

INTERNATIONAL &  
COMPARATIVE  
LAW  
QUARTERLY



Volume 51, Part 1

Offprint

OXFORD  
UNIVERSITY PRESS

BIICL  
THE BRITISH INSTITUTE OF  
INTERNATIONAL AND  
COMPARATIVE LAW

# INTERNATIONAL ORGANISATIONS AND IMMUNITY FROM JURISDICTION: TO RESTRICT OR TO BYPASS

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The development of international organisations and the increasing significance of their role in a wide range of fields, has put at issue the adequacy of the rules governing their operation, with regard to the needs of modern justice. In particular, the question of the scope of the immunity from jurisdiction of international organisations is the subject of some debate, as the multiplication of disputes involving international organisations has led courts to address this topic with increasing frequency.<sup>1</sup>

At present, the need to protect international organisations is still considered to be the main concern when it comes to the regulation of their immunities. This was also the case for some time for States, until it became widely acknowledged that States could submit to the jurisdiction of their own courts and, subsequently, that they could submit to the jurisdiction of courts of other States, in an increasing range of circumstances.

This evolution was not entirely predictable in relation to States, judging from the writings and case law of the nineteenth and early twentieth century. It was frequently held at that time that no distinction could be made on the basis of the nature of the activities of the State, since the State's activities, by definition, involved the exercise of its sovereignty. Even for those acts that could be performed by private persons, it was considered impossible to bring a State before domestic courts without striking an intolerable blow to its dignity.<sup>2</sup> Nonetheless, the expansion of the prerogatives of States, the corresponding increase in the number of disputes involving States, and the reinforcement of the

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<sup>1</sup> This situation was discussed, as early as in 1965, in a Memorandum of the Government of the United Kingdom on the privileges and immunities of international organisations and persons connected with them, which led to a report on the same subject by the Council of Europe (for the text of the Memorandum of the Government of the United Kingdom and the Council of Europe's explanatory report, see COUNCIL OF EUROPE, PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANISATIONS (1970), hereinafter 'Council of Europe Report'). As noted in the report of the various privileges and immunities granted to organisations, 'those which are most open to criticism are immunities from jurisdiction' (Council of Europe Report, at 71).

<sup>2</sup> For a clear statement of this principle, see, eg, the decision by the US Supreme Court in *The Schooner Exchange v McFaddon*, 7 US 116, 137 (1 Cranch).

principle of legality, ultimately led to the abandonment of this unsophisticated conception of the requirements of sovereignty.<sup>3</sup>

Today, the conditions exist for the regime of immunity of international organisations, in turn, to undergo a major evolution. Just as the reinforcement of the authority of the State made possible its submission to the rule of law, so international organisations have achieved a sufficiently solid foundation in the international legal order for private persons to be able to have their disputes with those organisations heard, when this is required by the imperatives of justice.

Nonetheless, the dominant case law still does not follow this approach. Relying either on the convention creating the organisation, or on the headquarters agreement between the organisation and the host State,<sup>4</sup> or, less frequently, on customary law,<sup>5</sup> judges generally consider themselves bound to grant immunity to an organisation that requests it. The benefit of such immunity may be refused in some cases. For instance, it may be refused on the basis that the organisation waived its immunity, although such waiver is rare.<sup>6</sup> Alternatively, it may be refused because the State before whose courts the matter has been brought is not a party to the convention creating the organisation, and the judge does not feel bound to grant immunity on the basis of a customary rule.<sup>7</sup>

Academic writing equally takes a highly classical approach to analysing the scope of the immunity from jurisdiction of international organisations. On the basis that this immunity is most often 'instituted without any restriction or exception', it is generally considered to be 'erroneous to attempt to interpret conventions granting immunity from jurisdiction [to international organisations] by attributing to the relevant provisions the meaning that the restrictive conception of immunity, now accepted by a number of States, attributes to the immunity from jurisdiction of States'.<sup>8</sup> In other words, according to this

<sup>3</sup> On this issue, see generally, Isabelle Pingel-Lenuzza, *LES IMMUNITÉS DES ÉTATS EN DROIT INTERNATIONAL* 17 et seq (1998).

<sup>4</sup> See, eg, 22 June 1995, Swiss Fed Trib, *F SA v G.*, unpublished, partially reproduced in 1996 *REVUE SUISSE DE DROIT INTERNATIONAL ET DE DROIT EUROPÉEN* [REV SUISSE DR INT ET DR EUR] 657; see also the 21 Nov 1990 decision of the Supreme Court of Austria, summarised in 120 *JOURNAL DU DROIT INTERNATIONAL* [JDI] 388 (1993).

<sup>5</sup> See, eg, the decision by the Supreme Court of The Netherlands, 20 Dec 1985, *AS v Iran—United States Claims Tribunal*, 94 *ILR* 321.

<sup>6</sup> On this point, see Jean Duffar, *CONTRIBUTION À L'ÉTUDE DES PRIVILÈGES ET IMMUNITÉS DES ORGANISATIONS INTERNATIONALES* 68 et seq (1982).

<sup>7</sup> See CA Paris, 13 Jan 1993, *CEDA O v. BCCI*, 120 *JDI* 353 (1993), and note by Ahmed Mahiou.

