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International Law Commission

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Provisional summary record of the 3660th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 1 May 2024, at 10 a.m.

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Present:

Chair:	Mr. Vázquez-Bermúdez
Members:	Mr. Akande
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	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	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:

Mr. Llewellyn	Secretary to the Commission

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

Filling of a casual vacancy (agenda item 2) (A/CN.4/773 and A/CN.4/773/Add.1)

The Chair said that the Commission would proceed to fill the seat that had become vacant owing to the resignation of Mr. Bogdan Aurescu. As was customary, the election would be held in a closed meeting.

The meeting was suspended at 10.10 a.m. and resumed at 10.35 a.m.

The Chair announced that Ms. Alina Orosan had been elected to fill the casual vacancy resulting from the resignation of Mr. Bogdan Aurescu. On behalf of the Commission, he would inform the newly elected member and invite her to take her place in the Commission.

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

Mr. Fathalla said that the comments made by States in the Sixth Committee of the General Assembly on draft guideline 1 on the topic "Settlement of disputes to which international organizations are parties" and the commentary thereto had confirmed that the Commission had chosen the right approach in relation to the type of disputes to be covered. The Commission should, as the Special Rapporteur suggested in paragraph 10 of his comprehensive second report on the topic, consider States' comments on draft guideline 2 before the end of the first reading.

He supported the Special Rapporteur's inclusion in his proposed text for draft guideline 3 of a reference to disputes between international organizations and States, as the information provided in the second report confirmed that such disputes were frequent. He also welcomed the inclusion of a reference to disputes between international organizations. Although the report made clear that such disputes were rare, they did occur and could become more frequent in the future. Their inclusion served as confirmation that the Commission's role was not just to codify the rules of law but also to develop them to cover both situations that existed and those that could occur in the future. For reasons similar to those that he had raised with respect to draft guideline 2 at the Commission's seventy-fourth session (A/CN.4/SR.3614) and that Mr. Forteau had put forward at the current one, the reference in guideline 3 to "other subjects of international law" should be deleted. Such a reference would create uncertainty as to the status of disputes involving non-governmental organizations, individuals and business entities.

He would appreciate clarification regarding the need for the proposed draft guideline 4, as its content was largely covered by draft guidelines 1 and 2. Furthermore, it was unusual for practice to be referred to directly, rather than reflected indirectly, in a legal text, which the draft guidelines were meant to be. If the proposed draft guideline was retained, changes would be needed. As drafted, it suggested that all the means of dispute settlement laid down in draft guideline 2 (c) were widely used, placing them all on the same level, even though the examples given in the report demonstrated that the various means were not used with the same frequency. For example, negotiation was widely used, while mediation and conciliation were less frequently provided for in agreements concluded by international organizations, even though considerations of confidentiality made them a particularly attractive option. If retained, the proposed draft guideline should reflect the differences between negotiation, on the one hand, and mediation and conciliation, on the other. In addition, it should directly link enquiry and fact-finding to negotiation, as paragraph 47 of the report indicated that where enquiry or fact-finding missions were available as a means of dispute settlement, it was often in combination with negotiations.

He agreed that, as stated in proposed draft guideline 5, arbitration and judicial settlement should be made available and more widely used, as they put the parties to a dispute on an equal footing, unlike non-judicial means of dispute settlement such as negotiation, mediation and conciliation, which could place the weaker party at a disadvantage. The guideline should also indicate exactly how arbitration and judicial settlement should be made available and more widely used; the information contained in paragraphs 219 and 225 of the report could be drawn on for that purpose. Although the Special Rapporteur noted the limited use of arbitration in paragraph 55, he went on to give interesting examples of arbitration

clauses in instruments such as constituent agreements of international organizations and privileges and immunities treaties. Importantly, according to paragraph 84 of the report, practice demonstrated that arbitration was a suitable form of independent third-party adjudication. Such a semi-judicial avenue was a fair means of dispute settlement, particularly for the weaker parties to disputes, and should therefore not only be encouraged but also strengthened.

The report contained a detailed explanation of why judicial dispute settlement was rarely available for settling disputes to which international organizations were parties. Through its work, the Commission should try to expand the adjudicatory role of international and regional tribunals, in particular the International Court of Justice. The "binding" advisory opinions of the Court described in the report presented one possible means of doing so without requiring an amendment to the Statute of the Court. He agreed with the Special Rapporteur's assessment of the Court's role in paragraph 133 of the report. The Court's contentious jurisdiction was an avenue that the Commission should explore: it could provide a means for achieving the aim of proposed guideline 5, that arbitration and judicial settlement should be made available and more widely used.

