Provisional

**For participants only**

18 June 2024

Original: English

# International Law Commission

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

**Provisional summary record of the 3661st meeting**

Held at the Palais des Nations, Geneva, on Thursday, 2 May 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 |
| | 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 10.10 a.m.*

**Subsidiary means for the determination of rules of international law** (agenda item 8) (A/CN.4/L.985/Add.1)

**The Chair**, drawing attention to the report of the Drafting Committee (A/CN.4/L.985/Add.1), recalled that, at its seventy-fourth session, the Commission had only taken note of draft conclusions 4 and 5 on the topic "Subsidiary means for the determination of rules of international law", as contained in that document and as orally revised by the Chair of the Drafting Committee, as there had not been sufficient time to prepare the commentaries thereto. The oral revision had concerned the insertion of the word "also" between the words "should" and "be" in the second sentence of draft conclusion 5, as that word had been inadvertently omitted in some of the language versions of the document, including the English and French versions. He invited the members to adopt draft conclusion 4, on the decisions of courts and tribunals, and draft conclusion 5, on teachings, as orally revised.

*Draft conclusions 4 and 5 were adopted.*

**The Chair** noted that the commentaries to the draft conclusions would be adopted during the second part of the current session.

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

**Mr. Patel** said that the Special Rapporteur's well-researched second report on the topic "Settlement of disputes to which international organizations are parties" provided a comprehensive overview of the background and approach that had informed the report, which had a bearing on the four additional draft guidelines proposed therein. In general, he supported the approach and the text proposed by the Special Rapporteur. One of the main conclusions of his doctoral thesis on the responsibility of international organizations, published in 2013, had in fact been that, in the context of potential disputes between international organizations, in view of the increased necessity of cooperation between such organizations and to meet the new challenges of the twenty-first century, the General Assembly might be called upon to adopt a resolution that provided detailed guidelines for international organizations in their inter-organizational relations. He was pleased to see his prediction being realized through the work of the Commission; detailed guidelines for international organizations were essential to guide them in their inter-organizational relations and to ensure accountability.

The Special Rapporteur's report provided a well-balanced discussion of the substantive issues but could be enriched through consideration of a broader range of regional practices. Such practices represented an equally important understanding of dispute settlement mechanisms and approaches. A shortcoming of the report in that respect was that it did not include an overview of the practices of international organizations in Asia, even though, in 2016, for example, there had been 58 international organizations active in the Asia-Pacific region. The report also failed to take due account of practice in Africa, where, in addition to the African Union, there were various interregional and region-specific organizations covering Southern, Western, Central, Eastern and Northern Africa. Such organizations were all international in nature, although their scope was limited to a specific region or subregion. As Arab civilization and the functioning of international organizations created by Arab States also offered highly enriching insights, a thorough examination of their practices would likewise add significantly to the legitimacy and acceptability of the study as a whole. He hoped that the Special Rapporteur would take account of some of the practices that he would be highlighting in his statement.

Chapter I of the second report defined the scope of "international disputes" and ended with a proposed draft guideline 3. He agreed with the Special Rapporteur's approach, which was to deal with "international disputes" first, in the second report, and with "non-international disputes" subsequently, in the third report. That approach would allow the Commission to fine-tune the draft guidelines on international disputes and define the guiding principles for the ones on non-international disputes. The definitions of the two types of

disputes should be mutually exhaustive so as to avoid leaving gaps in international law on the matter.

He would like the Special Rapporteur to clarify, perhaps in the commentary, his reasons for adopting the formulation “disputes … arising under international law” in draft guideline 3 instead of the construction found in the syllabus prepared by Sir Michael Wood, in which the topic was described as being focused “primarily on disputes that are international, in the sense that they arise from a relationship governed by international law”. It should be emphasized, in that connection, that while international organizations had extensive political, financial, administrative and technical relationships among themselves, differences of opinion and disagreements rarely reached the level of a dispute. In addition, by introducing a reference to “other subjects of international law” in draft guideline 3, the Special Rapporteur had expanded the scope of the topic. However, care should be taken to ensure that the topic dealt only with intergovernmental organizations, not with non-governmental organizations (NGOs) or business entities, which were also sometimes called “organizations” or “international organizations” in ordinary parlance.

