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Settlement of international disputes to which international organizations are parties

Statement of the Chair of the Drafting Committee
Mr. Mārtiņš Paparinskis

25 May 2023

Madam Chair,

This morning, it is my pleasure to introduce the second report of the Drafting Committee for the seventy-fourth session of the International Law Commission, which concerns the topic "Settlement of international disputes to which international organizations are parties". The report, which is to be found in document A/CN.4/L.983 and was issued on 18 May 2023, contains the texts and titles of the draft guidelines provisionally adopted by the Drafting Committee at the present session.

Before commencing, allow me to pay tribute to the Special Rapporteur, Mr. August Reinisch, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also would like to thank the other members of the Committee for their active participation and significant contributions to the successful outcome. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Madam Chair,

The Drafting Committee devoted seven meetings to this topic, from 8 to 12 May and on 17 May, for the consideration of the draft guidelines as originally proposed by the Special Rapporteur

in his first report,[1] together with a number of reformulations that were proposed by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the debate in Plenary and in the Drafting Committee. At the present session, the Drafting Committee provisionally adopted a total of two draft guidelines on this topic.

I shall introduce in turn the two draft guidelines provisionally adopted by the Committee. Let me turn first to draft guideline 1.

Draft guideline 1 - Scope

Draft guideline 1 was adopted by the Drafting Committee with two changes to the provision originally proposed by the Special Rapporteur in his first report. One change was made to the title of the draft guideline and the other to the text itself.

The title of draft guideline 1 is "Scope". The Committee was of the view that streamlining the title to "Scope" would better align it to the most recent practice of the Commission and its outputs. It bears recalling that the titles of the provisions on scope on the topics "Peremptory norms of general international law (*jus cogens*)", "Protection of the environment in relation to armed conflicts", "Protection of the atmosphere" and "Provisional application of treaties" are all "Scope". In addition, it was considered that the words "of the draft guidelines" in the title, as originally proposed by the Special Rapporteur, were superfluous since the text of draft guideline 1 itself contained reference to the "present draft guidelines".

With respect to the text of draft guideline 1, the Committee found it appropriate to replace the phrase "apply to", as originally proposed by the Special Rapporteur, with the verb "concern". Although the Committee did discuss using the phrase "relate to" instead of the verb "concern", it was considered that the latter was broader and more appropriate. Such verb is used to reflect the usual formulation of this type of provision in the work of the Commission, including in guideline 2, paragraph 1, of the guidelines on the protection of the atmosphere and in guideline 1 of the Guide to Provisional Application of Treaties. Draft guideline 1 as provisionally adopted by the Drafting Committee reads "[t]he present draft guidelines concern the settlement of disputes to which international organizations are parties".

[1] A/CN.4/756.

Madam Chair,

Allow me to say a few words about an extensive debate that took place in the Drafting Committee on possible formulations for draft guideline 1.

The Committee discussed whether it would be appropriate to qualify the word "disputes" in draft guideline 1 to clarify the types and nature of the disputes that the draft guidelines were meant to cover. Terms such as "disputes with legal aspects", "legal disputes" and "international disputes" were considered. Some members were of the view that a qualifier was important to delineate the precise scope of the topic and, in particular, to identify what types of disputes were included and excluded from the work of the Commission on the topic, such as disputes of a private law character, commercial disputes and staff members disputes. Here, I should say that members of the Drafting Committee stressed that the title of the topic might need to be changed to better reflect the scope of the topic.

The Committee eventually agreed that adding qualifiers at this stage would not be appropriate. It was felt that adding qualifiers was premature and could have an adverse effect on the work on the topic at a later stage. It was concluded that the text as adopted by the Committee gave the Commission enough flexibility to refine the nature and types of disputes that the draft guidelines were meant to cover, both in the commentaries and as the work progresses. The importance of having comments by States on the text and on the commentaries was also mentioned. In that connection, it was noted that clarity and transparency from the outset were important and, thus, it was understood that the commentaries would explain the scope of the topic, as well as elaborate on the question of the parties involved in disputes with international organizations. It was also understood that the commentaries would clarify that national law issues pertaining, for example, to the competence of the judiciary, and questions that were governed exclusively by national law, were not included in the scope of the topic.