There was no doubt that the independence and impartiality of adjudicators and due process were the main elements of the rule of law requirements referred to in proposed draft guideline 6. The fact that those elements were directly linked to arbitration and judicial settlement gave some weight to those two peaceful means of dispute settlement, as they provided guarantees that other peaceful means did not. The proposed draft guideline was therefore extremely important; it should promote access to arbitration and judicial settlement. To achieve that goal, elements of the recommendations contained in paragraphs 219 to 225 should be added to both proposed guidelines 5 and 6, and the link between the two articles should be made explicit. He supported the proposal for the future programme of work contained in chapter V of the report.

Ms. Oral said that she welcomed the Special Rapporteur's use of a questionnaire to reach out to States and international organizations, but the challenge when using such tools was to ensure that there were sufficient responses from each region. As it was, only a small number of States had provided written responses. The responses from States and international organizations generally suggested that there was limited practice in the settlement of disputes involving States and international organizations, and that most such disputes involved private law and private parties, which the Special Rapporteur said he would address in his third report.

With respect to proposed draft guideline 3, a clear-cut distinction between international and non-international disputes would perhaps not provide an accurate reflection of the disputes to which international organizations were parties. There were disputes between international organizations and private parties that could be classified as international in nature. In paragraph 19 of his report, the Special Rapporteur noted how a non-international dispute could be transformed into an international one. The Commission must decide whether that reality could be adequately reflected in draft guideline 3. The Drafting Committee should discuss the use of the phrase "arising under international law" in the proposed draft guideline.

There were concerns regarding the representativeness of the organizations studied in the report; for example, there was no discussion of the practices of the Association of Southeast Asian Nations (ASEAN). Article 4 of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism provided for the use of good offices, mediation and conciliation.

Although the Special Rapporteur had noted the preference of States and international organizations for consensual means of dispute settlement and the responses to his questionnaire had also suggested that negotiation and less adversarial means were preferred to adjudicatory forms of dispute settlement, the policy recommendations contained in the report and proposed draft guidelines 4, 5 and 6 favoured the more adversarial approaches of arbitration and judicial settlement. The Commission should place a greater focus on alternative means of dispute resolution. There was a growing interest in such alternatives, one example of which was the establishment by the International Law Association in 2022 of a Committee on Alternative Dispute Resolution. Examples of alternative means of dispute resolution included the compliance and implementation mechanisms provided for in various

treaties, to which Mr. Paparinskis had referred at the previous meeting, and the provisions regarding conciliation under article 14 of the United Nations Framework Convention on Climate Change and article 24 of the Paris Agreement.

If, as suggested in the report, mediation and conciliation, like negotiation, depended on the disputing parties' consent and could disadvantage the weaker party if the more powerful party withheld its consent, the Special Rapporteur should perhaps have put forward a draft guideline recommending greater use of mediation and conciliation, with a view to counteracting any imbalances in the power of disputing States. Indeed, Ms. Ridings had made the point at the previous meeting that mediation and conciliation could be more appropriate in situations of such an imbalance.

The Commission should present a balanced perspective on the different modalities of dispute settlement, including fact-finding, which could also be an effective non-adversarial method of dispute settlement. For example, the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)* had been resolved by a panel of experts appointed by the International Tribunal for the Law of the Sea, and the 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 provided for the use of expert panels to resolve disputes concerning technical matters. Given the actual practice of States and international organizations, she was concerned that the use of the words "falling short of" in proposed draft guideline 4 created a *de facto* hierarchical preference for arbitration and judicial settlement. In addition, the proposed draft guideline was descriptive and served no normative function.

While the Special Rapporteur stated, in paragraph 202 of his report, that independent third-party adjudication in the form of arbitration or judicial dispute settlement was often not available, she agreed with Mr. Fife that there seemed to be no evidence of a lack of opportunities to pursue adjudicatory dispute resolution. The evidence instead showed a preference for negotiation and alternative means of dispute settlement. Furthermore, the responses of States and international organizations to the questionnaire did not appear to reveal any concerns about the non-availability of arbitration or judicial dispute settlement.

The Special Rapporteur rightly observed that access to justice was a core element of the rule of law and that disputes should be settled by fair adjudication. She agreed with him that international organizations had limited access to the International Court of Justice but did not agree that their access to dispute settlement mechanisms in general was limited. The resolution of the Institute of International Law on the legal consequences for member States of the non-fulfilment by international organizations of their obligations towards third parties, referred to in the report, addressed means of dispute settlement only in its last article, and the wish expressed in the Institute's 1957 resolution on judicial redress against the decisions of international organs for judicial or arbitral dispute settlement methods to be made available to international organizations was focused on private rights or interests. International organizations had access to judicial proceedings under, for example, article 20 of the Statute of the International Tribunal for the Law of the Sea, part XI of the United Nations Convention on the Law of the Sea and the dispute settlement system of the World Trade Organization.

