Provisional

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# International Law Commission

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

**Provisional summary record of the 3659th meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 30 April 2024, at 10 a.m.

## Contents

***Present***:

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| *Chair*: | Mr. Vázquez-Bermúdez |
| *Members*: | Mr. Akande |
| | Mr. Asada |
| | Mr. Cissé |
| | 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. Nesi |
| | Mr. Nguyen |
| | Ms. Okowa |
| | Ms. Oral |
| | Mr. Ouazzani Chahdi |
| | Mr. Oyarzábal |
| | Mr. Paparinskis |
| | Mr. Patel |
| | Mr. Reinisch |
| | Ms. Ridings |
| | Mr. Ruda Santolaria |
| | Mr. Sall |
| | Mr. Savadogo |
| | Mr. Tsend |

***Secretariat***:

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| Mr. Llewellyn | Secretary to the Commission |

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

**Settlement of disputes to which international organizations are parties** (agenda item 6) (*continued*) (A/CN.4/766)

**Mr. Fife** said that he was grateful to the Special Rapporteur for his second report on the topic "Settlement of disputes to which international organizations are parties" (A/CN.4/766), which contained an impressive collection and analysis of the practice of international dispute settlement, and to the secretariat for its useful memorandum (A/CN.4/764), which contained the replies of States and international organizations to the questionnaire prepared by the Special Rapporteur.

There was broad agreement that the most suitable form for the Commission's output was a set of draft guidelines intended to direct States, international organizations and other users to answers that were consistent with existing rules or that seemed most appropriate for contemporary practice. The second report contained four proposed draft guidelines. He would focus on draft guidelines 4 to 6, as they provided concise guidance intended to be of practical use to States, international organizations and other users.

Draft guideline 4 on the practice of dispute settlement consisted of descriptive phrases such as "are settled by the means of", "are widely used" and "are often not provided for and are therefore resorted to less frequently". A preliminary concern might be whether the draft guideline, as currently formulated, had sufficient normative content or added value, or whether the wording should be revised to provide further guidance. Without entering into a premature discussion on the drafting, he wished to raise a number of questions and put forward some thoughts.

The draft guideline stated that international disputes to which international organizations were parties "are settled" by the various means of dispute settlement discussed in the report. That appeared to be a statement of fact, but it was not clear whether all such disputes were settled by those means, as there might be impediments to their availability. Furthermore, the Commission should reflect on the issues that were likely to arise, as identified by Sir Michael Wood in his 2016 syllabus.

With regard to available and adequate means for the settlement of disputes, according to practice, the draft guideline referred to negotiation and other means "falling short of" binding third-party adjudication as being widely used in dispute settlement. However, the words "falling short of" could be taken to suggest that amicable dispute settlement had a normatively lesser status and value than adjudicatory or arbitral dispute settlement, whereas that idea was not borne out in contemporary practice.

Negotiation and other so-called alternative means of dispute settlement were far more commonly used than adjudication or arbitration in resolving such disputes. That was recognized in paragraphs 40 and 41 of the report, which stated that, in practice, disputes were "regularly" or "usually" settled by such means. The answers to the questionnaire further showed that it was far from evident that States and international organizations considered such means to be a lesser alternative compared to third-party adjudication or arbitration. Often, negotiation and consultation appeared to be the preferred means. He saw no indication, in the evidence provided, of any shortcoming inherent in amicable settlement.

Moreover, no evidence had been uncovered that resort to such means was a consequence of a lack of opportunity to pursue adjudicatory dispute settlement instead. Nonetheless, the last sentence of draft guideline 4 erroneously seemed to suggest the contrary: "Arbitration and judicial settlement are often not provided for and are therefore resorted to less frequently." The word "therefore" in that context implied such a causality. He was not convinced that, seen from the perspective of States, and from that of individuals, arbitration and judicial settlement were always preferable or regarded as the gold standard of dispute settlement. Perhaps, rather than engaging in lengthy and costly legal proceedings, parties to such disputes believed that it was more important to be heard, to be taken seriously and to focus on fact-finding and possible remedies. The exact nature and form of the procedure to be followed would not necessarily be the main focus.

That hypothesis was, in fact, validly advanced in the first report of the Special Rapporteur (A/CN.4/756), where he rightly stated, in paragraph 82: “It remains to be seen whether the Commission’s study of the topic, also based on the results of the questionnaire sent to States and relevant international organizations, will provide material to conclude that the prominent place of such alternative forms of dispute settlement may often result from the non-availability of adjudicatory forms of dispute settlement.” The hypothesis had now been tested.

Judging from the review of practice and from the answers received, it was far from evident that States and international organizations would rather pursue adjudication or arbitration, if available. He did not believe that the Commission should discard so-called non-legal alternative forms of dispute settlement, as they had an important role in and potential for resolving disputes of fact or law in an efficient way, while also taking into account other important and legitimate considerations for international organizations and States in their mutual relations. Yet the Special Rapporteur allocated only 5 pages in total of his report to those alternative means, while devoting 8 pages to arbitration and 37 pages to judicial settlement, despite the fact that those two means of settlement were rarely used in that particular context. Admittedly, detailed material for analysis by researchers was more abundant for arbitration and judicial settlement. In addition, the Special Rapporteur’s review of the relevant material was solid, with findings that might also have considerable potential for useful interlinkages with the Commission’s work on subsidiary means for the determination of rules of international law. Nevertheless, the role and value of alternative means might, upon reflection, emerge as being particularly relevant. Even human rights courts, when informed of a friendly settlement, regularly struck out the relevant case on the grounds that the dispute had been settled.

The review of treaty practice showed that arbitration was provided for almost exclusively on the condition that prior attempts at amicable settlement had been unsuccessful. In most of the report’s examples of treaty provisions that provided for arbitration, amicable solutions were to be sought prior to arbitration. The only exception concerned the particular case of certain international financial institutions in disputes between the organization and a withdrawing member. What emerged, then, was that States and international organizations actually preferred to settle disputes amicably, where possible. That preference was further corroborated by the answers given to the Special Rapporteur’s questionnaire.

The reasons why that was so might be based on a variety of considerations, including the costs and length of judicial or arbitral proceedings, or the wish to identify ways of promoting transparency and accountability without having to remove immunity protections that were important for the functioning of international organizations. Another reason might be that aggrieved parties were less interested in an eventual legal ruling, which could take time, than in actually having access to remedies signifying recognition of their claim and a financial or other settlement.

There was ample scope for exploring further additional means of dispute settlement where there had been developments in international law and practice involving efforts to facilitate the presentation of contrary opinions and ensure transparency and neutrality in relation to fact-finding and remedies. That was in large part recognized in the report. There was a reference to internal oversight mechanisms that might be instrumental in providing indirect ways of settling disputes between international organizations and their member States. In paragraph 153, the report referred to advisory opinions as having such a role. That should reasonably also be true of internal enquiries, oversight services, independent external review systems or mechanisms established to deal with claims on an independent and sometimes administrative basis.

One example of the use of alternative mechanisms was very recent indeed, namely the response to the allegations made against the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) in the wake of the 7 October 2023 terror attacks on Israel. The Secretary-General had activated a separate investigation by the Office of Internal Oversight Services, whose legitimacy was rooted in its exercise of operational independence under the authority of the Secretary-General. Furthermore, an independent review group had been appointed by the Secretary-General to assess whether UNRWA was doing everything within its power to ensure neutrality and respond to allegations.

Alternative mechanisms might also include the administrative processing of claims on a large scale. An intriguing example was the innovative legal practice developed by the United Nations Compensation Commission, which had operated between 1991 and 2022 as a subsidiary organ of the Security Council to process claims and pay compensation for loss and damage suffered as a direct result of the invasion and occupation of Kuwait by Iraq in 1990 and 1991. The role of the Compensation Commission had been to consider claims by individuals and entities, including international organizations on behalf of individuals, against a State. The Compensation Commission's legal process had involved a diversified approach to methodologies and problem-solving and had had a notable influence on legal compensation, reparations and accountability. The Compensation Commission had operated more in an administrative manner than in a litigation format, but it had been highly successful. Also of relevance in that connection were the human rights accountability mechanisms of international organizations. Examples included the refugee camps administered by the Office of the United Nations High Commissioner for Refugees, the detention centre at the International Criminal Court and the common security and defence policy missions of the European Union.

In respect of regional arrangements, he welcomed the fact that the report gave a description of the 1992 Agreement on the European Economic Area in paragraphs 165 and 166. Nevertheless, it would be interesting to explore further the relationship between the European Union and three members of the European Free Trade Association, namely Iceland, Liechtenstein and Norway, and the key role played by the Joint Committee of the European Economic Area in dispute settlement. That machinery involved a very advanced system of institutionalized means of communication and dispute settlement as an alternative to adjudication.

