Provisional

For participants only

23 May 2023

Original: English

International Law Commission

Seventy-fourth session (first part)

Provisional summary record of the 3616th meeting

Held at the Palais des Nations, Geneva, on Friday, 28 April 2023, at 10 a.m.

Contents

Present:

Chair:	Ms. Oral
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Aurescu
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Tsend
	Mr. Vázquez-Bermúdez

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Settlement of international disputes to which international organizations are parties (agenda item 5) (*continued*) (A/CN.4/756)

Mr. Patel said that the arrival of the new quinquennium was marked by various precedents, including in terms of geographical representation on the Commission, with many of the new members hailing from Asian and African countries. They were sure to bring with them new ideas and a fresh impetus that would shape the Commission's work in the future. Nonetheless, Asia remained critically underrepresented on the Commission. There could be no justification for such a state of affairs, given that the inhabitants of Asia currently accounted for well over half the world's total population and the region was home to some of the world's oldest civilizations and legal systems. Not to address such an imbalance would damage the legitimacy, authority and credibility of the Commission. Mitigating that deficit should be one of the Commission's institutional goals for the quinquennium.

Another deficit that must be addressed related to multilingualism. According to one report, Hindi was the third most widely spoken language in the world after English and Mandarin Chinese. The Hindi-speaking population was three times larger than the entire population of Western Europe. The question was whether modern international law, which was already regarded as Eurocentric in some respects, could be considered legitimate while the needs, interests, concerns and aspirations of the population of an ancient civilization, the world's fifth-largest economy, continued to be ignored. Practitioners and scholars of international law advocated for inclusivity of all sorts, but when it came to inclusivity in the field of international law itself, they were unable to reckon with the inconvenient truth. Until such fundamental imbalances were addressed, the Commission's work could have only limited weight, power and influence.

Turning to the topic at hand, namely "Settlement of international disputes to which international organizations are parties", he said that new trends had emerged in the African and Asian regions that appeared to provide more privileges and immunities than were otherwise required in the universal context. For example, an undertaking on the part of the State hosting a regional meeting to bear the costs of accommodation incurred by the heads of visiting delegations had become an established practice for the Association of Southeast Asian Nations (ASEAN), and was likely becoming an established practice for the South Asian Association for Regional Cooperation and the ASEAN Inter-Parliamentary Assembly. The question of disputes involving international organizations had not yet been addressed by the Asian-African Legal Consultative Organization or the African Union Commission on International Law.

With regard to the precise scope of the types of disputes that should be addressed by the Commission in its work on the topic, the work in that area by the Committee of Legal Advisers on Public International Law of the Council of Europe had focused on topical questions related to the settlement of third-party claims for personal injury or death and property loss or damage allegedly caused by international organizations and the effective remedies available to claimants in such situations. Recent events involving the United Nations Stabilization Mission in Haiti could be relevant in that regard. During the debate in the Sixth Committee of the General Assembly, no State had come out against the inclusion of disputes of such a nature in the Commission's work. Moreover, the model status-of-forces agreement for peacekeeping operations, as set out in the Secretary-General's comprehensive review of the whole question of peacekeeping operations in all their aspects (A/45/594), contained provisions on the settlement of both such types of dispute.

On the question of the immunities of international organizations, all international institutions were set up to achieve specific purposes or goals and were given specific functions or tasks in order to achieve them. To perform their functions, international organizations needed powers allowing them to alter the legal rights and duties of other persons. Such powers could be explicit or implied and must be exercised according to legal limits set by the organization's constituent instruments or other international or domestic legal obligations imposed on or assumed by the organization. It was therefore important to distinguish between an international organization's purposes and goals, which could be very broad, its functions, which were more precise, and the limits placed on how the organization

could carry out its functions. The work of the Committee of Legal Advisers on Public International Law in that regard suggested that the immunity enjoyed by international organizations remained a pillar of international law and was necessary for the execution of their core missions. Restricting that immunity could have important consequences, since it could lead to an increase in claims for compensation and thus limit the actions and operations of international organizations. According to the work of the Inter-American Juridical Committee of the Organization of American States, the international practice was that international organizations should provide alternative means of handling individual claims in the event that their governing treaties or statutes did not include dispute resolution mechanisms. International organizations could offer, among other things, facilities for submitting disagreements to arbitration, sufficient insurance policies to cover potential damages and the option of waiving immunity in the interests of justice.

