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International Law Commission

Seventy-fourth session (first part)

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Held at the Palais des Nations, Geneva, on Wednesday, 3 May 2023, at 10 a.m.

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* Reissued for technical reasons on 7 August 2023.

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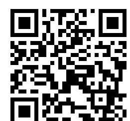

***Present*:**

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

***Secretariat*:**

Mr. Llewellyn	Secretary to the Commission

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

Tribute to the memory of Sompong Sucharitkul, former member of the Commission

At the invitation of the Chair, the members of the Commission observed a minute of silence.

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

Mr. Ruda Santolaria said that the Special Rapporteur's first report on the topic "Settlement of international disputes to which international organizations are parties" constituted an excellent initial examination of the issues. The topic was an important and topical one, since, as the Special Rapporteur noted in paragraph 16, international organizations, which normally enjoyed international as well as domestic legal personality, had relationships with various other entities, including member and non-member States, other international organizations and private parties, that might give rise to disputes.

He agreed with the Special Rapporteur that the scope of the topic should include disputes of a private law character, especially when they raised questions of international law. Such an approach would, moreover, be in line with discussions on the matter conducted by the Committee of Legal Advisers on Public International Law of the Council of Europe in 2015 and similar discussions within the Inter-American Juridical Committee of the Organization of American States between 2015 and 2018, which had led to the adoption of the Practical Application Guide on the Jurisdictional Immunities of International Organizations. He also agreed that, in view of the diversity of international organizations and their legal relationships, the most appropriate outcome would be a set of guidelines, accompanied by model clauses. On the other hand, he thought it premature to change the title of the topic at the present time. Such a change might be made at a later stage, if deemed appropriate, after consideration of subsequent reports of the Special Rapporteur and input received from States, international organizations and academics.

With regard to definitional questions, it was certainly important to distinguish international organizations established on the basis of a treaty or other instrument governed by international law from international non-governmental organizations, transnational corporations and multinational enterprises that, although active in a number of countries, were created under national law. The importance of international legal personality as a defining element of international organizations should also be underscored, as it was on the basis of such personality that international organizations could, *inter alia*, enter into treaties, enjoy immunities and privileges, incur international responsibility and make claims. Furthermore, the possession of legal personality distinguished international organizations from forums that did not have their own international legal personality, such as the Asia-Pacific Economic Cooperation forum and the Pacific Alliance.

The definition of international organizations contained in article 2 (a) of the 2011 articles on the responsibility of international organizations had represented a significant development of article 2 (1) (i) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The latter article established simply that an international organization meant an "intergovernmental organization", whereas the membership of various international organizations now included entities of a non-governmental nature – and not just other international organizations but also subjects of international law of a distinct nature, such as the Holy See or the Sovereign Military Hospitaller Order of St. John of Jerusalem, of Rhodes and of Malta, as well as territories or entities that were not sovereign States and yet had the capacity to join certain international organizations, such as the special administrative regions of China, which were part of the World Trade Organization as separate customs territories.

The South Pacific Regional Fisheries Management Organization provided a particularly pertinent example of the diversity of international organizations' membership: its members included a diverse number of States, large and small, a regional economic integration organization such as the European Union, and Chinese Taipei. In the convention

establishing that Organization, a distinction was drawn between the members themselves and the "fishing entities", which were treated as members other than in a few specific aspects.

With regard to the references to the Andean Community and the Southern Common Market (MERCOSUR) in paragraph 35 of the report, it should be noted that only the Andean Community was a supranational organization to which the member States had transferred powers in certain matters, such as intellectual property.

While agreeing with the Special Rapporteur that the existence of at least one organ capable of expressing its will was a defining characteristic of an international organization, he supported Mr. Vázquez-Bermúdez's proposal that that characteristic should be explained in the commentaries in order to circumvent the need to replace the agreed definition in the 2011 articles on the responsibility of international organizations. There could be valid reasons for proposing a new definition, but, like several other members who had spoken previously, he would prefer to retain the definition of an international organization adopted in the 2011 articles.

With regard to the notion of a "dispute", he agreed with the Special Rapporteur's suggested definition, which, building on the definition stemming from the 1924 judgment of the Permanent Court of International Justice in the *Mavrommatis* case, encompassed disputes that were not strictly legal disputes. He also agreed that Article 33 of the Charter of the United Nations captured well the different means of dispute settlement and that it was thus appropriate to take the content of that Article as a starting point for considering what was meant by "settlement of disputes". Similar means of dispute settlement were envisaged in the American Treaty on Peaceful Settlement, also known as the Pact of Bogotá, of 30 April 1948.

Mr. Sall said that the Special Rapporteur's first report provided an excellent basis for the Commission's work. As the report was introductory and exploratory by nature, it devoted considerable attention to the question of whether disputes of a private law character to which international organizations were parties should be covered. The Special Rapporteur put forward a range of arguments in favour of their inclusion, including the support for their inclusion demonstrated by States in the debate in the Sixth Committee and the fact that they accounted for a significant number of disputes to which international organizations were parties. The case law of the International Court of Justice was also cited in support of their inclusion, specifically, the advisory opinion issued in the 1954 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* case. The advisory opinion issued in 1987 in *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal* could also be cited; in that case, Judge Ago had noted, in a separate opinion, that the system did not provide "proper safeguards both for the overriding interests of the United Nations as an organization and for the legitimate claims at law of individuals in its service".

The inclusion of disputes of a private law character should not, in principle, be a problem. In addition to the arguments put forward in the report, their inclusion was supported by the growing tendency in international law to place an emphasis on justiciability requirements and, as a corollary, the rights of recourse that private parties should have. The inclusion of "The rule of law at the national and international levels" on the agenda of the General Assembly of the United Nations, on the one hand, and, on the other, the move to limit the scope of immunity – not only of States but also of international organizations in disputes with private parties – provided further supporting arguments.