She was not convinced of the need for proposed draft guideline 5, which was limited to making arbitration or judicial settlement of disputes more readily available. In its response to the questionnaire, Côte d'Ivoire had indicated that negotiation, mediation and conciliation were the most useful dispute settlement methods, and Jordan had included judicial mediation in its response. Furthermore, the Commission's final outcome should distinguish between disputes between States and international organizations and those between international organizations and private parties. The response of the Netherlands to the questionnaire indicated that the most suitable dispute settlement method varied from case to case, with a combination of consultations and arbitration being most suitable in disputes between States and international organizations, and arbitration and judicial settlement being more suitable in disputes between international organizations and private parties. Austria had responded that it found negotiation to be the most effective tool in disputes between international organizations and private parties and used arbitration less frequently in such cases. Austria had also highlighted the high cost of arbitration, a factor that the Commission should take into account.

She supported the referral of the draft guidelines proposed by the Special Rapporteur to the Drafting Committee. Her reservations regarding the form and content of the Special Rapporteur's proposals for draft guidelines 4, 5 and 6 could be discussed in that forum.

Ms. Mangklatanakul said that the Commission's aim should always be to clarify and resolve practical issues for States. To that end, the Commission must consider how the current exercise would contribute to the codification and progressive development of international law on the settlement of disputes to which international organizations were parties. She agreed with the Special Rapporteur that the Commission should consider the comments from States before the end of the first reading. The debate in the Sixth Committee on draft guidelines 1 and 2, which addressed scope and use of terms, respectively, should inform the Commission's work on all the guidelines. She agreed with Mr. Asada that the Commission should reconsider the definition of "international organization" contained in draft guideline 2 in the light of comments made in the Sixth Committee, especially with respect to whether international organizations must be established by a legally binding document. By considering States' constructive comments at the earliest possible opportunity, the Commission would send a strong message to the Sixth Committee that it was committed to responding to feedback and strengthening relations between the two bodies.

Regarding proposed draft guideline 3, she was still uncertain about whether the binary distinction drawn by the Special Rapporteur between "international" and "non-international" disputes was totally correct, as that distinction was not always clear-cut in practice. Even in cases where the source of a dispute was the breach of an international treaty obligation, national law might still need to be considered in interpreting and applying the international treaty in question. The interaction between national and international law was therefore inevitable. An obvious example of such interaction was that, in dualist States, an international treaty must be incorporated into the national legal system by means of a law and regulations and could not be interpreted in isolation. Furthermore, as noted by the Special Rapporteur in his report, non-international disputes might involve a number of international law issues that could give rise to an international dispute. In the absence of a clear-cut distinction between "international disputes" and "non-international disputes", she would prefer to use the term "disputes with a private law character".

In proposed draft guideline 3, the Special Rapporteur focused on identifying the parties to international disputes without elaborating on the legal basis that might give rise to a particular dispute, in other words, the text that defined the applicable law. The definition of international disputes should make it clear that, regardless of the subject of the dispute, to be classed as international, the dispute must arise under international law because, unlike in domestic disputes, international disputes required an agreement by the parties to serve as the legal basis for settling them. Whether before or at the time of the dispute, the parties must consent to resolving the dispute and agree on the means and methods for doing so. That point was essential when arbitrators or judges came to decide on the question of jurisdiction.

As noted by the Special Rapporteur and States in the Sixth Committee, disputes arose most often from agreements on privileges and immunities, and often involved the staff of international organizations. The Commission might therefore wish to devote its efforts to exploring the legal basis for, and providing useful guidance on, the settlement of such disputes. Individuals, insofar as they were involved in such disputes and were relevant to the topic under consideration, should likewise be included in the scope of the Commission's study. That issue might usefully be discussed in the Special Rapporteur's third report, which would be focusing on disputes with a private law character.

While the responses to the Special Rapporteur's questionnaire on the topic had provided useful information, the questions posed in such questionnaires and the responses received to those questions were seldom comprehensive. Indeed, only 11 States had responded to the questionnaire. She agreed with other members that the Commission needed to draw on a wider range of practice in the context of its study. In addition to the issue of privileges and immunities, the Commission might wish to explore other issues that were of practical concern to States and identify practices outside the United Nations system. For example, the Special Rapporteur might consider addressing the topic of treaties concerning the civil liability of international organizations in his third report. She proposed moving the

phrase “arising under international law” from the end of the sentence to after the word “disputes” in the second line to clarify the legal basis of those disputes.