<sup>8</sup> Christian Dominicé, *L'arbitrage et les immunités des organisations internationales*, in *ÉTUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE* 483, 487 (Christian Dominicé et al eds, 1993) (our translation). By the same author, see *L'immunité de juridiction et d'exécution des organisations internationales*, *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW*, vol 187, Year 1984, Part IV, at 145. For a similar approach, see Ignaz Seidl-Hohenveldern, *L'immunité de juridiction et d'exécution des Etats et des organisations internationales*, 1 *DROIT INTERNATIONAL* 109, 161–2 (1981); Panayotis Glavinis, *LES LITIGES RELATIFS AUX CONTRATS PASSÉS ENTRE ORGANISATIONS INTERNATIONALES ET PERSONNES PRIVÉES* 122 (1990).

theory, the immunity from jurisdiction of States has become relative, whereas that of international organisations has remained absolute, barring exceptions allowed under specific provisions<sup>9</sup> mandated by the nature of the organisation or of the dispute in question.

Such absolute protection would not be objectionable, from the point of view of ensuring access to justice for private persons dealing with the organisation, so long as the applicable rules (whether contained in a constitutive instrument, headquarters agreement, or an ad hoc treaty) provide for the equitable resolution of disputes by means other than recourse to national courts.<sup>10</sup> For disputes between the organisation and its agents, such means might include recourse to internal organs of the international organisation, such as the Administrative Tribunal of the United Nations. Equally, disputes between the organisation and third parties might be resolved by recourse to international arbitration.<sup>11</sup> According to the dominant theory, it is the existence of these alternative means of dispute resolution that justifies maintaining the absolute character of the immunity of international organisations, for the reason that they neutralise this absolute character.<sup>12</sup>

Nonetheless, courts do, on occasion, grant the benefit of immunity in the absence of any existing or practicable alternative means of recourse.<sup>13</sup> Moreover, where such recourse does exist, but a dispute arises over its implementation, the organisation in question may invoke its immunity to avoid the procedures intended to ensure the smooth functioning of that form of recourse. Thus, where recourse to international arbitration is chosen to counterbalance the immunity of an international organisation from jurisdiction, there is a risk

<sup>9</sup> See, eg, IBRD CHARTER Art. VII, para 3, the EUROPEAN INVESTMENT BANK CHARTER, Art 29, or Art 4(1) of the *Protocol on the privileges and immunities of the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT)* of 1 Dec 1986, United Nations, *Treaty Series*, vol 1522, at 161. For an overview of exceptions to immunity, see Duffar, above n 6, at 63 et seq; see also the International Law Commission's Fourth Report on relations between States and international organisations, UN Doc A/CN.4/424 (24 Apr 1989), *Yearbook of the International Law Commission*, 1989, Vol II (Part One), 153, at 160 et seq.

<sup>10</sup> On this issue, see Philippe Kahn's commentary following CA Paris, 18 June 1968, *Dame Klarsfeld v Office franco-allemand pour la jeunesse*, 96 JDI 671, 673 (1969).

<sup>11</sup> For further detail, see below Part II (B).

<sup>12</sup> Following this approach, see Swiss Fed Trib, 30 Oct 1996, partially reproduced in 1997 REV SUISSE DR INT ET DR EUR 668. See also Jean-Flavien Lalive, *L'immunité de juridiction des Etats et des organisations internationales*, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, vol 84, Year 1953, Part III, at 303; Glavinis, above n 8, at 125.

<sup>13</sup> See, eg, in France, Cass 1e civ, 6 July 1954, *Procureur général près la Cour de cassation v Sté immobilière Alfred Dehodencq*, 83 JDI 136 (1956), and note by Jean-Baptiste Sialelli; Cass 1e civ, 14 Nov 1995, *Hintermann v Union de l'Europe occidentale*, 124 JDI 141 (1997), and note by Christian Byk; 85 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [RCDIP] 337 (1996), and note by Horatia Muir-Watt. In the second case, the *Cour de Cassation* granted immunity to the Western European Union, refusing to hear the claim for payment of indemnities brought by its former Secretary-General. It justified this position by referring to the need to refrain from 'gravely perturbing the law of international relations by reducing to nearly nothing the jurisdictional privileges and immunities of the international organisations of which France is a member' (RAPPORT DE LA COUR DE CASSATION 418-19 (1995) (our translation)). In the United States, see *Mendaro v World Bank*, 717 F.2d 610 (DC Cir 1983).

that immunity will be invoked should difficulties arise in the constitution of the arbitral tribunal or in the event that a party challenges the tribunal's award.

This situation is clearly unsatisfactory. If it is truly to be reformed, the law of international organisations cannot long avoid addressing the question of how to balance the scope of the immunity from jurisdiction of international organisations with the functioning of alternative means of dispute resolution. One cannot justify the absolute character of immunity by reference to the existence of alternative means of dispute resolution and, at the same time, allow immunity to interfere with the proper functioning of the mechanisms that are supposed to counterbalance it. To overcome this contradiction, the following alternatives are available: restricting the scope of the immunity of international organisations (I); or reinforcing the effectiveness of alternative means of dispute resolution, where such organisations have agreed to submit to them (II).