However, assuming that there was agreement in principle on the inclusion of disputes of a private law character, the Commission would need to bear in mind that such a decision would raise some formidable challenges. As several members had noted, it would be necessary to define very carefully which disputes fell within the scope of the topic and which did not. Disputes between international organizations and their staff members were one source of possible difficulties. It would appear from the report that disputes of that kind were considered to fall within the scope of the study. However, if that was the line taken, the Commission would need to ask itself whether there was actually any legal room for manoeuvre in that area, given that relationships between international organizations and their staff, including the contentious aspects, were already subject to regulation. The disparities to be found in the regulations of the different international organizations, their scope and their

modalities, were a further complication. If staff disputes were to be covered, the Commission must keep in mind that a regulatory framework, or regulatory frameworks, existed and could not be disregarded.

The applicability of another body of law, specifically, international human rights law, to the situation of private parties in general was a second potential source of difficulty. That powerful and extensive body of law had a bearing not only on the topic under consideration but also on other topics considered by the Commission in the past, such as diplomatic protection. Furthermore, the aforementioned 1954 advisory opinion might also in fact be considered to belong to the more "general" field of human rights law, insofar as it stated that: "It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them."

The International Court of Justice was not alone in issuing guidance of that nature. Two other important judgments of principle, one issued by a world court, the other by a subregional court, underscored the need to take international human rights law into account in disputes of a private law character. In the first, issued in 1953 in the *Desgranges* case, the International Labour Organization Administrative Tribunal had found, using language very similar to that used by the International Court of Justice in the aforementioned advisory opinion, that "it is unthinkable that the International Labour Organisation, which was established to ensure the security of all wage-earners, does not desire to assure that of all its officials" and that its officials "cannot be left without any right of appeal". In the second, issued in 2020 in a case between the West African Economic and Monetary Union and one of its officials, the Union's Court of Justice stated that an interpretation of legal texts leading to the conclusion that no avenues of recourse were open to certain officials would be contrary to the provisions of the Union's constitutive treaty, which stipulated that members of the Union "shall respect the fundamental rights enshrined in the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples' Rights of 1981". Those examples emphasized a specific right, namely, the right of recourse, but it was reasonable to assume that all rights associated with the requirement of a fair trial would in the long run be given precedence in disputes between international organizations and their staff members. International human rights law was thus likely to have a bearing on the disputes that were the subject of the topic under consideration.

The aforementioned examples pointed to the conclusion that, if the Commission wished to deal with disputes of a private law character, it would need to pay due attention to rules that already existed, specifically, the regulations of international organizations that governed disputes with staff members and the rules of international human rights law that were applicable to the situation of private parties.

As a last point related to disputes of a private law character, he recalled that Mr. Forteau had pointed out that the term "disputes of a private law character", as used in the report, could give rise to misunderstandings. Furthermore, a decision to consider "private law" – which might well be national law, although it did not exclude the law of international organizations – might seem out of step with the Commission's mandate, which was, in principle, to consider issues of international law. It might be useful to consider whether, when speaking of "disputes of a private law character", the Commission was not simply referring to disputes with private parties. Such a discussion would also inevitably touch upon the inequality of the parties involved – of which the immunity enjoyed by international organizations was the supreme illustration – and the sense of being let down and disregarded that the weaker parties, meaning the "private parties", were likely to experience. Assuming that issue was accepted as relevant, the Commission might wish to consider replacing the term "disputes of a private law character" with "disputes with private parties". The report itself did not seem very clear on the distinction between the two terms and appeared to skip between them indiscriminately. Paragraph 24, for example, stated that "disputes of a private law character" were a very important part of disputes to which international organizations were parties, but then said that it might be necessary to provide for dispute settlement methods in case of "disputes with private parties", before concluding that "in practice, the

most pressing issues relate to the settlement of disputes of a private law character". Clarification was therefore needed.

With regard to the definition of an international organization proposed in paragraph 59, he noted that the "improvement" contained in it was the emphasis placed on possession of an own will to the exclusion of possession of legal personality. Paragraph 63 confirmed that "the proposed wording suggests referring to the possession of an organ capable of expressing an international organization's will instead of the possession of international legal personality". However, the two characteristics were not mutually exclusive, and the report was careful to note that a definition combining both was still possible. The new definition did not therefore invalidate the old one, and the Commission should be careful not to exaggerate the importance of those variations in its approach to the definition of an international organization.

That said, the new emphasis on the separate will of an international organization was of interest in two respects. A first advantage was that it positioned the organization as an actor in the full sense of the term, in other words, as an entity that acted, expressed itself, implemented acts and carried out actions, whereas the notion of legal personality simply described an attribute, an acquired or given capacity that might never be used. That distinction was relevant from the perspective of the settlement of disputes as it made clear that international organizations could incur responsibility. The second advantage was that, by emphasizing their separate will and distinguishing them from their member States, the definition suggested by the Special Rapporteur accorded international organizations a status that should make less likely any argument over which party – the international organization or its member States – should be held answerable for specific responsibilities. However, conceptual or definitional adjustments alone would not be sufficient to eliminate all risk of dispute.

Regarding the notion of a "dispute", the definition suggested by the Special Rapporteur was novel in that it incorporated the notion of political and policy disputes. The decision to cover such disputes appeared to be based on two points highlighted in the report. The first was the fact that disputes between international organizations and their members frequently had political aspects: according to paragraph 67, "a number of disputes between international organizations and their members may be of a more political nature, especially when they concern policy decisions and their implementation". The second was the fact that the International Court of Justice had, in a series of judgments, dismissed the argument that it lacked jurisdiction *ratione materiae* in respect of disputes that had political aspects. It was also noted in paragraph 67 that, while in *United States Diplomatic and Consular Staff in Tehran* the Court had explained that "legal disputes … often form only one element in a wider and longstanding political dispute", that fact did not deprive the Court of its jurisdiction.