Since the scope of the Special Rapporteur’s second report was limited to disputes of an international nature to which international organizations were parties, she proposed modifying the title of proposed draft guideline 4 to read “Practice of international dispute settlement”. Moreover, she wondered whether the means of dispute settlement laid down in draft guideline 2 (c), which were also referred to in the first sentence of proposed draft guideline 4 and which reflected the means and methods of dispute settlement enumerated in Article 33 of the Charter of the United Nations, should not be updated by adding, for example, “good offices”, in order to better reflect current State practice and the evolution of treaty law and dispute settlement systems since the Charter’s adoption in 1945. She was likewise unsure whether, in the second sentence of proposed draft guideline 4, it was useful to categorize negotiation and other means of dispute settlement as “falling short of binding third-party adjudication”, since negotiations and other methods of dispute settlement and binding third-party adjudication were not dichotomous in practice.

She found the phrase “falling short of” to be problematic because, as had been pointed out by other members, the dispute settlement process was not necessarily linear, beginning with negotiation and ending with “binding third-party adjudication”. In some cases, litigation was merely a step towards resolving a dispute rather than a means of definitive settlement. The danger of presenting negotiation and judicial or arbitral settlement as dichotomous rather than as tools to be used interchangeably was exhibited in *Case concerning a Dispute between Argentina and Chile concerning the Beagle Channel*. Furthermore, she wondered whether the phrase “binding third-party adjudication” might not give the impression that all “third-party adjudication” was binding and that all diplomatic means of dispute settlement were not. Upon concluding a treaty, States might well agree to be bound by an obligation to negotiate or to engage in other means of dispute settlement, such as consultations, in the event of a dispute arising. While those were often obligations of conduct and not result, it showed that, ultimately, autonomy of the parties was still the most important factor in the settlement of disputes. She was also uncertain about whether there was currently a sufficient factual basis on which to conclude that arbitration and judicial settlement were often not provided for and were therefore resorted to less frequently.

As for proposed draft guideline 5, while she agreed that there was merit in making arbitration and judicial settlement more readily available, she was unsure as to whether the Commission should advocate for those means of dispute settlement to be “more widely used”. Ultimately, what mattered was that disputes were settled, regardless of the methods used. States and international organizations often turned to methods other than binding third-party adjudication to settle disputes because, as the parties to the dispute, they were best placed to identify the most appropriate means to settle it, taking into account factors such as the subject of the dispute, political concerns, cost, the desire to preserve relations and the degree of control that they preferred to have. Judicial and arbitral settlement might be appropriate in certain contexts, but not in all. Furthermore, making arbitration and judicial settlement more available to promote access to justice might not necessarily lead to an increased preference for their use. Even if the Commission took the position that arbitration and judicial settlement should be more widely used, international organizations and their staff could find, and had found, access to justice through other avenues. International organizations had their own local remedies, which had to be exhausted before a claim could be brought.

Regarding proposed draft guideline 6, she agreed with the Special Rapporteur’s assessment that, even in national legal systems, the concept of the rule of law did not have a “clearly defined and generally accepted meaning”. As he rightly pointed out, some elements linked to the rule of law, such as access to justice, were not directly transposable to the international level. The concept of the rule of law thus warranted further discussion before a reference to “the requirements of the rule of law” could be included in the proposed draft guideline. She did not agree with the Special Rapporteur’s statement that: “The fact that the jurisdiction of international courts and tribunals is usually consent-based does not alter the fact that, as a matter of policy, access to independent third-party dispute settlement is of equally valid concern for the international rule of law.” She believed that consent and access to dispute settlement, and the rule of law more generally, could not be considered together.

The distinction between the jurisdiction and admissibility stage and the merits stage must be re-emphasized and, contrary to the situation prevailing in national legal systems, jurisdiction must always be considered before the merits in international courts and tribunals. She wondered whether it might not be better to deal with applicable law, which was relevant at the jurisdiction stage, separately from the conduct of proceedings, which comprised "rule of law elements" such as the independence and impartiality of adjudicators and due process. She would elaborate on that point in the Drafting Committee.

Mr. Lee said that he wished to thank the Special Rapporteur for his comprehensive second report, which laid a solid foundation for the Commission's future work on the topic. As members would recall, the Commission had decided to change the title of the topic from "Settlement of international disputes to which international organizations are parties" to "Settlement of disputes to which international organizations are parties". In his second report, the Special Rapporteur had further delimited the work to be accomplished by the Commission by clarifying that the scope of the report was limited to international disputes to which international organizations were parties and that non-international disputes would be dealt with in his third report, in 2025.

The definition of international disputes set out in proposed draft guideline 3 focused on the identity or status of the parties to the dispute – in other words, whether they were international organizations, States or other subjects of international law. The Special Rapporteur had taken a similar approach in defining non-international disputes as a "dispute between an [international] organization and a private party". However, as the Special Rapporteur had himself pointed out, the distinction between international and non-international disputes could pose challenges in practice. In proposed draft guideline 3, the concept of "other subjects of international law" remained ambiguous and posed the risk of eroding the seemingly clear dichotomy between international and non-international disputes. That ambiguity had been borne out by the divergence of opinion within the Commission over whether the category of "international disputes" included disputes between international organizations and private persons.