Draft guideline 5 was entitled "Access to arbitration and judicial settlement", but, in the light of his earlier comments, his view was that access to dispute settlement as such, and not only to arbitration or judicial settlement, was crucial. In practice, other means of dispute settlement played a key role and could also help to overcome difficulties or impediments related to the existence of immunities, while at the same time promoting the interests of justice. That might call for a balancing of interests, which could ultimately include careful consideration of the extent of functional immunities, or the possibility of a waiver. It might be more in tune with the actual practice identified and ably described in the report to highlight that balancing of interests by amending the draft guideline to read, for example: "Means of dispute settlement laid down in draft guideline 2 (c) should, as appropriate, be made available for the settlement of international disputes to which international organizations are parties. When adjudication or arbitration are not available, other means of dispute settlement should be considered, in order to promote resolution of such disputes."

There were two target groups for the draft guidelines: on the one hand, States parties undertaking a review of the constitutive instruments of international bodies; and on the other, the competent organs of international organizations, and their membership, in considering to what extent dispute settlement might better be addressed through use of internal or other oversight, review or ombudsman mechanisms, which could include innovative, independent and impartial procedures to promote fact-finding and ensure a remedial focus.

Draft guideline 6, concerning dispute settlement and rule of law requirements, introduced a requirement of respect for the rule of law in adjudication. That requirement, in his view, applied to all dispute settlement and not just to adjudication. The major problem facing international organizations was not the independence and impartiality of adjudicators, however important that was, but rather the question of how to reconcile seemingly contradictory interests. Furthermore, universally and exhaustively setting out concrete rule of law requirements could be challenging, even for the International Law Commission. While dispute settlement unquestionably should conform to rule of law requirements, it could be difficult for members to define that complex term with precision. The proposed formulation pointed specifically to three elements, namely neutrality, independence and impartiality, which were not only the province of judges and arbitrators but applied to alternative means as well. There were aspects pertaining to due process, in addition to access to, or what he would term participation in, dispute settlement. It might be advisable to focus on those

elements specifically rather than engaging in an abstract discussion of the term “rule of law”. Enhanced accountability should certainly be one of the Commission’s aims.

His comments did not detract from his overall assessment of the high quality of the report. However, as he had stated at the Commission’s seventy-fourth session (A/CN.4/SR.3615), it was essential to safeguard key interests of international organizations, which, as everyone was aware, were beset with financial challenges, in a world that required maximum engagement under difficult conditions to help resolve a variety of problems. That could be done while enhancing respect for the rule of law and removing obstacles to dispute settlement. Since 2023, the Commission had received a considerable amount of evidence that practice spoke in favour of a much broader focus that included means of settlement other than arbitration or adjudication. He was grateful to the Special Rapporteur for advancing the Commission’s understanding of practice. The litmus test of its work on the topic was whether the outcome served the purpose of dispute settlement, which was to overcome disagreement.

**Mr. Galindo** said that, at the outset, he would like to join his colleagues in congratulating the Special Rapporteur on another thorough and well-researched report. It was clear that the Special Rapporteur was deeply committed to engaging with the views expressed by States and international organizations.

First and foremost, he commended the Special Rapporteur for referring, in chapter II (E) (4), to the practice of a variety of States and international organizations in different regions and with different levels of development. However, parts of the report still seemed to rely too heavily on the practice of certain developed States or certain international organizations, as for example in paragraphs 36 to 41 and paragraph 70. He therefore recommended that future reports should further explore the practice and views of developing and least developed States, as well as regional organizations in as wide a variety of regions as possible. Their practice and contributions should also be given serious and substantive consideration.

Second, paragraph 143 could have benefited from a reference to the landmark 2023 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction. The Agreement contained a provision whereby the Conference of the Parties could, in certain circumstances, decide to request an advisory opinion from the International Tribunal for the Law of the Sea.

Third, paragraph 206, which dealt with the rule of law in national legal systems, could also have mentioned that, in some States, the rule of law was closely linked to democracy. That was true of the Brazilian Constitution, which established the “democratic rule of law” as a fundamental principle of the Republic. Moreover, the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels stated that human rights, the rule of law and democracy were interlinked and mutually reinforcing and that they belonged to the universal and indivisible core values and principles of the United Nations.

Turning to the proposed draft guideline 3, which defined international disputes, he said that paragraphs 13, 19 and 25 of the report rightly pointed out that, in practice, it was not always easy to distinguish between international and non-international disputes. While he agreed with the Special Rapporteur that it seemed useful to retain the distinction for the purposes of the draft guidelines, the test for making the distinction might warrant further consideration.

The draft guideline contained two criteria for defining an international dispute: first, the identity of the parties, which must be an international organization on the one hand and another subject of international law on the other; and, second, the fact that the dispute was one “arising under international law”. The phrase “arising under international law” was rather vague, but seemed to refer to the legal basis of the dispute, as opposed to the relief sought by the parties or the relevant underlying facts.

A loosely similar discussion occurred in international investment law when tribunals had to distinguish treaty claims from contract claims, particularly for *lis pendens* and “fork-in-the-road” dispute settlement clauses. Tribunals following the 1980 decision in the

case of *Benvenuti et Bonfant v. People's Republic of the Congo* often applied the so-called triple identity test, which compared disputes based on the strict verification of the identity of the parties, the cause of action and the object. Other tribunals followed the less rigorous "fundamental basis of the claim" test, as set out by the United States-Venezuela Mixed Claims Commission in the 1903 *Woodruff* case, and dealt flexibly with the factual matrix and the legal basis underlying the dispute.

Furthermore, in any given dispute, parties could make multiple claims, some of which might be based on international law and others on domestic law. For example, if a State hired an international organization as a contractor and there was a subsequent dispute over payment owing to a disagreement on how the contractual provisions coexisted with the tax exemptions granted to the international organization under the headquarters or host agreement, the question arose as to how the dispute should be classified.

The expression "arising under international law" might also cast doubt on the nature of certain instruments adopted between entities within the structure of the State (such as ministries, departments and agencies) and international organizations. Such instruments were becoming increasingly common, especially in international cooperation programmes. Issues of State attribution might arise in arbitration or mediation and conciliation procedures applicable to State entities and international organizations in such instruments.

In other words, the formulation "arising from" did not clarify whether draft guideline 3 envisaged a formalistic analysis of the asserted cause of action or was meant to apply a possibly more complex "fundamental basis" test. The International Court of Justice, in its 2016 judgment in *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, citing the Court's 30 March 1950 advisory opinion in *Interpretation of Peace Treaties*, defined disputes, *inter alia*, as those concerning the question of the performance or non-performance of certain international obligations. Although also probably imperfect, that wording could be an alternative to "arising under international law".

A second issue concerned the reference to "other subjects of international law". Human rights holders, such as natural persons, might claim that an international organization had violated their right to life under customary international law. Such a dispute would seemingly arise under international law and would involve an international organization and another subject of international law. Since draft guideline 3 did not mention any specific means of dispute settlement, the question of whether the international organization's jurisdictional immunity would prevent the victim from bringing a claim before the domestic courts was irrelevant for purposes of the definition. Whether the victim sued the forum State for upholding the international organization's jurisdictional immunities would also appear to be irrelevant, since the disputes would have different parties and, accordingly, different characteristics. However, far from being hypothetical, that was a critical scope issue with practical implications, considering the well-known claims of human rights and international humanitarian law violations by peacekeepers and military campaigns carried out by international organizations. Defining such disputes as "international disputes" might have significant implications for the application of the draft guidelines. Should the Commission decide on such a definition, that decision should be made clear in the commentaries to the draft guideline.

Draft guideline 4, on the existing practice of dispute settlement, was supported by data collected by the Special Rapporteur that had confirmed the overall strong preference for negotiation, consultation and other forms of amicable dispute settlement as opposed to third-party adjudication. The use of the phrase "falling short of", which also appeared in paragraph 199 of the report, raised serious concerns. As Mr. Forteau had noted, the term carried explicitly negative connotations, implying that third-party adjudication was inherently superior to negotiation and other non-adjudicatory forms of dispute settlement. In contrast to the proposed draft guideline 5, which addressed policy considerations, draft guideline 4 was intended to be descriptive. Thus, imbuing the provision with a policy option seemed incompatible with its purpose. There was no hierarchy between, for instance, arbitration and judicial settlement, on the one hand, and negotiation, on the other. As the International Court of Justice had observed in its 2020 judgment in *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Article 33 of the Charter of the United Nations

included both “political and diplomatic means” and “adjudicatory means”. In other words, third-party adjudication was not and should not be perceived as a superior, threshold-setting means of dispute settlement. Accordingly, the words “falling short of” should be replaced with more neutral language.

