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# International Law Commission

**Seventy-fourth session (first part)**

**Provisional summary record of the 3617th meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 2 May 2023, at 10 a.m.

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***Present***:

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| *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. Oyarzábal |
| | Mr. Paparinskis |
| | Mr. Patel |
| | Mr. Reinisch |
| | Ms. Ridings |
| | Mr. Ruda Santolaria |
| | Mr. Sall |
| | Mr. Savadogo |
| | Mr. Tsend |
| | Mr. Vázquez-Bermúdez |

***Secretariat***:

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| 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)

**Ms. Galvão Teles** said that the Special Rapporteur's excellent first report on the settlement of international disputes to which international organizations were parties (A/CN.4/756) was short but very informative and provided a solid basis for the Commission's deliberations. The Special Rapporteur described very well the importance and difficulty of the topic by referring to the multifaceted potential disputes that could arise involving international organizations, as well as the limited procedures for third-party settlement of disputes to which international organizations were parties. In her view, those were the issues that must guide the Commission's work on the topic.

As noted in the report, several other bodies, such as the Institute of International Law, the International Law Association, the Committee of Legal Advisers on Public International Law of the Council of Europe and the Inter-American Juridical Committee, had taken an interest in that or related topics, which demonstrated its relevance. Moreover, States had generally supported the topic. The responses to the questionnaire that had been sent to States and relevant international organizations, together with the memorandum by the Secretariat to be prepared on the practice of States and international organizations regarding their international disputes, would be extremely useful resources for the Commission.

With regard to the scope of the topic, she agreed with the Special Rapporteur that it should cover only intergovernmental organizations and that non-governmental organizations and business entities should be excluded. In order to precisely delimit the scope of the topic, it was necessary to define what was meant by the terms "international organization", "dispute" and "dispute settlement". As the Special Rapporteur had shown, the way in which each of those terms was defined had implications for the scope of the topic.

A crucial point raised at the beginning of the report was whether disputes of a private law character should be included in the scope of the topic. When the topic had been included in the long-term programme of work in 2016, that question had been left open. However, in view of the reactions in the Sixth Committee and the Commission itself, as well as the work of other bodies and important examples from recent international practice, it would seem that part of the added value of the topic would lie precisely in its coverage of disputes of a private law character. The Special Rapporteur and other members seemed to generally agree that such disputes should be included in the scope of the topic. In her view, however, it was not yet clear what exactly should be understood by "disputes of a private law character" and, more importantly, what exactly should be included as part of the scope of the topic. Some members had already proposed, for example, that the qualifier "international" should be deleted from the title of the topic and had argued that disputes of a private law character should be included only if they had an international law dimension. "Disputes of a private law character" seemed to her a misleading term; in fact, the Commission was actually trying to cover disputes with private persons to which international law was applicable.

In that regard, two issues seemed to be of relevance. First, if the Commission decided to include such disputes in the scope of its work, it would most likely have to consider the jurisdictional immunities of international organizations and their scope of application. In contrast to the law of State immunity, the rules on immunities of international organizations were dispersed across a vast legal expanse composed of different constituent treaties and supplementary agreements. Although Article 105 of the Charter of the United Nations and the 1946 Convention on the Privileges and Immunities of the United Nations provided the general structure for the immunities afforded to international organizations and their personnel in the host country, there was still a great deal of legal uncertainty in that area, especially when disputes involved third States and their nationals. Moreover, the settlement of disputes concerning private persons might also give rise to the controversial issue of invoking immunity before domestic courts as a matter of customary international law and the question of whether exceptions to the immunity of States could be extended by analogy to international organizations.

Second, disputes concerning private persons could also have human rights implications, especially in relation to access to justice for individuals. The case of the cholera outbreak in Haiti and the criminal acts, including sexual abuse, committed there by peacekeepers highlighted the perils of having absolute immunity without the provision of alternative access to remedies. A solution to that issue could include more objective consideration of the waiver of immunity in relation to acts where continued immunity prevented the course of justice and where immunity could be waived without prejudice to the interests of the organization. Moreover, there was also some evidence to suggest that national courts might be ready to deny immunity from jurisdiction to international organizations in the absence of an internal review process that could properly safeguard the right to a fair trial. For those purposes, it would be necessary to make explicit the difference between disputes involving international organizations as legal subjects and disputes involving officials of international organizations who enjoyed immunity. The Commission's work on the topic could add value by recommending practices for ensuring appropriate means of settlement by international organizations, including through, for example, standing claims commissions and other non-judicial and judicial means.

Bearing all that in mind, even though the Special Rapporteur had not yet proposed a draft guideline on the inclusion of private law disputes, she would propose that the Drafting Committee should already consider that issue in connection with the proposed draft guideline on scope. Even if it might be too early to draft a specific guideline on the matter of disputes with private persons, at least the commentary to that initial draft guideline, for the purpose of inviting further consideration by States and also by the Commission, should reflect those different approaches and options.

As to the outcome of the work on the topic, she agreed with the Special Rapporteur that the most useful form would be a set of recommendations on the settlement of disputes to which international organizations were parties. Rather than creating new rules, the Commission should promote the implementation of existing rules. Like others, she would also be open to the possibility of formulating model clauses if that was considered appropriate as work on the topic progressed.

Regarding the definition of "international organization", the reasons for departing from the definition contained in the Commission's 2011 articles on the responsibility of international organizations should be clearly explained. The Commission could adopt a definition that was more robust than the ones adopted previously in different contexts, since the focus of the current project was not the status of international organizations as such, but rather the settlement of disputes to which they were parties. The Commission could adopt a functional definition of "international organization" for the purposes of the current codification project and still be consistent with the approaches taken in its previous work. For instance, the definition of "international organization" adopted in the context of the law of treaties, namely that international organizations were intergovernmental organizations, had been appropriate for the purposes of those draft articles, insofar as the Commission had intended to exclude non-governmental organizations from the scope. Moreover, at that time, the Commission had not seen the need to expressly include other elements in the definition, since the international legal personality of an international organization was implied in its capacity to conclude treaties. The definition of "international organization" adopted in the 2011 articles on the responsibility of international organizations had itself marked a departure from the Commission's previous definition. Thus, there was precedent for adopting a definition that suited the purposes of the project at hand.

Although she generally agreed that the definition proposed by the Special Rapporteur seemed appropriate, she was unsure about the need to include the requirements of "possessing at least one organ" and being capable of expressing "a will distinct from that of its members". As noted in paragraph 54 of the report, the existence of organs seemed inherent in the notion of "international organization". Moreover, it seemed natural that only an international organization capable of expressing its own will, and therefore possessing its own international legal personality, would be able to participate in a dispute.

Ultimately, she agreed with the parallel established between the category of acts that gave rise to the responsibility of international organizations and the category of disputes to which international organizations were parties, insofar as disputes involving international

organizations were likely to involve the existence of an internationally wrongful act. For that reason, a functional definition of "international organization" needed to be closely connected to the types of disputes covered by the project.

As for the definition of "dispute", she agreed with the Special Rapporteur that the definition set out in the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case was a good basis for a definition. However, it might be necessary to explain why none of the more recent formulations in judgments of the International Court of Justice had been used, such as those in the cases concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* and *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*. In the latter case, there was still a good deal of uncertainty regarding the legal basis of the "objective awareness" element of a dispute, and the Commission might wish to clarify that point in the commentary. She believed that the disputes covered should be limited to legal disputes and that policy disputes should be excluded from the topic.

While she agreed with the Special Rapporteur's proposal to include in the definition of "dispute settlement" all traditional political/diplomatic and judicial means of dispute settlement, the Commission's work should focus on the judicial means. At the same time, non-judicial means such as standing claims commissions or ombudsman's offices could also be relevant and merit special attention from among the political and judicial means of dispute settlement.