#### I. RESTRICTING THE SCOPE OF IMMUNITY FROM JURISDICTION

The immunity from jurisdiction of international organisations is generally analysed by comparison with the immunity of States.<sup>14</sup> The principal argument advanced to justify the differences in nature between the two is that international organisations have no territory. Their independence can, therefore, only be guaranteed by a strict approach to their immunity, in particular with respect to the courts of the State in which their headquarters are located. It has been observed that the organisation must benefit 'in any event from some degree of protection at the place of its seat, which can be guaranteed by immunity formulated in relatively broad, if not absolute, terms'.<sup>15</sup> Various judicial decisions reflect this idea, typically framing it as a fundamental principle.<sup>16</sup>

Such line of reasoning embraces in absolute terms both the existence and the scope of immunity of international organisations. One could reasonably concede that the recognition of immunity to an international organisation which lacks territory and is established on the territory of a State is justified primarily by the necessity of precluding any undue interference by the host State in the activities of that organisation. Generally, no organisation could fulfil its mission if it was submitted to the jurisdiction of national courts for all of its activities. It is however difficult to see why respect for the functional autonomy

<sup>14</sup> For this type of presentation, see, eg, Glavinis, above n 8, at 120 et seq. See also Philippe Cahier, *Commentaire de l'article 105*, in LA CHARTE DES NATIONS UNIES—COMMENTAIRE ARTICLE PAR ARTICLE 1397, 1401–2 (Jean-Pierre Cot, Alain Pellet (eds), 1991).

<sup>15</sup> Dominicé, above n 8, at 487 (our translation). Similarly, see Richard J. Oparil, *Immunity of International Organizations in United States Courts: Absolute or Restrictive?*, 24 VAND J TRANSNAT'L L 689, 710 (1991).

<sup>16</sup> See Swiss Fed Trib, 21 Dec 1992, *Groupement Fougerolle & Consorts v CERN*, 2 BULLETIN DE L'ASSOCIATION SUISSE D'ARBITRAGE [BULL ASA] 259 (1993); 1994 REVUE DE L'ARBITRAGE [REV ARB] 175, and note by Panayotis Glavinis. See also Geneva Surveillance Authority for Debt Recovery and Bankruptcy Matters, 9 Apr 1997, 1999 REV SUISSE DR INT ET DR EUR 656.

of an international organisation should necessarily entail the exclusion of the jurisdiction of national courts, irrespective of the nature of the acts of that organisation. While it is important that disputes that might affect the exercise of an international organisation's essential prerogatives remain outside the reach of national courts, this is not the case for all disputes involving these organisations. The case law has progressively accepted that the independence or sovereignty of a State is not endangered when the State is brought before domestic courts for a dispute arising from a *jure gestionis* act. Similarly, the independence of an international organisation would not be endangered if it too had to submit to the jurisdiction of local courts, in respect of comparable disputes.

If one accepts that there is no theoretical obstacle to the restriction of the immunity from jurisdiction of international organisations, the question remains whether such a restriction is appropriate (A) and, if so, under what conditions this restriction should be implemented (B).

#### A. *The Appropriateness of the Restriction*

There can be no doubt that it is appropriate to restrict the immunity from jurisdiction of international organisations where the functioning of the organisation is not at issue. Adopting the opposite view would privilege the protection of the institution over all other considerations. As a necessary consequence, it would also deny the fundamental right of access to justice guaranteed to all private persons. It is regrettable that the European Court of Human Rights, when faced with a dispute involving the European Space Agency (ESA) in the case of *Beer and Regan v Germany*, did not affirm more clearly that only particularly convincing reasons could justify subordinating the principle of access to justice to the immunity of the organisation.<sup>17</sup>

In that case, two employees, of German and British nationality respectively, were placed at the ESA's disposal by two private companies to perform various services at the European Space Operations Center (ESOC) run by the organisation in Darmstadt, Germany. After the termination of their contract, both employees brought actions against the ESA before the courts of Darmstadt, claiming that they had acquired the status of agents. The Darmstadt court declared the requests inadmissible, relying on the defendant's immunity from jurisdiction.<sup>18</sup> Invoking the former Article 25 of the European

<sup>17</sup> European Court of Human Rights, *Beer and Regan v Germany*, Judgment of 18 Feb 1999, Case No 28934/95, unpublished but accessible on the Council of Europe's Website, <<http://www.echr.coe.int>> [hereinafter the Decision]; see also the decision of the same date rendered on the same terms in *Waite and Kennedy v Germany*, Judgment of 18 Feb 1999, *Reports of Judgments and Decisions* 1999-I, at 393. For a critique, not unexpected, of this case law and that of the European Commission on this issue, see Jean-François Flauss, *Contentieux de la fonction publique européenne et Convention européenne des droits de l'homme*, in *LE DROIT DES ORGANISATIONS INTERNATIONALES—RECUEIL D'ÉTUDES À LA MÉMOIRE DE JACQUES SCHWOB* 157, 162 et seq (1997).

<sup>18</sup> On the basis of the case law of the Federal Labour Court, holding that the immunity granted to the ESA was not contrary to the fundamental principles of German constitutional law, see the

Convention on Human Rights, the claimants then referred to the European Commission on Human Rights the question of whether the German State, whose courts had granted immunity to the organisation in question, had violated Article 6§1 of the European Convention. That article provides that '[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.<sup>19</sup>

In its report of 2 December 1997,<sup>20</sup> the Commission expressed its opinion, by 17 votes to 15, that there had been no violation of the Convention. The Court unanimously reached the same conclusion.<sup>21</sup> After recalling the existence of a right of access to the courts,<sup>22</sup> with reference to the *Golder* case, the Court noted that this right was not absolute: contracting States have a certain degree of discretion in this field. The Court simply has to assure itself that the limitations in question did not restrict access to the courts 'in such a way or to such an extent that the very essence of the right is impaired', that these limitations had a legitimate goal, and that the means used were proportionate to the goal sought.<sup>23</sup> The Court concluded that these conditions had been fulfilled in the present case.