Allow me also to say that the term "dispute" is defined in draft guideline 2.

Draft guideline 2 – Use of terms

Madam Chair,

Let me now introduce draft guideline 2, which was adopted by the Drafting Committee with changes to the provision originally proposed by the Special Rapporteur in his first report.

Draft guideline 2 is entitled "Use of terms", which corresponds to the proposal made by the Special Rapporteur in his first report. The draft guideline comprises three subparagraphs and intends to set forth the functional meaning of terms that are considered to have direct implications on the scope of the topic.

Before addressing the three subparagraphs, allow me to draw your attention to the inclusion of the word "present" before the term "draft guidelines" in the *chapeau*. This change was made to clarify the text and to align it with the usual practice of the Commission when including a provision of this nature in its outputs.

Madam Chair,

Allow me to first address subparagraph (a), which contains a definition of the term "international organization". At the outset, I would like to stress that the central question confronting the Drafting Committee was whether, for the purposes of the work on the present topic, the Commission should (a) reproduce the definition of "international organization" contained in article 2 of the articles on the responsibility of international organizations, adopted by the Commission at its sixty-third session in 2011, or (b) adopt a new definition, as proposed by the Special Rapporteur. An extensive and thorough debate took place in the Committee regarding this question. For the purposes of my statement, Madam Chair, I shall hereinafter refer to the definition of "international organization" contained in article 2 of the articles on the responsibility of international organizations as the "ARIO definition".

Several members of the Committee were of the view that reproducing the ARIO definition was more appropriate. According to those members, such definition afforded enough flexibility for the purposes of the work on the present topic, was robust and generally accepted by States, was well-established, known to the reader and to legal practitioners, fostered legal security, and was consistent with previous work of the Commission. Adopting a new definition would create confusion and raise unnecessary questions. It was also emphasised that the articles on the responsibility of international organizations were still before the Sixth Committee of the General Assembly. It was stated that any nuances or refinements that were due for the purposes of the

present topic could be addressed in the commentary. Other members considered that a new, more refined, and more elaborated definition was the better option for the work on the topic and was more in line with the general understanding of international organizations. Some members considered that the definition of "international organization" had evolved since the Commission last dealt with this question. It was stressed that a new definition would nevertheless build upon the ARIO definition and include its crucial elements. Ultimately, the Drafting Committee settled on adopting a new definition of the term "international organization", on the understanding that the commentaries would explain in detail its consistency with the ARIO definition and the reasons for its new element, as well as that States would have the opportunity to comment on it at the next session of the Sixth Committee.

Madam Chair,

Having made these preliminary remarks, I shall now address the definition of international organization contained in subparagraph (a), as adopted by the Drafting Committee.

It reads as follows:

> (a) "International organization" means an entity possessing its own international legal personality, established by a treaty or other instrument governed by international law, that may include as members, in addition to States, other entities, and has at least one organ capable of expressing a will distinct from that of its members.

Subparagraph (a) was adopted by the Drafting Committee with changes to the original proposal by the Special Rapporteur.

First, the phrase "refers to", as originally proposed by the Special Rapporteur, was replaced with the verb "means". The Committee concluded that the verb "means" better reflected the purpose of the subparagraph and aligned it with the usual formulation of this type of provision in the work of the Commission.[2] It bears noting that the Committee also considered using the word "organization" instead of "entity" at the beginning of the sentence, but concluded that "entity" was more appropriate to avoid a circular definition.