With regard to the methodology of the study and the question of the importance of undertaking an analysis of the immunity *ratione materiae*, or functional immunity, of international organizations, he wished to point out that, in order to determine an international organization's functions, a close analysis of its constituent instruments and its practice must be undertaken. The logical way to determine the scope of the functional immunities of an international organization was to refer to its functions as established in its constituent instruments, or to analyse its subsequent practice, and then to assess whether the performance of those functions would be impeded if a national court were to adjudicate on the claims at issue. Regarding categorization, there could be several categories of disputes involving international organizations. The question was how the Special Rapporteur might classify and analyse the various dispute resolution mechanisms available for the peaceful settlement of international disputes, such as negotiation, consultations, good offices, arbitration and judicial mechanisms, and, if the Special Rapporteur were to engage in such an exercise, what the criteria for the assessment of the various options would be: such criteria might include, for example, independence, fair trial guarantees, judicial impartiality and decisional independence.

One of the most important aspects of the Commission's work on the topic related to whether it should cover disputes of a private law character. The reference to "international disputes" could be understood as excluding disputes of a private law character, and there was therefore a need for further reflection in that regard. The current presumption was that the topic included both types of dispute; indeed, that position had received some support in the Sixth Committee. Of course, disputes of a private law character raised numerous issues of international law, such as jurisdictional immunity and the obligation to make provision for appropriate modes of settlement provided for in various treaties. Article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, provided that: "The United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party." Article VII of the model status-of-forces agreement provided that: "Except as provided in paragraph 53, any dispute or claim of a private law character to which the United Nations peacekeeping operation or any member thereof is a party and over which the courts of [host country/territory] do not have jurisdiction because of any provision of the present Agreement, shall be settled by a standing claims commission to be established for that purpose." From the statements made in the Sixth Committee, it was clear that most States were in favour of including disputes of a private law character within the scope of the topic and that the concept of immunities was perhaps a limited construction. Furthermore, disputes of a private law character were often included in the dispute settlement clauses of international conventions and were often discussed vis-à-vis immunities.

As an example of State practice, a review of the Indian treaty database revealed that the dispute settlement clauses of the treaties contained therein covered disputes of a commercial and private law character. The issue of the immunities of international organizations was also highly contentious in India. The aforementioned example might support the inclusion of disputes of a private law character within the scope of the study. However, the Commission should carefully analyse the effects that the settlement of such disputes would have on countries that provided troops for peacekeeping operations. In the case of the United Nations Stabilization Mission in Haiti, for example, the United Nations Secretariat was the primary responsible institution, not the troop-contributing country. In

terms of the international organizations hosted by India, the host agreements between the national Government and the International Solar Alliance, the South Asian University and the Asian-African Legal Consultative Organization provided for the settlement of contractual disputes and disputes of a private law character, including staff disputes where immunities were waived. However, any decision to waive immunity would be based on a subjective assessment, and there was no precedent for such a decision in India. Guidance from the Special Rapporteur and the Commission in that regard would therefore be very valuable in providing clarification to States and national courts.

There was also a need for guidance on the application of the functional immunities of international organizations and for a clearer delimitation of the scope of those functional immunities. The immunities provided for in article 105 of the Charter of the United Nations and in specific conventions and agreements granting immunities needed to be clearly delimited to prevent functional immunities from becoming absolute immunities. The courts had been able to pierce the institutional veil only in employment and pecuniary disputes and criminal matters. Although the concept of functionalism had occasionally played a role in determining the scope of the immunities of international organizations, it had not played any significant role in delimiting them in general.