In justifying the legitimacy of the measure taken by the German State, the Court observed that 'the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments'.<sup>24</sup> This principle cannot be challenged in itself. However, it

*Waite and Kennedy* case decided in 1999 and referred to in *Beer and Regan*, above n 18, at para 15. The claimants did not appeal the decision of the Darmstadt court. On the fact that there were no local remedies to exhaust in that case prior to referral to the Commission, see the Decision on Admissibility, 24 Feb 1997, No 28934/95. More generally, and on the question of what constitutes exhaustion of local remedies under the European Convention on Human Rights, see Frédéric Sudre, *DROIT INTERNATIONAL ET EUROPÉEN DES DROITS DE L'HOMME* 381, 385–6 (1999).

<sup>19</sup> The case was brought before the Commission after an amicable settlement had been reached between the employees and the companies that had hired them. The question was raised by commentators, but not examined by the Court, whether the settlement had put an end to their status as victims (see the commentary by Paul Tavernier, 127 *JDI* 102, 103 (2000)).

<sup>20</sup> Unpublished, but accessible on the Council of Europe's Website, <<http://www.echr.coe.int>>.

<sup>21</sup> On the grounds that its task was not to substitute itself for the domestic jurisdictions (Decision, above n 18, at para 44), the Court did not examine in this case the claimants' argument that the German courts should have applied Art 6 s 2 of the ESOC Agreement, providing for the lifting of its immunity for certain disputes concerning the staff of the Organization. Had the Court done so, it would have had to decide on issues concerning the succession of organisations, as the ESOC Agreement was concluded with the European Space Research Organisation (CERC), which preceded the ESA. The prudence of the Court on this point is regrettable, as it 'creates flaws in the analysis, neglects an essential factor of the case, and runs the risk of resulting in a denial of justice' (see commentary by Tavernier, above n 20, at 103 (our translation)).

<sup>22</sup> Decision, above n 18, para 48 and European Court of Human Rights, *Golder v United Kingdom*, Judgment of 21 Feb 1975, *Series A No 18*, paras 34–5 (1975).

<sup>23</sup> Decision, above n 18, at para 49.

<sup>24</sup> Decision, above n 18, at para 53. For a commentary on the Court's grounds for taking this position, see Isabelle Pingel-Lenuzza, *Autonomie juridictionnelle et employeur privilégié: Concilier les contraires*, 2000 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* [RGDIP] 446, 457–8.

does not prejudice the scope of the immunity that should be recognised for these organisations.

In determining that the restriction resulting from the immunity was proportionate, the Court relied on the existence of other ‘reasonable alternative means’ allowing for the adequate protection of the claimants’ rights. These alternative means were the possibility of bringing the case before the Board of Appeals of the ESA, which the Court treated as independent, and the possibility of bringing an action before the local courts against the companies that had placed the claimants at the ESA’s disposal.<sup>25</sup>

The fact that the claimants had been made available to the ESA by two private companies was a circumstance specific to the particular case. Putting that to one side, it is doubtful that the Court made an adequate assessment of the independence of the institution put in place by the organisation to resolve disputes.<sup>26</sup> One might also question whether the means of recourse that were available were effective, unless it is considered that the right of the claimants to refer the case to the Appeals Board, only to be refused the status of agent after having been refused access to the German courts, would be sufficient to satisfy the requirements of the Convention. Clearly, in the conflict between the right of access to the courts—which is expressly declared in the Convention’s text and is held by the Court itself to be fundamental—and the principle of the immunity of international organisations, the latter manifestly prevailed.<sup>27</sup>

However, this solution was not self-evident. There was hardly a risk that the functioning of a well-established organisation would be disrupted by the recognition of the right of staff members, who have not been accorded the status of agents, to refer any claims they might have to the jurisdiction of the State.<sup>28</sup> The Court might have been expected to affirm the claimants’ right more strongly.

A bolder approach would have recognised that it is necessary to limit the immunities that international organisations enjoy, in the same way that this was judged to be essential for States. It would then be necessary to determine the conditions in which such a restriction should be implemented.

<sup>25</sup> Decision, above n 18, at para 59.

<sup>26</sup> On the condition of independence of the court before which the case is brought under Art 6, para 1 of the Convention, see for example *Sudre*, above n 19, at 234 *et seq.*

<sup>27</sup> The reservation, stated in the Decision, pursuant to which ‘[i]t would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution’ (Decision, above n 18, at para 57), does not affect this analysis, although it could in certain cases allow the private party’s interests to prevail over those of the organisation.

<sup>28</sup> In other words, ‘it should be borne in mind that . . . [p]rivileges and immunities constitute a right not a courtesy’ (Fourth Report on relations between States and international organisations, above n 9, at 161). It is also accepted, as the General Assembly of the United Nations has stated, that ‘no privileges and immunities which are not really necessary should be asked for’, GA Resolution of 13 Feb 1946, A/Res/22A (I), s D.

*B. The Conditions of Implementation*

Choosing to limit the scope of the immunity from jurisdiction of international organisations entails both determining the method of limitation (1) and defining the relevant substantive principles (2).