In introducing the report, the Special Rapporteur had stated that, while disputes between international organizations were highly exceptional in practice, the replies to the questionnaire had provided interesting examples of such disputes. He himself had examined nearly 200 relationship and cooperation agreements and arrangements as part of the research for his doctoral thesis and had found that instruments concluded between international organizations generally did not include a dispute settlement clause. As an example, the World Bank’s relationship agreement with the United Nations had been drafted so as to reduce the potential for conflict between the two organizations arising from the provisions of the Charter of the United Nations while laying the foundation for far-reaching cooperation between the two institutions. However, while that approach might be acceptable in theory, in practice the potential for conflict could not be ruled out. While conflict might not arise under the relationship agreement, it could well arise under other legal instruments. For example, in the mid-1960s, the United Nations had been unable to prevent the World Bank from extending loans to Portugal and South Africa, which, in its opinion, had violated the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by General Assembly resolution 1514 (XV). The World Bank had defended its decision by invoking article 4 (10) of its statutes, which provided that only economic considerations should be relevant to the decisions of the Bank and its officers. The Bank and the United Nations had ultimately made peace by reaching a political compromise. As responsible actors within the international system, international organizations could not be exempted from responsibility for the violation of obligations or from accountability to each other.

A number of advisory opinions issued by the International Court of Justice and by regional and national courts and tribunals underscored the fact that advisory opinions were, as a last resort, a preferred means of settling disputes between international organizations and between international organizations and States. Advisory opinions were most frequently requested as a means of clarifying legal issues or differences of opinion that arose in the operations of international organizations. As noted in the work of the International Law Association on the accountability of international organizations, and also in his own work, there had been innumerable instances of a lack of accountability on the part of international organizations towards stakeholders, specifically States, other international organizations and third parties. Owing to the inequality and the power imbalance between the parties, such stakeholders were reluctant to engage international organizations in third-party dispute settlement. In other words, both real and potential disputes were often left unaddressed. However, he firmly believed that, as the number of international organizations and the range of their activities grew, appropriate means of third-party dispute settlement, as well as compliance and monitoring mechanisms, were both useful and necessary. Such mechanisms could help in clarifying roles and responsibilities and settling issues of accountability that often only came to light when disputes were submitted to a third party for resolution.

He was in favour of referring draft guideline 3 to the Drafting Committee but, like several other members, believed that it should remain there until the scope of the concept of non-international disputes had been clarified. It should be noted, in that connection, that disputes could also arise owing to a lack of responsibility-sharing and to overlapping

competencies. For example, overlap in the mandates of the International Monetary Fund and the World Bank had created serious difficulties that had had both long- and short-term political and financial implications. Similarly, the joint mission of the United Nations and the North Atlantic Treaty Organization during the crisis in the former Yugoslavia had also brought to light significant political and legal issues that could potentially give rise to disputes.

Limitless immunity for officials of international organizations, which was one of the reasons why the question of disputes had not previously been addressed in depth, was certainly not desirable. The Supreme Court of India, for example, in the 2003 labour relations case *G. Bassi Reddy v. International Crop Research Institute for the Semi-Arid Tropics*, had been required to consider several legal questions: whether an international organization's immunity was inviolable and, if not, under what circumstances it could be violated; whether a municipal court could issue a writ against an organization that enjoyed immunity under the law implementing the Convention on the Privileges and Immunities of the United Nations; whether the Indian Parliament had legislative capacity to grant immunity to the respondent organization even though it was not an organ or specialized agency of the United Nations; whether granting immunity to such an organization would infringe the constitutionally protected rights of Indian citizens; whether the Government could enter into an international treaty or agreement that might have the effect of infringing such rights; and whether an organization could be granted immunity from the judicial review powers of municipal courts.

Chapter II of the second report laid out an extensive analysis of treaties, agreements and the practice of States and international organizations, on the basis of which the Special Rapporteur concluded, in paragraph 28, that non-adjudicatory means of settling disputes seemed to be used more frequently than arbitration, while resort to international courts or tribunals was even rarer. He agreed with that finding. In the Asia-Pacific region, the founding treaties and headquarters agreements of many international organizations provided either for amicable means of settling disputes over the interpretation or application of the treaty or agreement or for negotiation, mediation or conciliation before the dispute was submitted to arbitration or judicial settlement. However, while dispute settlement through judicial means was mentioned less frequently in the dispute resolution clauses of founding treaties and headquarters agreements, examples of recourse to judicial mechanisms could be found in practice. In the case of the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* brought before the International Court of Justice, for example, a request for an advisory opinion submitted by the Economic and Social Council had succeeded only after earlier attempts to reach an out-of-court settlement had failed.

While chapter II of the second report generally provided a good overview of the different means of dispute settlement, he noted that, in relation to judicial settlement, the Special Rapporteur mentioned in paragraph 89 that international organizations were excluded from the contentious jurisdiction of the International Court of Justice and that, at various stages, demands had been made to broaden the Court's jurisdiction to include such organizations. Subsequently, in paragraph 215, the Special Rapporteur referred to proposals from States to that effect, but concluded with a simple statement that those plans had been suspended, without any explanation of the reasons. It was very important to explore those reasons, as they would serve to explain the thought processes behind the failure to give international organizations access to contentious proceedings before the International Court of Justice.