With regard to alternative access-to-justice mechanisms, owing to the operation of the immunities of international organizations, a structural bias was built into the regulatory regimes that governed international organizations. Whereas an international organization was free to approach a national court to enforce its legal rights, a person wishing to raise a claim against an international organization could not readily do so. Such entrenched structural inequality, while not impermissible under international law, entailed a bias in favour of the organization by rendering it immune from suit. To counter that structural bias, a key regulatory requirement for the exercise of institutional power was that an international organization must provide access to justice to individuals who were harmed by its actions. Considering that there was ample treaty practice, State practice and case law in that regard, developing draft guidance on the implementation and interpretation of constituent treaties and agreements would be useful.

There was a need to develop definitions that were constitutive, rather than restrictive, in nature. Such constitutive elements would serve as guidance for national courts handling questions related to the immunities of international organizations. They would also provide greater certainty in terms of the scope of the definitions of the terms “dispute”, “dispute settlement” and “international organization”. Moreover, positive constitutive elements, in addition to negative elements, would be useful in helping national courts to determine whether to accord immunity or not.

Regarding international disputes, several cases that had come before the International Court of Justice were of immense value: those cases included the *Mavrommatis Palestine Concessions* case, the *South West Africa Cases*, the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the case concerning *Legality of Use of Force (Serbia and Montenegro v. Belgium)* and the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*. The term “international organization” was settled law; it referred to an organization established by a treaty or another legal instrument governed by international law and possessing its own international personality. However, the scope of the definition of an international organization needed to be developed in such a way as to ensure that peacekeeping missions were not included, since the need to maintain a greater level of autonomy in the execution of the mandate of peacekeeping missions was an *a priori* norm.

The forums for the peaceful settlement of disputes generally included negotiation, good offices, conciliation and mediation, but the work on the topic could also concentrate on judicial and quasi-judicial, independent third-party dispute-settlement methods, which were usually established by courts or arbitral tribunals. The State practice of Asian and African nations revealed a preference for mutual consultation and negotiations followed by an arbitration procedure. However, a more thorough analysis of the various means of dispute settlement, including those listed in Article 33 of the Charter of the United Nations, was required. The appropriateness of such means should be assessed in the context of the principles of judicial independence, decisional independence, personal independence of

judges, impartiality, fairness, equal access, equality of arms, delay, effectiveness of remedy and access to appeal mechanisms.

Regarding the outcome of the topic, it would be useful if the Special Rapporteur could provide an overview of the merits and demerits of a particular outcome. He wished to observe that the number of international organizations in the Asia-Pacific region had been increasing since 1995, with the current number sitting at 63. The study and analysis of the practice, doctrine and precedents emerging from those 63 international organizations would ensure a representative outcome to the work of the Special Rapporteur and the Commission.

Mr. Lee said that he welcomed the Special Rapporteur's first report on the topic of the settlement of international disputes to which international organizations were parties, which was exemplary in its erudition. The law of international organizations was an area of substantial uncertainty and ambiguity, and the variety and diversity of international organizations only complicated the efforts of international law scholars and practitioners to clarify it. The less than impressive track record of the Commission in its work relating to international organizations was probably the result of the elusive nature of the law of such organizations. In that regard, the Commission should be wary of falling into the trap of engaging in abstract conceptual debate, unless there was a compelling need to do so, and should instead take a pragmatic approach to the topic.

There was a substantial asymmetry between the ever-expanding role of international organizations, on the one hand, and the still underdeveloped regime of the responsibility or accountability of international organizations, on the other. By dint of some recent events, such as a series of cases before the European Court of Human Rights and problems that had arisen in relation to the outbreak of cholera in Haiti, the international community had become keenly aware of that asymmetry, a realization which had promoted a recalibration of law and practice relating to the responsibility or accountability of international organizations. For those reasons, he welcomed the inclusion of the topic on the Commission's agenda; indeed, the Commission's work in that regard would provide an important forum in which States, international organizations and other relevant parties could work together to collect information, exchange opinions and ultimately devise better ways to address the problem and thereby enhance the legitimacy and functionality of international organizations.