Proposed draft guideline 3 was arguably too inclusive and, at the same time, not inclusive enough. On the one hand, the definition of international disputes it contained, if interpreted overly broadly, could be taken to include internal disputes between international organizations and their member States, which were generally regulated by the constituent instrument of the organization in question and arguably did not fall within the scope of the topic. On the other hand, the definition set out in proposed draft guideline 3 would not be inclusive enough if it excluded international law disputes with private persons or, more specifically, disputes between international organizations and private parties that "arise from a relationship governed by international law". To his mind, the Special Rapporteur had used the identity or status of the parties involved in disputes as the criterion distinguishing between international and non-international disputes while paying insufficient attention to the legal nature of the acts of the international organizations involved and the circumstances surrounding them, resulting in a definition of international disputes that was open to debate. Indeed, the definition of "non-international disputes" proposed by the Special Rapporteur effectively precluded the categorization of disputes between international organizations and private parties that retained an international character as "international disputes" under proposed draft guideline 3. The suggestion by Mr. Forteau, that a far more detailed approach should be taken to the topic, should be heeded.

He likewise had some reservations about the Special Rapporteur's view that non-international disputes to which international organizations were parties occurred because of their capacity to act as subjects of domestic law. The tenability of that view, at least with respect to some disputes, was questionable in view of cases such as *Georges et al. v. United Nations et al*. He also wished to recall that, in 2014, the Committee of Legal Advisers on Public International Law had decided to take up the topic "Settlement of disputes of a private character to which an international organization is a party", which addressed claims arising from operational activities, in particular military operations, of international organizations such as the United Nations and the North Atlantic Treaty Organization. When an international organization concluded commercial contracts with private parties, it could be said to be acting

as a subject of domestic law. However, it would be difficult to argue that international organizations were acting as such when they engaged in peacekeeping operations.

The Commission might therefore wish to consider the advisability of adopting the clear dichotomy between international and non-international disputes presented by the Special Rapporteur. While he was not suggesting that the Commission's decision to drop "international" from the title of the topic should be revisited, there appeared to be a need to address the ambiguity of the scope of the topic, including the over- and under-inclusiveness of proposed draft guideline 3. He wished to suggest that the Commission should take a more focused approach by narrowing the scope of the topic. Greater consideration should be given to the views of States and international organizations and to important practice, such as the aforementioned decision of the Committee of Legal Advisers on Public International Law.

Properly delimiting the scope and focus of the topic at the present juncture was of crucial importance. He agreed with other members that the Commission should approach that matter more prudently. It might consider sending proposed draft guideline 3 to the Drafting Committee on the proviso that it remained there pending the outcome of future work on the concept of "non-international disputes", as had been suggested by Mr. Paparinskis. Alternatively, the Special Rapporteur might devise a clearer and more detailed definition of "non-international disputes", which could be the subject of a more thorough discussion within the Drafting Committee.

At the previous session, while the Commission was discussing the definition of an international organization, he had expressed a preference for retaining the definition found in article 2 (a) of the articles on the responsibility of international organizations of 2011. In doing so, he had suggested that the past work of the Commission should be more actively consulted and utilized. The link between the topic at hand and the articles on the responsibility of international organizations needed to be strengthened. He hoped that the dearth of reference to that output would be addressed in the Commission's future work on the topic.

He agreed with other members that the descriptive language of proposed draft guideline 4 was not appropriate, as guidelines were intended to be prescriptive. However, at the same time, proposed draft guideline 4 was not merely descriptive, since it introduced an element of hierarchy among the various means of dispute settlement set out in draft guideline 2 (c). He concurred that the phrase "falling short of binding third-party adjudication" in the second sentence of proposed draft guideline 4 should be reconsidered. Proposed draft guideline 4, which described the practice of settlement of disputes to which international organizations were parties, could be included in the commentary to draft guideline 2 (c). Alternatively, the first and second sentences of the proposed draft guideline could be inserted at the start of proposed draft guideline 5. That matter could be discussed further by the Drafting Committee.

Moreover, there was arguably some divergence between the position taken by the Special Rapporteur in introducing an element of hierarchy in proposed draft guidelines 4 and 5, on the one hand, and the views of States and international organizations compiled in the memorandum, on the other.

Regarding proposed draft guideline 5, he again agreed with many members that, while increasing the availability of arbitration and judicial settlement as means of settling international disputes was welcome, prescribing the wider use of arbitration and judicial settlement for that purpose, and thus reinforcing an element of hierarchy among the various means of dispute settlement, needed to be reconsidered. As had been pointed out by a number of Commission members, the actual practice of States and international organizations did not seem to accord with the position taken in proposed draft guideline 5. To ensure that the draft guidelines were useful in solving practical problems, the Commission should pay more attention to the actual practice and views of States and international organizations going forward.

