019), at 13-14. However, according to Daugirdas, 'the United Nations' response to cholera in Haiti showcases some important limitations and complications of reputation as a motivator and disciplinarian'. Ibid., at 15.

[1730] According to Daugirdas: 'The deficiencies and even pathologies of reputation as a motivator . . . highlights the urgency of developing additional formal accountability mechanisms to assure recourse to individuals harmed by the acts and omissions of international organizations.' Ibid., at 41.

[1731] <ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25851&LangID=E> accessed 21 December 2021.

case, and it would be shared amongst the parties.[1732] Moreover, Article 41 of the PCA Arbitration Rules 2012 goes beyond the UNCITRAL rules in providing 'a novel, mandatory review mechanism of the tribunal's fees and expenses.'[1733] That is, 'the PCA is tasked with monitoring compliance with the reasonableness standard of Article 41(1) through three distinct procedures, each applicable at a specific stage of the arbitral proceedings.'[1734]

Lastly, the UNGA resolution would provide for the sharing in the expenses of the Mechanism by other international organisations in the event they were to recognise the Mechanism's competence.[1735]

5.3.3 Other international organisations

The General Convention is closely mirrored in the 1947 Specialized Agencies Convention. And, as Jenks noted in 1962 (as discussed above), the formula in Section 29 of the General Convention was adopted with respect to several international organisations. That practice has since continued with respect to both headquarters agreements and multilateral treaties.[1736] This underscores the significance of the UN's practice under Section 29 of the General Convention for several other organisations.

By the same token, the proposed Mechanism could be made available to other international organisations. In this respect, as seen, the UNAT (as well as the UNDT) is available to several agencies and organisations beyond the UN Secretariat, Funds and Programmes, and the ILOAT is currently available to 58 organisations.

In the case of the UNAT, Article 2(10) of its Statute provides in relevant part:

> 'The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency . . . or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a <u>special agreement</u> has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal and be responsible for the payment of any compensation awarded by the Appeals Tribunal in respect of its own staff members and shall include, inter alia, provisions concerning its participation in the administrative arrangements for the functioning of the Appeals Tribunal and concerning its sharing of the expenses of the Appeals Tribunal. Such special agreement shall also contain other provisions required for the Appeals Tribunal to carry out its functions vis-a-vis the agency, organization or entity.' (emphasis added)

[1732] UN Doc. A/67/265 (2012), Annex IV, paras. 17-21.
[1733] Daly, Goriatcheva and Meighen (2014), para. 6.76. Art. 41(1) of the PCA Arbitration Rules 2012 provides: 'The costs referred to in article 40, paragraphs 2(a), (b) and (c) shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any experts appointed by the arbitral tribunal, and any other relevant circumstances of the case.'.
[1734] Daly, Goriatcheva and Meighen (2014), para. 6.82.
[1735] Cf. Art. 2(10) UNAT Statute.
[1736] See section 1.2 of this study.

Thus, the recognition of UNAT jurisdiction by an international organisation notably involves the conclusion of a 'special agreement' between it and the UNSG.

In the case of the ILOAT, the tribunal was originally part of the League of Nations but at the same time served the ILO, to which it was transferred in 1946.[1737] Soon thereafter, the ILOAT was made available to other organisations as well, as explained by the ILOAT itself:

> 'In 1949, at the thirty-second Session of the International Labour Conference, Article II of the Statute of the ILO Tribunal was amended to permit other international organizations approved by the Governing Body of the International Labour Office to recognize the jurisdiction of the Tribunal to consider complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the provisions of the Staff Regulations of those organizations . . . That same year, the World Health Organization accepted the Statute of the ILO Administrative Tribunal, prompting other specialized agencies of the UN system to do likewise.'[1738]

Article II(5) of the ILOAT Statute provides:

> 'The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules, and which is approved by the Governing Body.'

The annex to the ILOAT Statute provides in relevant part:[1739]

> '1. To be entitled to recognize the jurisdiction of the Administrative Tribunal of the International Labour Organization in accordance with paragraph 5 of article II of its Statute, an international organization must either be intergovernmental in character, or fulfil the following conditions: (a) it shall be clearly international in character, having regard to its membership, structure and scope of activity; (b) it shall not be required to apply any national law in its relations with its officials, and shall enjoy immunity from legal process as evidenced by a headquarters agreement concluded with the host country; and (c) it shall be endowed with functions of a permanent nature at the international level and offer, in the opinion of the Governing Body, sufficient guarantees as to its institutional capacity to carry out such functions as well as guarantees of compliance with the Tribunal's judgments.
>
> 2. The Statute of the Tribunal applies in its entirety to such international organizations subject to the following provisions which, in cases affecting any one of these organizations, are applicable as follows'.