The key question raised in the Special Rapporteur's first report was how to delimit the scope of the topic. In that connection, it was important to consider the background and context of the topic. In the 2016 syllabus on the topic (A/71/10, annex A), Sir Michael Wood had taken a rather restrictive approach to the question of scope, suggesting that "disputes to which international organizations are parties" should be understood to include "disputes between international organizations and States (both member and non-member States), and disputes between international organizations" and to exclude "disputes involving the staff of international organizations" – with regard to which he used the term "international administrative law" – and "questions arising out of the immunity of international organizations". As to 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, he had suggested that the Commission should defer the question for a future decision. He agreed with Sir Michael Wood as far as "international administrative law" was concerned. Although the question of the immunity of international organizations would unavoidably be present in the background of discussions on the topic, it would be difficult to address it directly under the mandate currently afforded to the Commission.

The Special Rapporteur had suggested that "disputes of a private law character" should be included in the scope of the topic, and that suggestion appeared to already have been endorsed by the Commission. In principle, he supported the suggestion, because concerns about denial of justice or denial of access to judicial process arose when an international organization was engaged in a dispute with a private party. However, the Special Rapporteur might wish to clarify the meaning of "disputes of a private law character", as that concept seemed overly broad and could give rise to misunderstandings. It might be necessary to distinguish between "disputes of a private law character" and "disputes of a private character". In the 2016 syllabus on the topic, reference was made to an item on the agenda of the Committee of Legal Advisers on Public International Law of the Council of Europe in 2015: "Settlement of disputes of a private character to which an international

organization is a party.” “Disputes of a private character”, in other words disputes with private parties, seemed to be different from “disputes of a private law character”, or disputes based on private law. If “disputes of a private law character” were unreservedly included in the topic, the scope of the topic might become too broad.

He proposed that the scope of the topic should include “disputes of a private character” that, to take the expression used in the 2016 syllabus, “arise from a relationship governed by international law”. Disputes with private parties to which an international organization was a party and which had substantial human rights implications would fall under the category of “international disputes with private parties to which an international organization is a party”. For instance, at its 2015 meeting, the Committee of Legal Advisers on Public International Law had mentioned “the settlement of third-party claims for personal injuries or death and property loss or damages allegedly caused by an international organization and the effective remedies available for claimants in these situations”. That category would be a prime candidate for inclusion in the topic.

In view of those considerations, he would hesitate to go along with the suggestion made by some members that “international disputes” should be changed to “disputes” in the title of the topic. However, he was open to the Special Rapporteur’s suggestion that the scope of the topic should be broadened.

The Special Rapporteur had devoted a substantial part of the report to discussing definitional questions and had conducted a thorough analysis of some of the fundamental concepts of international law, offering revised definitions of such terms as “international organization” and “dispute”. It was understandable that the Special Rapporteur should wish to adapt the definitions of those terms to ensure better alignment between the concepts and the topic under consideration. However, he shared some of the reservations expressed by other members in that regard. Concerning the definition of an “international organization”, he would rather retain the definition found in article 2 (a) of the articles on the responsibility of international organizations. It was not just that the Special Rapporteur’s concern appeared to be largely addressed by that definition: retaining the established definition would also save the Commission a prolonged debate on the abstract concept of “international legal personality”. The same would apply to the definition of a “dispute”. Despite the reservations expressed about the *Mavrommatis* definition of the term, in his view it would be advisable to apply the principle of *quieta non movere*. The Special Rapporteur could then express his concern about the existing definitions in the commentary. As for the definition of “dispute settlement”, as had already been pointed out, the Special Rapporteur’s proposal was more of an illustration than a definition.

Concerning the outcome of the Commission’s work on the topic, he agreed with the Special Rapporteur’s suggestion that a set of guidelines would be appropriate. He also largely agreed with the Special Rapporteur’s explanation, drawn from the 2011 Guide to Practice on Reservations to Treaties, that guidelines were “not a binding instrument but a *vade mecum*”, a toolbox in which users should find answers to practical questions. However, it might be necessary to point out the difference between the 2011 Guide to Practice and the expected outcome of work on the current topic. Binding normative elements relating to reservations to treaties were contained in articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties; the Guide to Practice itself had no separate or additional binding normative force. He was not convinced that the same would be true of the outcome of the work on the current topic. One of the ideational foundations of the topic was that the rule of law should be respected by international organizations, which could currently disregard it by relying on, *inter alia*, jurisdictional immunities. The future draft guidelines on the topic would therefore be, assuming that they confirmed the applicability of the rule of law to international organizations, more than recommendations *de lege ferenda* or a mere *vade mecum*.