In the light of those considerations, she supported draft guideline 1 but considered that the issue of the inclusion of disputes with private persons would have to be addressed in the commentary thereto. Draft guideline 2 would need to be revised; specifically, the reference to "possessing at least one organ" capable of expressing "a will distinct from that of its members" in subparagraph (a) and the reference to policy disputes in subparagraph (b) should be eliminated. In the commentary to subparagraph (c), the emphasis on arbitration/judicial means would need to be explained.

The Special Rapporteur's proposals on the future programme of work for 2024 and 2025 seemed sufficiently flexible to allow for adjustments as the work progressed. However, it would be useful to have greater clarity as to the precise issues that might be covered by future draft guidelines. In conclusion, she supported the referral of both of the proposed draft guidelines to the Drafting Committee, taking into account the debate in the plenary.

**Ms. Mangklatanakul** said that the Special Rapporteur's first report was well written, clearly identified relevant key issues and provided an excellent starting point for the Commission's deliberations. She commended his attempt to delimit the scope of the topic by considering the definitions of the terms "international organization", "dispute" and "dispute settlement". However, she wondered whether it might be more useful to begin not with definitions but by identifying the problems of practical concern to States, international organizations and the international community on which the Commission could provide clarification or guidance.

The 2016 syllabus on the topic, which was annexed to the report of the Commission on the work of its sixty-eighth session, provided a number of possible answers to that fundamental question. If, for example, the main issue had to do with the obstacles preventing disputes to which international organizations were parties from being submitted to the mechanisms available to States, such as the International Court of Justice, the Commission's discussion might focus on the issue of access, including the utility and availability of other forms of dispute settlement, such as arbitration and mediation. If the concern was with the uncertainty surrounding the question of whether international organizations could assert the rights of their staff members in a manner analogous to the way in which a State might assert the rights of its nationals, the discussion might focus on the concept of functional protection and the requirement of exhaustion of local remedies in that context. If the problem was that private parties were denied access to justice and remedies in disputes with international organizations because of the latter's immunity, the Commission might focus on the relevant aspects of the regime on the privileges and immunities of international organizations, including an obligation to make provision for appropriate modes of dispute settlement. She

did not wish to suggest that the Commission should focus on one issue or the other, or that those questions were exhaustive, but simply to point out that, without having some sort of common understanding on those fundamental issues, it would be difficult to delimit the scope of the study clearly enough to ensure a meaningful outcome.

In that regard, it would be useful to receive the responses to the questionnaire prepared by the Special Rapporteur on the practice and views of States and international organizations on the topic. She hoped that a large number of responses from a diverse range of States and international organizations representative of all regions would be received. The memorandum by the Secretariat would also give the Commission a better understanding of the current practice of States and international organizations, as well as their needs and expectations. It was important for the work of the Commission to be guided and informed by the practice of States and international organizations.

In deciding whether or not to adhere to the definition of "international organization" contained in the 2011 articles on the responsibility of international organizations, it was important to recall that any definition would ultimately depend on the specific purposes for which the term was being defined. If the Commission's work was aimed at providing practical guidance to a variety of international organizations, it might be best to keep the definition sufficiently flexible to cater to the needs of those organizations that might be excluded by a strict definition. Indeed, the current reality of international affairs was that there were diverse forms of international organizations with varying degrees of legal personality. International organizations should be considered not in purely theoretical terms but against the backdrop of practice.

By way of example, reference could be made to the 2018 Act on the Privileges and Immunities of International Organizations and International Conferences in Thailand. As a host to almost 50 international organizations, more than half of which were United Nations-affiliated agencies, Thailand could offer some useful insights in terms of practice. In section 3 of the Act, "international organization" was defined as an "intergovernmental organization or a quasi-governmental organization". An intergovernmental organization could be an organization established by States under international law, with its membership composed of States; an organ established by a decision of an intergovernmental conference or by a treaty between States, and endorsed by the Government of Thailand; or another organization or organ similar to or resulting from an organization or organ in the first or second category, as prescribed in a royal decree. A "quasi-governmental organization" was defined as an organization whose membership comprised not only States or intergovernmental organizations, but also members that were not States or intergovernmental organizations.

Another category recognized under the Act for the purpose of granting privileges and immunities was international cooperation forums, which would cover entities such as Asia-Pacific Economic Cooperation and the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation. Such entities might not necessarily fall within the strict definition of an "international organization", but were granted a certain legal capacity by their member States. In that regard, she agreed with Ms. Ridings that certain international entities, while acknowledged as having legal personality, did not exercise a will distinct from that of their members, but rather operated on the basis of the "collective" will of their members. Given that international cooperation forums could become parties to a dispute, it would be useful to hear the Special Rapporteur's view on whether such entities should be included within the scope of the study. She was open to further discussion on whether to deal with that issue in the definition of "international organization" or in a separate provision.

As for the term "dispute", she was uncertain as to whether a definition was necessary. It might be more useful to examine the nature of disputes that could arise in different real-world situations, based on a number of conceptual distinctions. One useful approach would be to examine the different sources of rights and obligations on which the claim was based, such as a breach of treaty or contractual obligations or a violation of domestic laws in the performance of the organization's functions. Disputes could also arise out of non-observance of commitments under non-legally binding agreements or arrangements.

Another way to analyse the nature of disputes was in terms of the categories suggested by Mr. Jalloh: disputes between international organizations and their members; disputes

between international organizations and non-members; disputes between international organizations; and disputes between international organizations and private parties. A distinction could also be made between disputes in which the international organization was the claimant and those in which it was the respondent. Lastly, disputes could be analysed from the perspective of the purposes of engaging in dispute settlement: to find an amicable solution to a conflict; to seek interpretation and application of a treaty or contract; or to seek remedies or compensation for damage caused.

She agreed with other members that the scope of the study should be limited to disputes that had a legal basis in international or domestic law and should not be extended to disputes concerning policy differences, which could go beyond the Commission's mandate.

She did, however, support the inclusion of disputes of a private law character within the scope of the Commission's study. As had already been pointed out by many members, the reality was that, in carrying out their functions, and by virtue of having both legal personality under international law and legal status under the domestic law of their host countries, international organizations often needed to enter into contracts with private persons, which could give rise to disputes. Excluding such disputes could greatly limit the usefulness of the final outcome of the Commission's work. However, it would be necessary to clarify the term "disputes of a private law character", as contained in section 29 of the Convention on the Privileges and Immunities of the United Nations, or the slightly different term "disputes of private character", as contained in section 31 of the Convention on the Privileges and Immunities of the Specialized Agencies. She would welcome the Special Rapporteur's views on whether any other types of disputes besides disputes arising out of contracts or tort claims would potentially fall under that category.

It would also be useful to clarify whether the scope of the Commission's work covered only disputes to which international organizations, as organizations, were parties, or also disputes concerning the acts of their officials or staff members performed by them in their official capacity. If disputes arising out of private acts committed by such officials or staff members outside the official functions of the organization were to be excluded from the scope of the study, it might be useful to make such exclusion explicit.

With regard to the term "dispute settlement", she supported the Special Rapporteur's approach in using Article 33 of the Charter of the United Nations as the basis for draft guideline 2 (c). She trusted that he had compelling reasons for omitting from his proposed definition the words "resort to regional agencies or arrangements", as contained in Article 33, but it might be useful to state those reasons explicitly.

She agreed with the Special Rapporteur that it would be highly instructive to analyse existing provisions for dispute settlement in constituent instruments and headquarters agreements, as well as other treaties or contractual arrangements, and their actual use. In doing so, the Special Rapporteur might wish to consider different types of international organizations across all regions, including Asia. As Mr. Patel had pointed out, countries in Asia had a wealth of experience in concluding host country agreements with international organizations. Notable examples included the 2012 agreement between the Government of Indonesia and the Association of Southeast Asian Nations (ASEAN) on hosting and granting privileges and immunities to the ASEAN Secretariat and the 2000 headquarters agreement between the Government of India and the Asian-African Legal Consultative Organization.