He likewise concurred that the added value of proposed draft guideline 6 was not necessarily clear. In making only means of adjudicatory dispute settlement subject to "the requirements of the rule of law", the Special Rapporteur again seemed to be introducing an element of hierarchy among the various means of dispute settlement listed in draft guideline 2

(c). He looked forward to discussing the various points he had raised in the Drafting Committee.

Mr. Jalloh, recalling that, at the previous session, he had expressed the hope that the detailed questionnaire would attract submissions from a representative group of States and international organizations to help enrich the quality and relevance of the Commission's work, said that he commended the 11 States and around 18 international organizations and other entities that had responded, as the information provided afforded a valuable picture of their practices, forming an essential foundation for the report, and would help to guide the Commission's work on the topic. He also echoed the call by several other members for more submissions, including from those States that hosted international organizations in different parts of the Americas, Asia and Africa.

He generally supported the basic approach adopted in the report, but agreed with some of the criticisms made by Mr. Forteau, Mr. Galindo, Mr. Nguyen, Ms. Ridings, Mr. Fife and Mr. Fathalla. He considered that drafting matters should be dealt with by the Drafting Committee, so would not comment on the four proposed draft guidelines or the suggestions made by other members, but noted that some of the concerns expressed might be addressed through explanations in the commentaries.

He agreed with the distinction drawn by the Special Rapporteur between disputes addressed under international law and those qualified as non-international law disputes. The decision to address them in two separate reports was thus acceptable: the focus on international disputes in the second report might well have resulted in a more complete analysis, allowing a better understanding of issues that tended to arise in practice. He also agreed that, in practice, the distinction between international and non-international law disputes was not always self-evident, and the precise delimitation between them posed a number of challenges. The nature of a dispute might also depend upon the choice made by the parties as to whether their relationship would be governed by private or international law.

A second point, related to that choice, concerned the nature of the initial injury and the victim of that injury. There was, furthermore, the possibility of a State deciding to espouse the private claims and to assert diplomatic protection for alleged violations of international law, including international human rights law, as in the case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* before the International Court of Justice.

A further example was the 1949 International Court of Justice advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* – the Bernadotte case – in which the Court established that the United Nations could bring a claim against a State before an international court to obtain reparation in respect of injury caused to an agent of the organization in the course of the agent's performance of duties essential to the functions of the organization. Such disputes could also be solved through private tort law but, even in that case, it was very likely that some issues of international law might arise. As shown in the second report, most non-international disputes involving international organizations might implicate elements of international law, including sometimes sensitive questions of privileges and immunities, related to the legal personality of the organization. In his view, the most important issues to be addressed under the present topic concerned the private claims of victims of various types of tortious harms caused by international organizations, which the Special Rapporteur intended to consider in his next report.

The examination, set out in chapter II of the report, of negotiations, consultation, mediation, conciliation, enquiry, arbitration and judicial settlement, was perhaps somewhat long and tedious, but nevertheless provided a generally useful review of the ways that States settled disputes with international organizations. A key lesson to be drawn was that, while all the traditional means of dispute settlement were used in practice, the frequency with which they were invoked varied hugely. The Special Rapporteur's conclusion, that amicable, non-adjudicatory means of settling disputes – especially negotiations, enquiry, mediation and conciliation – were the preferred modalities for settling disputes between States and international organizations – ahead of arbitration and resort to international courts and tribunals – was quite telling about what would typically be referred to as "alternative forms of dispute settlement" in domestic legal practice, as it appeared to invert the traditional

understanding of dispute settlement in national practice. Arbitration and judicial settlements were seen as alternatives to negotiations, enquiry, mediation and conciliation, rather than the other way round.

From his extensive survey of the literature and practice, the Special Rapporteur had confirmed that judicial settlement was rarely available for disputes involving international organizations as parties. For example, Article 34 (1) of the Statute of the International Court of Justice provided that "only States may be parties in cases before the Court", a requirement that dated from the establishment of the Permanent Court of Arbitration and reflected the twentieth-century concept of international law, in which States were the only subjects. That situation had been widely criticized, as it meant that international organizations did not have access to contentious proceedings before the Court, and demands had been made to broaden the Court's jurisdiction to accommodate that possibility. Although international organizations could be parties before the International Tribunal for the Law of the Sea, the World Trade Organization dispute settlement system and some regional courts or tribunals, the only means – albeit imperfect and indirect – that they had been able to use to address some disputes concerning international organizations before the International Court of Justice was to submit requests for an advisory opinion, as in the Bernadotte case.