Turning to draft guideline 5, which constituted an explicit appeal in favour of two specific means of third-party adjudication, namely arbitration and judicial settlement, he noted that the reasons for the underlying policy option were explained in paragraphs 203 and 213 of the report with reference to the rule of law at the international level. In paragraph 213, the Special Rapporteur also acknowledged that, in practice, since the jurisdiction of international courts and tribunals was consent-based, the choice of dispute settlement means would ultimately depend on the will of the States and international organizations concerned.

It was not entirely clear why draft guideline 5 focused on arbitration and judicial settlement, to the exclusion of means such as mediation and conciliation. Paragraph 42 of the report affirmed that those means, though used by international organizations, were “less frequently provided for in agreements concluded by” such organizations. The Commission might therefore consider either referring to additional means of dispute settlement in the draft guideline or establishing clearer criteria for selecting arbitration and judicial settlement to the exclusion of all other means.

Paragraphs 203 and 213 of the report, concerning the policy reasons for that preference, indicated that dispute settlement by direct negotiation negated, in itself, the international rule of law. Those paragraphs also concealed the political nature of third-party adjudication. The power asymmetries highlighted in paragraph 45 were a paramount concern for negotiation, but they applied equally to third-party adjudication. The brief reference to third-party funding in paragraph 240 did not suffice to address that critical issue. In investment arbitration, for example, developing and least developed States often complained about the cost of legal representation; in practice, bringing an effective case before an international tribunal generally entailed hiring an expensive law firm specialized in international law adjudication, which for many States was not feasible. Third-party funding remained a controversial topic. The ongoing discussions in Working Group III of the United Nations Commission on International Trade Law also attested to the challenges associated with adjudication.

He did not dispute that third-party adjudication could enhance fairness and parity of arms in comparison to direct negotiation between two subjects of international law with unequal levels of development or unequal access to resources. That recognition was at the core of the dispute settlement mechanism of the World Trade Organization, for instance, and much had been written about the rise in trade-related unilateral coercive measures and the paralysis of the Appellate Body. He was doubtful, however, that the value of third-party adjudication should cause the Commission to overlook its inherent risks and flaws.

Article 33 (1) of the Charter of the United Nations did not establish a hierarchy among the different means of dispute settlement and referred to the principle of free choice of peaceful means. The Manila Declaration on the Peaceful Settlement of International Disputes, approved by the General Assembly in its resolution 37/10 of 1982, affirmed that, in seeking to settle a dispute, the parties should agree on “such peaceful means as may be appropriate to the circumstances and the nature of their dispute”. That Declaration was regularly referred to in the resolutions adopted and debates held by both the Sixth Committee and the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. Also noteworthy was the fact that no hierarchy of means had been defined during the Special Committee’s annual thematic debates on the different means for the settlement of disputes, which had been inaugurated by General Assembly resolution 72/118. The debates had in fact begun with an examination of negotiation and enquiry.

In the light of those considerations, he suggested that draft guideline 5 should be adjusted to state that arbitration and judicial settlement “could”, rather than “should”, be made available and more widely used for the settlement of international disputes to which international organizations were parties, and that the phrase “when appropriate to the circumstances of the parties to the dispute” should be inserted at the end of the sentence.

**Ms. Ridings** said that the Special Rapporteur's second report on the topic "Settlement of disputes to which international organizations are parties" was well written and provided a comprehensive assessment of related practice. The memorandum by the secretariat was a very useful practical guide to current approaches to the resolution of disputes between States and international organizations and between such organizations and private parties. She supported the Special Rapporteur's proposal that the constructive comments on draft guidelines 1 and 2 put forward by States in the Sixth Committee should be considered before the end of the first reading of the draft guidelines and commentaries.

The first issue that she wished to raise was the question of opening both the advisory jurisdiction and the contentious jurisdiction of the International Court of Justice to international organizations. As the Special Rapporteur highlighted in his report, the current practice of recourse to advisory opinions by international organizations was often an effective *de facto* means of resolving a dispute between an international organization and its members. However, under Article 96 of the Charter of the United Nations, requests for advisory opinions of the Court could be initiated only by the organs and specialized agencies of the United Nations. While commentators had suggested that there might be scope for extending that prerogative to other international organizations, for example through a General Assembly committee process, the practical difficulty of either adopting such an approach or amending the Charter made the utility of that option questionable.

The Special Rapporteur suggested in his report that opening the Court's contentious jurisdiction to international organizations, a possibility that had been a subject of discussion for decades, was a crucial reform issue. An amendment to the Statute of the Court to give international organizations *locus standi* before the Court as parties in contentious cases would perhaps be easier to achieve than an amendment to the Charter of the United Nations. Even so, for various reasons, securing the necessary support from States was likely to be extremely difficult. Thus, from a practical perspective, that option might not be the best solution.

The second issue on which she wished to comment was the preference evident in the report for arbitration and judicial settlement as means of settling international disputes to which international organizations were parties. She agreed that it would be useful to provide for arbitration clauses in treaties in a more extensive manner. Arbitration would thus be more widely available, providing an additional tool in the toolbox for resolving disputes. However, the Special Rapporteur went further by indicating that, from a policy perspective, recourse to arbitration and judicial settlement by international organizations and States should be encouraged. Although she generally agreed with his statement, in paragraph 203 of the report, that independent and impartial third-party adjudication offered the advantage of settling disputes according to rules and principles without regard to the position of the parties to the dispute, a policy preference for arbitration and judicial settlement failed to duly recognize the important role of other alternative means of dispute settlement.

The memorandum by the secretariat included some interesting observations from States and international organizations as to why alternative means of dispute settlement were preferred by international organizations. She herself saw advantages in using alternative means, including, in addition to negotiation, fact-finding enquiries, good offices, mediation and conciliation. Such methods were less adversarial and could be used effectively to get to the crux of the problem, ascertain the facts, identify the interests of both parties and ensure that those interests were taken into account in the final outcome. Côte d'Ivoire, for example, considered negotiation, mediation and conciliation to be the most useful dispute settlement methods, while responses from the United Nations Office of Legal Affairs and the World Food Programme mentioned the use of alternative dispute resolution as a means to reach mutually acceptable, amicable settlements. By using such methods, the parties could achieve a just and equitable outcome in which there was no winner or loser.

The conciliation between Australia and Timor-Leste under the United Nations Convention on the Law of the Sea provided a particularly good example of such an outcome. The conciliators had used innovative procedures, including shuttling between the parties and preparing non-papers, to help identify the interests of the parties and the economic and other considerations that needed to be taken into account. The conciliation process had also allowed for non-legal considerations to be taken into account to provide a basis for compromise between the parties.

Such non-adjudicatory methods of dispute settlement also ensured that relationships between the parties were preserved, especially when the parties would need to work together in the future. The need to maintain relationships might be one of the reasons why recourse to arbitration as a means of resolving international disputes to which international organizations were parties was so rare. That consideration was mentioned in the responses to the questionnaire received from international organizations such as the Organization of African, Caribbean and Pacific States, the World Food Programme and the United Nations Conference on Trade and Development. Other reasons cited for preferring non-formal means of dispute settlement had been the cost and time involved in judicial settlement and arbitration.

Although arbitration for the settlement of disputes was frequently provided for in headquarters agreements between international organizations and their host States, arbitration had been used in only a few such cases. Even the protracted dispute between the Food and Agriculture Organization of the United Nations and Italy had not gone to arbitration and had eventually been resolved through a negotiated settlement. That outcome seemed to confirm that the need to maintain good relations between the organization and its host State was a major factor in the avoidance of arbitration as a method of dispute settlement. In the *Lockerbie* case before the International Court of Justice, the proceedings had been discontinued and the matter had eventually been settled through negotiation. That case, too, appeared to demonstrate that recourse only to adjudicatory forms of dispute settlement might not bring about a successful resolution of the dispute. In general, the views of States and international organizations demonstrated that all methods of dispute settlement could be used and that the choice of method was dependent on the nature of the dispute and the preferences of the parties involved. In some responses. it was also suggested that adjudicatory means of dispute settlement should be used only as a last resort after all other means had been exhausted.

Turning to the issue of equality of the parties, she noted the potential argument that non-adjudicatory means of dispute settlement raised the spectre of a power imbalance between the parties. It was often assumed that, as suggested in paragraph 202 of the report, non-adjudicatory means placed the weaker or less powerful party at a disadvantage, while the lack of compulsory arbitration or judicial settlement gave an advantage to the more powerful party. On the other hand, mediation or conciliation might be appropriate in situations of power disparity because such methods were less adversarial in nature and were focused on outcomes acceptable to both parties. As Karen Schmalenbach suggested in *Research Handbook on the Law of International Organizations*, States and international organizations were almost equal. Any potential issues regarding equality of the parties would apply more to disputes between international organizations and private parties than to disputes between international organizations and States. Even in such cases, there was a role for neutral third parties in equitably applying procedural rules in a way that treated the parties equally but was sensitive to any power imbalances between them.