However, both of those points were debatable. The claim that disputes tended to have a political dimension required substantiation. Legal disputes between international organizations and their members were not particularly rare: they arose whenever the compatibility of an organization's conduct with its constitutive act was called into question. More specifically, such disputes might relate to the principle or scope of the sanctioning power of an international organization when such power was implemented, as demonstrated by the recent practice of African international organizations such as the Economic Community of West African States and the West African Economic and Monetary Union. In those cases it was the States concerned that had initiated the proceedings even though they had never previously appeared before the courts in question – proof that the claimant States considered their dispute with the international organization to be a legal one, even if not exclusively a legal one.

The assertion that disputes between international organizations and States were predominantly political in nature was also questionable. What if the reverse were true? Might it not be that, even if motivated by political considerations, States preferred to formulate their claims in legal terms and made a particular effort to do so? Although the fact that they chose to couch their disputes in legal terms did not preclude the existence of political motivations and considerations, the assertion put forward could nonetheless be challenged on two

grounds: firstly, it could not be said with certainty that such disputes were always political; and, secondly, it was far from certain that disputes of a political nature accounted for the majority of the disputes between international organizations and their member States.

The case law of the International Court of Justice might be considered to provide a further explanation for the inclusion of political disputes. As that widely cited case law made clear, the fact that a dispute had political aspects did not prevent the Court from hearing the case. However, did that fact provide a basis for the Commission to accept, without question, that disputes of a political nature fell within the scope of the topic? There was one simple reason for not doing so: while the Court had always affirmed its competence to hear disputes that also had political aspects, it had never ventured into the realms of strictly and exclusively political disputes. It would be wise, therefore, not to extend the study into realms from which the Court had excluded itself. To do so would mean according the Court the will and capacity to hear disputes of a strictly political nature.

In fact, purely political disputes were often talked about in relation to the Court's case law but were never actually found there. The Court itself had never claimed to have dealt with such a dispute. It would be surprising, moreover, if it had done, as such a claim would run counter to the provisions of Article 36 (3) of the Charter of the United Nations, according to which: "In making recommendations under this Article, the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." In short, the Court's remit was to deal with legal disputes, not political ones. He therefore suggested that political disputes should be excluded from the scope of the study or at least that their possible inclusion should be discussed in greater depth.

Mr. Ouazzani Chahdi, thanking the Special Rapporteur for the quality of his first report on the topic under consideration, said that the report complemented and continued the Commission's previous work on legal issues involving international organizations in many respects. One of its points of departure was the definition of an international organization in the Commission's 2011 articles on the responsibility of international organizations. That definition remained valid and other speakers had already highlighted its importance for the current topic. The 2011 definition clearly distinguished international organizations from non-governmental organizations, which were established not by treaty or other instrument governed by international law but under national law, and specified that their members might include other entities in addition to States. The essential element in the definition was the possession of their own international legal personality, a personality separate from that of their members.

It was difficult, however, to perceive that characteristic as a consequence of "organization-hood", as certain authors held. In the definition suggested in paragraph 59, the Special Rapporteur, by contrast, appeared to have settled on the existence of organs capable of expressing the will of the organization as the defining characteristic of an international organization, citing the scholarly debate between supporters of the "will theory" and the defenders of the "objective personality theory". Nonetheless, after referring also to the advisory opinion of the International Court of Justice in the 1949 case *Reparation for injuries suffered in the service of the United Nations*, the Special Rapporteur concluded by suggesting, in paragraph 63, that the Commission might also consider adding after the words "a will distinct from that of its members" the phrase "and thus [possessing] its own international legal personality".

That suggestion would ensure that possession of legal personality remained an element of the definition. That was important since it was their legal personality that enabled international organizations to enter into treaties, to claim privileges and immunities, to incur responsibility and to make claims or defend against claims raised against them under international dispute settlement mechanisms. The reference to international legal personality would also ensure the exclusion from the definition of human rights treaty bodies such as the Human Rights Committee that did not have the status of international organizations. Furthermore, the possession of "juridical personality" was considered a defining characteristic of the United Nations in article 1 of the 1946 Convention on the Privileges and Immunities of the United Nations.

Regarding the scope of the topic, he agreed that disputes of a private law character should be covered, particularly since several States had expressed support for their inclusion and no State had expressed opposition. The syllabus drawn up by Sir Michael Wood in 2016 suggested that the Commission should decide at a later stage whether certain disputes of a private law character should be covered by the study, a process that would involve defining and delimiting which disputes of that nature were included and which were not. The Commission might also consider whether disputes between international organizations and members of their staff should be included in the scope of the topic.

Another noteworthy point was that, in practice, disputes of a private law character might also raise questions of international law, such as the immunity from jurisdiction enjoyed by international organizations. For example, in situations where an international organization engaged in activities of a private nature such as the conclusion of a contract for the purchase of property or rental of a building belonging to private parties, limits might be applied to that immunity. That argument was supported by the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, an entire section of which was devoted to proceedings in which State immunity could not be invoked, including commercial transactions, contracts of employment, ownership, possession and use of property, personal injuries and damage to property.

Another important question arising in connection with the scope of the topic was whether the Commission's work should be limited to legal disputes or whether it should also cover disputes that might have political aspects. He agreed with the Special Rapporteur's observation, in paragraph 67, that, while legal disputes formed the core of what would be discussed in the context of the topic, a number of disputes between international organizations and their members might be of a more political nature, especially when they concerned policy decisions and their implementation. The Special Rapporteur also cited a passage from the judgment in *United States Diplomatic and Consular Staff in Tehran*, in which the International Court of Justice explained that "legal disputes … often form only one element in a wider and long-standing political dispute". On that basis, disputes with a political dimension might also be included within the scope of the draft guidelines.