Concerning the outcome of the work on the topic, she supported the Special Rapporteur's suggestion that the Commission's major contribution in that area could be to analyse the *status quo* and to make carefully weighted recommendations that were apt to be taken into consideration by international organizations generally. Guidelines seemed appropriate but she would be open to considering other forms that might emerge as the Commission's work on the topic progressed.

**Ms. Okowa** said that the election of a woman to serve as Chair was a reminder of the importance of diversity in the Commission, an institution that had often attracted attention for the low number of women among its members. Despite recent steps in the right direction, further efforts were needed to accelerate the current glacial pace of progress.

The Special Rapporteur's clear and concise first report on the topic "Settlement of international disputes to which international organizations are parties" set out a clear road map for the Commission's work. However, his conception of the "disputes" to be addressed was broader in scope than the generally accepted definition first formulated by the Permanent Court of International Justice in *Mavrommatis Palestine Concessions* and later developed by the International Court of Justice in *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests" between the parties. In its judgment on preliminary objections in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, the International Court of Justice had recalled that the two sides to a dispute must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations.

The Special Rapporteur had noted that, while the focus of the project would be on legal disputes, its scope could be expanded to include disputes of a political nature, such as disagreements between international organizations and their members regarding policy matters. In her view, the Commission would arguably be exceeding its mandate if it took such a radical approach. It would have been useful if the Special Rapporteur had provided an indicative list of the kinds of disputes that he had in mind. She was not sure that the Commission could realistically offer guidance on the resolution of a disagreement regarding the scope of the peace and security mandate of the Economic Community of West African States or a disagreement between the Organization of Islamic Cooperation and its members regarding its foundational values. It was unclear from paragraphs 77 and 78 of the report whether the Special Rapporteur was anticipating that the Commission would be providing guidance on the full range of dispute settlement methods listed in Article 33 of the Charter of the United Nations, some of which were overtly political. It was true that the International Court of Justice had never declined jurisdiction on the basis that a dispute had political overtones or related to a wider political controversy. Two examples were *United States Diplomatic and Consular Staff in Tehran* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Nevertheless, the Court had also taken care to limit itself to the distinctly legal issues raised by such cases.

Like Mr. Akande, she had grave reservations about the inclusion of political disputes, including disagreements on policy matters and the political methods of dispute settlement listed in Article 33 of the Charter, within the scope of the project. For one thing, the Commission arguably had no competence to deal with policy matters, as members were elected on the strength of their legal expertise. While the Commission was not being called upon to settle any political and policy disputes, the question of how to resolve them could not be addressed without such competence. She had no doubt that many members of the Commission had considerable expertise in that regard. However, the Commission had a narrow mandate and should exercise considerable restraint before venturing into political and policy matters, including the ways in which political and policy disputes should be settled. Moreover, as negotiated compromises, political settlements might raise major difficulties from a rule of law perspective, since they might entail derogations from recognized private law rights. Such derogations might conflict with the Commission's implicit mandate to promote the rule of law. By extension, the Commission might need to reflect on whether it was possible to formulate recommendations on the settlement of such political disputes while promoting the rule of law.

She welcomed the Commission's decision to include disputes of a private law character within the scope of the project. Disputes between international organizations and private persons raised seemingly insurmountable problems relating to the identification of the courts with jurisdiction, the applicable law and avenues of enforcement, particularly when the international organization in question enjoyed immunity from the jurisdiction of domestic courts and the applicable treaties made no provision for dispute settlement. Plaintiffs might face obstacles to justice, including discriminatory treatment, as a direct result of the application of the forum's own rules of private international law.

It was unclear from the report whether the Special Rapporteur intended to anchor the project exclusively within the public international law framework. In her view, the topic

provided an excellent opportunity to consider the private law questions that it raised. Under article 1 (2) of its statute, the Commission was "not precluded from entering the field of private international law". The most problematic disputes involving international organizations had in fact arisen from claims relating to private law rights. As Mr. Jalloh had noted, such difficulties were related to the inequality of arms between the claimants and the international organization and, in many cases, the lack of a forum in which the claim could be brought. The Haiti cholera epidemic offered an example of the difficulties that might arise. Further difficulties might arise when a claim was brought by an international organization constituted by a treaty to which the forum State was not a party. In such cases, it was unclear whether the organization had legal standing to sue in the forum, and there were often serious difficulties associated with the identification of the courts with jurisdiction.

The jurisdictional issues raised by such claims could not be considered solely through the lens of public international law; indeed, their consideration necessarily involved the reasoning and methodology of private international law. Of course, the Commission should refrain from restating the rules of private international law as a whole; that exercise was being undertaken very ably by the United Nations Commission on International Trade Law and the Hague Conference on Private International Law. As the Institute of International Law had recognized, such issues were of practical relevance to any consideration of private law claims arising within a public law framework.

In addition, no national or international tribunal dealing with a private law claim would be able to determine its validity without reference to the law that had given rise to it. In general, a claim in tort would be valid only if it was actionable under the law of the place where the tort had occurred. Similarly, the validity of contractual claims and property claims depended not on abstract rules of public international law but on an appreciation made with reference to the law that had given rise to them. In general, municipal law would determine whether a contract was valid, whether it had been executed and whether it was illegal under the law of the place of performance or invalid on account of error or duress. For example, a contract that had been procured by corruption and was unenforceable under the law of the place of performance could not give rise to a private law claim at the international level. Similarly, municipal law determined whether a property right had been acquired and whether it was vested in the claimant. Furthermore, in cases where the actions of an international organization had caused harm to a multiplicity of private claimants, a decision would have to be made as to which of the many potentially applicable national laws should be applied. Which, for instance, should determine the amount of any damages? In all such cases, preliminary questions of that kind could not be answered without reference to municipal law, including the forum State's rules on private international law.

Considerable support could be found in the literature for the view that public international law possessed a distinct body of conflict of law rules governing the determination of claims where reference to the domestic law of a State was necessary. The judgments of the Permanent Court of International Justice in the *Case concerning the Payment of Various Serbian Loans Issued in France* and the *Case concerning the Payment in Gold of the Brazilian Federal Loans Issued in France* were usually cited as examples in that context. The Commission might wish to return to that line of enquiry if it decided to avail itself of the methodology of private international law in its work on the topic.

Lastly, questions relating to the enforcement of rights under domestic law against an international organization might turn not on the powers granted under the constituent instrument but on whether the treaty establishing the international organization had been domesticated under the laws of the forum or whether the international organization was recognized under a foreign law to which the forum was obliged to give effect under its private international law rules. Status, including the capacity to sue and be sued, might not necessarily depend on the constituent instrument but on the terms of incorporation under some domestic law. While she fully supported the expansion of the scope of the project to include claims by private persons, any meaningful resolution of such claims would seem to require recourse to the methodology of private international law. It was noteworthy that the Institute of International Law had increasingly relied on the methodologies of both public and private international law in the context of its work on the judicial settlement of disputes involving private actors.

At the current stage, the Special Rapporteur was right to be cautious about the form of the final outcome of the project. States had been surprisingly reticent to implement those of the Commission's outputs that dealt with the rights and obligations of international organizations. Given the enormous variety of such organizations, and the varied contexts in which disputes involving them arose, it was likely that a set of draft guidelines would be more useful than a draft treaty. The fact that the Commission's articles on responsibility of States for internationally wrongful acts had not been transformed into a treaty had not prevented their widespread use and dissemination.

She supported the referral of the proposed draft guidelines to the Drafting Committee, taking into account the comments made in the debate.

**Mr. Oyarzábal** said that the Special Rapporteur was to be congratulated for his well-researched first report, which struck a commendable balance between reflecting relevant legal and practical developments and describing the current state of scholarly debate on the topic. The proliferation of international organizations had given rise to certain problems and challenges, such as the complexities of resolving disputes to which they were parties, in particular those described by the Special Rapporteur as having a "private law" character. In that regard, it was his firm conviction that the Commission should take a proactive approach to those problems and challenges by offering practical and legally sound solutions.