The Special Rapporteur had explained that adjudicatory means of dispute settlement must conform to core rule of law requirements for the good administration of justice, and she had no difficulty with that principle. However, he also appeared to suggest that the rule of law and the good administration of justice were arguments in favour of not only making arbitration and judicial settlement more widely available but also encouraging their use. She considered rule of law requirements to be equally applicable to alternative forms of dispute resolution. Thus, no preference should be given to one form of dispute resolution over another.

That view was borne out by the 2012 declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels. The preamble of the declaration reaffirmed that the rule of law was the foundation of friendly and equitable relations between States. Fundamental to the rule of law was the maintenance of international peace and security. Achieving a mutually acceptable solution through alternative dispute resolution methods could serve to further the maintenance of international peace and security and the rule of law, as confirmed in paragraph 4 of the declaration, which used the language of Article 33 of the Charter of the United Nations and did not distinguish between the different means for the peaceful settlement of disputes. Adjudicatory and alternative dispute resolution processes were complementary, and each was founded on the rule of law.

With regard to the text of the proposed draft guidelines, she agreed with the Special Rapporteur that, in draft guideline 3, a distinction should be made between disputes between international organizations and disputes between States and international organizations that arose under international law and were characterized as international disputes on the one hand, and non-international disputes on the other. She also supported the inclusion of a reference to "other subjects of international law", to recognize that there could be disputes involving entities that were not States but were nonetheless subjects of international law, such as the Holy See and territories such as the Cook Islands and Niue. The meaning of "subjects of international law" should be explained in the commentaries to help to address the point made by Mr. Forteau at the previous meeting.

The commentary to draft guideline 4 should explain why arbitration and judicial settlement were used infrequently despite being provided for in various treaties. As she had sought to explain, and as the responses from States and international organizations demonstrated, there were other reasons for the limited recourse to arbitration and judicial settlement, which should be explored further in the commentaries, and there should be no implicit hierarchy of means, as Mr. Galindo had noted.

Draft guideline 5 contained a policy recommendation to States and international organizations not only to ensure access to arbitration and judicial settlement but also to encourage their use. Article 33 of the Charter established that parties had a free choice of means for the peaceful settlement of disputes. Accordingly, just as States were not tied to a particular procedure, international organizations should not be required or even encouraged to adopt a particular procedure. Every dispute was unique, and it was impossible to decide in advance which means of dispute settlement should be used more frequently than others, especially in view of the need for consent. Ultimately, it was for the parties to the dispute to decide which dispute settlement means was most appropriate, and the Commission should not make a policy recommendation one way or another.

She had no objection to draft guideline 6 but, like Mr. Fife and Mr. Forteau, she wondered whether other aspects of the rule of law could also be usefully mentioned. She supported the referral of the draft guidelines contained in the second report to the Drafting Committee and wished to thank the Special Rapporteur for his clear exposition of the issues he intended to cover in his third report.

**Mr. Paparinskis** said that, taken together, the Special Rapporteur's second report and the memorandum by the secretariat had confirmed his expectation that the Commission's work on the topic would unearth as well as foster practice that would lead to a better understanding of international organizations.

Regarding the definition of international disputes, he agreed with the Special Rapporteur that such disputes should be delineated by reference to applicable law, using the expression "arising under international law". The focus on applicable law rather than other possible benchmarks, such as forum or actors, necessarily had implications for the scope of the topic. Unlike Mr. Forteau, he did not read the second report as implying that the Special Rapporteur considered disputes with individuals to be excluded from the category of "international" disputes. The discussion of investment arbitration tribunals and human rights courts in paragraphs 53 and 148, respectively, was in line with the Commission's traditional understanding that the non-State character of the entity to which responsibility accrued was without prejudice to the international character of its claim and the resulting dispute. Consequently, draft guideline 3, as currently drafted, would cover past cases such as the claims against the Bank for International Settlements brought by its shareholders before the Permanent Court of Arbitration in the early 2000s; pending cases such as *Nord Stream 2 AG v. European Union*, currently before the Permanent Court of Arbitration, and *Klesch Group Holdings Limited & others v. European Union*, currently before the International Centre for Settlement of Investment Disputes; and possible future cases such as human rights complaints brought before international courts in which international organizations were respondents.

While he would support the referral of draft guideline 3 to the Drafting Committee, he would prefer that it should remain there pending the outcome of future work on the concept of non-international disputes. The close relationship between the categories of "international" and "non-international" disputes, in principle and practice, was recognized in paragraphs (5)

and (7) of the commentary to draft guideline 1, and the Special Rapporteur himself had acknowledged the difficulty of distinguishing between the two categories of dispute. The Commission would therefore benefit from hearing the Special Rapporteur's views on both aspects before drafting the respective guidelines. Alternatively, the qualifier "international" in the title of draft guideline 3 could be deleted and the current text of the draft guideline could become paragraph 1 of a longer draft guideline 3, to which a paragraph 2 on non-international disputes would be added the following year. That option would have the merit of introducing the overall taxonomy of the topic as the first substantive point, for the convenience of the reader and the logic of the exposition.

Recalling that, at the previous meeting, Mr. Forteau had called for a much more detailed approach to the topic, he said that he would like to understand how disputes regarding "rules of the organization", within the meaning of article 2 (b) of the 2011 articles on the responsibility of international organizations, fitted within the taxonomy proposed by the Special Rapporteur. The last sentence of paragraph (2) of the commentary to draft guideline 1, which had been commented upon extensively by the European Union in the Sixth Committee, acknowledged that disputes with international organizations might also arise under the rules of the organization. He wondered whether such disputes constituted a third category of disputes to which international organizations were parties, namely disputes arising under law other than international or domestic law, as article 32 (1) of the 2011 articles might imply, or rather were fully "international" disputes within the meaning of draft guideline 3. Alternatively, was the relevant consideration the distinction between internal and international aspects of the rules of the organization, as explained in paragraphs (7) and (8) of the commentary to article 10 of the 2011 articles?

The Commission might not be able to avoid answering those questions, which were implicit in the substance of the discussion, including in relation to the exhaustion of local remedies in diplomatic protection claims against organizations, as referred to in paragraph 20 of the report and in paragraphs 7 and 29 of the syllabus for the topic, and in relation to the tension that access to justice considerations placed on the handling of claims lodged by individuals against organizations based on internal rules, as noted in paragraph (6) of the commentary to draft guideline 1. In responding to those questions, the Commission could draw upon the variety of ways in which an organization's internal rules could interact with its international obligations, particularly in international disputes, for example by constituting a *lex specialis* between the parties, by containing an explicit *renvoi* to general international law, by serving a gap-filling function or even by violating provisions of general international law, as explained in paragraphs 173–175 of the 22 November 2002 partial award in the *Bank for International Settlements* arbitration.

With regard to the wording of draft guideline 3, he had a mild preference for the formulation "governed by" rather than "arising under" international law, building on paragraph 3 of the syllabus. Irrespective of the formulation used, the phrase should be placed near the beginning of the sentence, perhaps after the words "international disputes to which international organizations are parties are disputes". He would also prefer for the sentence to end after that phrase. Spelling out possible parties to disputes seemed unnecessary and made the sentence cumbersome, as the Commission had recognized in paragraph (6) of the commentary to draft article 3 of the 1982 draft articles on the law of treaties between States and international organizations or between international organizations, from which the language appeared to have been drawn. The definition contained in the syllabus, on which the Special Rapporteur had relied, also did not address the parties to disputes. It would suffice for the commentary to the proposed draft guideline to confirm that, taken together, the term "disputes" and the phrase "arising under international law' necessarily limited the range of possible actors to those capable of making a claim or assertion, or refusing or denying such claim or assertion, under international law, including non-State actors.

If mention was to be made of the possible parties to disputes, he would prefer to avoid the formulation "other subjects of international law". While draft article 3 of the 1982 draft articles used that expression, as did the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, paragraph (1) of the commentary to draft article 3 of the 1982 draft articles explained that the Commission, in using that language, had in mind a narrow group of actors, such as the Holy

See, the International Committee of the Red Cross (ICRC) and entities that had not yet been constituted as States, which were very different from claimants against international organizations before investment or other arbitration tribunals or human rights courts. His reading of the formulation was thus the same as that of Ms. Ridings, although his conclusion, in terms of its desirability, was the opposite. Given the close connection between secondary rules of responsibility and tertiary rules of dispute settlement through which responsibility was invoked and attributed, a more pertinent source of language would be article 33 of the 2011 articles on the responsibility of international organizations, which referred to "any person or entity other than a State or an international organization".