In 1999, the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization had considered a revised working paper submitted by Guatemala on possible amendments to the Statute of the International Court of Justice (A/AC.182/L.103). The proposed amendments would have extended the Court's competence with respect to contentious matters to disputes between States and international organizations. However, as noted in its 1999 report (A/54/33), the Special Committee had rejected all the proposals on the grounds that there was no practical need or consensus for reforming the Charter of the United Nations or the Statute of the Court along the lines of the proposal and that the numerous existing dispute settlement mechanisms for disputes between States and intergovernmental organizations had proved to be adequate. The Special

Committee had suggested that the proposal ran counter to General Assembly resolution 53/106, which indicated that whatever action might be taken as a result of the consideration of the matter would have no implications for any changes in the Charter of the United Nations or in the Statute of the Court. The Special Committee had taken the view that the proposal was not feasible politically and that the gains to be obtained from it did not justify the risky, lengthy and complex work involved in amending the Charter of the United Nations and the Statute of the Court.

Turning to the proposed draft guidelines, he said that he agreed with those members of the Commission who had noted the descriptive nature of draft guideline 4. As currently formulated, it did not constitute a guideline that could be followed by States and/or international organizations. In paragraph 199 of the report, the Special Rapporteur set out the reasons behind the wording chosen for the second and third sentences of draft guideline 4. Nonetheless, the draft guideline did not contribute much to the intended objective of providing guidance on the practice of dispute settlement. Rather, in its current form, it appeared simply to draw a conclusion from the existing practice of States and international organizations. Furthermore, the draft guideline was not in keeping with the outcome of the Commission's work envisaged in the Special Rapporteur's first report (A/CN.4/756), namely "to make carefully weighted recommendations for the settlement of disputes that are apt to be taken into consideration by international organizations generally".

Draft guideline 5, on access to arbitration and judicial settlement, would be useful only if the interdependence and complementarity of draft guidelines 4 and 5 were clarified, the link being that draft guideline 4, supported by the Special Rapporteur's research and the questionnaire responses in the memorandum by the secretariat, established that adjudicatory forms of dispute settlement were less frequently employed, and draft guideline 5 then advocated the wider use of such forms. As currently worded, draft guideline 5 had an assertive tone in that it used the word "should", rather than the alternative "could" suggested by Mr. Galindo. The language of the draft guideline also appeared more prescriptive in that it urged parties to opt for arbitration or judicial settlement. However, the aim should be to craft guidelines that outlined the existing practices of international organizations and States in terms of their preferences for certain methods of dispute settlement over others. Consequently, the inference drawn by the Special Rapporteur in paragraph 199, which stated that adjudicatory forms of dispute settlement were less frequently employed mainly because international courts or tribunals either did not exist or often possessed only limited jurisdiction and because arbitral tribunals were only exceptionally consented to as dispute settlement mechanisms, seemed to be unsupported.

As a last comment on draft guideline 5, he noted the perhaps unintended hierarchy created between adjudicatory and non-adjudicatory means of dispute settlement. However, the hierarchy thus created suggested that non-adjudicatory methods of dispute settlement might be superior to arbitration and judicial settlement in terms of efficiency and effectiveness, as the latter methods were more costly and time-consuming than negotiation, enquiry, mediation and conciliation.

As the Commission's work on the topic supplemented and complemented four important earlier works on the law and practice of international organizations, namely the work of the International Law Association on the accountability of international organizations, the Commission's articles on the responsibility of international organizations, the Commission's articles on responsibility of States for internationally wrongful acts and the report of the Institute of International Law entitled *The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties*, adopted in 1995, it might be useful for the Special Rapporteur to refer to those works in the commentaries, where appropriate. The current approach of the Special Rapporteur and the draft guidelines under development would contribute to the progressive development of international law, as they would help to clarify the rights and obligations of international organizations *vis-à-vis* States, other international organizations and third parties.

He would be sharing more specific comments on the formulation of the draft guidelines during the discussions in the Drafting Committee. The work as a whole should achieve a balance among the three pillars of the Commission's outputs, namely practice, jurisprudence and doctrine.

It was heartening to see that the Commission's work in the current quinquennium was being enriched by literature from various regions and linguistic traditions. To enhance the credibility, legitimacy and acceptability of the Commission's work, and to ensure universality of content and approach, he humbly requested that all Special Rapporteurs and all Chairs of working groups and study groups should continue to step up their efforts in that regard.

**Mr. Grossman Guiloff** said that the Special Rapporteur's outstanding second report was well researched, clear in style and enriched by interesting examples and arguments. He commended the Special Rapporteur for having had the idea of circulating a questionnaire on the topic to States and international organizations; their responses provided a very good overview of existing practice and would be of great value to the Commission's work. He hoped that more States and organizations would share their dispute settlement practices, providing the Commission with a rich and representative picture supported by examples from all regions of the world.