Overall, he shared the Special Rapporteur's view that disputes with private parties should be included within the scope of the project. Logically, it was unclear whether the Commission's work on the topic would have any added value if they were not included. The responses to the Special Rapporteur's questionnaire might shed light on the types of international disputes that arose most frequently and the methods used to resolve them. That said, it would appear on first impression that the methods set out in Article 33 of the Charter of the United Nations, which had originally been intended to relate to disputes between States, did generally apply to disputes to which international organizations were parties, perhaps with some modifications. Consequently, unless the responses revealed significant problems that were not addressed within the existing legal framework, the contribution of a set of draft guidelines that covered only international disputes would necessarily be limited. If "the most pressing questions" in practice related to the settlement of disputes of a private law character, as the Special Rapporteur argued, it would seem counterintuitive to focus on other questions. It could in fact be argued that a special focus on disputes between international organizations and private parties was needed.

Such an approach would, for example, enable the Commission to address the deep-rooted problem of the lack of access to justice in disputes involving international organizations. As the Special Rapporteur had noted some years previously, there was an "increased awareness of accountability gaps" in that regard. That concern was widely shared among scholars and had also been debated in case law and by the Commission itself. Of course, the topic was inextricably linked with the question of immunities, and he agreed with other members that the Commission should not wade too far into that debate or the debate on the international responsibility of international organizations. Rather than opening a Pandora's box, the Commission should look for a way of addressing the topic that avoided the impasses that made consensus difficult.

From a more political and strategic point of view, the existing legal framework – under which international organizations had neither the incentive nor the obligation to resolve their disputes – had in practice helped to erode their legitimacy and, with it, support for the immunities that they enjoyed. From a reputational point of view, projecting an image of compliance with international law was an essential facet of an international organization's legitimacy, and an impression of legitimacy was important in securing the cooperation and support of member States and other interested parties. From a legal point of view, an even more important point was that international organizations had "international legal personality", meaning that they were the bearers of rights and obligations at the international level. But there could be no rights without primary or secondary obligations or, in other words, without responsibility.

However, the reality of the situation was particularly worrying in that regard. In theory, even if a State enjoyed immunity before a foreign court, it could be prosecuted before

its own courts. In principle, diplomats could also be held accountable before the courts of their home State. The problem with international organizations was that, when the applicable headquarters agreement provided for functional or personal immunity, there was no forum to provide the interested parties with access to justice. In addition, although it could no longer be said that there existed an international rule on State immunity for *acta jure gestionis*, the distinction between public and private acts was of little direct relevance when determining the scope of the immunities of an international organization. International organizations needed immunities to be able to perform their functions, but such immunities might result in a serious denial of justice for persons that entered into contracts with them or were affected by wrongful acts committed by them or their staff. That was one of the main reasons for including disputes involving private parties within the scope of the project.

If the Commission decided to adopt the approach proposed by the Special Rapporteur, he agreed with Mr. Grossman Guiloff and Ms. Mangklatanakul that all disputes between international organizations and private parties should be included within the scope of the project. As Ms. Okowa had noted, nothing in the Commission's statute prevented it from entering the field of private international law. Of course, the multiplicity of such disputes raised problems of a practical nature. The Commission would have to decide whether it was feasible to develop a set of draft guidelines that covered disputes ranging from those relating to breaches of contractual obligations to those relating to serious human rights violations. That task was made even more complex by the fact that labour, contractual and tortious disputes each had their own specific features and related doctrine and case law. For example, international organizations had a long-standing and established practice of resolving labour disputes with their staff through administrative tribunals. Similarly, the specificity of disputes relating to human rights violations lay in the legally protected values and rights at stake. Nevertheless, such disputes all had one feature in common: when a private person suffered harm and could not avail himself or herself of a redress mechanism, his or her right of access to justice was violated. From that perspective, at least, the difference seemed to be a matter of degree rather than of substance.

Various international human rights treaties provided for an explicit right of access to justice, at least in cases of human rights violations, including article 2 (3) of the International Covenant on Civil and Political Rights, article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, article 47 of the Charter of Fundamental Rights of the European Union, article 25 of the American Convention on Human Rights and article 7 (1) (a) of the African Charter on Human and Peoples' Rights. A more general – albeit less widely recognized – right of access to justice that extended beyond human rights violations was enshrined in provisions such as article 8 of the Universal Declaration of Human Rights, article 14 of the International Covenant on Civil and Political Rights, article 8 of the American Convention on Human Rights, article 7 (1) (b)–(d) of the African Charter on Human and Peoples' Rights, article 12 of the Arab Charter on Human Rights and article 5 of the Association of Southeast Asian Nations Human Rights Declaration.

In addition, it was increasingly recognized that the right of access to justice might constitute a general principle of law, although its relationship with other principles, such as immunity, was still being developed. Consequently, any dispute for which no access to justice was provided, whether through a judicial body or an alternative dispute settlement mechanism, raised a question of international law and a potential violation of human rights. He therefore remained unconvinced by arguments that the Commission should focus on disputes that "only" raised questions of international law.

However, even if access to justice was deemed not to constitute a general principle of law, it was difficult to make such a distinction in practice, since rights protected under international law often came into play in disputes arising under domestic law. The most obvious example was a labour dispute at an international organization arising as a result of a complaint of discrimination based on race, sex, religion, views or beliefs, which were grounds of discrimination prohibited under the Charter of the United Nations, the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The question that then arose was how to define

the “internationality” of the disputes between international organizations and private parties that were covered under the draft guidelines.

Beyond those considerations, there was a strategic reason for addressing disputes with private parties. In paragraphs 6 and 8 of his report, the Special Rapporteur described a tendency in Europe and Latin America to limit the immunities enjoyed by international organizations in some cases. In 1983, for example, the Supreme Court of Argentina had made the immunities of international organizations conditional on the right of access to justice. That showed that the once absolute immunity of international organizations had been increasingly eroded, particularly in relation to serious human rights violations, but also in cases arising under private law, which might jeopardize their capacity to perform their functions independently and effectively. The Commission therefore had an opportunity to define the obligation of international organizations to resolve their disputes by providing adequate means of dispute settlement. To define that obligation would be in the interests not only of private parties but also of international organizations themselves, since it would enable them to avoid situations where their immunity was called into question by national courts. It might even be in the interests of States, as it would ensure that they were not held jointly or subsidiarily liable for the acts of international organizations.

That said, the final decision should be based on the memorandum by the Secretariat and the responses to the questionnaire. The Commission should also consider proactively approaching States and international organizations to garner their views on the matter.

The Special Rapporteur argued that the most useful approach would be to define disputes in a way that was broad enough to encompass “non-legal disputes” and that disputes between international organizations and their members might be of a “more political nature” in some cases. Despite the importance of political disputes, they did not seem amenable to the same systematic approach that could be applied to legal disputes. Furthermore, it was unclear what would constitute a “political” dispute, since almost any difference of opinion between States and international organizations might qualify. One example was the recent objection of certain States members of the International Labour Organization to the allocation of budgetary resources for programmes on gender identity and sexual orientation. Another was the criticism levelled at the Office of the United Nations High Commissioner for Human Rights for its preparation of a report without the consent of the Member State concerned. How could the Commission address the myriad political disputes that might arise between an international organization and its member States, let alone those that might arise between an international organization and third parties? It was also worth noting that, as Ms. Okowa had pointed out, the Commission would be exceeding its mandate – the progressive development of international law and its codification – if it addressed non-legal disputes. In addition, the inclusion of such disputes would not be aligned with the Special Rapporteur’s aim of ensuring that the topic was properly “delimited” so that it would remain sufficiently focused.