With regard to dispute settlement methods, he agreed that Article 33 of the Charter of the United Nations listed a good range of settlement methods to which the parties to a dispute might have recourse. He also agreed that guidelines were probably the most appropriate format for the final outcome of the Commission's work. On the other hand, he supported the proposal, made by Mr. Jalloh and others, that the title of the report should be changed and that, in the proposed draft guideline 1, on the scope of the draft guidelines, the word "disputes" should not be preceded by the qualifier "international". Furthermore, a reference to "legal personality" should be added to the proposed draft guideline 2 (a); a definition of "other entities" should be included in the commentaries; and the formula "at least one organ" should be reconsidered. He recommended that the draft guidelines should be sent to the Drafting Committee.

Mr. Nesi said that the decision to move the topic "Settlement of international disputes to which international organizations are parties" from the Commission's long-term programme to the current agenda was most welcome. The number and diversity of organizations now operating in the international context attested to the need to establish procedural means of dispute settlement as a matter of urgency. As had been noted, the limited practice available had not only made the adoption of the 2011 articles on the responsibility of international organizations a difficult task; it was also still affecting their operability. Accordingly, procedural guidelines were needed to ensure that breaches of legal obligations by international organizations were adequately addressed and sanctioned, which would help prevent situations of impunity from arising.

The Special Rapporteur's first report constituted an excellent start to the Commission's consideration of the topic. It singled out the pertinent aspects of the issues that the Commission would need to address and provided an accurate overview of scholarly contributions and judicial practice on the topic. He fully supported the Special Rapporteur's proposal that a set of guidelines should be the outcome of the Commission's work. The resulting legal document would be closely linked to the 2011 articles, which, despite being

central to the field of international responsibility, were non-binding. For that reason, the same approach should be adopted for the current topic.

In addition, the approach adopted should be flexible, allowing States to decide for themselves whether to adhere to the Commission's guidelines or take a different approach. Allowing that flexibility was the best way to ensure that the guidelines were as effective as possible, especially in view of the reluctance of States to agree to binding procedural obligations. The non-binding nature of guidelines might persuade States to endeavour to comply with them, and even to consider the possibility of incorporating them into their national legal systems.

He noted that the Special Rapporteur was proposing a definition of an international organization that differed from that set forth in the 2011 articles on the responsibility of international organizations. It was important, however, to maintain continuity within the work of the Commission. Even though the commentaries to the 2011 articles specified that the definition contained therein was not of a general nature and was intended to serve only for the purpose of the articles, the adoption of a different definition would create unnecessary confusion in an area where certainty was essential.

The Special Rapporteur's suggested definition encompassed three characterizing elements. Specifically, it stipulated that an international organization must be established by States and/or other entities; that it must be established on the basis of a treaty or other instrument governed by international law; and that it must possess an organ capable of expressing a will distinct from that of its members. While the Special Rapporteur's proposal to change the definition of an international organization from the one agreed previously was clearly linked to a noble attempt to broaden the scope of international organizations potentially subject to international disputes, the third element of his suggested definition could be misleading. What was actually required in order for an organization to be considered an international organization was not the presence of an organ that expressed a distinct will but rather the existence of an organ capable of expressing the will of the organization, in other words, a deliberative organ. Accordingly, the focus of the definition should be not on the existence of an organ but on the existence of a "distinct will". The organ was simply the means by which that will was expressed. Furthermore, that will could not be general in nature but must be linked to the organization's capacity to act at the international level; otherwise, the distinction between international organizations and other quasi-judicial bodies such as the Human Rights Committee would become blurred.

In short, the decision to adopt a new definition could be counterproductive. The first characterizing element of the new definition proposed was in fact implicit in the definition in article 2 (a) of the articles on the responsibility of international organizations, as was clearly confirmed in paragraph 12 of the corresponding commentary. Moreover, article 2 (a) already contained the second characterizing element, making any amendment unnecessary. For continuity's sake, the definition contained in that article – which was sufficient to cover a wide range of international organizations operating in the international context – should therefore be retained for the current topic. Also with regard to the second element, it was important to maintain the reference to "other instruments" in order to include within the scope of the topic not only organizations established by binding instruments but also forms of cooperation not clearly linked to agreements that were subject to signature and ratification.

With regard to the definition of a "dispute", he supported the Special Rapporteur's proposal to include disputes of a private law character in it. Many of the activities in which international organizations were involved were of a private nature, and failing to address those activities in the discussion would mean excluding a number of potential situations in which disputes could arise. However, assuming that the Commission took that line, it would be helpful if the Rapporteur could clarify to what types of dispute the term "disputes of a private law character" actually referred, and what primary rules might apply to disputes of that kind. Would only those rules that were generally considered to be part of private international law apply, or would other bodies of law also be involved? Given the complexities of the topic, the definitional groundwork should be extended to address those questions. Moreover, assuming that disputes of a private law character were included, he supported Mr. Jalloh's suggestion that the word "international" should be removed from the

title of the topic. However, as noted by Ms. Ridings, the reasons for making that change would need to be explained.

Although the proposed definition of disputes as “disagreements concerning a point of law, fact or policy” suggested that political disputes would also be addressed under the topic, in his opinion, the report should focus solely on international disputes of a legal nature. While Article 33 of the Charter of the United Nations, establishing the obligation for the parties to a dispute to seek a solution by peaceful means, did not explicitly characterize the disputes encompassed by its provisions as international, that was generally considered to be the case, and, on that basis, political disputes should be excluded – all the more so since they could be, and generally were, better dealt with under the quasi-judicial systems of self-accountability that international organizations such as the World Bank had established to guarantee flexible complaints procedures. It was also quite possible that the Sixth Committee would object to political disputes being addressed under the topic, since some States might perceive their inclusion as potential interference in their internal affairs.