He looked forward to receiving the secretariat’s memorandum on the practice of States and international organizations with regard to their international disputes and disputes of a private law character. He also agreed with Mr. Patel on the importance of collating the practice of international organizations based in Africa and Asia.

Mr. Vázquez-Bermúdez said that the Special Rapporteur’s first report provided a sound basis for the Commission’s work on the topic. The report combined a very useful

summary of the main aspects of earlier work on aspects of the topic by the Institute of International Law, the International Law Association and the Commission itself. It also complemented and continued the previous work of the Commission on legal issues concerning international organizations. The outcome of the Commission's work on the topic would be very useful for the numerous international organizations that had proliferated in recent decades, as well as for States that were parties to disputes involving international organizations or were negotiating dispute settlement clauses in treaties with such organizations.

In his proposed draft guideline 1, the Special Rapporteur sought to broaden the scope of the topic by omitting to qualify the disputes as "international", whereas both the title of the topic and the 2016 syllabus referred to "international disputes". The Special Rapporteur also noted that, in practice, disputes of a private law character accounted for a large proportion of the disputes to which international organizations were parties and raised numerous issues of international law, such as jurisdictional immunity or the obligation to make provision for appropriate modes of settlement. In his view, the Special Rapporteur's proposal seemed reasonable, especially in view of the usefulness of the outcome of the Commission's work for both international organizations and for States; its usefulness would be severely limited if the topic dealt only with international disputes. He therefore supported the formulation proposed by the Special Rapporteur for draft guideline 1, although, in purely drafting terms, the word "concern" seemed more appropriate than "apply to" and had been used in the guidelines on the protection of the atmosphere and the draft guidelines on the provisional application of treaties. Moreover, the title of draft guideline 1 could simply be "Scope", in line with recent Commission practice.

If the scope of the draft guidelines was expanded, it would be necessary for the title of the topic to be amended in due course by deleting the qualifier "international", as had already been suggested by other members of the Commission. It might be preferable to wait to do so until the Special Rapporteur had presented the types of disputes that would be included in the topic.

As for the outcome of the Commission's work on the topic, the Special Rapporteur's suggestion to adopt a set of draft guidelines seemed appropriate. However, it should be borne in mind that guidelines were essentially a guide to the practice of States and international organizations and were not synonymous with "recommendations". Guidelines had a normative content and could sometimes reflect established principles and norms of international law, as in the case, for example, of the Guide to Practice on Reservations to Treaties, the guidelines on the protection of the atmosphere and the Guide to Provisional Application of Treaties. Having said that, he supported sending draft guideline 1 to the Drafting Committee.

With regard to the definitions, the Special Rapporteur recalled in the report that, in the context of treaty law, the Commission had defined "international organizations" merely as "intergovernmental organizations", which had largely served the purpose of differentiating them from non-governmental organizations. However, in the context of the Commission's work on the responsibility of international organizations, it had decided to adopt a more comprehensive definition. Article 2 (a) of the articles on the responsibility of international organizations of 2011 defined an international organization as "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality", adding that "international organizations may include as members, in addition to States, other entities". The Special Rapporteur believed that the Commission's consideration of the current topic provided the opportunity to adopt a new definition. He himself saw no need for a new definition, as the one adopted in 2011, while arguably not optimal, remained valid for the topic of dispute settlement. The 2011 definition fulfilled the objective of characterizing what was meant by an international organization and distinguishing it from non-governmental organizations and corporations operating at the international level. An important element of the 2011 definition was that international organizations were created by treaties or other instruments governed by international law, such as the resolutions of international bodies. Another important element of the definition that should be maintained was that international organizations possessed their own international legal personality. In other words, the organization's international legal

personality was distinct from that of its members. Another useful element of the 2011 definition was that international organizations could include entities other than States in their membership. That part of the definition did not exclude exceptional situations, such as the one mentioned in the report, where an international organization had only other international organizations as members.