With regard to the proposed definitions, he could support the referral of draft guideline 2 (a) to the Drafting Committee, though it was his firm view that a reference to the “legal personality” of an international organization should be included. The omission of such a reference might have repercussions for the question of immunities and international responsibility, which were both premised on the existence of legal personality not only at the international level but also at the domestic law level. It might also undermine the notion that international organizations had an international legal personality distinct from that of their founding and member States, with all that such a change would imply, including in terms of the argument that member States bore joint or subsidiary responsibility under international and national law. If the first part of draft guideline 2 (a) was retained, the word “entities” should be replaced with “international organizations” to clarify that the international organizations in question were those created by States and/or international organizations. Replacing the word “entities” would also allow the Commission to avoid wading into the debate regarding the legal capacity of subnational and other entities to enter into a treaty and to establish and/or join an international organization in their own right, where national constitutional law granted them such capacity. One example was the capacity of the regions of Italy to enter into international agreements. The Constitution of Argentina also granted provinces the right to enter into treaties, subject to certain conditions. However, such capacity

remained highly controversial, and the Commission should avoid giving the impression that it was opening the door to the participation of "entities" other than States and international organizations in the establishment of international organizations.

For the reasons that he and other members had already given, he considered that disagreements over policy should be excluded from the scope of the Commission's work. His preference would therefore be not to include them in the definition proposed in draft guideline 2 (b).

With regard to the definition of "dispute settlement", the specific mechanisms to be mentioned in the definition would ultimately depend on the scope of the Commission's work, since different types of disputes might require different mechanisms. If the Commission decided to address labour disputes, for example, it would probably need to add a reference to administrative tribunals. He supported the referral of draft guideline 2 (c) to the Drafting Committee on the understanding that it might need to be revised at a later stage. He wondered whether the Special Rapporteur's prediction that the Commission's work would focus on arbitration and adjudication was premature, since the scope of the project had yet to be decided and the complexities of the various types of disputes had yet to be analysed. He agreed that the question of whether international organizations had a legal obligation to submit disputes to a settlement mechanism or to settle them, which had been raised by Mr. Grossman Guiloff, was an important one, which the Special Rapporteur should address at an early stage.

He supported the idea of producing draft guidelines as the final output. He agreed with Mr. Forteau and Mr. Vázquez-Bermúdez that the development of model treaty clauses might be useful for States and international organizations. If the Commission decided to produce draft guidelines, they should be aimed not only at international organizations, as suggested in paragraph 27 of the report, but also at States. If disputes with private parties were included within the scope of the project, the Commission could also produce model contractual clauses. The decision as to whether such disputes were to be addressed should be taken at an early stage. It would then be clear what work remained to be completed by the Special Rapporteur, who would ideally be able to put forward substantive draft guidelines or at least an analysis of practice on the settlement of such disputes and the problems most often encountered for consideration by the Commission in 2024.

**Mr. Tsend** said that he welcomed the Special Rapporteur's systematic and thorough first report on the settlement of international disputes to which international organizations were parties, which provided an excellent starting point for the Commission's work on that important topic. He was particularly grateful for the comprehensive and multilingual sources referred to in the first report and for the questionnaire prepared by the Special Rapporteur and sent to States and relevant international organizations in December 2022. That process in itself could prove to be extremely useful; for example, the Mongolian authorities had begun to gather data in response to the questionnaire and had uncovered many issues that would help them to improve national legislation and judicial practice.

He wished to add his voice to those of members who had underlined the importance of ensuring that the outcome of the Commission's work on the topic was of practical use to States, international organizations and third parties, including private persons. In his view, the yardstick by which the success of the Commission's work should be judged was whether the outcome was of value to the judges of national courts.

The question of whether disputes of a private character should be included in the scope of the topic was an interesting one. From the statements made in the plenary Commission thus far, it was clear that a consensus was forming around the need to include such disputes, in view of the prevalence of disputes between international organizations and private parties. The Commission could not overlook the important human rights implications of ensuring that international organizations provided dispute settlement methods in the event of disputes with private parties. He concurred with Ms. Ridings and other members that the exclusion of such disputes from the scope of the topic would render the Commission's conclusions less relevant to all interested parties, including national judges, who often dealt with cases involving disputes of a private law character between international organizations and private litigants. From 2020 to 2023, the Mongolian courts had issued decisions in 25 cases involving

international organizations, including both intergovernmental and non-governmental organizations. Of those cases, 19 related to employment matters, including wrongful dismissal and the miscalculation of salaries and benefits. One case had involved a dispute regarding the performance of a procurement contract, while the remaining five cases had involved disputes between property owners and tenants. Of course, not every dispute of a private law character could or should be included in the scope of the topic.

The Commission and the Special Rapporteur had much work to do in order to clarify the exact nature of the disputes of a private character that should be covered by the Commission's work. Some members had suggested that disputes involving the staff of international organizations, which fell under international administrative law, should be excluded from the topic, as had been suggested by Sir Michael Wood in the 2016 syllabus. There were strong arguments in favour of that suggestion; however, he agreed with Mr. Paparinskis that the Commission would need to make explicit the rationale for any such exclusion and address the issue of the role of internal rules of dispute settlement within international organizations. He also agreed with those members who had taken the view that for a dispute of a private law character to be covered by the topic, it must have some nexus with international law. As Mr. Akande had stated, the Commission should deal only with situations where international law had something to say about the settlement of a dispute of a private law character. He was therefore unsure whether it was appropriate to delete the adjective "international" as a qualifier of "disputes" in the title of the topic. The Commission was not aiming to provide guidance on the settlement of all disputes to which international organizations were parties, but rather only on the settlement of disputes that arose from a relationship governed by international law.

With regard to the definition of "international organization", the international organizations most likely to be involved in disputes that came before national courts were international non-governmental organizations. According to the preliminary results of research into the records of the Mongolian justice system, for every 20 to 25 cases involving international organizations before the courts, only 1 case involved an international intergovernmental organization. That meant either that international intergovernmental organizations in Mongolia functioned seamlessly across many fields, managing hundreds of employees and thousands of contracts, or that something was preventing disputes involving such organizations from reaching the courts. Perhaps that state of affairs was a function of the privileges and immunities enjoyed by international intergovernmental organizations, or perhaps all such organizations had comprehensive and efficient internal dispute settlement systems. Further research would elucidate the situation.

As for the definition of "international organization" proposed by the Special Rapporteur, he preferred a simple solution and concurred with those members who had come out in favour of using the definition set out in article 2 (a) of the articles on the responsibility of international organizations. That definition would serve the Commission's purposes, since it was comprehensive enough to cover the international organizations intended to be covered and simple enough to prevent controversies or academic debate on the subject. Most people, notably the judges of national courts, would be confused by the idea that an international organization possessed "at least one organ capable of expressing a will distinct from that of its members". National judges would, however, be familiar with the concept of legal personality from their work in relation to municipal law.

Like many other Commission members, he questioned the need for a definition of the term "dispute", at least at the current stage, as what constituted a dispute was generally understood. Alternatively, the meaning of "dispute" could be elaborated upon in the commentary to the definition of the term "dispute settlement". In the event that the Commission decided it was necessary to define "dispute", it should not include in the definition disagreements concerning points of "policy". The political question doctrine was firmly established in most national legal systems. In Mongolia, national judges would be well aware that controversies or disagreements over issues that were the responsibility of political branches of the Government were non-justiciable and would be confused if asked to adjudicate on a disagreement between an international organization and a State or another international organization over a point of policy.

He fully agreed with the Special Rapporteur's suggestion in paragraph 27 of the report that, in view of the diversity of international organizations and the wide array of disputes in which they might be involved, the Commission's contribution in the area could be to "analyse the *status quo* and to make carefully weighted recommendations for the settlement of disputes that [were] apt to be taken into consideration by international organizations generally". Hence, he supported the proposal that the outcome of the Commission's work on the topic should take the form of draft guidelines, provided, of course, that the Commission was free to change the form of the outcome later on if necessary. He also agreed with the future programme of work as proposed by the Special Rapporteur in paragraph 84 of the report.

