

Government response to advisory report no. 47 of the Advisory Committee on Issues of Public International Law (CAVV) on the settlement of disputes to which international organisations are parties

[Translation of the official government response in Dutch ('Kabinetsreactie op CAVV-advies nr. 47: Beslechting van geschillen waarbij een internationale organisatie partij is'), published on November 13, 2024.]

Introduction

Following the inclusion of the topic of settlement of disputes to which international organisations are parties in the work programme of the International Law Commission (ILC) of the United Nations (UN) at its seventy-third session in 2022, the Minister of Foreign Affairs asked the Advisory Committee on Issues of Public International Law (CAVV) on 21 March 2024 to prepare an advisory report. The CAVV was asked to devote specific attention to disputes of a private law character to which international organisations are parties. On 13 August 2024, the CAVV completed its advisory report on the settlement of disputes to which international organisations are parties.

Comments

First, the government wishes to express its appreciation for the CAVV's analysis. The advisory report provides useful assistance to the government in shaping its views at this early stage of the ILC process. In the past, the government has only asked the CAVV to advise on the ILC's work once the ILC has adopted draft guidelines, draft conclusions or draft articles on first reading. Thus far, the ILC has not adopted any draft conclusions or guidelines regarding disputes of a private law character to which international organisations are parties. The CAVV's advisory report therefore provides insights of a general nature that the government can take into account going forward. The CAVV's input and recommendations can also be used in any written commentary that the Dutch government may submit to the ILC in due course. The CAVV pointed out that it has already addressed the issue of the settlement of disputes of a private law character to which international organisations are parties in previous advisory reports, in particular in reports no. 13 (2002) and no. 27 (2015). In the present report, the CAVV does not discuss the guidelines that the ILC has provisionally adopted, but rather confines itself to the subject of disputes of a private law character, with a focus on the dispute settlement systems of the UN and the European Union (EU), and suggests institutional improvements. The government has tailored its comments to the structure of the CAVV's advisory report and will examine the CAVV's advice on a section-by-section basis.

CAVV's previous position on disputes of a private law character to which international organisations are parties

In section I of its advisory report, the CAVV discusses previous reports which addressed the settlement of disputes of a private law character to which international organisations are parties. In report no. 13 (2002) on responsibility for wrongful acts during UN peace operations, the CAVV advised that local claims review boards staffed by members of peacekeeping operations and used by the UN as an internal procedure for settling disputes of a private law character concerning peacekeeping operations should comply with the principle of independence. In addition, the CAVV deemed the establishment of a central claims commission within the UN desirable and suggested that the Netherlands should develop initiatives to that end. In its response to that advisory report, the former government endorsed all of the conclusions and recommendations with the exception of the proposal to establish a central claims commission, and did not develop any initiatives to that

effect. The reasons for this are set out below under the subheading 'Wrongful acts'. In advisory report no. 27 (2015) on the responsibility of international organisations, the CAVV noted that international organisations do not always provide an adequate claims procedure, particularly for claims brought by third parties. In that report, the CAVV highlighted the essential role played by national courts. The former government reflected on the fact that a large number of organisations have an internal procedure for handling disputes with their own staff. However, the situation is different for third parties affected by decisions or policies of an international organisation. In many cases, there is no adequate alternative dispute settlement procedure for such third parties, who as a result will often apply to the national courts, where the issue of immunity comes into play. As early as 2014, the Netherlands drew attention in the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI) to the settlement of disputes of a private law character to which international organisations are parties, and the matter has remained on CAHDI's agenda ever since. The Netherlands raised this issue in relation to the genocide in Srebrenica, after surviving relatives of the victims brought civil proceedings against both the UN and the Dutch state in the Dutch courts. The UN was able to avoid responsibility by invoking immunity from jurisdiction. The Dutch state was held responsible for part but not all of the damage suffered, and as a result the rest was borne by the surviving relatives. In addition, at the urging of the Netherlands, the ILC included this topic in its work programme in 2022.