Turning to the concept of dispute settlement, he noted that, although the definition provided in paragraph 81 reflected the content of Article 33 of the Charter of the United Nations, in that it referred to both diplomatic and judicial means of settlement, in paragraph 82 the Special Rapporteur proposed that the Commission’s work should focus on the latter, as they produced “legally binding results” that were the “most likely to be reflected in published judgments or awards”. While he agreed with that position, there was another fundamental reason why judicial means of dispute settlement should be the sole focus of the report. The notion of diplomatic means of dispute settlement was generally used to refer to procedures in which the parties had primary control over the outcome of the dispute, implying that freedom to decide how to reach an agreement was essential to the success of the process. The establishment of procedural guidelines, by contrast, even if they were of a non-binding nature, would convey the idea that negotiation, mediation and conciliation – the success of which was generally dependent on their flexibility – could be subject to a fixed procedure that might be used by States to limit the freedom of the parties to use diplomatic means of settlement. The content of the report should thus be limited to procedural guidelines aimed at regulating judicial means of dispute settlement and providing practical assistance to national courts dealing with cases involving international organizations.

In his view, the Special Rapporteur should pay greater attention to the issue of immunity, which was barely mentioned, and to the relationship between immunity and the Commission’s work on dispute settlement. Although the issue of immunity was distinct from the subject of the topic, the two were related, as Mr. Akande had pointed out. Furthermore, the content of the final report could potentially influence the decisions taken by national courts when ruling on whether or not to uphold claims of immunity. More than a decade after the Haiti cholera dispute, the scope of the right of international organizations to invoke immunity, particularly in disputes involving the United Nations, remained unclear, owing to the differing positions of national courts on the matter. In general, however, national practice revealed a tendency to grant absolute immunity to the United Nations when it was involved in peacekeeping operations, relying on section 2 of the 1946 Convention on the Privileges and Immunities of the United Nations, which denied all exceptions to immunity unless expressly waived.

Since 1946, however, there had been a clear increase in the number and functions of international organizations, including in areas where there was a high risk of fundamental rights being violated. That development could not be ignored by the international community, and the Commission must take account of the new scenario. Immunity remained fundamental for international organizations and the effective performance of their functions but it was important that immunities should be strictly linked and limited to those functions and should be necessary for their fulfilment. The immunities granted to international organizations should thus remain functional in nature, and, while not being limited to the powers expressly recognized in the organizations’ constitutive acts, should not be too broadly defined, at risk of giving rise to impunity.

In conclusion, although the issue of dispute settlement should be kept separate from that of immunity, he suggested that the Commission should take the issue of immunity into account in its work on the topic at hand. In particular, the recent case law of human rights

courts such as the European Court of Human Rights, when referring to immunities as potential obstacles to the fundamental right of access to justice, should be the subject of further analysis. Based on that consideration, the future outcome of the Commission's work, even if mainly focused on providing procedural guidelines, should at least include provisions requiring national courts, when relying on immunities, to identify alternative forms of justice by which to ensure adequate reparation for victims.

The Chair said that it was a great honour to have been elected as Chair of the International Law Commission for the first part of the session, especially as she was only the second woman in 74 years to be elected to that position. Speaking as a member of the Commission, she wished to commend the Special Rapporteur on his excellent report. As noted by Mr. Fife, the 2011 articles on the responsibility of international organizations had stopped short of addressing the consequences of that responsibility. It was therefore logical that the Commission should now address the settlement of disputes to which international organizations were parties. The topic was timely, would be of great practical value and had been welcomed by States. She fully supported the important points made by various Commission members regarding the importance of regional representation in the Commission's examination of international organizations.

Several members had rightly highlighted the tensions surrounding the immunity of international organizations and access to justice, especially for private individuals, an issue that the Commission should consider in its work. Although the immunity of international organizations and dispute settlement were, as Mr. Akande had pointed out, separate issues, the work of the Commission could help clarify the relationship between them. She fully agreed with Mr. Nesi's comments on the importance of addressing the issue of immunity.

In principle, she agreed with the view expressed by many Commission members that the scope of the topic should encompass disputes of a private law character. However, the scope of those disputes must be clearly delineated. The observations made by the Special Rapporteur in his article "Contracts between international organizations and private law persons", on the applicability of conflict-of-law rules to sales, rental and service contracts and the rather limited role played by international law in contractual relations between international organizations and outside private parties, suggested that certain categories of private disputes could be excluded from the scope. She agreed with the Special Rapporteur and others who favoured including within the scope disputes that had human rights implications or involved labour issues or tortious harms. In that regard, Mr. Akande had proposed that the Commission should consider limiting the scope of its work to situations where either treaty law or customary international law suggested that international organizations had an obligation to settle disputes of a private law character.

She agreed with the Special Rapporteur that the outcome of the Commission's work should take the form of draft guidelines, and she was open to the proposal put forward by other members that the outcome should include model clauses.

The Special Rapporteur's report contained a rich discussion of the scholarly work on the definition of an "international organization". She appreciated the practical examples provided by members of the definitions used in specific countries and the characteristics of specific organizations. It was her understanding that the Special Rapporteur wished to maintain the spirit but adjust the wording of the definition used in the 2011 articles on the responsibility of international organizations. However, many Commission members had expressed reservations about deviating from that definition. Although the chapeau of article 2 of the 2011 articles had limited the definitions contained in the article by stating that they were being given "for the purposes of" those articles, any change made to the 2011 definition of an "international organization" should have a clear rationale, given that it had been extensively debated by the Commission and the topic now before the Commission was closely related to that of the 2011 articles. She appreciated the focus in the 2011 definition on the three elements of mode of establishment, legal personality and membership. She was, however, willing to consider alternatives to it.

Many Commission members did not support the principal change that the Special Rapporteur had proposed making to the 2011 definition: that the words "possessing its own international legal personality" should be replaced with "possessing at least one organ

capable of expressing a will distinct from that of its members". She wished to note that, in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the International Court of Justice had decided that the Administering Authority made up of the Governments of Australia, New Zealand and the United Kingdom did not have a legal personality distinct from those of the States. Although the Court had not explicitly stated that the Administering Authority was not an organ capable of expressing a will distinct from that of its members, it had possibly implied that that was the case.