**Mr. Huang** said that he wished to thank the Special Rapporteur for his carefully crafted first report on the settlement of international disputes to which international organizations were parties, which was well structured and based on solid arguments. The two draft guidelines proposed in the first report would serve as a good basis for the Commission's consideration of the topic. He had listened attentively to the statements made by other members and had noted that there was broad agreement on the importance, practicality and relevance of the topic. However, major differences of opinion on the exact scope of the topic were apparent, in particular with regard to such fundamental issues as the definition of the terms "international organization" and "dispute". Since those issues concerned the starting point and direction of the study, it was important to explore them in depth and reach a consensus, to the extent possible.

Before beginning his comments on the issues raised in the first report, he wished to stress the importance of listening closely to and respecting the views of Member States. As was well known, States had always been the source of and the driving force behind the progressive development and codification of international law. The leading role of States should be reflected at all stages of the Commission's work; it was States that established precedents, developed practice and doctrine, provided political guidance and research materials to the Commission and accepted the outcome of its work. In accordance with the spirit of article 15 of the Commission's statute, both the development and the codification of international law should be based on State practice that already existed, rather than on the academic works of international legal scholars, the personal academic interests of members of the Commission or utilitarian or subjective goals. The Commission should incorporate a wide range of opinions to ensure that the outcome of its work on the current topic reflected general State practice. To that end, it should take due account of the statements made by Member States in the Sixth Committee, their feedback on the questionnaire and their comments and suggestions on the progress of the Commission's work at each stage. Despite its value as reference material, the research of international academic bodies such as the International Law Association should not be used as a basis or guide for the conclusions to be reached by the Commission, nor should the Commission follow in the footsteps of such academic bodies, since, as a subsidiary body of the General Assembly with a mandate flowing from the Charter of the United Nations, it had a unique status and role.

In chapter I (A) of the first report, the Special Rapporteur dwelt at length on the "previous work of other bodies", rather than on the previous work of the Commission. There was no detailed information on the genesis of the topic in 2016 or the preliminary consensus reached by the Commission in that regard. That made him somewhat uneasy. The primary task of the Commission at the current initial stage was to define the scope of the topic, the direction of the study and the form of its outcome, with a view to laying a solid foundation for future work and discussions. To that end, it was essential for the views expressed and the proposals made by the Member States in the Sixth Committee to be fully heard and respected, which would take some time and could not be rushed. It was noteworthy that although the topic had been included in the long-term programme of work as early as 2016, it had not been placed on the current programme of work until the end of the Commission's seventy-third session, in 2022. The General Assembly had taken note of the Commission's decision to include the topic in its programme of work and had invited States to comment on the specific issues identified by the Commission only on 7 December 2022, in its resolution 77/103. A questionnaire had been prepared by the Special Rapporteur for that purpose and had been sent to Member States and relevant international organizations in December 2022, with the expectation that replies would be received by 1 May 2023. The Commission had also requested the secretariat to prepare a memorandum on the practice of States and international

organizations in relation to international disputes and disputes of a private law character. Previous experience suggested that the replies to the questionnaire were unlikely to be received by the deadline, since the answers were not readily available and would take time to collate, and the secretariat would also need time to prepare the memorandum. The Commission should not rush to make decisions on the basis of the feedback received from only a few States. Specifically, there was no need for the Commission to decide in haste at the current session to refer the two draft guidelines proposed by the Special Rapporteur to the Drafting Committee, as they were premature and could wait; in the alternative, if a majority of members agreed to refer the draft guidelines to the Drafting Committee, the latter should consider them only on a preliminary basis, for the time being, rather than taking action on them.

It was important to connect the Commission's work on the topic to its previous work, especially the 2016 syllabus submitted by Sir Michael Wood and adopted by the Commission as an annex to its report on the work of its sixty-eighth session. The syllabus and the conclusions of the Sixth Committee's deliberations on the relevant elements of that report should be the starting point for the Commission's study. Any modification of the title or scope of the topic would need to be based on detailed reasoning and consensus. Sir Michael Wood had opened his 2016 syllabus by stating that the topic flowed from earlier work of the Commission, including its 2011 articles on the responsibility of international organizations and the Commission's general debate on the peaceful settlement of disputes. He had proposed that the scope of the topic should be limited to the settlement of disputes to which international organizations were parties, namely disputes between international organizations and States, including both member and non-member States, and disputes between international organizations, but should exclude disputes to which international organizations were not parties but in which they were involved in some other way, such as participation in the settlement of disputes between member States. Disputes in which international organizations merely had an interest, such as disputes between member States over the interpretation of the organization's statute, would also fall outside the topic. The main focus of the proposed topic was intended to be international disputes, meaning disputes concerning international law. The topic would not cover disputes between international organizations and members of their staff, which should be settled through international administrative tribunals, nor would it cover issues relating to the immunity of international organizations. The question of whether it could cover 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, could be decided at a later date.

On that basis, Sir Michael Wood had suggested that the topic should focus on the legal issues of the admissibility of claims and the dispute settlement mechanisms applicable to international organizations, which were two key difficulties common to the resolution of all international disputes to which international organizations were parties. Having studied the syllabus, the Working Group on the long-term programme of work had recommended the topic's inclusion in the long-term programme of work, and the Commission had accepted that recommendation. Sir Michael Wood's syllabus and the consensus reached by the Commission at the sixty-eighth session thus provided direction for the Commission's study and could serve as a basis and starting point. Of course, the Commission could further define, supplement and improve the scope of the topic and the programme of work in the future.

Concerning the issues raised in the Special Rapporteur's first report, he agreed that the scope of the topic should be confined to international organizations that were intergovernmental in nature and should exclude non-governmental organizations and commercial entities. The latter were fundamentally different from intergovernmental organizations in terms of their status in international law and the legal systems applicable to the disputes to which they were parties. At the same time, however, he noted that the Commission's 2016 and 2022 reports and the Special Rapporteur's first report all referred to the need for further study on the question of whether disputes of a private law character should be covered. He had always been of the view that such disputes should not be covered by the topic, unless they had risen to the level of disputes between international organizations and States, such as in the case of violations committed by United Nations peacekeepers against the local population that attracted the attention and involvement of the host Government. That was because disputes of a private law character between international

organizations and private individuals in tortious matters were beyond the scope of international disputes, understood as disputes between international organizations and States and between international organizations. The inclusion of disputes of a private law character would expand the scope of the study, leading it towards the field of human rights protection and thus deviating from the original intent of the project.

However, in its report on the work of its seventy-third session (A/77/10), the Commission had indicated its presumption that the Special Rapporteur and the Commission would take disputes of a private law character into account, considering the importance of such disputes for the functioning of international organizations. No State had expressed any objection in that regard when the annual report had been considered in the Sixth Committee. Accordingly, and if the majority of the Commission members wished to expand the scope of the topic to disputes of a private law character, he would not retain his objection, provided that such disputes were appropriately qualified and that priority was given to the study of disputes of a public law nature. He agreed with Mr. Forteau and Mr. Lee that the scope of disputes of a private law character considered under the topic should be limited to disputes between international organizations and private persons in matters involving international law. In addition, it would be necessary to define the terms "dispute of a private law character" and "international dispute" in the draft guidelines or the commentaries thereto, in order to clarify the object of study.

The definition of "international organization" in the 2016 syllabus was taken from the Commission's 2011 articles on the responsibility of international organizations, which defined such an organization as one "established by a treaty or other instrument governed by international law and possessing its own international legal personality" and noted that international organizations could "include as members, in addition to States, other entities". That definition reflected the long-standing and consistent opinion of the Commission and had been generally accepted in international jurisprudence. It was his view that "international legal personality" was the key element that enabled an international intergovernmental organization to become a subject of international law and gave it the independent right to engage in external relations, the right to conclude treaties and the ability to assume international responsibility. An international organization without international legal personality could not be a subject of international law. In the context of the Commission's study of the current topic, it was not necessary to make major changes to the definition of "international organization". In particular, "international legal personality", as a core element, should not be excluded. The definitional element of "possessing at least one organ capable of expressing a will distinct from that of its members", as proposed by the Special Rapporteur, could be elaborated on in the commentaries to the proposed draft guidelines.