Evaluation of dispute settlement systems established by the UN

The CAVV notes that there are gaps in the systems for settling disputes of a private law character and, in this regard, specifically discusses the situation within the UN, namely that under Section 29 of the Convention on the Privileges and Immunities of the United Nations, the UN is obliged to make provision for appropriate modes of settlement of disputes of a private law character. The Convention on the Privileges and Immunities of Specialized Agencies contains a similar obligation. The CAVV distinguishes between the provisions that the UN has made in that regard for: (1) contractual disputes and (2) disputes about wrongful acts. The CAVV also discusses the concept 'dispute of a private law character'.

Contractual disputes

Pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations, the UN has made various provisions. The CAVV considers that the UN has made quite effective arrangements for the settlement of contractual disputes. Such disputes are submitted to arbitration if negotiations prove unsuccessful. However, the CAVV notes that there is room for improvement, particularly in the case of disputes about procurement procedures and contracts with interns. In the government's view, the CAVV is justified in recommending that information should be provided about the handling of complaints that arise during the procurement stage, in the form of dispute settlement, in order to enhance transparency. In addition, the CAVV agrees with the proposal put forward by the UN Joint Inspection Unit in 2018 that an internal appeal mechanism should be available to interns. In the government's view, as a general rule where there is a gap in the legal protection available in relation to international organisations, the most desirable solution from a legal perspective is for the organisations themselves to fill that gap. In that regard, it is worth examining whether the jurisdiction of the United Nations Dispute Tribunal, which currently handles disputes between the UN and its employees, can be expanded to include disputes between the UN and interns.

In addition, the CAVV also states that an accelerated and cheaper form of arbitration is a possibility and that consideration could be given to making the Permanent Court of Arbitration (PCA) competent to settle all contractual disputes to which the UN is a party. After all, a large share of the

disputes of a private law character between the UN and private parties, particularly commercial parties, are already submitted for arbitration to the PCA, where necessary. The government supports this proposal by the CAVV and will ask the ILC to consider it.

Wrongful acts

The CAVV states that in the case of disputes about wrongful acts, the UN uses arbitration for acts committed at its New York headquarters and duty stations. The CAVV believes that the settlement of disputes concerning wrongful acts committed in the course of UN peacekeeping operations leaves something to be desired. The UN Status of Forces Agreements (SOFAs) provide that standing claims commissions are to be established, but in practice this is not done. The CAVV is of the opinion that the local claims review boards, which the UN uses instead of standing claims commissions, do not meet the minimum requirements of the rule of law and, in this regard, calls for the establishment of independent standing claims commissions, a central appeals body, a permanent central claims commission or an international court. The CAVV called for the establishment of a central claims commission in advisory report no. 13 (2002). The government would not rule out the added value of a central claims commission, if such a commission provided a means of dispute settlement for third parties who are victims of violations of private law norms. In its response to CAVV advisory report no. 13 (2002), the government was of the view that there were practical objections to establishing such a body, but also that the substantive law that would apply is unclear because each UN peace operation has a different mandate. The government notes that the obvious course of action would be to press for the UN to establish in practice the standing claims commissions referred to in the SOFAs. Before addressing the added value of establishing a central claims commission, the government wishes to await the outcome of the ILC's deliberations on this topic and the publication of further draft guidelines. A further assessment of whether this would be a course of action worth pursuing can be made on the basis of additional analysis in a future advisory report.

Definition of disputes of a private law character

The CAVV provides a number of guiding criteria to be used when determining whether a dispute is of a private law character: (i) the nature of the claimant (individual or private legal entity), (ii) the damage sustained (e.g. personal injury or property loss or damage), (iii) the remedy requested (compensation), (iv) the use of an agreement governed by private law (in the case of contractual obligations), and (v) the fact that the dispute does not relate to the performance of the organisation's mandate under its constitution. However, the CAVV notes that in practice it can be difficult to determine the precise character of a dispute and in that light advises the minister to request the ILC to clarify the difference between disputes of a private law character and those of a non-private law character. The government will act on this recommendation and ask the ILC to provide clarification on this point.