Second, the Drafting Committee considered it necessary to add the phrase "possessing its own international legal personality" after the words "an entity". This change was prompted by

[2] See, for example, guideline 1 of the guidelines on the protection of the atmosphere and article 2 of the articles on the responsibility of international organizations.

comments made by members of the Commission in the plenary debate, as well as in the Drafting Committee, that express reference to international legal personality was warranted in the definition itself. The purpose of this change was to reflect the formulation of the ARIO definition. It was pointed out that international legal personality was a core element and a fundamental issue in the ARIO definition. It was understood that the commentary would explain the meaning of "international legal personality" and the crucial importance of having this element expressly referred to in the definition of international organization for the purposes of the present topic.

With regard to the phrase "established by a treaty or other instrument governed by international law", the Drafting Committee held an extensive debate concerning by *whom* and by *which means* an international organization could be established. This phrase is also present in the ARIO definition. I wish to point out that a debate took place among members of the Drafting Committee regarding the distinction between subjects of international law that can establish an international organization and subjects that can become its members. It was agreed that the phrase "by treaties or other instruments governed by international law" made it clear that international organizations could be established by States and international organizations as well as *sui generis* subjects of international law with treaty-making powers. It was understood that this matter would be further developed in the commentary, including the aspect that individual persons and non-governmental organizations could not establish international organizations. The commentary would also address the question whether the phrase "other instruments governed by international law" includes international organizations created by non-legally binding instruments.

Regarding the phrase "that may include as members, in addition to States, other entities", the Drafting Committee considered appropriate to add it to the provision. It will be recalled that the provision, as originally proposed by the Special Rapporteur, did not expressly mention who could be a member of an international organization. The issue of membership was thoroughly discussed in the Drafting Committee, and it was considered important to include this phrase, as it is also contained in the ARIO definition. It was agreed that the commentary would explain the meaning of the term "other entities", including that international organizations may have a mixed membership, and would address international organizations whose membership only comprises international organizations.

Finally, the phrase "possessing at least one organ capable of expressing a will distinct from that of its members" originally proposed by the Special Rapporteur was retained, but with one change: the word "possessing" was replaced with the word "has". Differing views were expressed as to whether such phrase should be included in the provision and whether it would represent a departure from the ARIO definition, in particular whether it could be construed as a constitutive element of an international organization. Some members were of the view that express reference

to "organ capable of expressing a will distinct from that of its members" in the definition was not necessary because the crucial constitutive element was possession of international legal personality. It was also mentioned that including this phrase could be construed as adding more criteria to the ARIO definition. It was noted that the International Court of Justice, in its Advisory Opinion on "*Reparation for injuries suffered in the service of the United Nations*",[3] did not refer to an "organ capable of expressing a will distinct from that of its members" as a constitutive element of an international organization. According to some members, the issue would be better addressed in the commentary, where the nuances and the difference between "international legal personality" and "at least one organ capable of expressing a will distinct from that of its members" could be explained in detail. Some members indicated that terms such as "distinct" and "will" were unclear and should be avoided. Some of them indicated that they would be better dealt with in the commentary. In that connection, the Committee considered using the phrase "acting on its own behalf" instead of the term "will distinct". Other members were of the view that international organizations usually possessed at least one organ through which they acted, that is, through which they fulfilled the tasks that were entrusted to them by the founding members. For that reason, the main purpose of having the phrase in the definition itself was to emphasise that an organ was a crucial defining element of an international organization. It was also stated that express reference to "will" in the text was essential and that international legal personality should be considered as a consequence of the possession of an international organization's distinct will.

The final text adopted by the Drafting Committee is the result of a compromise between the various positions. It was understood that integrating text that was in line with the ARIO definition with the express reference to "at least one organ capable of expressing a will distinct from that of its members" should not be interpreted as a departure from the ARIO definition, but rather as a way of enriching it. The importance of ensuring coherence and consistency between the definition of "international organization" in the present topic and the ARIO definition was also highlighted. It was agreed that the commentary would explain the reasons for having the phrase "at least one organ capable of expressing a will distinct from that of its members", in addition to the phrase "possessing its own international legal personality" in subparagraph (a).