In connection with the thorough overview of relevant dispute settlement practice contained in chapter II of the report, he would be interested to hear the Special Rapporteur's views on whether implementation and compliance committees fell within the category of "other peaceful means" of dispute settlement, as suggested by the Movement of Non-Aligned Countries in paragraph 4 (e) of its explanatory note to the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization on the identification of "other peaceful means" of pacific settlement of disputes (A/AC.182/L.162). Implementation and compliance committees, which existed for several treaties to which the European Union was a party, including the Paris Agreement, the Convention on Environmental Impact Assessment in a Transboundary Context, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, would provide a good example of the flexibility with which third-party involvement was addressed in modern international instruments, as could be explained in the commentary.

Turning to the proposed wording of draft guideline 4, he said that the points he wished to make were, overall, in line with Mr. Forteau's suggestions. The language of the draft guideline was descriptive and more suited to the commentary than to the draft guideline itself; that was especially true of the second and third sentences. In the second sentence, he would prefer to avoid the phrase "falling short", which might indicate a perception that non-adjudicatory means of dispute settlement were inferior, thus contradicting the better view, set out in paragraph (32) of the commentary to draft guideline 2, that there was no prescribed order in which means should be resorted to. In the third sentence, he would prefer to make a sharp distinction between availability of means of dispute settlement and resort to available means, without addressing the latter at all.

The first sentence, which made an important claim about the overall applicability of means of dispute settlement to the topic, would benefit if that claim were to be expressed in normative terms that went beyond what was set out in draft guideline 2 (c). One of the key insights in the Special Rapporteur's second report and the memorandum by the secretariat was the variety, and occasional combination, of different approaches to dispute settlement identified in practice. On that basis, he wished to suggest that the first sentence should be amended to read: "International disputes to which international organizations are parties may be settled by resort to means of dispute settlement, either singly or in combination." That language was borrowed in part from the Commission's work on forms of reparation in the context of its consideration of the law of international responsibility.

Turning to access to arbitration and judicial settlement, which the Special Rapporteur proposed to address in draft guideline 5 by calling for their greater availability and wider use, he said that, overall, his views were aligned with those of Mr. Forteau.

He did not support the Special Rapporteur's position that arbitration and judicial settlement should be "more widely used". As Sir Elihu Lauterpacht had stated in his Hague Academy lecture on principles of procedure in international litigation, the first rule of international litigation was to "avoid it if at all possible". The necessary merit of greater litigiousness was not a self-evidently correct position for the Commission to endorse but rather a subject of serious legal and empirical debate, both in international law and in other settings. The memorandum by the secretariat also did not show that there was much support for the Special Rapporteur's position.

He did, however, support the idea that arbitration and judicial settlement should be "made available". He was agnostic on whether the rule of law, while of great importance at the international level and for the work of the Commission, provided the sharpest normative benchmark for nudging that sort of practice in the desirable direction. Another way of asking the question, in line with the Commission's work on the law of treaties and international responsibility, would be to take the position for States as the starting point and consider whether a similar approach would also make sense for international organizations. The question would then become whether there was a good reason to treat States and international organizations alike – or, rather, not to treat them unalike – when it came to access to international courts and tribunals. If the answer was in the affirmative, the case for the adoption of more inclusive approaches became stronger. That framing would also have the merit of enabling the Commission to draft the guideline in more prescriptive terms, as in article 19 of the articles on diplomatic protection, for example as a recommendation to ensure that newly concluded treaties gave international organizations access, as appropriate, to arbitration and judicial settlement if such access was given to States, or to consider amending treaties and other rules regulating access to dispute settlement bodies that were currently limited to States.

Draft guideline 5 should also address the effectiveness of the means of dispute settlement. The distinction between availability and effectiveness of judicial remedies was recognized in the Commission's work, particularly in article 15 (b) of the articles on diplomatic protection. Given that the effectiveness of remedies was likely to play a role in the Commission's discussion, at its seventy-sixth session, on access to justice in non-international disputes, for actors whose views were not reflected in the memorandum by the secretariat, it would be useful to provide a juridical foothold at the current stage. Language such as "should be made available and effective" would capture the point succinctly.

With regard to dispute settlement and rule of law requirements, he supported the substance of the proposed draft guideline 6. With regard to terminological consistency, he wished to note that the Special Rapporteur appeared to use the word "adjudicatory" to cover both arbitration and judicial settlement, while in paragraph (30) of the commentary to draft guideline 2, "adjudication" applied only to judicial settlement.

As to the rule of law, important as it was, he wished to reiterate his agnosticism regarding how prominently it should feature in the draft guideline. The general principles of law regarding international procedure identified by the Special Rapporteur were not particularly controversial and were widely recognized, including by the International Court of Justice. Thus, circling to the rule of law and back again for their justification could appear to be superfluous. He would not object, however, to using the rule of law for the overall framing in the commentary, accompanied by a clear explanation that it was being used in the thin, procedural sense.

In draft guideline 6, he would prefer "good administration of justice" as the umbrella concept, in line with the approach taken by the International Court of Justice, most recently in its 2012 advisory opinion on *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*. Judicial decisions could provide further granularity, such as the "elements of the right to a fair hearing" listed in paragraph 92 of the Court's 1973 advisory opinion in *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, particularly the principle of equality of the parties, explained in paragraphs 39 and 44 of the 2012 advisory opinion. Other relevant authorities might include the practice of the International Centre for Settlement of Investment Disputes *ad hoc* annulment committees on "serious departure from a fundamental rule of procedure" as a ground of annulment, as summarized in the updated background paper on annulment published by the Centre on 11 March 2024. Whether the particular elements should be identified in the draft guideline itself or in the commentary thereto was an aesthetic choice that could be entrusted to the Special Rapporteur.

In summary, he supported, in principle, draft guideline 3, on the understanding that it applied to international disputes with non-State persons and entities, but would prefer that it should be adopted together with, or at least leave scope for, the future draft guideline on

non-international disputes. In any event, he would prefer not to use the language "subjects of international law".

He also supported, in principle, the first sentence of draft guideline 4, provided that it was expressed in normative terms and went beyond draft guideline 2 (c) in some way.

He supported draft guideline 5 with respect to availability of arbitration and judicial settlement, but did not support the call for their wider use and would prefer to include wording explicitly addressing their effectiveness.

While he could support draft guideline 6 as proposed, he would prefer to use "good administration of justice" as the operative concept, rather than "rule of law".

He fully supported the Special Rapporteur's proposed future programme of work, as set out in the second report, including the discussion of non-international disputes in 2025. At an appropriate juncture, the Special Rapporteur could perhaps also consider addressing how disputes to which international organizations were parties that arose under the rules of the organization fitted within the topic at hand.

**Mr. Oyarzábal** said that he wished to thank the Special Rapporteur for his well-articulated and exhaustively researched second report. He welcomed the Special Rapporteur's decision to limit the report to international disputes and to address non-international disputes and disputes of a private law character in the third report; proceeding otherwise would have been confusing from a technical standpoint and impossible from a practical standpoint.

The memorandum by the secretariat portrayed a clear reality: there was no conflict surrounding the settlement of international disputes to which international organizations were parties. The responses provided by both States and international organizations showed that disputes between international organizations and States were rare and disputes between international organizations were virtually non-existent. The memorandum also showed that most such international disputes, when they arose, were settled through negotiation. Against that backdrop, it could be argued that there was no business case for the Commission to undertake complex and detailed work on the settlement of "international disputes" beyond the adoption of guidelines that reflected current practice and provided additional clarity on the matter.

Conversely, the memorandum by the secretariat showed that the practice in respect of non-international disputes and disputes of a private law character was rich and diverse. Moreover, it revealed certain conflicts and tensions, such as those between immunity and access to justice, that were deserving of attention and on which the Commission could provide added value by pointing towards better ways of addressing them. It also reinforced the Commission's 2023 decision, which he had supported, to include non-international disputes and disputes of a private law character within the scope of its work on the topic.

With regard to the inclusion of advisory opinions as a means of dispute settlement, he would prefer to draw a clearer distinction between the advisory and adjudicatory functions of international courts and tribunals. As the topic at hand concerned dispute settlement, any references to advisory proceedings should be made with caution.

Despite recent teachings that had made the opposite argument, the advisory function had inherent features that should not be overlooked, in particular its non-legally binding nature. The consent of the State concerned in a given dispute was a fundamental prerequisite of international adjudication, as well as an underlying principle of international law. The "binding" advisory opinions highlighted by the Special Rapporteur in his report were an example of, rather than an exception to, that rule. In the examples cited, States had consented to be bound by the advisory opinion at the time they had ratified the relevant instruments. While some of the examples provided were landmark cases that had greatly influenced international law, they should not be seen as "regular" means of dispute settlement.