More recently, some organs of international organizations had also invoked advisory opinion procedures on issues that defied categorization as disputes. One such instance was the March 2023 request of the United Nations General Assembly to the International Court of Justice for an advisory opinion on the obligations of States in respect of climate change. Advisory opinions had also been sought on climate change issues before the International Tribunal for the Law of the Sea. The lack of access to a judicial forum for international organizations meant that advisory opinions were being sought to address matters that concerned the international community as a whole, as negotiations in other forums were stuck in political deadlock.

In respect of chapter III of the report, he supported the Special Rapporteur's assertion that the limited adjudicatory means available to international organizations for dispute settlement restricted free choice and risked giving an advantage to the stronger party in negotiations. From the argument that adjudicatory means presented significant advantages for the settlement of disputes to which international organizations were parties, including in respect of the application of the rule of law and independent and impartial third-party adjudication, he understood the Special Rapporteur to be proposing, on the basis of the rule of law having strong foundations, that judicial means of dispute settlement should be made more widely available to international organizations, emphasizing that it was a matter not of legal obligation but of sound policy.

The rule of law requirements included the independence and impartiality of arbitral or judicial institutions, as well as respect for due process through safeguarding of the principle of equality of parties in the course of adjudicatory proceedings. They also covered the right to access justice, including the right to remedies. He concurred with the Special Rapporteur that international organizations could probably demand access to dispute settlement means through a claim related to the rule of law, which could form a good basis on which to extend judicial dispute settlement mechanisms to international organizations. However, as several members had pointed out, the question of consent to international adjudicatory means could be a barrier to such a development.

He nevertheless also agreed with the Special Rapporteur that a first step could be to push for more arbitration clauses in treaties and agreements. Some arbitration institutions had formulated draft arbitration clauses for that purpose. It would, however, be difficult to achieve wider availability of direct judicial settlement for international organizations; in the case of the International Court of Justice, that would require an amendment to the Court's Statute, something that States and organizations had already called for, but for which the political will did not yet appear to exist. Nevertheless, the prevalence of international organizations in modern international life would seem to militate in favour of providing such access. It should also be noted that the Court was increasingly busy with cases brought by States, as more political organs of the international community, such as the Security Council, were considered to have failed woefully in the performance of their duties.

He supported the Special Rapporteur's proposal to focus his third report on non-international disputes to which international organizations were parties, which would mostly be disputes between international organizations and private parties. However, he was concerned that, despite that being the most important issue to be addressed under the topic, it would be taken up in only one of the Special Rapporteur's reports. He was in favour of referring all the proposed draft guidelines to the Drafting Committee.

Mr. Nesi said that the Special Rapporteur's second report on the topic was comprehensive and detailed and, together with the memorandum prepared by the secretariat, formed a valuable basis for the Commission's deliberations. In particular, the Special Rapporteur's questionnaire had produced information on the practice of States and international organizations that helped immensely in clarifying the preferred means of settlement chosen by international organizations.

However, he thought that some consideration should be given to the approach taken by the Commission. The expected outcome of the work was to be guidelines on the availability and adequacy of means of dispute settlement, mainly to restate existing practices rather than delve into procedural rules. Even if the purpose of the draft guidelines was to provide guidance to States and international organizations that would help them identify the most appropriate means of settling disputes, the Commission should also consider producing a more concrete and pragmatic document, in line with its expected role in the development of international law. Furthermore, the analysis in the report gave rise to broader legal issues that needed clarification to ensure that the outcome of the Commission's work was both effective and consistent with the reality of international relations.

In respect of the definition of international disputes, the change to the title of the report meant that its focus was no longer limited to international disputes to which international organizations were parties, but concerned all disputes to which they might be parties. While that extension of the scope of the Commission's work was positive, he had concerns about the distinction between international and non-international disputes.

Firstly, as noted in paragraph 20 of the report and underlined by many Commission members, some non-international disputes might develop into international disputes or involve aspects of international law from the outset, in particular those concerning the immunity of organizations before national courts. However, it appeared from the report that the distinction between international and non-international disputes was based, rather, on the legal instruments under which the dispute arose, with non-international disputes being identified as those arising from contractual or private law obligations. He agreed with other Commission members that the distinction should be based on the subject factor, with international disputes being disputes between subjects of international law and governed by international law.

He would welcome clarification on how the text of the proposed draft guidelines would be harmonized with the content of the 2011 articles on the responsibility of international organizations, which focused only on the international responsibility of those entities and did not address issues of responsibility under national law. Furthermore, and notably in the light of the planned content of the Special Rapporteur's third report, he wished to know what regime of responsibility would be considered when dealing with non-international disputes, since the second report appeared to indicate that it should correspond only to domestic private law regimes. However, arguably, the relevant responsibility regime would also include internal rules or constituent instruments not cited in the second report, meaning international norms applicable to relations between international organizations and private entities. In that case, and notwithstanding the application of an international instrument, the dispute would remain non-international in nature, since not all parties to the dispute would be subjects of international law.