Regarding the definition of "dispute" in proposed draft guideline 2 (b), two points were at issue: first, the scope of the disputes covered, in other words whether they included only disputes between subjects of international law or extended to disputes between certain international organizations and private parties; and, secondly, the nature of the disputes, meaning whether they were limited to legal disputes or included other disputes, such as political and policy disputes. The Special Rapporteur's proposal was to include disputes concerning a point of "law, fact or policy". In principle, he agreed with the Special Rapporteur and favoured a broad definition of "dispute", since international disputes to which international organizations were parties were hardly of a purely legal nature; there were legal issues at stake in political disputes and political issues at stake in legal ones. Such issues were so closely intertwined that it was impossible to make a clear distinction between them. In terms of international practice, the methods mentioned in the proposed draft guidelines, such as negotiation and mediation, could be used to resolve disputes of a policy nature. However, from a practical point of view, the Commission's discussions should focus on legal disputes.

Concerning methods of dispute settlement, the proposed draft guidelines referred to both legal and non-legal means of solving disputes. He agreed with the Special Rapporteur that both categories should be studied. In that regard, the mechanisms and procedures of inter-State dispute settlement developed over time in international practice could serve as a reference. While legal means such as arbitration and the judicial settlement of disputes between States must comply with the "principle of State consent", non-legal means such as negotiation, mediation and good offices were more commonly used in practice and their

results were more readily accepted. In its study of the topic, the Commission should devote particular attention to the restricted access that international organizations had to the traditional methods of international dispute resolution, a point raised in the 2016 syllabus, and the search for dispute resolution methods that were compatible with the characteristics of international organizations as non-State entities.

There were several options when it came to the form of the outcome of the Commission's work on the topic. In the 2016 syllabus, Sir Michael Wood had suggested that the Commission should develop existing and new procedures for the settlement of disputes to which international organizations were parties, as well as model clauses. The Special Rapporteur was proposing the elaboration of a set of draft guidelines that, although non-binding, could be useful as a manual that set out hands-on approaches in order to facilitate the resolution of practical questions. He agreed with that approach in principle. Despite his disagreement with the definition of "international organization" and the scope of disputes in the two draft guidelines proposed by the Special Rapporteur, he had no objection to their referral to the Drafting Committee. Based on previous experience, he trusted that the divergent views of the members would be duly resolved in the Committee.

**Mr. Mingashang**, welcoming the thorough and balanced nature of the Special Rapporteur's first report on the topic, said that the reasons behind the definitions of the terms "international organization", "dispute" and "dispute settlement", which determined the scope of the topic, were meticulously explained and documented in the report. However, only limited reference was made to African international organizations, and even those that were mentioned were cited only in passing. He could recommend the 1988 compilation *Les organisations régionales africaines. Recueil de textes et documents*, by Sylvie Belaouane-Gherari and Habib Gherari, as a possibly useful source.

Decisions on certain issues, such as the question of whether the term "dispute" should cover disputes of a private law character, would depend on the strategic and methodological choices made by the Commission. In his view, that issue should be considered in detail, as such disputes were among the crucial problems facing individuals and other actors in their relations with international organizations. For example, in the Democratic Republic of the Congo, victims of sexual violence had been unable to obtain redress from the presumed perpetrators, who were members of the United Nations Organization Mission in the Democratic Republic of the Congo peacekeeping mission. Such a denial of justice was not only likely to discredit the Organization, but was also incompatible with its rhetoric advocating the rule of law.

The apparent "untouchability" of international organizations was inconsistent with the increasing tendency to view States as being under an obligation to resolve their differences with individuals by means of dispute settlement mechanisms. The idea that disputes of a private law character involving international organizations should be exempted from judicial settlement mechanisms seemed to be a relic of the former, almost mystical view of the State as enjoying privileges and immunities that placed it out of reach of the common people. However, the historical and international context had changed and international organizations, like States, should be seen as subjects of international law that must live up to their moral and especially their legal responsibilities, given that international organizations entered into private contracts in many areas of everyday life. For instance, if it was accepted that international organizations could borrow from a private bank, but that any dispute that might arise from the transaction could not be submitted to a traditional method of dispute settlement, there was clearly a problem of coherence and effectiveness in the articulation of the principle of rights and obligations within a given legal system.

Regarding the scope of the work under the current topic, he agreed that proper definitions were essential to avoid confusion and supported the comments made by other members praising the Special Rapporteur's approach in the definitions proposed. However, particular attention should be paid to other wording used in the report, such as the recommendation in paragraph 19 that the Commission should adopt "sufficiently flexible language" to ensure that "any disputes to which international organizations [were] parties [could] be addressed". That wording could lead to an inappropriate expansion of the concept of "disputes" to the point where international organizations were continually brought before dispute settlement bodies. It was thus preferable to restrict the disputes covered to legal

disputes to which international organizations could be parties. It might be beneficial to eschew a broad understanding of "dispute" and, rather, to include "disputes of a private law character", for the reasons he had just outlined. However, the Special Rapporteur had not explained what should be understood by that term. The report indicated, with reference to the 2016 syllabus, that "the reference to 'international' disputes might be understood as not comprising" disputes of a private law character. However, care should be taken not to set the adjectives "private" and "international" in opposition to each other, as they referred to different aspects of disputes. In his view, the appropriate distinctions to be made, for the purpose of defining the scope of the project, were between "disputes under domestic law" and "international disputes", on the one hand, and between "disputes of a private law character" and "disputes of a public law character", on the other. By looking at the practical implications that could arise from each, the Commission could draw the relevant conclusions in order to decide whether "disputes of a private law character" should be included in the scope.

Greater clarity was also called for in relation to the term "international disputes", as it might currently be deduced that the simple fact that an international organization was a party to a dispute conferred an international character on that dispute. Furthermore, in some cases international organizations, like States, could be subject to the jurisdiction of national courts in disputes. The case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* before the International Court of Justice, referring to civil claims that had been brought against Germany before the Italian courts, could be cited.

The commonly used approach of wording a definition by exclusion often led to a reduction in the scope of application to disputes that essentially concerned subjects other than non-international entities having the status of subjects of international law, regardless of whether they were brought before an international court or a State's domestic court. However, not every dispute to which a non-international subject was a party was necessarily a dispute of a domestic law or even a private law character. For instance, cases brought before the International Centre for Settlement of Investment Disputes might concern the interpretation and application of international treaties, but involve parties other than subjects of international law; however, that did not deprive those disputes of their international character. Clarification on that point from the Special Rapporteur would be welcome. In deciding whether to include disputes of a private law character in the scope of the topic, the Commission might wish to take as a basis the idea that an international dispute was a dispute that concerned the interpretation or the application of an international legal instrument before an international or a domestic judicial organ.

The Special Rapporteur had clearly laid out the relationship between the Commission's previous work and the current topic, but some points might nevertheless be added. General Assembly resolution 66/100 on the responsibility of international organizations was similar to resolution 56/83 on responsibility of States for internationally wrongful acts. The fact that an internationally wrongful act could be attributed to an international organization and the circumstances in which that might occur made it necessary to harmonize the definitions used in the current project with the ones used in those two sets of articles to ensure the proper functioning of the rules governing international dispute settlement.

The privileges and immunities enjoyed by international organizations constituted a major obstacle to efforts to hold them responsible before judicial dispute settlement mechanisms. In view of the principle that international organizations must be protected from any undue interference by States or individuals, that obstacle could not be removed unless an organization expressly waived its immunity, either on the basis of a clause in its constitutive instrument or headquarters agreement allowing it to do so or by giving consent in a specific case. The Commission should consider how its previous work on immunities could shed light on the guidelines to be adopted under the current topic.

In respect of the form of the outcome of the Commission's work, the complex and varied nature of international organizations, whose concerns were sometimes at odds with one another, and the fragmentation of international law in an increasingly divided world made the decision somewhat delicate. It would ultimately depend on the objective of the work on

the topic. Whether or not the Commission's output should be binding was a key question in that regard.

