‘Try Again, Fail Again, Fail Better’: The International Law Commission is back on International Organizations

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By Dr Lorenzo Gasbarri June 28, 2023

At its latest session in Geneva, the International Law Commission (ILC) inaugurated the discussions on its new project on the settlement of disputes to which international organizations (IOs) are parties. This is the fifth time in which the ILC focuses on IOs, after its projects on international responsibility, the representation of states, status, privileges and immunities, and the law of treaties. The absolute importance of this new effort and the mixed results of its previous endeavors call for a preliminary analysis of promises and pitfalls.

The topic in short

In 2016, Michael Wood proposed the inclusion of the topic ‘The settlement of international disputes to which international organizations are parties’ in the long-term programme of work of the ILC. In his syllabus, he reflected on “the restricted access that international organizations have to the traditional methods of international dispute resolution” and on admissibility barriers of claims brought by and against them.

In 2022, the ILC decided (para 238) to place this topic on its current programme of work and appointed August Reinisch as Special Rapporteur (SR). He delivered his first report in February 2023 covering previous projects, the scope and outcome of the work, definitional questions, and his future programme of work. In May, the Drafting Committee proposed a few amendments to the adoption of two draft guidelines on the scope and use of terms.

Promises

Based on Michael Wood’s syllabus, there are four outcomes one could expect. First, the ILC could elaborate on the role of permanent courts. Evidently, IOs cannot be party to proceeding before the International Court of Justice (ICJ). Only the International Tribunal for the Law of the Sea is open to one IO, the European Union, which was party to one case only, and settled out of court. Thus, the ILC could focus on a proposal to amend the ICJ Statute, elaborate on the practice of so-called ‘binding’ advisory opinions (for instance, Article VIII, section 30), and/or write the statute of a new tribunal (as it did for the International Criminal Court).

Second, Michael Wood mentioned international arbitration. There are several bilateral treaties concluded by IOs that include arbitration clauses, but only a handful of cases in the public domain (para. 20). The ILC could focus on drafting arbitral clauses and procedural

rules.

The third issue concerns non-legal mechanisms such as enquiry, mediation and conciliation. These covers institutional mechanisms with no binding outcome, such as Ombudspersons and bodies like the World Bank Inspection Panel. The ILC could identify best practices, set international minimum standards, and/or even draft the procedural rules of institutional mechanisms.

Finally, the fourth issue mentioned by Michael Wood concerns the admissibility of claims, arising after a dispute settlement mechanism is available. This mainly concerns the application of the customary rules concerning diplomatic protection and exhaustion of local remedies. The ILC could focus its work on transferring these rules from the domain of states to that of IOs.

Pitfall I: output

The main obstacle to the project will be IOs reaction. They were particularly critical of the project on international responsibility and one can expect the same reaction against the proposal of general frameworks that may lead to accountability for their action. SR Reinisch is particularly concerned (para. 27) with providing an output that will be welcomed and not ostracized by IOs. He acknowledged their diversity and stressed that "adopting a uniform outcome, in particular in the form of draft articles, might not be appropriate". This is an interesting change of strategy for the ILC engagement with IOs, which has an important impact on the proposed output.

In particular, SR Reinisch contended that the ILC should not develop new provisions and limit his scope "to analyse the *status quo* and to make carefully weighted recommendations for the settlement of disputes that are apt to be taken into consideration by generally". Following the recent practice of the Commission, he proposes to elaborate a set of guidelines, 'a *vade mecum*, a 'toolbox' in which [addressees] should find answers to the practical questions' (p. 36, para. 4). After focusing on the sources of international law (reservations, customary law, *jus cogens*, to mention a few), the ILC is expanding its 'Codification by Interpretation' to issues concerning non-state actors. The apparent reason is to reassure IOs of the recommendatory nature of its work and seek their engagement, but it might be challenging to adapt this approach to a field in need of progressive development, in which there is not much to interpret.

Despite the capacity of the ILC to draft the best possible guidelines, the success of the project will depend on IOs reactions and the pressure by civil society to finally adopt effective dispute settlement mechanisms. IOs may welcome the careful approach adopted by SR Reinisch, but it might be difficult to find an equilibrium between satisfying IOs requests and providing a useful output. The engagement of IOs will be essential for the success of the project, but it can also represent its most formidable challenge.