(1) In terms of method, there are two conceivable solutions for limiting the scope of the immunity granted to international organisations. The first is recourse to a multilateral convention applicable to all categories of organisations. The second is leaving the matter to the headquarters agreement or to other specific instruments, such as the treaty regulating the immunities of the United Nations.<sup>29</sup>

The multilateral agreement option presents the unquestionable advantage of increasing the predictability of results. It would also contribute to the elaboration of a general theory of international organisations, which is lacking in this respect.<sup>30</sup> However, it has been argued, to the contrary, that the standardisation of the applicable rules is 'not necessary or desirable', in light of the diversity of organisations and their equally diverse needs in terms of immunity.<sup>31</sup> Although this argument is not irrefutable—diversity justifies codification even if it does not facilitate its use—it explains, in part, the decision of the International Law Commission of the United Nations to abandon its work on this topic,<sup>32</sup> thereby limiting the chances of any multilateral solution in the short term.

(2) On a substantive level, limiting the immunity from jurisdiction of international organisations would depend on the resolution of two series of questions.

As a first step, it must be decided whether disputes involving international organisations and their staff members should be distinguished from those

<sup>29</sup> See UN CHARTER Art 105; see also General Convention on the Privileges and Immunities of the United Nations, 13 Feb 1946, United Nations, *Treaty Series*, vol 1, at 15. For a commentary on these provisions and a position, quite isolated at the time, in favour of restricting the immunity of international organisations, see Nguyen Quoc Dinh, *Les privilèges et immunités des organismes internationaux d'après les jurisprudences nationales depuis 1945*, 3 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [AFDI] 262 (1957).

<sup>30</sup> On the 'tendency to standardize' the regime of immunity of organisations since the Second World War, see André Lewin, *Principes communs aux organisations internationales—Statut juridique*, JURIS-CLASSEUR DROIT INTERNATIONAL, Fasc 112–13, para 31 (1989).

<sup>31</sup> Council of Europe Report, above n 1, at 15. As a result, for example, the United Nations, which has political functions and liable to come under pressure, would have extended immunity, whereas 'in the case of a small organisation with purely administrative functions . . . there might be no good reason for excluding the jurisdiction of the local courts' (Council of Europe Report, above n 1, at 27). The Fourth Report on relations between States and international organisations also takes this view (above n 9, at 160 et seq).

<sup>32</sup> Eight reports were submitted between 1977 and 1991 on the Relations between States and international organisations, before the International Law Commission concluded that it would be 'wise to put aside for the moment the consideration of a topic which does not seem to respond to a pressing need of States or of international organisations' (*Yearbook of the International Law Commission*, 1992, Vol II (Part One), at 53).

involving international organisations and third parties.<sup>33</sup> Case law suggests that such a distinction should be made, since it frequently emphasises the particular significance of disputes between organisations and their employees.<sup>34</sup>

It does not follow from the recognition of this specific category of case, however, that all disputes within the category should be removed from the jurisdiction of the local courts. A more nuanced conclusion is possible: that only those disputes concerning qualified staff, permanently employed by international organisations, should fall outside the jurisdiction of the national courts. This approach has been adopted in various court decisions rendered in Italy,<sup>35</sup> The Netherlands,<sup>36</sup> and France,<sup>37</sup> and is comparable—although not identical—to the approach adopted by the Court of Justice of the European Communities.<sup>38</sup>

It is also important to determine criteria for the exclusion of immunity in relation to disputes between international organisations and third parties. One option would be to apply to international organisations the distinction between *jure gestionis* and *jure imperii* acts, used for acts of States. The case law is inconclusive on this point.<sup>39</sup> Most authors do not favour this approach, either because they consider that the immunity of international organisations should

<sup>33</sup> Cf, on this point, the position of Horatia Muir-Watt, note following the French *Cour de Cassation*'s Decision of 14 Nov 1995, above n 13, at 340.

<sup>34</sup> *Mendaro*, above n 13, in which the Court of Appeals for the District of Columbia Circuit emphasized that 'one of the most important protections granted to international organisations is immunity from suits by employees of the organisation in actions arising out of the employment relationship', *Mendaro*, 717 F.2d at 615.

<sup>35</sup> See, eg, *Corte di Cassazione*, 8 Apr 1975, Di Banella Schirone, 77 ILR 572. For an overview of the position of the Italian Courts, see Antonio Cassese, *L'immunità de jurisdiction civile des organisations internationales dans la jurisprudence italienne*, 30 AFDI 556 (1984).

<sup>36</sup> See *AS v Iran–United States Claims Tribunal*, above n 5, at 321.

<sup>37</sup> See CA Paris, 27 Jan 1999, *Béatrice Refievna v Union Latine*, unpublished. According to this decision, 'given the nature of her functions as a publications assistant, Béatrice Refievna only gathered, sorted, formatted and set up information and databases concerning the Union Latine, involving no particular responsibility in the exercise of a public service, such that the acts of the latter, in particular her dismissal, were of a managerial nature not covered by immunity from jurisdiction' (our translation). Compare the earlier, but more classic position of the French *Cour de Cassation* in *Hintermann*, above n 13.

<sup>38</sup> According to the applicable texts, the Court of Justice of the European Communities has jurisdiction over disputes concerning officials and other servants (temporary staff, auxiliary staff, and special advisers). The courts of the member States have jurisdiction over disputes concerning local staff (under contract for specific tasks or services). On this question generally, see, eg, Guy Isaac, *DROIT COMMUNAUTAIRE GÉNÉRAL* 91–2 (1998).