While he supported the Special Rapporteur's line of thinking on the proposed definitions, the dissymmetry between the amount of analysis devoted to the definition of "international organization" and the amount devoted to the definition of "dispute settlement" raised a question as to which of those was the actual focus of the topic. Furthermore, some of the language used was not as straightforward as it might at first appear. For instance, saying that international organizations were established by States implied that it was possible to define what was meant by a "State"; however, the definition offered in the 1933 Montevideo Convention on Rights and Duties of States was not conclusive and further precision was thus required.

The same was true of the reference to the international nature of an organization's constitutive instrument (treaty or other international legal instrument). Furthermore, the semantic content of terms such as "other entities" or "other instrument" could lead to confusion. A question might be raised as to whether the "entities other than States or international organizations" had their own international legal personality. As to the words "other instrument", the words "governed by international law" did not resolve the issue, in that not every instrument governed by international law was an "international legal instrument". The term "instrument" could refer to a multitude of objects, which, even if they were governed by international law, were not necessarily international legal instruments.

The Special Rapporteur based his proposed definition of "dispute" on wording from the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, and recommended that the Commission should go beyond the notion of a "legal dispute", as understood in case law, to include political disputes. However, the settlement of political disputes was influenced by considerations of expediency and the interests of the parties involved rather than the objective criteria that characterized the legal process. Should the Commission, whose mandate was limited to "the progressive development of international law and its codification", be addressing the political aspects of disputes? As the Special Rapporteur correctly noted that disputes between international organizations and their members were frequently of a political nature, it would be interesting to see to what extent such disputes could justifiably be included in the scope of the topic, given that the suggested outcome was to consist only of guidelines.

Concerning the definition of "dispute settlement", it would have been interesting to see the same type of in-depth analysis that had been done in respect of the two words in the term "international organization" applied in respect of "dispute settlement", going beyond a list of the different types of settlement that existed.

**Mr. Asada**, noting that the Special Rapporteur's first report covered all the basic points related to the topic, said that he supported the proposal to limit the scope of the international organizations covered by the topic to "intergovernmental" organizations, thus excluding non-governmental organizations and business entities, on the understanding that the term "intergovernmental" would not be taken as restricting the scope to organizations established only by States or whose membership was open only to States.

He also favoured the inclusion of disputes of a private law character, as they affected international organizations to a significant degree and raised numerous issues of international law, including jurisdictional immunity and human rights. He agreed, however, with those members who wished to exclude disputes between international organizations and their staff members, as such matters were best dealt with internally by the organization concerned, so long as no human rights issues were involved.

He had no specific preference as to the form of the final outcome, and considered it unnecessary to decide on the outcome at the current stage. As the Special Rapporteur had suggested, some form of non-binding guidelines could be preferable, but the substantive content of future work on the topic would determine the best approach. The matter should thus be deferred for consideration at a later stage. Noting his unfamiliarity, as a new member of the Commission, with the different categories of outcomes, he said he agreed with Ms. Ridings that the various forms that the outcomes of the Commission's work could take should be clarified.

As there was no established definition of “international organization”, the Commission should take a pragmatic approach, eliminating entities to be excluded from the scope of the topic. At the same time, it was important to agree on the core elements of the concept, such as the idea that an international organization should be sufficiently autonomous to be an independent party to an international dispute, however tautological that might seem. In respect of the defining elements of international organizations, specifically the wording concerning the organizations’ constituent instruments, the phrase “other instrument governed by international law” was taken from article 2 (a) of the 2011 articles on the responsibility of international organizations. According to the commentary to that article, the phrase was intended to encompass “resolutions adopted by an international organization or by a conference of States” as a constituent instrument of international organizations. However, in article 2 (a) of the Vienna Convention on the Law of Treaties, the phrase “governed by international law” was used to refer to the legally binding character of an international agreement. If that same phrase was used in the proposed definition of “international organization”, it would have the effect of excluding entities created by non-legally binding instruments. That might pose problems, particularly when the non-legally binding nature of a constituent instrument was explicitly provided for in the instrument itself.

For instance, the Organization for Security and Cooperation in Europe (OSCE) had encountered difficulties in securing privileges and immunities in its activities in participating States, as its constituent instruments, the 1975 Helsinki Final Act and the 1990 Charter of Paris, explicitly stated that they were not eligible for registration under Article 102 of the Charter of the United Nations, indicating that they were not considered treaties. Comparable issues had been faced by the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, established by a resolution of the States that were signatories to the Treaty, in States that did not acknowledge the Preparatory Commission as having been established by a treaty or other instrument governed by international law. Disputes concerning privileges and immunities were legal disputes that fell naturally within the purview of the disputes considered under the topic, no matter what definition was adopted for the term “dispute”. Thus, an entity established by a non-legally binding instrument could still become a party to a legal dispute. It would be unwise to exclude such disputes from the scope of the topic as a result of the proposed definition of “international organization”.

He supported the Special Rapporteur’s position that treaty bodies should be excluded from the scope of the topic, as they were not international organizations. The term “treaty body” generally referred to monitoring bodies that were created under treaties, typically treaties concerning human rights and environmental issues, and thus were not international organizations as such, although their views and observations might be subject to dispute. For example, some States parties to the International Covenant on Civil and Political Rights had challenged the Human Rights Committee’s interpretations in its general comments No. 24 (1994), on reservations, and No. 31 (2004), on the meaning of article 2 (1) of the Covenant. Those challenges were disagreements “concerning a point of law” and should fall outside the scope of the topic, not because there was no dispute, but because a treaty body was not regarded as an international organization.

However, it was unclear which element of the proposed definition of “international organization” was lacking in a treaty body, which was an entity established by States on the basis of a treaty and possessing at least one organ capable of expressing, by means of a vote, a will distinct from that of its members. If that observation was valid, perhaps the proposed definition of “international organization” was not precise enough to explain the differentiation between international organizations and treaty bodies. The Special Rapporteur himself admitted as much by saying that the differentiation might be “a question of degree rather than a clear line”. A way to solve the problem would be to include “international legal personality” in the definition, as a treaty body usually did not have a separate international legal personality.

The Special Rapporteur argued that possession of an international legal personality was a consequence of, rather than a prerequisite for, an entity’s status as an international organization. While that might be true, if the problem concerning treaty bodies was to be resolved, it would seem necessary to refer in the definition to “international legal personality” or include some other language indicating that the entity was a separate subject of

international law. However, if that phrase was included in the definition of "international organization", it might exclude organizations such as OSCE that were not regarded as possessing international legal personality. There were two opposing views on the legal personality of OSCE. According to one school of thought, as OSCE had been established by a non-legal instrument, it did not possess international legal personality; the other argued that OSCE enjoyed *de facto* international legal personality through its tasks and actions.

The disagreement reflected a broader doctrinal debate about the source of international legal personality for international organizations, between the "will theory" and the "objective personality theory", as explained by the Special Rapporteur in paragraph 49 of the report. The "objective personality theory" could potentially resolve the challenge of including entities such as OSCE in the definition of "international organization" while excluding treaty bodies: OSCE would be covered because of its possession of international legal personality by virtue of its mere existence, while treaty bodies would be excluded because they lacked such personality. Even under the "will theory", an international organization established by a non-legal instrument could obtain legal personality if its members subsequently recognized it as possessing such status after its establishment. Some OSCE participating States, particularly those, such as Austria, that hosted its organs, tended to acknowledge its legal personality. Thus, the question could be resolved under either of the two theories; although it was perhaps not a perfect solution, especially for supporters of the "will theory", it could still lead to some improvements in the definition of "international organization".

If the Commission thought that argument valid, it could consider deleting the words "on the basis of a treaty or other instrument governed by international law" from the proposed definition of "international organization", and instead include a reference to "international legal personality". The definition would thus cover entities created by non-legal instruments such as OSCE or certain preparatory commissions for international organizations. The change would avoid broadening the scope too much, as it would still exclude many entities that did not properly belong under the definition, in particular treaty bodies.

*The meeting rose at 1.05 p.m.*