Turning to the proposed draft guidelines, he said that draft guideline 3 constituted a good starting point for defining the scope of what could be regarded as "international disputes". Although it brought much-needed clarity to the Commission's work by focusing on the parties to a dispute rather than on the subject matter, there was one important issue

that must be clarified. In the formulation "other subjects of international law", it was not clear who those subjects were or who was included in or excluded from the scope of the draft guidelines. When dealing with subjectivity, traditional international law textbooks usually included under the umbrella of "other subjects" a wide variety of actors, ranging from ICRC to individuals.

He recalled the concerns that had arisen during the discussion, at the Commission's seventy-fourth session, of a similar issue with respect to draft guideline 2 (a) as proposed in the Special Rapporteur's first report (A/CN.4/756), which had included "other entities" as being able to establish international organizations. Some delegations had raised that issue in the Sixth Committee and asked for clarification. In the same vein, a practical issue could be raised with respect to the reference to "other subjects of international law" and how to delimit the scope of the disputes that would fall under draft guideline 3.

There was a growing body of scholarship on the issue of non-State actors in international law. Much had been written on insurgents and belligerents and the validity of the arrangements they might enter into, as well as on the application of international humanitarian law to their acts. The same could be said about other "subjects". There was a well-established and diverse body of literature on the international legal status of corporations, which could sue States before arbitral tribunals and whose operations were increasingly scrutinized through the lens of international norms. The picture was much clearer with regard to individuals, who had consistently been recognized as "subjects of international law" since the 1950s.

It was unclear whether the scope of draft guideline 3 would encompass disputes between such non-State actors and an international organization or disputes arising between an international organization and entities that might have been accepted as members of the organization pursuant to that organization's rules, but that were not subjects of international law.

The reference to disputes "arising under international law" in draft guideline 3 was not helpful in answering those questions. The Special Rapporteur had drawn upon the definition of "international disputes" offered by Sir Michael Wood in the syllabus for the topic, namely "disputes that are international, in the sense that they arise from a relationship governed by international law". On that logic, a claim brought by an individual before a domestic tribunal in respect of a human rights violation committed by an international organization would be a "non-international dispute" that could potentially become an international dispute if the State did not uphold the immunity of the international organization and the latter took action against the former in consequence. Conversely, disputes between a State and an international organization arising from a relationship governed by a private contractual instrument would be excluded, as would, apparently, disputes between an international organization and a non-State entity that was a member of the international organization, to which the internal rules of the organization, but not other rules of international law, would apply.

While he maintained an open mind on the matter, he was therefore of the opinion that the reference in draft guideline 3 to disputes between international organizations and "other subjects of international law arising under international law" should be further clarified and reformulated as needed, or perhaps deleted altogether.

With regard to draft guideline 4, he was concerned that the text was descriptive rather than prescriptive. The Special Rapporteur, in his first report, had recalled the Commission's characterization of "guidelines" as a "toolbox" in which addressees could find answers to practical questions. In its current formulation, draft guideline 4 did not meet the aim of providing guidance to States and international organizations regarding the means of dispute settlement to which they could or should resort. Moreover, to say that amicable means of dispute settlement were "widely used" while adjudicatory means were "resorted to less frequently" did not reflect the more nuanced landscape that the report and the memorandum by the secretariat actually set out.

It was clear that negotiation was widely employed. As noted by the Special Rapporteur, that means of dispute settlement was included in treaties concerning privileges and immunities, headquarters agreements and other instruments. It had also been resorted to

in practice to settle different kinds of disputes. Conversely, mediation and conciliation – which, together with negotiation, were described as means "falling short of binding third-party adjudication" – did not enjoy the same level of acceptance and use in the settlement of international disputes and, in fact, were rarely used for the settlement of international disputes involving international organizations.

Recourse to different types of adjudicatory means was similarly uneven. While there were significant limitations on the use of judicial settlement as a result of international organizations' lack of legal standing and the absence of references to judicial settlement in treaties involving such organizations, arbitration was more commonly provided for in the constituent agreements of international organizations, agreements on privileges and immunities, and headquarters and similar agreements. There had been a number of cases involving the use or attempted use of such arbitral clauses. In other words, in practice, some of the means of dispute settlement said to be "resorted to less frequently" in the draft guideline were in fact employed more frequently than other means said to be "widely used". More importantly, the draft guideline should help international organizations and States to decide which means of dispute settlement to use, rather than simply describing the current state of affairs.

Draft guideline 5 was intrinsically linked to draft guideline 4. It recommended an increase in the availability and use of adjudicatory means of dispute settlement. Making arbitration and judicial settlement more readily available involved, on the one hand, the inclusion of adjudicatory means of dispute settlement in more treaties and agreements and, on the other, the removal of existing barriers that prevented international organizations from appearing as parties in contentious cases before judicial organs. He supported the idea of encouraging the inclusion, in treaties and agreements involving international organizations, of clauses on arbitration or judicial settlement as subsidiary means of settling disputes when negotiations failed. However, the removal of *locus standi* barriers should be approached with caution, and only after the benefits of allowing international organizations to appear in contentious cases before judicial organs were carefully weighed against the risk of overwhelming the courts with unmanageable numbers of disputes that might jeopardize their effectiveness and run counter to the objectives for which they had been created in the first place.

With regard to the assertion that arbitration and judicial settlement should be "more widely used" for the settlement of international disputes to which international organizations were parties, he was of the opinion that the draft guideline should be tailored to the needs and preferences of international organizations and States and should avoid advocating the expansion of the arbitration market. As evidenced in the memorandum by the secretariat, almost every State and most of the international organizations that had responded to the questionnaire considered amicable means to be more useful than adjudicatory means in settling international disputes. Guidance to the effect that States and international organizations should settle their disputes in a manner other than the one they considered to be most useful was counterintuitive and was likely to be ignored. Furthermore, such a recommendation would not be consistent with the tendency in many domestic legal systems to promote amicable means of dispute settlement in order to avoid the zero-sum dichotomy and other problems often brought about by litigation. It should also be recalled that adjudicatory means such as arbitration were costly. At a time when a number of international organizations were experiencing a financial and liquidity crisis and many States were following a zero nominal growth policy, a guideline encouraging international organizations to make wider use of means of dispute settlement that neither they nor States had thus far considered to be warranted and that were also more costly than the amicable means that they preferred would need to be justified by compelling reasons. In summary, he was of the opinion that arbitration and judicial settlement should be promoted only after amicable means of dispute settlement had failed to produce the desired results.

To conclude his remarks on draft guidelines 4 and 5, he wished to suggest that, in draft guideline 4, the Commission should encourage international organizations to settle international disputes to which they were parties via negotiations and other amicable means as appropriate, and that, in draft guideline 5, it should address recourse to adjudicatory means in a manner consistent with the considerations he had outlined.

Lastly, regarding draft guideline 6, he could not but agree with the Special Rapporteur that, as a matter of principle, dispute settlement should conform to the rule of law. However, the formulation "the requirements of the rule of law" might be too broad or vague. A clearer link was needed between the general principle of the rule of law and its precise requirements in relation to international adjudication. As the Special Rapporteur acknowledged in his report, in national legal systems, the concept of the rule of law did "not have a clearly defined and generally accepted meaning", and different legal traditions might emphasize different aspects of its procedural and substantive content. That could generate uncertainty with regard to the interpretation and application of the concept in a specific case or context. One option could be to omit any express reference to the concept and, instead, to elaborate on the concrete requirements of the rule of law.

In that connection, integrity should also be explicitly mentioned in the proposed draft guideline, alongside the independence and impartiality of adjudicators. While a few commentators had referred to integrity as the synthesis of independence and impartiality, several others considered it a distinct requirement in itself, usually linked to the ethics, honesty, quality and credibility of adjudicators. Moreover, several relevant soft law instruments referred to the "three 'I's", namely independence, impartiality and integrity. For instance, paragraph 13 of General Assembly resolution 67/1 stated that "the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice". In the same vein, the sixth preambular paragraph of Economic and Social Council resolution 2006/23 stated that "the integrity, independence and impartiality of the judiciary are essential prerequisites for the effective protection of human rights and economic development". The Bangalore Principles of Judicial Conduct, which were annexed to that resolution, referred to those values together with the values of propriety, equality, and competence and diligence. In conclusion, he thanked the Special Rapporteur and the other members for enabling the Commission to hold such a rich and fruitful debate.