It was also agreed that the definition of "international organization" contained in subparagraph (a), provisionally adopted by the Drafting Committee at the present session, may be revisited at a later stage in light of further developments on the topic. It should be noted that the Commission would particularly benefit from comments by States on this issue.

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[3] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174*.

Madam Chair,

Let me now turn to subparagraph (b). Subparagraph (b) contains the definition of "dispute" and was adopted by the Committee with changes to the provision originally proposed by the Special Rapporteur in his first report.

Subparagraph (b) now reads as follows: "'[d]ispute' means a disagreement concerning a point of law or fact in which a claim or assertion is met with refusal or denial."

Following the same reasoning as in subparagraph (a), the Committee replaced the phrase "refers to" with the verb "means".

With respect to the word "policy", contained in the original proposal of the Special Rapporteur, the Drafting Committee decided to omit it from the text. It was considered appropriate to narrow the scope of the definition of disputes to disagreements on questions of law or fact and to exclude disputes possessing an exclusively political nature. That said, I would like to highlight certain issues that were extensively debated in the Committee.

A debate ensued as to whether the provision should reproduce the definition of dispute contained in the *Mavrommatis Palestine Concessions Judgment*.[4] Some members of the Drafting Committee were of the view that the question of disputes under the draft guidelines was already covered by the scope of the topic. In that regard, and since the commentary to draft guideline 1 would elaborate on the types and nature of disputes, a definition of disputes was superfluous and could create confusion. According to those members, if, however, there was a need to keep a definition of the term "dispute", the Commission ought to use the one contained in the *Mavrommatis Palestine Concessions Judgment*. Other members considered that having a definition of the term "dispute" was useful, stressing that the word "policy" should nevertheless be omitted. Those members were of the view that the commentaries should go into detail about the nature of the disputes, recalling the *Mavrommatis Palestine Concessions Judgment* and the case *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom)*.[5] In addition, it was noted that despite the word "policy" being omitted from the text, the commentary would need to explain that the political context surrounding a dispute could at times play an important role in understanding the dispute itself. The Drafting Committee reached a compromise with the adoption of a provision that built upon the definition of the term "dispute" contained in the *Mavrommatis Palestine*

[4] *Mavrommatis Palestine Concessions Judgment* No. 2, 1924, P.C.I.J. Series A, No. 2, p. 11.
[5] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 833*.

Concessions Judgment, on the understanding that the commentary would explain the reasons for it, as well as address the concerns raised by members.

Regarding the word "fact", the Committee considered whether it was necessary to make specific reference in the provision itself to the legal aspects of a disagreement concerning a fact. The view was expressed that wording on the lines of that contained in Article 36, paragraph 2*(c)*, of the Statute of the International Court of Justice, was needed in order to specify that the "fact" in question should be one that, if established, would constitute a breach of an international obligation. In that regard, it was noted that the breach could be a breach of an obligation, not necessarily of an international obligation. It was also stated that the commentary would need to explain that reference to a "fact" for the purpose of the provision meant a fact related to a point of law.

The Committee agreed that the commentaries would explain the meaning of disagreement concerning a fact for the purposes of the provision and address in detail the types of disputes that would be covered under the provision and the ones that would fall outside of its scope.

Lastly, the Committee omitted the terms "of one party" and "by another" originally proposed by the Special Rapporteur. A debate took place as to whether it was necessary to refer to the parties that might be in opposition to each other and to define with *whom* international organizations might be in a dispute. First, it was noted that if reference to "party" were to be kept, there was a need to define the word "party". Second, it was suggested that if the reference was kept, the provision should envisage that third parties might also have an interest in a dispute with an international organization. The Committee agreed that these matters would be better explained in the commentary and, thus, reference to "party" was omitted.