One of those provisions states with respect to Article IX(2) of the ILOAT Statute: 'Expenses occasioned by the sessions or hearings of the Tribunal shall be borne by the international organization against which the complaint is filed.'[1740]

[1737] < ilo.org/tribunal/about-us/lang--en/index.htm> accessed 21 December 2021.
[1738] Ibid., accessed 12 December 2021 (hyperlink removed).
[1739] <ilo.org/tribunal/about-us/WCMS_249194/lang--en/index.htm#art2> accessed 21 December 2021.
[1740] Ibid.

The recognition of the ILOAT's jurisdiction therefore involves a (i) declaration addressed to the ILO Director-General, (ii) by a qualifying organisation, (iii) recognising, in accordance with that organisation's Constitution or internal administrative rules, the jurisdiction of the ILOAT and its Rules.

Along the same lines, the recognition of the Mechanism's competence could involve (i) a declaration addressed to the PCA Secretary-General, (ii) by an organisation that is subject to a provision akin to Section 29(a) of the General Convention,[1741] (iii) recognising, in accordance with the organisation's internal legal framework, the competence of the Mechanism in the implementation of said provision.

A potential complexity arises with respect to the nationality of the arbitrators on the Mechanism. The determination of an international organisation's third-party liability may involve sensitive issues, and any liability may be significant. For that reason, it may be problematic for third-party disputes against an international organisation to be resolved by arbitrators from non-member states.

To provide context, in the case of ILOAT it is in fact conceivable for a judge from a non-member state to decide a dispute against the organisation. Article III of the ILOAT statute merely provides that the tribunal 'shall consist of seven judges, who shall all be of different nationalities.' Over the years, ILOAT's (deputy) judges have come from a great variety of states,[1742] not all of which are necessarily members of the organisations that have recognised the ILOAT's jurisdiction. This appears not to have given rise to controversy, notwithstanding the sensitivities that may be at issue in cases before the ILOAT.

In the case of the ICS, the matter of nationality has been given particular consideration. Article 8.27(2) of CETA provides: 'Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada (1) and five shall be nationals of third countries.'

Furthermore, according to Article 8.27(6) of CETA:

> 'The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country.'

Similarly, in designing the Mechanism's statute, particularly as regards the Appellate Tribunal which would be a standing body,[1743] careful consideration ought to be given to the issue of the nationality of

---

[1741] The essential elements of such an obligation arguably are to (i) make provision(s) for appropriate modes of settlement, of (ii) disputes of a private (law) character.
[1742] D. Petrović (ed.), *90 Years of Contribution of the Administrative Tribunal of the International Labour Organization to the Creation of International Civil Service Law* (2017), at 203-204.
[1743] First instance tribunals are proposed to be composed of a single arbitrator and the proposed Panel of Arbitrators may provide a sufficiently broad choice of arbitrators of various nationalities.

arbitrators. In particular, the Mechanism's competence to determine the nature of third-party disputes would involve delicate issues concerning the 'constitutional functions' of an international organisation.

A solution might be found in the direction of allowing a joining international organisation a degree of leeway regarding the composition of the Appellate Tribunal in cases against it.[1744] The aim would be to strike a balance between, on the one hand, the (political) reality concerning the nationality of arbitrators and, on the other, the need for consistency in decision-making by the Appellate Tribunal concerning Section 29 of the General Convention. A potential solution could be to allow an international organisation to appoint ad hoc arbitrators to add to, or partially replace, the bench. Concretely, in lodging a declaration with the PCA Secretary-General, recognising the Mechanism's competence, an international organisation would put forward such arbitrators (or reserve the right to do so), subject to vetting by the PCA.

The proposed Convention would apply to Mechanism proceedings and awards as such, that is, without regard to the particular respondent international organisation. However, it may be that (for political reasons) a state is not in a position to recognise Mechanism proceedings in relation to a particular organisation. To that end, the Convention could be drafted so as to allow states to opt out.[1745] The PCA Secretary-General would inform the treaty depository of each international organisation that has accepted the Mechanism's competence. Upon being informed by the depository of such newly joined organisation, states parties could then opt out of the Convention for purposes of that specific organisation.

Finally, as with the ILOAT and UNAT (discussed above), in accepting the Mechanism's competence, each international organisation would accept to participate in the administrative arrangements for the functioning of the Mechanism and pay its share in the Mechanism's expenses.