The Special Rapporteur did not dispute that international organizations possessed a legal personality independent of their members; rather, he took the view that the possession of legal personality was a consequence of being an international organization, not a defining element of such an organization. Given the Special Rapporteur's expertise on the topic, she was open to his proposed definition. Mr. Jalloh's proposal to add the words "and thus possessing its own international legal personality" to the end of the proposed definition could offer a compromise between the 2011 definition and the Special Rapporteur's proposal. She agreed with Mr. Fathalla that the definition should clearly distinguish between the entities that established the international organization and its members.

She agreed with those Commission members who did not support the inclusion of disagreements concerning a "policy" – which was a broad and fluid concept – in the definition of a "dispute". With regard to the future programme of work, she supported the proposals made by the Special Rapporteur in paragraph 84 of the report. She was in favour of referring the draft guidelines to the Drafting Committee.

Mr. Reinisch (Special Rapporteur), summing up the debate on his first report on the topic "Settlement of international disputes to which international organizations are parties", said that he was pleased that a large majority of members appreciated the importance of the topic, that some members had expressly recognized its practical value and that there had been general support for the approach taken and the proposals made in the report. He supported the request made by several Commission members to have the questionnaire described in footnote 5 of the report placed on the Commission's website. A list of the international organizations to which the questionnaire had been sent should also be made available. The secretariat had thus far circulated the questionnaire to United Nations specialized agencies and international organizations that had received a standing invitation to participate as observers at the United Nations. The secretariat was preparing a memorandum on the basis of the responses to the questionnaire.

During the debate, members had stressed the need to build on the Commission's prior work. In his report, which summarized and highlighted the Commission's previous work on topics related to international organizations and dispute settlement, he had attempted to do exactly that. Furthermore, the proposed draft guidelines built on the Commission's previous definitions.

He was glad that Commission members had appreciated his attempt to include references to doctrinal works on the law of international organizations from different legal systems and different language backgrounds. He was grateful for the references to further doctrinal works that members had provided and the examples that they had given of pertinent practice from their regions. The references would be added to the bibliography for the topic. Such collaborative efforts within the Commission would help ensure that the outcome of its work would benefit all regions of the world.

Almost all members who had taken the floor had shared the view that "disputes of a private law character" should be included within the scope of the topic. Mr. Huang would prefer such disputes to be dealt with only if they rose to the international level, for instance as the result of claims by a State against an international organization. Mr. Jalloh had proposed that, in the title of the topic, the words "international dispute" should be replaced simply with "dispute"; there appeared to be significant support for that proposal. Mr. Patel, however, had considered that the use of a reference to "international disputes" required further reflection, as it might be understood to exclude disputes of a private law character. Other members had an open mind on the issue, but several were hesitant to change the title, at least at the current stage, taking the view that a link to international law should be retained.

The drafting histories of both the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies showed that disputes concerning property rights, contracts, unjust enrichment or tort disputes had been considered to be "disputes of a private law character". Ms. Ridings had helpfully noted a slight difference in the definition of "disputes of a private law character" in the two conventions. However, the final report of Sub-Committee 1 of the Sixth Committee on the coordination of the privileges and immunities of the United Nations and of the specialized agencies (A/C.6/191) suggested that the difference was the result of a clerical error and had not been meant to change the notion of "disputes of a private law character". According to that report, when the Convention on the Privileges and Immunities of the Specialized Agencies was being adopted, it had been observed that the provision regarding the settlement of disputes of a private law character to which a specialized agency was a party "applied to contracts and other matters incidental to the performance by the Agency of its main functions under its constitutional instrument and not to the actual performance of its constitutional functions. It applied, for example, to matters such as hiring premises for offices or the purchase of supplies."

In such matters, the other party to the dispute would often be a private party who, owing to the international organization's immunity, had no recourse in the domestic courts. The final report of Sub-Committee 1 had gone on to state that: "The provision relates to disputes of such a character, that they might have come before municipal courts, if the Agency had felt able to waive its immunity, but where the Agency had felt unable to do so". Such disputes raised the most pressing issues in practice, as many Commission members had recognized.

Such an understanding of disputes "of a private law character" had also been reflected in the 1995 report of the Secretary-General on procedures in place for implementation of article VIII, section 29, of the 1946 Convention on the Privileges and Immunities of the United Nations (A/C.5/49/65). In that report, the Secretary-General had written:

> In addition to disputes arising out of commercial agreements, the Organization has encountered claims of a private law character, which may, in broad terms, be categorized under the following headings: (a) third-party claims for personal injuries (arising outside the peace-keeping context), (b) claims related to United Nations peace-keeping operations, (c) claims related to operational activities for development and (d) other claims.

Furthermore, the 2016 syllabus on the topic illustrated "disputes of a private law character" by referring to disputes "such as those arising under a contract or out of a tortious act by or against an international organization" (A/71/10, annex A, para. 3).

Although on rare occasions "international disputes" to which international organizations were parties arose between international organizations, they were primarily disputes between international organizations and States and concerned matters of international law, with the prime examples being disputes concerning rights and obligations under headquarters agreements, such as those at issue in the arbitral decision in *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* or the advisory opinion of the International Court of Justice in *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*. If the term "international disputes" was understood in that manner, it would be difficult for the Commission to retain that term and also address the pressing issues relating to disputes of a private law character. Although the Commission could resort to arguing that it would only address disputes of a private law character that had some connection with international law, for instance because they raised issues of immunity or access to justice or because the underlying claims had been espoused by States, such rationalizations could be hard for outsiders to comprehend.