**Mr. Nguyen** said that he wished to thank the Special Rapporteur for his exemplary work on the second report.

The widespread support expressed by the majority of delegations in the Sixth Committee on two crucial issues – expanding the scope of disputes involving international organizations and revising the definition of international organizations – indicated that the Commission had progressed in the right direction. Most delegations had concurred with the Commission's recommendation to broaden the topic to include disputes of a private nature; only one delegation had advocated limiting the scope of the topic to international disputes. It was important to underscore that the topic was still confined to the legal dimensions of both international disputes and non-international disputes involving international organizations. With regard to the definition of international organizations, any alteration of the definition set out in the Commission's 2011 articles on the responsibility of international organizations must not disregard or diminish the significance of the element of legal personality. However, there was room to consider including the element of having an organ capable of expressing a separate will of the organization. He endorsed the Special Rapporteur's suggestion that draft guidelines 1 and 2 should, on first reading, be revised to incorporate constructive comments from States.

The second report focused on international disputes to which international organizations were parties. Distinguishing between international and non-international disputes was challenging, particularly when some non-international disputes encompassed aspects of international law and could lead to or involve other international disputes, such as issues regarding the immunity of international organizations before domestic courts. The primary criterion for distinguishing between international and non-international disputes was the subject factor. International disputes entailed conflicts between subjects of international law and were governed by international law. Therefore, it was crucial to emphasize the subject element in the definition set out in draft guideline 2 (b). Disputes between States and international organizations often revolved around the interpretation and implementation of headquarters agreements and agreements on privileges and immunities. However, disputes concerning matters such as delayed payments to staff fell under the administrative law of the international organization and should not be regarded as disputes governed by international

law. Disputes between international organizations were disputes between subjects of international law, whereas disputes that arose with non-governmental organizations or other entities were not. Further, disputes between individuals and international organizations acting as subjects of the national law of the host State were non-international disputes. Such disputes could include conflicts over service contracts, labour agreements, rental agreements for premises, traffic accidents or claims for compensation for damage caused to organizations and individuals in the host country. The subject factor was thus pivotal in determining the nature of the dispute. That element should be underscored in draft guideline 3.

With regard to the practice of dispute settlement, the questionnaire replies set out in the memorandum by the secretariat (A/CN.4/764) showed that disputes between States and international organizations often concerned the interpretation and implementation of headquarters agreements. As noted in paragraph 40 of the Special Rapporteur's report, most such disputes were settled successfully through negotiations and consultations, despite the presence of specific clauses in headquarters agreements mandating arbitration in cases where such methods failed. However, the role of negotiation seemed to have been somewhat understated in the report, given that the analysis of negotiation spanned only around 4 pages, in contrast to the extensive examination of arbitration, which spanned 46 pages. In the future, the Special Rapporteur should endeavour to provide a more detailed analysis of the advantages and limitations of negotiation, given its status as one of the dispute settlement means that could be freely chosen under draft guideline 2 (c).

Negotiation had proved to be an effective means of resolving legal disputes devoid of political entanglements between States and international organizations. Psychologically, it was challenging for a State to accept the idea that a derived subject of international law could be empowered to sue the original subject of international law. That reluctance underlay the hesitancy among States to entertain proposals to amend the Charter of the United Nations to allow international organizations to participate in contentious proceedings before the International Court of Justice. In response to the 1971 survey referred to in paragraph 215 of the second report, only 15, or just under half, of the 31 States that had responded to the survey had replied positively to a question on "the possibility of enabling intergovernmental organizations to be parties in cases before the Court". In other words, not only a minority of the 130 parties to the Statute of the Court at the time, but a minority of the States that had responded to the survey, had expressed a positive stance towards amending the Charter to permit international organizations to participate in contentious proceedings before the Court alongside Member States.

Despite the inability of international organizations to participate in contentious proceedings, the Court's advisory opinion mechanism remained valuable and warranted further promotion. In practice, that mechanism had seen increased utilization in relations between international organizations and States, as well as indirectly through the involvement of international organizations in resolving disputes among States via requests for advisory opinions. Examples such as *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* and the request for an advisory opinion on *Obligations of States in respect of Climate Change* submitted in 2023 illustrated that trend. Granting international organizations the right to participate in contentious proceedings before the Court could potentially escalate conflicts between such organizations and States, in particular in the realm of politics and international peace and security. Instances such as the conflict between the Russian Federation and Ukraine or disputes over the Gaza Strip underscored the growing caution among States towards expanding the Court's contentious jurisdiction to include international organizations.

In the light of those considerations, the Special Rapporteur's suggestions regarding draft guidelines 4 and 5 were generally acceptable, albeit with the amendment proposed by Mr. Galindo to amend the phrase "should be made available" in draft guideline 5 to read "could be made available".

In relation to draft guideline 6, the Special Rapporteur's observations on dispute settlement and the rule of law were practical. However, in addition to the independence and impartiality of arbitral or judicial institutions and the equality of parties during adjudicatory proceedings, the question of transparency should be highlighted. Transparency not only garnered public attention but also enhanced the equality of all parties involved. The Special

Rapporteur had briefly mentioned the issue of transparency in his 2023 article on arbitrating disputes with international organizations, published in volume 34, issue 3, of *King's Law Journal*, but regrettably had not delved deeper into the issue in the second report. Regarding the principle of equality of parties in proceedings before judicial organs, it was essential to maintain a balance in safeguarding the parties' interests in cases where one party did not appear.

Lastly, in the second report, the Special Rapporteur extensively analysed arbitration models in Europe, Africa and Latin America, but there were limited examples of Asian practice. The practices outlined in the Manila Declaration on the Peaceful Settlement of International Disputes and the Hong Kong International Arbitration Centre Rules, as well as those of the Kuala Lumpur Court Mediation Centre and the Kuala Lumpur Regional Centre for Arbitration, among others, deserved to have been more prominently featured in the report.

**Mr. Asada** said that he wished to thank the Special Rapporteur for his high-quality second report on the settlement of disputes to which international organizations were parties, which, like the first report, provided useful context and was well grounded in practice and literature.

In paragraph 7 of the second report, the Special Rapporteur addressed the definition of "international organization" as contained in draft guideline 2 (a), stating that, in the Sixth Committee of the General Assembly, some delegations had pointed to the fact that international organizations might not necessarily be established by an international legally binding instrument. Notably, the delegations in question were those of Thailand, the State where the 1967 Bangkok Declaration establishing the Association of Southeast Asian Nations (ASEAN) had been signed, and Austria, the State that hosted the secretariat of the Organization for Security and Cooperation in Europe (OSCE). The fact that the constituent instruments of ASEAN and OSCE were considered to be non-legally binding seemed to indicate that international organizations established by such instruments were facing problems and that the States hosting or otherwise connected to them also had concerns. Although draft guideline 2 had been provisionally adopted in 2023, the Special Rapporteur had stated that the constructive comments made in the Sixth Committee should be considered by the Commission before the end of the first reading of the draft guidelines. He wished to propose that all such revisions should be made before the end of the first reading, rather than being postponed to the second reading.

In his statement on the topic at the Commission's seventy-fourth session (A/CN.4/SR.3617), he had explained the issues surrounding international organizations established by non-legally binding instruments, using OSCE as an example. A further example was that of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, which had been set up pursuant to a resolution of the signatory States of the Comprehensive Nuclear-Test-Ban Treaty and was based in Vienna. The Preparatory Commission was composed of 187 States that had signed the Treaty. Its provisional technical secretariat had 300 staff members from about 90 States. However, the legal nature of its founding instrument had been disputed among the States parties to the Treaty. As a result, while some States had enacted national legislation to enable the Preparatory Commission to import necessary equipment free from tax, duties and customs restrictions, others required it to pay significant sums in direct or indirect taxes and customs duties. In some cases, the Preparatory Commission faced obstacles regarding customs clearance. Similarly, some States granted privileges and immunities to the staff of the provisional technical secretariat, but others did not. Disputes over those and other problems resulting from the legal nature of the constituent document had lasted over 25 years. Such disputes might arise more frequently in relation to international organizations whose constituent document's legal nature was denied or disputed. Given the serious nature of the problems that arose and the concerns expressed in the Sixth Committee, draft guideline 2 should be amended to make clear that the definition of "international organization" included such organizations.

Some members of the Commission had argued that the Commission should stick to the definition of "international organization" contained in the 2011 articles on the responsibility of international organizations and the commentaries thereto. However, the Commission must take due account of the concerns raised by Member States in the Sixth Committee. Moreover, the definition of "international organization" in the draft guidelines

already included new elements that were not present in the 2011 articles. Furthermore, given the opening phrase of draft guideline 2, "For the purposes of the present draft guidelines", it was quite possible and reasonable for there to be slight variations in the definition to suit the document's objectives. In the context of dispute settlement, the activities of international organizations established by non-legally binding documents were highly likely to lead to legal disputes. That said, while it seemed advisable to formulate a definition that reflected those realities, it was also true that the definition of a concept as fundamental as "international organization" should not evolve so quickly and frequently.