The notion of "other entities" in the new definition proposed by the Special Rapporteur was too broad; it could include international organizations and other entities that did not have international legal personality. While he understood the Special Rapporteur's logic in proposing a new definition, he believed that its adoption might cause more problems than it solved and that it could give rise to conflicting interpretations and academic debate. He therefore shared the reservations already expressed in that respect by Mr. Forteau and others.

While a definition of the term "dispute" could potentially be useful, he was not convinced that it was necessary. He agreed that a "dispute" could be defined as a disagreement over a point of law or fact, but the reference to a disagreement over a policy was unclear. The second part of the proposed definition was also problematic. If a compulsory method of dispute settlement, such as arbitration, had been agreed, it was sufficient for one of the parties to consider that there was a dispute and to have recourse to that method. However, if no such method had been agreed, a situation could arise whereby one party made a claim or assertion and the other party simply asserted that there was no dispute. In addition, a definition of "dispute" in the context of dispute settlement involving international organizations could potentially be seen as a definition of a general nature and could have implications in the context of disputes between States or between States and foreign investors, for example.

The Special Rapporteur's third proposal was to define the term "dispute settlement". However, the content of his proposed definition was actually an illustrative list of peaceful means of dispute settlement rather than a definition. Having said that, he agreed with other members that it could be useful if it helped States and international organizations to draw up model dispute settlement clauses.

Perhaps instead of definitions, the Special Rapporteur might consider referring, in a general and introductory commentary to the draft guidelines or in the commentary to draft guideline 1, to the 2011 definition of an international organization in the articles on the responsibility of international organizations, with some additional explanations. The commentary could also develop the notions of disputes and peaceful means of dispute settlement, without the need for definitions as such in the guidelines. The Special Rapporteur might wish to wait until all the draft guidelines had been completed before deciding whether or not it was necessary to include definitions. In any event, he would support sending draft guideline 2 to the Drafting Committee if the Special Rapporteur so wished, taking into account the debate in the plenary and without prejudice to the Committee's decision as to whether or not it was appropriate to adopt such definitions.

For reference, it was worth recalling that, on the topic of immunity of State officials from foreign criminal jurisdiction, several proposed definitions had been sent to the Drafting Committee and, when consideration of the proposed definitions had been taken up on completion of the set of draft articles, only some of them had been adopted, while the others had been addressed in the commentaries.

Lastly, he supported the future programme of work proposed by the Special Rapporteur.

Mr. Galindo said he was glad to see that sources in various languages had been used in the report. For there to be justice under international law, consideration must be given to the diversity of the world's languages and the need to provide different peoples with equitable access to knowledge.

He agreed with the Special Rapporteur's views on addressing disputes of a private law character. However, such disputes must be precisely defined and should not simply be presented in contradistinction to disputes of a public law character. Because the acts of international organizations must be informed by the principle of functionality, and all their

acts, whether public or private, must relate to the aims and purposes set out for them by their members in a proper constitutive instrument, a decision to address disputes of a private law character could not be used as a pretext to allow international organizations to engage in *ultra vires* acts.

The outcome of the Commission's work on the topic would be more influential if it did not take the form of draft articles. It was hard to imagine that the General Assembly would take action resulting in an internationally binding instrument on the topic, given the degree to which international organizations varied in type, size and other characteristics and the variety of disputes to which they could be parties.

Paragraph 35 of the report pointed to certain international organizations as examples of institutions to which member States had transferred "powers". Meanwhile, footnote 122 included language from the United Nations Convention on the Law of the Sea that defined international organizations as intergovernmental organizations to which States had transferred "competence" over specific matters. However, it was doubtful that a transfer of powers and a transfer of competence could be equated. At least in the case of the Southern Common Market (MERCOSUR), one of the organizations cited as an example in paragraph 35, States could be said, in a very general sense, to have transferred powers to it, as they might to any international organization of which they were a member. The transfer of competence, however, was related to the idea of supranationality and the transfer of sovereign powers previously belonging to States. There had been no transfer of sovereign powers by MERCOSUR members, and the definition contained in footnote 122 was unsuitable for such an international organization. The Special Rapporteur could have indicated that the Additional Protocol to the Treaty of Asunción concerning the institutional structure of MERCOSUR explicitly granted legal personality under international law to that organization.