He agreed with Mr. Fife and others that the outcome of the Commission's work should be practical, and if the prevailing view was that disputes of a private law character should be addressed in the outcome, the title of the topic should signal their inclusion. If the Commission changed "international disputes" to "disputes", the title could not be misconstrued as excluding disputes of a private law character. Ms. Galvão Teles had

suggested that the inclusion of disputes of a private law character should be addressed in the commentary to the draft guideline on the scope of the topic. Mr. Mingashang had remarked that delimiting the scope of the topic might involve complex debates about the distinctions between international and internal disputes and between disputes of a private law character and those of a public law character. However, such debates could be sidestepped by taking a broad view of the topic and considering it to address all disputes to which international organizations were parties, as Mr. Oyarzábal had proposed. Mr. Sall had argued that disputes between international organizations and members of their staff should be addressed because they embodied the problem of inequality between parties and, as had been alluded to by Mr. Fife and others, because the settlement of such disputes, which took place mainly before administrative tribunals, could offer a model relevant to the settlement of disputes of a private law character.

The Commission had modified the titles of topics under consideration several times in recent years, and a change of title could help the Commission more accurately convey the actual subject of its work. He was therefore in favour of amending the title to “Settlement of disputes to which international organizations are parties”.

A number of members had expressed concern that the Commission would find too few or too many examples of the practice of States and international organizations. It was true that there were relatively few examples of international law disputes between international organizations, on the one hand, and either States or other international organizations, on the other, while there were quite a few examples of disputes of a private law character between international organizations and private parties. His preliminary study on practice in that area had indicated that the amount of material to be assessed would be manageable if the Commission decided to consider all the forms of disputes to which international organizations could be parties.

There appeared to be agreement among members that the scope of the topic should not include non-governmental organizations and corporations or issues of privileges and immunities. Some members had rightly noted that some national courts had begun to restrict or even refuse to recognize an international organization’s immunity if no appropriate alternative means of dispute settlement was available. Although immunity and dispute settlement were certainly distinct issues, there were also important links between them that the Commission should take into consideration when dealing with the topic. As members had noted, the desire to prevent denials of justice and the fact that treaties sometimes contained obligations regarding the settlement of disputes were important rationales for the establishment of alternative methods of dispute settlement.

There had been broad support among Commission members for the proposal that the outcome of the Commission’s work on the topic should take the form of guidelines. Members had pointed out that guidelines could restate existing law or provide recommendations. In his view, the Commission’s past use of guidelines showed that a set of guidelines could potentially include both statements of existing law and practice and recommendations. For example, the introduction to the 2011 Guide to Practice on Reservations to Treaties stated: “The purpose of this Guide is not – or, in any case, not only – to offer the reader a guide to past (and often uncertain) practice in this area, but rather to direct the user towards solutions that are consistent with existing rules (where they exist) or to the solutions that seem most appropriate for the progressive development of such rules.” Similarly, the 2021 Guide to Provisional Application of Treaties stated: “The objective of the Guide is to direct States, international organizations and other users to answers that are consistent with existing rules or that seem most appropriate for contemporary practice.”

On the basis of comments made by members regarding the possible use and scope of the guidelines, he was convinced that a succinct explanation about the purpose of the guidelines should be included in the commentary. The model clauses that members had suggested formulating could be added to the set of guidelines.

The statements of most members had, as expected, focused on the definitions contained in draft guideline 2. While some members had supported the proposed definition of an “international organization”, perhaps a greater number had expressed a preference for retaining the definition contained in the 2011 articles on the responsibility of international

organizations. However, many had expressed both concern about departing from the 2011 definition and interest in his proposed definition, recognizing that it built on the 2011 definition. He was concerned about ensuring the consistent use of terms in the work of the Commission. However, he was also aware that the 2011 definition had itself been a departure from a definition previously adopted by the Commission. Adjustments to the 2011 definition could be considered necessary because of the definition's partial circularity in defining an "international organization" as an "organization" and the absence in the definition of an explicit reference to organs. It was his understanding that Commission members had acknowledged that the possession of organs was an accepted characteristic of international organizations. It was therefore unclear why the Commission should not bring the definition into line with what Mr. Paparinskis had appropriately called the "mainstream view in international institutional law".

As a number of members had noted, the Commission's work should have practical relevance and be accessible and understandable. It would be helpful to imagine how the imaginary judge described by Mr. Tsend would react if – after consulting various sources to try to determine what an international organization was and finding that the leading sources emphasized, albeit with nuances, the elements of a membership mainly comprising States, establishment on the basis of an instrument governed by international law and the existence of organs able to express the will of the organization – he or she came across the Commission's 2011 definition. The Commission had to ensure that the outcome of its work was widely understood and in line with developments in international law and that it did not become a self-contained subsystem of international law.

He agreed with those members who had noted that the difference between the 2011 definition and his proposed definition was perhaps more apparent than real. As Mr. Akande had emphasized, there was no inconsistency between the two definitions; the proposed definition was merely "slightly more elaborate" since it included the accepted requirement that international organizations must possess organs through which they could act independently and which ultimately led to their having international legal personality.

As had been acknowledged by Mr. Akande and others, international legal personality was the legal consequence of the establishment under international law of an entity able to express its own will through its organs. In the absence of any organs, there would simply be a group of States that had entered into a treaty and that would perhaps assemble from time to time at conferences to express their common will. As Mr. Fathalla had noted, the possession of at least one organ capable of expressing a will distinct from that of its members was key.

He agreed with Mr. Paparinskis and others who had said that for the purposes of dispute settlement, as for the purposes of responsibility, an organization needed to possess international legal personality. However, very few constituent instruments explicitly conferred international legal personality on the international organizations that they established. There were likely few examples beyond the Rome Statute of the International Criminal Court and the instrument establishing the International Anti-Corruption Academy. Clauses regarding personality in constituent instruments generally conferred personality under domestic law in order to enable organizations to enter into contracts, own property and institute legal proceedings. It had been difficult to identify international legal personality since the International Court of Justice had issued its advisory opinion in *Reparation for Injuries Suffered in the Service of the United Nations*; the identification of organs was a much more feasible exercise. While it could on occasion be difficult to assess the degree to which the organs could express a separate will, such difficulties arose far less frequently than in the identification of international legal personality.