Disputes of a non-private law character

The CAVV is of the opinion that even if an organisation such as the UN is obliged to make provision for the settlement of disputes of a private law character, the question of whether or not the dispute is of a private law character is of secondary importance if it concerns a human rights violation. It stands to reason that a legal remedy should be made available for cases in which a human rights violation may have been committed. The CAVV notes, however, that in some cases national courts do not consider claims relating to the acts and omissions of states during missions abroad to be justiciable if the claims relate to political policy or military activities. On the CAVV's recommendation the government will call on the ILC to consider whether this approach should also apply to disputes

involving international organisations. In any case, the government is of the opinion that even if the acts and omissions of an international organisation are connected with the performance of its official duties (*acta jure imperii*), a legal remedy must be available should a human rights violation arise from those acts or omissions. While a dispute of this kind is not contractual and therefore falls outside the scope of Section 29 of the Convention on the Privileges and Immunities of the United Nations, it is a dispute to which individuals may be a party. This while the organisation does not operate on an equal footing with individuals (*acta jure gestionis*). For these situations, too, a dispute settlement mechanism should be available.

With regard to disputes of a non-private law character, the CAVV finds that the settlement system for disputes concerning UN sanctions leaves something to be desired, because in most cases persons placed on a sanctions list can only submit complaints to a 'focal point'. The CAVV considers an independent ombudsperson a good form of dispute settlement for complaints concerning sanctions. In connection with the resolution 1267 sanctions regime, the Netherlands, as part of the Group of Like-Minded States, supported the establishment of an independent monitoring mechanism, including an ombudsperson. The 1267 sanctions regime, adopted under Chapter VII of the UN Charter, requires all states to freeze assets and institute a travel ban and arms embargo against individuals and entities associated with Al-Qaida, Osama Bin Laden and/or the Taliban, regardless of where they are. The Netherlands is working with a group of like-minded countries within the UN to establish an ombudsperson's office in the context of other UN sanction regimes, too. As stated above, the government will await the ILC's deliberations on this matter before taking a position on the establishment of an independent sanctions court or a dedicated chamber within a central claims commission.

Disputes of a private law character and the European Union

The overview of EU practice, in comparison with that of the UN, illustrates, on the one hand, the diversity of the approach adopted by international organisations to disputes of a private law character and, on the other, the unique nature of the EU as an organisation, where the liability of the organisation is largely 'internalised'. There are, after all, many international organisations, and they differ in various ways, for example with respect to the content of their founding treaties and headquarters agreements, and their size, sphere of activity, tasks and responsibilities and immunities. With regard to the provisions made by the EU for the settlement of disputes of a private law character, the CAVV distinguishes between the contractual and non-contractual liability of the EU. In respect of contractual liability, the EU Court of Justice has jurisdiction to give judgment pursuant to an arbitration clause. However, in the absence of such a clause, the EU courts cannot rule on claims for contractual damages. Article 274 of the Treaty on the Functioning of the European Union (TFEU) gives national courts general jurisdiction over disputes to which the EU is a party. In the case of non-contractual liability, the EU is obliged to compensate any damage caused by its institutions or its employees. According to the EU Court of Justice, any action for damages under Article 340, paragraph 2 of the TFEU is an autonomous form of action. The CAVV concurs with the criticism that the Court of Justice has imposed very restrictive conditions with regard to non-contractual compensation claims against the EU. In this regard, the CAVV does mention that the Court of Justice has awarded compensation in a number of cases in recent years. The government is familiar with the criticism of the conditions for non-contractual liability imposed by the Court of Justice's case law. It is important to bear in mind that the action for non-contractual liability is part of the EU system of legal protection, which as such is closer to the system of legal protection afforded by national courts than by the international courts. For instance, the action for non-

contractual liability in the EU system is not restricted to ‘disputes of a private law character’ as defined by the CAVV.

Conclusion

The government wishes to thank the CAVV for its detailed advisory report, which will be used to shape and draft the Netherlands’ input on this subject for the ILC and the UN General Assembly. The government will also bring the translated version of the CAVV’s advisory report, together with the government’s written comments, to the attention of the ILC.