Pitfall II: disputes of private law character

Reinisch's first report is purposely open on the scope of the work, postponing to a future decision of the Commission the precise types of disputes that should be addressed (para 19). Learning from past criticisms concerning the engagement of IOs with the ILC, the first step of the SR was to ask them (and states) which kind of disputes they have encountered, distinguishing between: "a) disputes between international organizations, b) disputes between international organizations and States and c) disputes between international organizations and private parties, including individuals and legal persons, such as corporations or associations". It appears that their answers will be pivotal for determining the precise scope of the project.

The inclusion of disputes between IOs and private subjects (also referred by the ILC as 'private law character') was explicitly mentioned by the General Assembly (para. 238), after Wood's syllabus referred its inclusion to a future decision of the Commission (para. 3). SR Reinisch shared the importance of including this category, which represent the most frequent types of disputes involving international organizations. The ILC even agreed to eliminate the adjective 'international' from the name of the project, indicating its intention to discuss all kind of disputes (draft guideline 2 (b)).

However, the use of the expression 'private law character' may cause confusion, especially if it is equated to 'dispute with private parties'. The questionnaire sent to states and IOs (para 7) defines this category as including contractual disputes with service providers or other procurement (which most likely fall under domestic law), labour disputes with employees (traditionally considered institutional law), and extra contractual disputes caused by harmful activities attributable to international organizations (most likely under international human rights law, but also under certain institutional rules, if existent). In the current context of impunity for the activities of international organizations harming individuals, this last category is going to be the most challenging but also the most important of the project.

'Private law character' refers to the obligation included in the Convention on the Privileges and Immunities of the United Nations (UN) to provide appropriate modes of settlement for 'Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party' (Article VIII, section 29). However, the UN rejected a claim for compensation by residents of internally displaced person camps for harmful activities attributed to the organization because they "do not constitute claims of a private law character and, in essence, amount to a review of the performance of UNMIK's mandate". It used the same argument to reject the reparation claims for the cholera outbreak in Haiti. In this context, an ILC definition of what constitutes a dispute of a private law character will be extremely important.

Pitfall III: *lex specialis*

Without the need of a crystal ball, IOs will stress that they are too diverse to identify guidelines valid for all and that institutional regimes are *lex specialis* in relation to anything the ILC may produce (para. 26). They will demand the inclusion of a caveat at the beginning of the set of guidelines to stress the primacy of institutional regimes and defuse any recommendation that may imply external control (and accountability) for their actions.

IOs abuse the *lex specialis* argument in the absence of a theoretical debate on their legal nature. For instance, the International Monetary Fund referred to the absence of an institutional order separate from international law to exclude any relevance of the ILC general articles on responsibility in favor of the primacy of its institutional *lex specialis* (p. 9, para. 2). Conversely, the European Union (EU) relied on the development of a peculiar self-contained legal system to claim that (para. 18) special rules of attribution (applicable also against non-members) should apply to 'transform' member states conduct into EU conduct.

These inconsistent arguments cannot be tackled without engaging with legal theory and the capacity of IOs to develop legal systems separated but linked to international law. On the opposite, the ILC is stuck with definitional issues by reproposing the debate (p. 4) on whether international legal personality should figure among IOs essential elements. It does not tackle the theoretical implications of IOs legal nature, which inform fundamental practical questions such as their capacity to derogate from international law.

There can be no doubt that institutional *lex specialis* does not affect disputes involving non-member states in the absence of their consent. For instance, the EU's division of competences cannot affect disputes with a third state for illegal fishing, as ITLOS contended. In this context, the creation of international mechanisms of dispute settlements open to IOs remains the priority.

Institutional regimes may or may not impose an obligation to refer disputes with/between member states to institutional mechanisms. The ICJ heard cases involving ICAO's acts as bilateral disputes, while EU member states have the obligation to not submit a dispute concerning the interpretation or application of the EU Treaties to non-institutional dispute settlement mechanisms (Article 344). There is no *a priori* rule under which all disputes involving a member state should be settled within the institutional regime, and both institutional and international dispute settlement mechanisms might be available.

Concerning disputes with private subjects, they may fall under institutional or international mechanisms (or both) depending on the applicable law. In this context, the ILC has the authority to identify international minimum standards of institutional dispute settlement mechanisms, particularly concerning underdeveloped or inexistent mechanisms to settle disputes with individuals.