It was therefore also important to reflect on the scope of the notion of an international dispute as set out in proposed draft guideline 3, which referred to "other subjects of international law". He would welcome clarification on the entities to be included in that category. If it referred to claims by individuals against international organizations, care should be taken in classifying the disputes as international. In general, the term "subjects of international law" was considered to include States and international organizations, while

individuals and other actors were excluded and considered more as participants in international legal processes, as holders of limited prerogatives linked to international subjectivity. The wording of the proposed draft guidelines should therefore be reconsidered in order to avoid misinterpretations by States that would unduly extend the scope of the text.

He wished to suggest that non-international disputes should not be limited to those arising out of contract or tort. In its future work on the issue, the Commission should consider self-accountability mechanisms such as the World Bank Inspection Panel, through which individuals or groups of individuals – entities that were not subjects of international law – could bring claims against an international organization for violations of fundamental human rights that had been adversely affected by projects financed by the World Bank. Such claims gave rise to disputes which were disagreements on a question of law or fact. They were not based on the law of contract or tort, but were nonetheless non-international in nature, and should therefore be considered by the Special Rapporteur when addressing the issue in his third report.

With regard to the definition of "means of dispute settlement", and as other members had argued, the apparent preference expressed in the report for arbitral and judicial means of dispute settlement, as evidenced by the use of the phrase "falling short of" in proposed draft guideline 4, did not correspond to the practice of States and international organizations collected by the Special Rapporteur. The use of such language could lead to the erroneous assumption that a hierarchy existed between means of dispute settlement in international law, with amicable mechanisms playing a subordinate role. Although the principle of freedom of choice enshrined in Article 33 of the Charter of the United Nations and in the Manila Declaration on the Peaceful Settlement of International Disputes applied only to States, there was no international rule prohibiting international organizations from choosing amicable means of dispute settlement, except for conventionally agreed limitations.

International organizations tended to prefer diplomatic means of dispute settlement in order to avoid aggravating a dispute and resorting to judicial channels. The reason for that preference had been clearly recalled and was linked not only to the costs associated with recourse to judicial or arbitral means, but also, as Ms. Ridings had noted, to the interest that international organizations had in achieving an equitable result. Indeed, while, in some cases, the interest of States in resorting to judicial means of dispute settlement was also linked to diplomatic considerations, in particular to the interest in appearing as the winner of a dispute before the international community, international organizations were more inclined to settle their disputes discreetly, without aggravating relations with States and other actors.

Proposed draft guideline 4, as set out in the report, had little legal content and appeared to be more of a statement of fact. While it was true that practice showed how international organizations could potentially resort to all the means of dispute settlement provided for in Article 33 of the Charter of the United Nations, some practical conclusions should nevertheless have been drawn. First, since the information provided by States indicated that diplomatic means of dispute settlement were the means most frequently used by international organizations, the draft guidelines could make an important contribution by establishing a common basis of principles for negotiation, mediation and conciliation procedures. While those dispute resolution mechanisms were quicker than judicial ones and offered the parties more freedom in determining the forms of resolution, at the same time, power imbalances posed a risk to finding a solution to a dispute. Therefore, as had been made clear in the discussion in the Sixth Committee, while the draft guidelines should not be procedural in nature – in order to guarantee the freedom of the parties that was essential for the successful outcome of the negotiations – that did not exclude the possibility of some common elements being reformulated. For example, the content of General Assembly resolution 53/101, on principles and guidelines for international negotiations, could be cited, at least with regard to the most important principles, such as sovereign equality and good faith.

As to the judicial means of dispute settlement, in order to avoid giving the impression that a hierarchy existed between means of dispute settlement, it would be preferable, as other members had noted, not to state in proposed draft guideline 5 that "arbitration and judicial settlement should be made available and more widely used". While, in some cases, international organizations might have access to those forms of dispute settlement, it was important not to accord them priority. Nevertheless, the centrality of amicable settlement

mechanisms that was reflected in practice should be reaffirmed, since, if successful, they could ensure the maintenance of friendly relations between international organizations and States; the work of an organization could be affected if disputes were not effectively settled.

On proposed draft guideline 6, he agreed with other members that a term other than "rule of law" should be used, as that concept was rather vague and could lead to misinterpretation. Its meaning was not the same in all national legal systems, as it differed according to the legal culture that prevailed in the different regional contexts. However, in order to give concrete meaning to the Commission's work on the topic, it might be important to stress the centrality of the elements underlying the concept of the rule of law, in order to establish common guidelines for States and international organizations. In particular, as Mr. Oyarzábal had pointed out, the relevance of the requirements of impartiality, integrity and independence of the judiciary should be clearly stated, as they had a more uniform meaning in different legal cultures.

He was in favour of referring all the proposed draft guidelines to the Drafting Committee.

The meeting rose at 12.40 p.m.