<sup>39</sup> For the application of this distinction in disputes between staff members and international organisations, see for example Italian *Corte di Cassazione*, 8 Apr 1975, above n 36, and *Corte di Cassazione*, 8 June 1994, *Nacci v Bari Institute of the International Centre for Advanced Mediterranean Agronomic Studies*, 114 ILR 539. See also *AS v Iran–United States Claims Tribunal*, above n 5. Against such a distinction, on the basis that the immunity of international organisations is absolute, see, eg, Swiss Fed Trib, 22 June 1995, *F. SA v G.*, above n 4. Similarly, see the 28 Feb 1994 memorandum of the International Public Law Section of the Swiss Federal Department of Foreign Affairs, 1995 REV SUISSE DR INT ET DR EUR 596.

be absolute,<sup>40</sup> or because they judge that the proposed distinction is inadequate. Those who find the distinction inadequate would generally prefer an analysis that would take better account of the needs of the organisation, by distinguishing those acts performed in connection with the function of the organisation from those which are not,<sup>41</sup> or those acts which are part of the mission of the organisation from those which are not.<sup>42</sup> Although this approach appears to be better suited for international organisations, it might result in immunity being granted to international organisations in all circumstances, given that international organisations will always be deemed to act within the scope of their duties.

As a result, the question remains of what criteria would readily permit a distinction to be made between the various types of acts performed by international organisations. At the very least, even without reasoning strictly by analogy, one may conclude that 'the changing doctrine of sovereign immunity and in particular the more restrictive approach to the commercial activity of foreign sovereigns will inevitably have an impact on the way national courts view the activities of international organisations'.<sup>43</sup>

As long as these questions are not regulated by a comprehensive codification or, at least, certain minimum general provisions, the balancing of the rights of the parties can only be guaranteed by the existence of dispute resolution mechanisms other than recourse to national courts. Indeed, it is the existence of these mechanisms which justifies the survival of the current approach to the immunity of international organisations, both in academic writing<sup>44</sup> and in the majority of the relevant judicial decisions,<sup>45</sup> as reflected by the decision of the European Court of Human Rights in *Beer and Regan v Germany*. However, under current law, a private party's access to the courts is not systematically guaranteed. Bypassing the obstacle of immunity therefore necessarily entails reinforcing the effectiveness of alternative means of dispute resolution.

<sup>40</sup> See, eg, Cahier, above n 14, at 1041–2, criticising an Italian decision for refusing to grant immunity to the FAO on the basis that an international organisation should not have immunity superior to that of States.

<sup>41</sup> See Fourth Report on relations between States and international organisations, above n 9, at 157–8.

<sup>42</sup> See Ahmed Mahiou, note following TGI Paris, 4 Dec 1991, *CEDA O v BCCI*, 119 JDI 693, 704 (1992).

<sup>43</sup> Cited in Fourth Report on relations between States and international organisations, above n 9, at 161. The Report of the Council of Europe suggests the same conclusion, defining a series of possible exceptions to the regime of immunity from jurisdiction of international organisations that is similar to that applicable to States (Council of Europe Report, above n 1, at 24).

<sup>44</sup> See, eg, David Ruzié, note following *Conseil d'Etat*, 25 July 1986, *M. Girod de l'Ain et autres*, 1986 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 956, 960. See also Blaise Knapp, *Les privilèges et immunités des organisations internationales et de leurs agents devant les tribunaux internationaux*, 1965 RGDIP 615, 622.

<sup>45</sup> In France, see, eg, Cass Soc, 24 May 1978, *Bellaton v Agence spatiale européenne*, 1978 BULL CIV V, No 392.

## II. REINFORCING THE EFFECTIVENESS OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION

International organisations have established various alternative means of dispute resolution to settle disputes to which they are parties.<sup>46</sup> Depending on the type of organisation and the nature of the dispute in question, these might involve recourse to an internal organ of the organisation, often of a specialised nature, or recourse to an external entity, such as an arbitral tribunal. The effectiveness of each of these means of dispute resolution—which constitutes the justification for maintaining an expansive approach to the immunity of international organisations—depends on a number of very different factors. These will be discussed in turn.

### *A. Reinforcing the effectiveness of internal dispute resolution mechanisms*

One of the types of dispute to which an international organisation is likely to be a party is a dispute involving members of its staff, in particular, civil servants.<sup>47</sup> A number of mechanisms have been established to resolve such disputes, particularly within the larger organisations.<sup>48</sup> These are generally in the form of permanent entities, which may be specialised in disputes involving international civil servants, such as the Administrative Tribunals of the United Nations, of the International Monetary Fund, or of the Council of Europe,<sup>49</sup> respectively, or have a broader competence, such as the Court of First Instance of the European Communities.

In order to effectively counterbalance immunity from jurisdiction, recourse to these entities must offer adequate guarantees to claimants. In particular, maintaining immunity will only be justified if the organism entrusted with the resolution of the dispute is both independent and impartial. It is regrettable that, when the European Court of Human Rights was required to rule on the question of

<sup>46</sup> Not all organisations have established these. This is why, in its resolution on contracts concluded between international organisations and private persons adopted in Oslo in 1977, the International Law Institute stated that such contracts should provide for the resolution of any resulting disputes by an independent entity. Three means are suggested: institutional or *ad hoc* arbitration; recourse to a tribunal established by an international organisation; or recourse to a national court (Arts 7 and 8).

<sup>47</sup> On this question generally, see Alain Pellet, *LES VOIES DE RECOURS OUVERTES AUX FONCTIONNAIRES INTERNATIONAUX* (1982); Société Française pour le Droit International, *LE CONTENTIEUX DE LA FONCTION PUBLIQUE INTERNATIONALE* (1996).

<sup>48</sup> For a rare example of recourse to arbitration for the resolution of disputes concerning the staff of an organisation, see David Ruzié, *Le recours à l'arbitrage dans le contentieux de la fonction publique internationale: L'exemple du personnel local de l'U.N.R.W.A.*, 113 JDI 109 (1986).