He would be happy to follow the proposal made by Mr. Jalloh, which appeared to have broad support, that a reference to international legal personality should be included in the proposed definition to signal that the Commission was not departing from its previous definition but rather refining it to bring it into line with current thinking about international organizations. A formulation such as "and thus possessing international legal personality" could be added to the proposed definition.

A number of Commission members had commented on the use of the phrase "States and/or other entities" in the proposed definition to refer to the potential members of an

international organization. Mr. Fathalla and Mr. Fife had proposed that a distinction should be drawn between entities that could establish international organizations and those that could become members. Both speakers appeared to acknowledge that entities other than international organizations, including private entities, could become members of international organizations, although they perhaps could not establish international organizations. He agreed with their underlying reasoning but thought that it should be reflected in the commentary so as not to complicate the text of the draft guideline and make it difficult to understand.

The proposed definition aimed to ensure continuity with the Commission's previous work and in particular with the 2011 definition. As a number of members had noted, the requirement that the founding document of the international organization should be governed by international law would ensure that only States and international organizations could be founding members. At the same time, through the use of the word "entities" – the word used in the 2011 definition – the proposed definition acknowledged that a broader range of entities, beyond States and international organizations, could become members of international organizations. The Commission might like to consider Mr. Nguyen's proposal to adapt the language of the definition to indicate that it was predominantly States that established international organizations.

As explained in the report, the proposed definition of a "dispute" contained in draft guideline 2 (b) expanded the so-called *Mavrommatis* definition to include disagreements concerning points of policy, in addition to those concerning points of law or fact. Some members had expressly endorsed that expansion while also indicating that legal disputes should remain at the core of the definition. Others preferred to limit the Commission's consideration to legal disputes. In Mr. Akande's view, even if limited to legal disputes, the definition still allowed for consideration of a wide range of methods by which those disputes could be resolved. Mr. Vázquez-Bermúdez believed that a reference to political questions could be problematic, while Mr. Forteau and Mr. Lee suggested retaining the *Mavrommatis* definition for similar reasons.

More generally, some members had questioned the need to even include a definition of the term "dispute" in the draft guidelines. Mr. Vázquez-Bermúdez had considered such a definition useful, but not necessary. Ms. Ridings had acknowledged the possible practical utility of broadening the scope to include other disputes of a factual or policy nature and signalled her openness to such a definition. Mr. Mingashang thought that a discussion of political or policy disputes could be interesting, while Mr. Sall favoured limiting the Commission's consideration to legal disputes.

In his view, since the topic was primarily concerned with disputes to which international organizations were parties – whether they were international disputes involving States or other organizations or disputes with private parties – there was value in agreeing on a working definition of the term "dispute". Moreover, the Commission should not be prevented from defining a "dispute" simply because other international legal bodies and the International Court of Justice had refrained from doing so. Indeed, the Commission could make a contribution in that regard by providing a working definition.

It was his understanding that a majority of members would prefer the Commission to limit its deliberations to legal disputes and not to consider broader political and policy issues. He had suggested in the report that such issues might merit consideration but had also acknowledged that their consideration might pose practical difficulties, both because they could substantively enlarge the scope of the topic and because it could prove challenging to formulate guidelines that would be equally applicable to legal disputes and policy disputes. In that regard, he had found particularly significant the comments made by Ms. Okowa regarding the potential overreach that could result from the Commission's consideration of disputes over policy given its legal mandate, as well as her remark that disputes settled politically, often without regard to legal principles, were perhaps not an appropriate field of study for the Commission. He was thus open to the suggestion that it would perhaps be prudent to limit the topic to legal disputes for the time being, although he maintained that the fact that a dispute had political or policy implications did not render it a non-legal dispute, as clearly stated in the jurisprudence of the International Court of Justice.

He was grateful for Commission members' express or implied approval of the proposed definition of "dispute settlement" contained in draft guideline 2 (c). Although some questions had been raised about the definition and some drafting suggestions had been made, no fundamental concerns had emerged. Mr. Paparinskis and Ms. Mangklatanakul had rightly suspected that the reference to "regional agencies or arrangements" from Article 33 of the United Nations Charter had been omitted from the definition because it was not necessarily apposite to the settlement of disputes to which international organizations were parties, and it would be helpful to clarify that point in the commentary.

Mr. Jalloh had raised the interesting point that both Article 33 and the proposed definition listed methods of dispute settlement without actually defining the concept of dispute settlement. He had therefore proposed that "dispute settlement" should be defined as "the consideration of the claims or assertions comprising the subject matter of a disagreement concerning a point of law, fact or policy with the view to identifying an appropriate remedy". Because of similar considerations, Mr. Akande had proposed that the defined term should be changed from "dispute settlement" to "methods of dispute settlement". The two proposals should be addressed in the Drafting Committee and could perhaps be combined.

He wished to thank all the Commission members for their lively engagement in the debate and their stimulating ideas regarding the topic. He looked forward to the debate the following year on his second report, which would address international disputes, in the form of disputes between international organizations and States and the somewhat rarer disputes between international organizations.

The Chair said she took it that the Commission wished to refer to the Drafting Committee draft guidelines 1 and 2 as contained in the Special Rapporteur's first report, taking into account the comments made during the debate.

It was so decided.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Paparinskis (Chair of the Drafting Committee) said that, for the topic "Settlement of international disputes to which international organizations are parties", the Drafting Committee was composed of Mr. Akande, Mr. Asada, Mr. Fathalla, Mr. Fife, Mr. Forteau, Mr. Galindo, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Huang, Mr. Jalloh, Mr. Lee, Ms. Mangklatanakul, Mr. Mavroyiannis, Mr. Mingashang, Mr. Nesi, Ms. Okowa, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Oyarzábal, Mr. Patel, Ms. Ridings, Mr. Ruda Santolaria, Mr. Sall and Mr. Savadogo, together with Mr. Reinisch (Special Rapporteur) and Mr. Nguyen (Rapporteur), *ex officio*.

The meeting rose at 12.45 p.m.