The Commission should be cautious about proposing a new, broader definition of "international organization". Although, as indicated in paragraph 54 of the report, the definition contained in the articles on the responsibility of international organizations did not refer to the existence of organs, their existence could clearly be inferred from the reference in that definition to the organization's "international legal personality". Furthermore, as many disputes involving international organizations were related to internationally wrongful acts committed by them, the use of a definition different from the one provided in the articles on the responsibility of international organizations could, in practice, lead to confusion. In addition, given the possibility that a treaty or instrument establishing an international organization could state that domestic law, rather than international law, would be the law applicable to the organization's legal relations, it was crucial that the definition should contain a reference to international legal personality, as such a reference would imply that the organization's legal relations, as well as the treaty or instrument establishing the organization, were governed by international law.

A broad definition could further complicate the task of distinguishing international organizations from treaty bodies. The definition proposed in the report seemed to strengthen the argument that the term "international organizations" included bodies like conferences of the parties – such as the one provided for under the recently finalized draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, which would be able to establish subsidiary bodies, adopt a budget and adopt decisions related to the implementation of the agreement – and human rights treaty bodies with quasi-judicial, adjudicatory functions, which could be thought to be expressing a will distinct from that of their members when expressing their views on individual complaints or drafting general comments. Such concerns could be partially allayed by adding the words "and thus possessing its own international legal personality" to the proposed definition.

The "objective awareness" test referred to in paragraph 66 had no apparent basis either in customary international law or in the case law of the International Court of Justice, given the tight majority by which the Court had decided *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, the case cited in the relevant footnote.

The assertion in paragraph 72 that non-legal disputes were more likely to be settled by the less juridical forms of dispute settlement was problematic both because it was based on a somewhat complicated separation between political and legal means of international dispute settlement and because it implied that the political means were less juridical than arbitration or adjudication. Dispute settlement was not defined by the form of settlement chosen but by the attachment of those seeking settlement to legal rules and principles. Similarly, the presentation in paragraph 77 of an apparent evolution in dispute settlement methods, going from inter-party attempts to settle disputes to the increased involvement of third parties, was problematic because the presence of a third party did not in itself signal the settlement of the dispute.

Ms. Ridings said that she welcomed the Special Rapporteur's systematic and collaborative approach to the topic. Commission members had already noted the importance of international organizations as mechanisms for cooperation among States in addressing pressing issues of international and regional concern. International organizations ranged from regional economic integration organizations with significant autonomy, which had independent relations with one another and with third parties, to organizations that discharged the functions delegated to them by their members and represented the views of their members, with little or no discretion of their own. The scope of the topic should cover international organizations, including the many member-driven organizations in various regions of the world, which had the capacity to act at the international level and with which potential disputes could arise.

The outcome of the work of the Commission should be of practical relevance to international organizations, their member States, third States that interacted with international organizations and the international community. It should, to the extent possible, be based on the practice of international organizations. She therefore welcomed the questionnaire described in footnote 5 of the report, and hoped that it had been circulated widely, including to less well-known international organizations, in all regions of the world. She supported Mr. Jalloh's suggestion that it should be referred to in the analytical guide on the Commission's website.

The scope of the topic should include disputes of a private law character. Given the scale and complexity of the legal relationships that international organizations entered into with private parties, such disputes were perhaps more prevalent than disputes between international organizations and States. Disputes of a private law character could also raise important issues related to immunity from jurisdiction that might have to be resolved in order for the private parties involved to obtain redress.