<sup>49</sup> For a detailed analysis of the functioning of these tribunals, see, eg, Nassib Ziadé, *Some Practical Issues Arising in International Administrative Tribunals*, THE WORLD BANK ADMINISTRATIVE TRIBUNAL 1980–2000 (20th Anniversary Conference, 16 May 2000), to be published in the Proceedings of the 20th Anniversary of the Administrative Tribunal 1980–2000; Chittharanjan Felix Amerasinghe, *International Administrative Tribunals in the United Nations System*, in MANUEL SUR LES ORGANISATIONS INTERNATIONALES 206 et seq (R-J Dupuy (ed), 1998).

whether the immunity of the ESA could operate against employees put at the disposal of that organisation, without any violation of their rights under the European Convention, the Court did not verify whether the internal Appeals Board of the Agency was truly independent.<sup>50</sup>

This is not to say that the Appeals Board is independent or is not independent; but to emphasise that, unless the condition of independence is fulfilled, the principle of the right of access to the courts is not satisfied. Particular vigilance is required as a result, especially with regard to the appointment of judges.<sup>51</sup> Moreover, the question of appeals against decisions rendered by internal administrative tribunals remains outstanding,<sup>52</sup> as does that of the enforcement of those decisions, which is frequently difficult. Only when these questions have been answered satisfactorily can one consider that the effectiveness of internal dispute resolution mechanisms is sufficiently established to justify maintaining the immunity from jurisdiction of international organisations.

### *B. Reinforcing the effectiveness of recourse to arbitration*

For the resolution of disputes involving third parties, international organisations often accept recourse to arbitration. However, this option will only constitute a true counterbalance to immunity from jurisdiction if it is allowed to function properly with respect to international organisations. It is important to note in this regard that, to be fully effective, recourse to arbitration may require the residual intervention of national courts. In particular, when a party acts in bad faith, recourse to national courts must be allowed, be it to assist in the setting up of the arbitral tribunal or to review the validity of the award. In both cases, the question arises as to whether an international organisation may invoke its immunity from jurisdiction at this stage.

It is not disputed that an organisation may waive its immunity from jurisdiction or that, by agreeing to an arbitration clause, the organisation waives the right to invoke its immunity before the arbitral tribunal. The only point of debate is whether the waiver also extends to litigation concerning the estab-

<sup>50</sup> See above, Part I (A).

<sup>51</sup> Commentators have sometimes criticized this method of appointment, which is the prerogative of intergovernmental organs and often leads to the appointment of senior civil servants. 'Without casting doubt on their independence with regard to the organisations . . . , it is questionable whether these senior civil servants are not liable to be more preoccupied by the desire to protect the funds of the organisations than to impose severe financial sanctions for manifest irregularities. The intervention, for the selection of judges, of an independent external authority (such as the International Court of Justice or the European Court of Human Rights) . . . would doubtless offer better guarantees of independence' (David Ruzié, *Rapport général*, in Société Française pour le Droit International, LE CONTENTIEUX DE LA FONCTION PUBLIQUE INTERNATIONALE, above n 48, at 18–19 (our translation)).

<sup>52</sup> On this question, see, in particular, Hubert Thierry, *Les voies de recours contre les jugements du tribunal administratif des Nations Unies et du tribunal administratif de l'O.I.T.*, in Société Française pour le Droit International, LE CONTENTIEUX DE LA FONCTION PUBLIQUE INTERNATIONALE, above n 48, at 121 et seq; Ruzié, above n 52, at 46 et seq.

lishment of the arbitral tribunal or the review of the arbitral award, before the courts of the seat of the arbitration or the courts of the place where the arbitral award will be enforced.

Regarding the establishment of the arbitral tribunal, the French courts have decided in very clear terms that the waiver of immunity covers any such litigation, in a case concerning UNESCO. In that case, the organisation refused to appoint an arbitrator even though it was bound by an arbitration agreement. Both the President of the Paris Tribunal of First Instance, to whom the case was referred on the basis of Articles 1444 and 1457 of the New Code of Civil Procedure,<sup>53</sup> and the Paris Court of Appeals, rejected an inadmissibility argument based on UNESCO's immunity. In very clear terms, the Court of Appeals observed that

the immunity from jurisdiction upon which UNESCO seeks to rely does not allow it to free itself from the *pacta sunt servanda* principle by refusing to nominate an arbitrator in compliance with the arbitration clause in the contract between it [and the claimant in the arbitration], on the grounds of the absence of a dispute as to the performance of the contract at issue, a question which is to be decided by the arbitrators alone; in addition, to allow [UNESCO's] objection would inevitably prevent [the claimant] from submitting the dispute to a judicial authority. This would be contrary to public policy in that it would constitute a denial of justice and a violation of the provisions of Article 6 §1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and should therefore lead the court—which is involved in this case only in support of the arbitration—to accept the claimant's request [to have the arbitral tribunal constituted with the assistance of the courts].<sup>54</sup>

Taken literally, this reasoning clearly goes too far. It is not that immunity should not be granted because it leads to a denial of justice, but that the waiver of immunity must be understood as encompassing any means that a party, having accepted the principle of recourse to arbitration, may attempt to invoke in order to hinder the arbitral process.<sup>55</sup> Nevertheless, the decision of the Paris Court of Appeals should be approved, since the organisation was required to respect an obligation to which it had freely consented.