With respect to the term "claim or assertion", it was understood that the commentary would explain that the appropriate term was "claim" when referring to legal issues, while the term "assertion" was appropriate when referring to factual issues. In the same token, it was agreed that the commentary would explain that the term "refusal" referred to "claim", while the term "denial" referred to "assertion". In a nutshell, for the purposes of the draft guidelines, a dispute means a disagreement concerning a point of law in which a claim is met with refusal, or a disagreement concerning a fact in which an assertion is met with denial.

Madam Chair,

Allow me to now turn to subparagraph (c). Subparagraph (c) was adopted with changes to the original proposal by the Special Rapporteur. It now reads as follows: "'[m]eans of dispute

settlement' refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of resolving disputes".

Subparagraph (c) is inspired by Article 33 of the Charter of the United Nations. The Committee decided to insert the words "means of" before "dispute settlement" at the beginning of the sentence. It bears noting that other words, such as "methods", "forms" and "procedures" were considered by the Drafting Committee. Ultimately, the word "means" was considered more appropriate to qualify the term "dispute settlement" to ensure consistency between the provision and the text of Article 33 of the Charter, and also to take into account the wording used in the Manila Declaration on the Peaceful Settlement of International Disputes.

Contrary to subparagraphs (a) and (b), where the phrase "refers to" was replaced with the verb "means", the Committee decided to keep the phrase "refers to" in subparagraph (c), as originally proposed by the Special Rapporteur. It was felt that retaining the phrase "refers to" signalled to the reader that the provision provided examples of, or listed some of, the various means available to resolve a dispute, rather than providing a rigid sequence of the said means. Furthermore, the provision does not attempt to define "dispute settlement" but rather lists "means of dispute settlement", so it was agreed that the phrase "refers to" was more appropriate.

As the provision is inspired by Article 33 of the Charter, the Drafting Committee decided to include the phrase "resort to regional agencies or arrangements" in the text. It was considered that there was no reason or justification to depart from the text of the Charter in that respect, although it was unclear whether, in practice, such resort would not fall under one of the other means of dispute settlement enumerated in Article 33 of the Charter.

The Committee also replaced the word "and" before the term "other peaceful means" with the word "or". This change was made to bring the text closer to Article 33 of the Charter and to clarify that the means of dispute settlement listed in subparagraph (c) were not cumulative.

Regarding the phrase "other peaceful means of resolving disputes", it should be pointed out that the word "solving", originally proposed by the Special Rapporteur, was replaced with the word "resolving". The Drafting Committee considered that it would be more appropriate to use the word "resolving" as the subparagraph intended to encompass the notion of seeking a solution to the dispute rather than solving it.

That said, allow me to point out two other issues that were debated in the Committee. First, a debate took place as to whether this provision was appropriately placed. It was suggested that "means of dispute settlement" should be the subject of a substantive draft guideline, rather than being placed under a draft guideline concerning the use of terms. It was agreed that the commentary would explain the reasons for placing "means of dispute settlement" under draft

guideline 2. Second, members of the Drafting Committee also discussed the fact that subparagraph (c) did not contain the term "of their own choice" that qualified the expression "other peaceful means" in Article 33 of the Charter. While some members were of the view that such term should be included in the provision, the Committee agreed that in this specific context, departing from the text of Article 33 was justified. It was noted that not including "of their own choice" was appropriate for the present topic which concerns international organizations because in some cases the parties to a dispute were not free to choose the means to resolve their dispute. In particular, member States of an international organization may be under an obligation to have recourse to specific means of resolving disputes according to the constituent instrument of the said organization. It was understood that both of these issues would be explained in the commentary.

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Madam Chair,

This concludes my introduction of the second report of the Drafting Committee for the seventy-fourth session. It is my sincere hope that the Commission will be in a position to adopt draft guidelines 1 and 2 on the settlement of international disputes to which international organizations are parties, as presented.

Thank you, Madam Chair.