He therefore wished to propose that, to address the concerns raised in the Sixth Committee and his own concerns, the phrase "irrespective of the legal nature of these resolutions or decisions" should be added to the end of the third sentence of paragraph (5) of the commentary to draft guideline 2, which referred to international organizations set up by a resolution or decision. The purpose of the proposed addition was to stress that the issue was not necessarily the form of the constituent instruments, but their legal nature. That was important, because draft guideline 2 (a) defined international organizations as being "established by a treaty or other instrument governed by international law", language that resembled the definition of "treaty" in the Vienna Convention on the Law of Treaties. In any event, the flexible approach suggested by the Special Rapporteur was crucial in relation not only to the current topic but also to other topics and indeed for the Commission as a whole, as it demonstrated the Commission's ability to work flexibly and accurately and was thus conducive to long-term trust in its work.

Concerning the definition of "international disputes", the Special Rapporteur's observation that the distinction between international and non-international disputes posed challenges and complexities was correct. It was not uncommon for the two to be intertwined. However, as discussing them separately was useful for understanding the issue at hand, he fully supported the Special Rapporteur's approach in that regard. For the same reason, he supported the definition of "international disputes" proposed in draft guideline 3. The point made by Mr. Forteau at the previous day's meeting (A/CN.4/SR.3658) regarding disputes between international organizations and individuals was an important one; however, the question largely depended on the interpretation of the phrase "other subjects of international law" in draft guideline 3.

Chapter II of the report, on practice, generally conveyed an impression that emphasis had been placed on examples of judicial settlement mechanisms. That was understandable, given that dispute settlement mechanisms other than judicial means lacked transparency and information on them was therefore scant. In relation to dispute settlement in judicial institutions, as international organizations were not recognized as parties before the International Court of Justice, their legal questions primarily revolved around advisory opinion procedures. While advisory opinions had historically often pertained to inter-State disputes, issues involving international organizations as actual parties had less frequently been the subject of advisory proceedings. That did not necessarily mean that issues in the latter category were few or that rules and procedures of international organizations were rarely disputed. For example, in relation to the war in Ukraine, there existed an issue concerning mandatory abstention from voting by a party to a dispute, as stipulated in Article 27 (3) of the Charter of the United Nations. While that rule was said to have been ignored in practice for over 60 years, an argument had been put forward that members of the Security Council that were parties to the war in Ukraine should have abstained from voting in the Council. Such legally and practically significant and complex issues seemed fit for advisory opinions from the Court. Although politically sensitive, the questions of the effect of voluntary abstention in the Security Council and the veto power had been examined by the Court in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*. It was unclear why the second report made no mention of that advisory opinion, in which a number of legal issues involving international organizations were discussed.

The use of chemical weapons in the Syrian Arab Republic, which had led to military action by Member States, was another significant example of a case involving the legality of the acts of an international organization. Initially, a system of identifying the users of chemical weapons had been established through a Security Council resolution, but it had

ceased to exist owing to the failure to adopt a resolution to extend its mandate. Subsequently, a mechanism for the same purpose had been established by the Conference of the States Parties of the Organisation for the Prohibition of Chemical Weapons. However, the legality of that mechanism under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention) had been disputed and was one of the main causes of the impasse in which the Organisation was currently mired. Considering that the Organisation had the power to request advisory opinions from the International Court of Justice under the Chemical Weapons Convention, such issues should be suitable subjects for an advisory opinion. Similar legal issues regarding reporting and access also affected the International Atomic Energy Agency, which had an analogous power to request advisory opinions. Admittedly, such issues were politically sensitive and might not always be suitable for legal resolution. However, from the "rule of law" perspective emphasized in the second report, it was important to explore how those serious issues could be resolved through the use of judicial institutions.

The second report contained an extensive and detailed survey of arbitration and advisory opinions, which served as useful references. However, while numerous advisory opinions of the International Court of Justice were mentioned, several important opinions involving acts of international organizations were missing, including the *Namibia* advisory opinion.

After an extensive review of relevant cases, the Special Rapporteur proposed draft guideline 4. Unfortunately, the draft guideline appeared to be a mere statement of facts, as many members of the Commission had pointed out. The purpose of the draft guideline was somewhat unclear. It did not offer substantial guidance, as the first sentence seemed rather obvious and the subsequent sentences merely described factual information. He also supported the comments made by other members regarding the phrase "falling short of", which appeared to denote the inferiority of non-adjudicatory means of settling disputes.

Draft guideline 5 emphasized the importance of ensuring that arbitration and judicial settlement were more widely used for the settlement of international disputes to which international organizations were parties. If, as suggested by the Special Rapporteur in paragraph 90 of the report, the lack of standing of international organizations as parties in contentious cases before the International Court of Justice reflected the early twentieth-century approach of regarding States as the sole subjects of international law, then, given the dramatic increase in the number and activity of international organizations since then, rectifying such an oversight might pose little problem. Yet the resolution of that issue was far from straightforward. As correctly pointed out in paragraph 223 of the report, resolving the issue would, first, require an amendment to the existing jurisdictional limitations or the creation of new courts or tribunals. Moreover, enabling international organizations to become parties in contentious cases would require not only an amendment to the Statute of the Court, but also the insertion of compromissory clauses in the constituent treaties of international organizations, or the acceptance by those organizations of the Court's jurisdiction by other means, such as by declarations made pursuant to Article 36 (2) of the Statute, the so-called "optional clause".

However, it was unclear whether international organizations really wished to have standing in contentious cases before the Court. First, unlike advisory opinions, judgments in contentious cases were legally binding and were thus less likely to be sought. Second, if the United Nations made the "optional clause" declaration without reservations, it could be sued at any time, and any resulting compensation would ultimately be borne by the Member States. The major contributors were unlikely to consent to provide compensation for acts unrelated to them. On the other hand, given the divergent interests involved, it would be extremely challenging for Member States to agree on specific reservations to be made to the declaration. Third, given that even non-binding advisory opinions had been used sparingly, it did not seem necessary to grant international organizations the capacity to be parties to contentious cases. Those considerations suggested that arbitration could be more practical. Compared to judicial settlement, it might also be more acceptable, given its procedural flexibility and the involvement of the parties in the selection of arbitrators. However, whether to make arbitration compulsory was a significant decision. If it was not made compulsory, the situation would remain largely unchanged; if it was made compulsory, issues similar to those

related to the opening of contentious proceedings before the Court to international organizations would arise. If arbitration was made compulsory, a procedurally elaborate mechanism was essential to ensure that neither party to the dispute could circumvent the obligation to arbitrate by not agreeing to the establishment of the arbitral tribunal, as had happened in *Interpretation of Peace Treaties* in 1950. In that regard, the 2012 arbitration rules of the Permanent Court of Arbitration were a useful reference. If mandatory arbitration proved challenging, encouraging agreement to *ad hoc* arbitration might be the only realistically feasible alternative.

The fundamental issue remained that, even under the current system, where the advisory opinion mechanism was broadly open to international organizations, their utilization of the mechanism was limited. That attitude suggested that granting such organizations litigant capacity might not significantly alter the *status quo*. The tendency of international organizations to avoid using judicial bodies would need to be addressed before a new system was established. More fundamentally, the problem seemed to lie less with the international organizations themselves than with their member States. To sidestep those issues, granting the Secretary-General, and the directors general of other international organizations, the authority to request advisory opinions might be worth considering, though it would entail the risk that such officials could request advisory opinions contrary to the wishes of member States. Adequate substantive and procedural safeguards would thus be required. In any event, the report could have benefited from a more detailed examination of the advantages and disadvantages of empowering the Secretary-General and the directors general of other international organizations to take the initiative of requesting advisory opinions.

In conclusion, he generally supported the idea of promoting the use of judicial institutions by international organizations. However, he was not sure whether the idea of opening the contentious jurisdiction of the International Court of Justice to international organizations was the best available option in that regard. It was more important to prioritize the use of advisory proceedings by international organizations.

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

**Ms. Galvão Teles** (Co-Chair of the Study Group on sea-level rise in relation to international law) said that, in addition to herself and Mr. Cissé, Ms. Oral and Mr. Ruda Santolaria, who were the other Co-Chairs, the Study Group on sea-level rise in relation to international law was composed of Mr. Akande, Mr. Asada, Mr. Fife, Mr. Forteau, Mr. Galindo, Mr. Grossman Guiloff, Mr. Huang, Mr. Laraba, Mr. Lee, Ms. Mangklatanakul, Mr. Mavroyiannis, Mr. Nesi, Mr. Nguyen, Ms. Okowa, Mr. Ouazzani Chahdi, Mr. Oyarzábal, Mr. Paparinskis, Mr. Patel, Mr. Reinisch, Mr. Savadogo and Mr. Vázquez-Bermúdez, together with Ms. Ridings (Rapporteur), *ex officio*.

*The meeting rose at 12.55 p.m.*