Regarding the review of an award, the Swiss Federal Tribunal, in a dispute between a group of companies and CERN, the European nuclear research organisation, took a different approach from that of the French courts. It granted immunity to CERN on the basis that

<sup>53</sup> TGI Paris, 20 Oct 1997, *Boulois v UNESCO*, 1997 REV ARB 575, and note by Charles Jarrosson.

<sup>54</sup> CA Paris, 19 June 1998, *UNESCO v Boulois*, 1999 REV ARB 343 (our translation), and note by Charles Jarrosson.

<sup>55</sup> It should also be noted that, regrettably, the case law of the European Court of Human Rights is far more conservative than this holding of the Paris Court of Appeals. On this case law, see above, Part I (A). See also FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 645 (E Gaillard and J Savage (eds), 1999).

contrary to the situation of States, the submission of an international organisation to an arbitration agreement does not entail a waiver of its immunity. The arbitration in which it participates shall be shielded from any intervention of the national courts, unless the organisation waives its immunity or its headquarters agreement provides otherwise, or if the organisation accepts that the arbitration be governed by a national law, usually the law of the seat. (Dominicé, RCADI, 1984, p. 204). Only where the arbitration refers to a national law can the national courts potentially intervene in the proceedings. However, such reference is, in practice, never made by the major international organisations (Dominicé, RCADI, 1984, p. 182).<sup>56</sup>

This decision is unconvincing. No support is given for the holding that the scope of the waiver of immunity resulting from the acceptance of an arbitration agreement should vary according to whether it concerns the immunity of States or that of international organisations. Even if one accepted that the scope of the immunity of States should be distinguished from that of international organisations, this would not necessarily mean that the effects of a waiver should be different in each case. To the extent that it is accepted in both cases that the beneficiary of the immunity may waive that immunity, it is difficult to envisage a waiver resulting from an arbitration agreement having different effects.

The issue here is not the immunity itself or its scope, but the effects of a party's acceptance of an arbitration agreement. For States, the agreement to submit disputes to arbitration is understood to encompass an implicit acceptance of the mechanisms enabling the proper functioning of the arbitral proceedings. It is for this reason that the waiver of immunity resulting from the acceptance of an arbitration agreement is deemed to cover ancillary proceedings as well.<sup>57</sup> This reasoning has nothing to do with the nature of immunity and should, therefore, apply in the same way to both international organisations and States. By seeking to ensure that arbitration is 'shielded from any intervention of the national courts', the Federal Tribunal left open the possibility that an international organisation, having previously agreed to submit to arbitration, might subsequently avoid this obligation, for example, by refusing to appoint an arbitrator. This would call into question the very essence of the organisation's consent to submit to arbitration. It follows that the waiver resulting from an arbitration agreement cannot be understood in this way.

A similar analysis applies to the challenge of an award. In this case, ensuring that arbitration is 'shielded from any intervention of the national courts' would mean attributing to the parties the intention, for example, that a violation

<sup>56</sup> Swiss Fed Trib, 21 Dec 1992, *Groupement Fougerolle & Consorts v CERN*, above n 16 (our translation).

<sup>57</sup> See, eg, Cass 1e civ, 18 Nov 1986, *Yougoslavie v SEEE*, 114 JDI 120 (1987), and note by Bruno Oppetit; 76 RCDIP 786 (1987), and note by Pierre Mayer. On this question, see also the commentary by Berthold Goldman following CA Paris, 12 July 1984, *République Arabe d'Égypte v SPP*, 112 JDI 129, 145 (1985), noting that by accepting to submit to arbitration, the State must have accepted in good faith to submit to all ancillary national procedures. Compare the commentary by Philippe Kahn following TGI Paris, 8 July 1970, *SEEE v Yougoslavie*, 98 JDI 131, 136 (1971).

of due process, or some other basis for setting aside the award, could be sanctioned by the courts at the request of the organisation, which would waive its immunity for this purpose, but not at the request of the private party, given the immunity of the organisation. This would mean that the parties had agreed to an arbitration that would fail to respect the condition of equality of the parties. Once again, if the question is addressed in terms of the interpretation of the intention of the organisation accepting recourse to arbitration, rather than in terms of the relative or absolute nature of immunity, which is irrelevant for this purpose, this result is unjustifiable.

The Federal Tribunal's attempt to temper the result by invoking the possibility that the organisation might specifically submit to a national arbitral procedure, which would constitute a waiver of immunity with respect to the national courts, is of little help. In fact, the choice of the seat of the arbitration is, in itself, sufficient to trigger the application of a regime providing for recourse to the national courts to ensure the proper functioning of the arbitral process. The requirement of an express reference to a national law, just like the requirement of a specific waiver or a waiver resulting from the headquarters agreement, is superfluous. The mere acceptance of arbitration could easily have been interpreted as signifying the acceptance of the regime that ensured that arbitration would function properly.

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At the beginning of the 1960s, it was still possible to state that 'in the present stage of development of international organisations', such organisations, unlike States, could not accept only limited immunities.<sup>58</sup> This is no longer the case today. Indeed, international organisations have become essential elements of the international legal order, as institutionalised cooperation has spread to virtually every field. As a counterpart to this power, the independence of international organisations would hardly be threatened either by a restriction of their immunity from jurisdiction or by the guarantee, for those with whom they come into contact, of access to justice in accordance with the standards of a state observing the rule of law.

<sup>58</sup> In favour of this approach, see Wilfred Jenks, *INTERNATIONAL IMMUNITIES* 40-1 (1961)