5.4 Conclusions

This chapter built on the problems identified in chapter 3 of this study with the current implementation of Section 29 of the General Convention. Those problems arise in light of the international organisations law framework governing third party remedies discussed in chapter 2, within which Section 29(a) of the General Convention is embedded, and against the broader backdrop of the rule of law.

[1744] As well as possibly to add arbitrators to the Panel of Arbitrators.

[1745] Thus, contrary to the Specialized Agencies Convention, whose schedules contain specific provisions regarding individual agencies, the Convention would apply unreservedly to proceedings concerning all international organisations, except where states would opt out from their obligations under the Convention with respect to specific international organisations.

Notably, the UN's unilateral determination of the legal character of third-party claims contrasts with the principle *nemo iudex in causa sua*. Furthermore, to qualify as 'appropriate', modes of settlement under Section 29 of the General Convention must conform to the essence of Article 14(1) of the ICCPR. Moreover, such modes must shield the UN from domestic interference and they must not be unduly burdensome. Current modes of settlement are problematic: the envisaged settlement of claims arising out of peacekeeping operations lacks independence and impartiality; the UN Liability Rules are in need of development to enhance legal certainty; and, arbitration under the UNCITRAL Arbitration Rules is overly burdensome and does not adequately protect the UN from domestic interference.

These widely divergent problems indicate the need for a structural revision of the current implementation of Section 29(a) of the General Convention such that that provision counterbalances the jurisdictional immunity of the UN. As discussed in chapter 4 of this study, the absence of alternative remedies leads to 'accountability gaps', which undermine the legitimacy of international organisations and, in consequence, their effectiveness. And, courts may attempt to close such gaps by rejecting the jurisdictional immunity of international organisations, though that immunity is warranted more than ever to protect such organisations against interference.

To resolve these problems, an integrated approach to the proper implementation of Section 29(a) of the General Convention is called for. The Mechanism developed in this chapter would embody such an approach. It aims for Section 29(a) truly to operate as the 'counterpart' to the UN's jurisdictional immunity, by providing, in the words of the UN Legal Counsel in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* a 'complete remedy system to private parties'.

The Mechanism would build on UN practice. Thus, it would expand and institutionalise the practice regarding the amicable settlement of disputes, coupled with ADR. As to contentious dispute settlement, arbitration would remain the central technique, bolstered by a 'self-contained' regime. The arbitration rules applied by the Mechanism would be based on proposals produced by the UNSG at the initiative of the UNGA. The Mechanism would integrate the standing claims commissions currently foreseen for the settlement of third-party disputes in connection with peacekeeping operations. In so doing, the problems regarding their legal framework and establishment would be addressed. The Mechanism's Appellate Tribunal would facilitate the consistent interpretation and application of the UN Liability Rules. An important novelty would be the determination of the legal character of third-party disputes: it would be for the Mechanism to make that determination, following adversarial proceedings.

The Mechanism would be established by the UNGA, as a single comprehensive mode of settlement in implementation of the UN's obligation under Section 29(a) of the General Convention. The UNGA resolution would contain the Mechanism's statute. The UNGA would select the Mechanism's

conciliators and arbitrators. And, it would approve the Convention that operationalises the 'self-contained' arbitration regime. The UNGA would also approve the UN's engagement with the PCA for the administration of the Mechanism. That engagement would further the historic ties between the two organisations. The PCA would be able to deliver efficient and state-of-the-art dispute settlement services. Administered at arm's length, the Mechanism would be independent and impartial from the UN.

As a dispute settlement body, the Mechanism would not be foreign to the UN. Indeed, the UN has ample experience with a broad variety of courts, tribunals and other such bodies. In addition to the ICJ, as the UN's 'principal judicial organ', these include: a two-tiered system for the adjudication of staff disputes (the UNDT and UNAT); a variety of international criminal courts and tribunals;[1746] the UN Compensation Commission; and the International Tribunal for the Law of the Sea.[1747]

Decades ago, Jenks conceived that the UN would itself submit to such a body for the settlement of its third-party disputes. In so doing, the UN would live up to the expectation that it is committed to the rule of law in the area of third-party dispute settlement, having demonstrated its commitment to the rule of law in other contexts. That would not only strengthen the UN's immunity from jurisdiction, but also bolster its legitimacy and, thereby, its effectiveness. By making the Mechanism available to other international organisations, the UN would moreover lead the way concretely.

[1746] For example, the IRMCT.

[1747] Established by the 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 396.