However, the scope of such "disputes of a private law character" must be clearly delineated. The phrase had appeared in section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations and had then been adjusted in section 31 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies to "disputes arising out of contracts or other disputes of private character to which the specialized agency is a party". Although the 2016 syllabus on the topic had left to a future decision the question of whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act, might be covered, that syllabus had been focused on international disputes arising from relationships governed by international law. For a dispute to be encompassed within the scope of the topic, it would not be sufficient for it merely to be between an international organization and a private party. She agreed with Mr. Akande that the dispute would have to involve international law in some way and with Mr. Paparinskis that the Commission's assumptions and rationale in delimiting the scope should be explicitly addressed.

The title should be consistent with the scope of the topic. The words "international disputes" could be replaced with "disputes" in the title, but the rationale for the change should be clearly articulated.

She agreed with the Special Rapporteur that the outcome of the Commission's work should not take the form of draft articles. States and international organizations would benefit from guidance on the settlement of disputes to which international organizations were parties, and, as indicated in the report, guidelines could serve as a toolbox where the relevant parties

could find answers to practical questions. That toolbox could, for example, include model clauses for contracts between international organizations and private parties. However, there should be a clear articulation of what the Commission meant by "guidelines", and the Commission should be able to reconsider any initial decision taken regarding the form of the outcome. There should, in another venue, be a broader discussion of the various forms that the outcomes of the Commission's work could take, the distinctions between them and the reasons for choosing one outcome over another.

The definition of "international organization" was one of the most important issues to be considered by the Commission. The term clearly did not include non-governmental organizations or transnational or multinational corporations. It covered a wide range of different types of intergovernmental organization, which should be encompassed within its definition. The Commission should move beyond its initial circular definition of "international organizations" simply as "intergovernmental organizations".

A definition previously used by the Commission need not be retained if it no longer usefully fulfilled its purpose. With respect to the definition proposed by the Special Rapporteur, the first two elements – namely, that an international organization must be an entity established by States and/or other entities and that it must be established on the basis of a treaty or other instrument governed by international law – were not problematic. She understood the words "and/or other entities" to refer only to other international organizations, including regional economic integration organizations such as the European Union, which had been party to the establishment of other international organizations by treaty. However, like some previous speakers, she had difficulty with the last of the three elements of the Special Rapporteur's proposed definition: that an international organization must possess at least one organ capable of expressing a will distinct from that of its members. It was not problematic to say that the organization should possess "at least one organ", but it was a source of concern that that organ must be capable of expressing a will distinct or separate from that of the members of the organization.

She acknowledged the theoretical debate between the "will" and the "objective personality" theories of the law of international organizations and the view held by the Special Rapporteur and others that for an entity to be an international organization, it must have a will that was distinct and separate from that of its members. However, an academic debate on the theory of international organizations would not be useful, and the inclusion of a separate and distinct will as a defining element of an international organization might unintentionally exclude from the scope of the definition international organizations that, while acknowledged to have international legal personality, were consensus-based and served as forums for cooperation among members.

The inclusion of the requirement of a distinct will was in line with the view of international organizations as autonomous actors independent of their members, a view appropriate for international organizations such as the United Nations, the European Union and the North Atlantic Treaty Organization but not for international organizations that carried out the specific functions delegated to them by their members and that had organs that were considered by the members to express the members' collective will, even when they acted independently of the members. Such organizations were prevalent in her region of the world, and the Commission's outcomes should be useful for all geographical regions.

Furthermore, States and international organizations unfamiliar with the theory of international organizations might be confused by the phrase "expressing a will distinct from that of its members". It was important that the definition should be understandable on its own terms and easy to implement in practice. The definition should therefore refer to the possession by an international organization of international legal personality, an element that was commonly seen as central to the concept of an international organization.

She was open to the various views that had been expressed by Commission members on the proposed definition of "dispute" and the need for such a definition. While she saw the logic of limiting the definition to legal disputes, she saw the practical utility of broadening its scope to include disputes of a factual or policy nature. She would appreciate examples of the types of disputes that might fall within the broader scope. The proposed definition of

"dispute settlement" seemed appropriate given its clear textual link with Article 33 of the Charter of the United Nations.

She was in favour of referring the draft guidelines contained in the report to the Drafting Committee.

The meeting rose at 11.35 a.m.