He agreed with the Special Rapporteur that the Commission should consider the comments received from States and should revise the draft guidelines as provisionally adopted before the end of the first reading. Considering the comments sooner rather than later would enable the Commission to adopt well-reasoned decisions that would guide the remainder of its work on the topic, including its work on definitional questions. Delaying the examination of those issues until the second reading might result in unnecessary duplication of effort or a reopening of lengthy debates at a late stage in the Commission's consideration of the topic.

Turning to chapter I of the report, he noted that, in paragraph 13, the Special Rapporteur submitted that a decisive factor in determining whether a dispute was international in character was the applicable law and, more specifically, whether the dispute was governed by international law or a different legal order. There was a presupposition that the parties to the dispute were subjects of international law. He agreed with that approach and pointed out that a careful assessment was needed in each case in order to determine whether a dispute could be qualified as international despite the presence of significant domestic law elements in the legal relationship between the parties.

A number of issues had not been addressed. Among the international disputes to which organizations were parties, the report did not mention those involving private individuals, such as those arising from human rights violations by international organizations. Such organizations were bound to comply with human rights law within the scope of their activities, which was a necessary consequence of their obligation to comply with general international law, as recognized by the International Court of Justice in its 1980 advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*. Accordingly, he agreed with Mr. Forteau and other members that international disputes between individuals and international organizations should not be overlooked and should be considered in a future report.

For example, the allegations that United Nations troops in Haiti had committed human rights violations, including sexual exploitation and the transmission of cholera to the country through negligence, raised the question of impunity. Questions would also be raised by the Security Council's recent authorization of a multinational security support mission in the country, which would have the appearance of a United Nations mission but was not a peacekeeping operation. That meant that the United Nations would not be held responsible for any misadventures or violations that might occur during the mission. The United Nations must not be seen as washing its hands of any violations of the fundamental rights of a population with no available means of dispute settlement. Such matters should therefore be the subject of a recommendation and legal analysis, if not under the Commission's mandate on codification, then under its mandate on the progressive development of international law.

Another closely related question concerned the classification of labour disputes between an organization and its staff. Different positions had been expressed in the literature as to whether or not such disputes were governed by international law. On the one hand, it had been argued that they should be deemed to be international disputes, as they were governed by staff regulations that derived their binding force from the organization's

constituent treaty and its secondary law. On the other hand, it had been contended that labour disputes did not arise under international law, as they involved legal questions stemming from a contractual relationship and a body of administrative rules that, despite their ultimate origin, did not grant rights to individuals under the international legal order.

As labour disputes were not mentioned in the report, it was not clear whether the Special Rapporteur intended to address that issue, which would give the Commission an opportunity to provide welcome legal clarification. The issue of labour disputes had been raised in the discussions during the seventy-fourth session. One guiding principle might involve the notion of accountability. Even if the Commission could not argue that practice revealed the existence of customary law in that regard, it had a responsibility to contribute to the progressive development of international law. It should therefore make a recommendation on the subject.

After outlining the distinction between international and non-international disputes, chapter I (B) of the report addressed certain international law aspects of non-international disputes. He would like to add that agreements between a State and an organization operating in its territory might trigger an international dispute even if they were governed by domestic law under a choice of law provision. In particular, non-compliance with such agreements could also involve a breach of the obligation to respect the laws and regulations of the forum State, which might have been established in the respective headquarters agreement.

Paragraph 24 of the report contained an interesting statement, which read: “To the extent that an international organization’s immunity from legal process is recognized by domestic courts, such a decision may be challenged under international human rights law for not providing access to court and it may be challenged under the treaty provision stipulating the availability of alternative remedies.” He would be grateful if the Special Rapporteur could clarify the scope of the reference to the possibility of challenging the organization’s immunity on the grounds of non-compliance with the obligation to establish alternative remedies. If that suggested the possibility of denying immunity as a countermeasure, such an option would have to be analysed under the Commission’s 2011 articles on the responsibility of international organizations, which regulated countermeasures against international organizations in part four, chapter II. Article 53 (2) (b) was of particular relevance, as it provided that certain immunities of the organization could not be affected as a result of countermeasures. The Commission should explore possibilities for the progressive development of international law, guided by the principle that it should seek to ensure accountability in such matters.

The Special Rapporteur’s proposed draft guideline 3 offered a definition of international disputes. While he agreed with its substantive content, the wording employed could be further improved. He proposed that the draft guideline should be amended to read: “For the purposes of the present draft guidelines, international disputes to which international organizations are parties are disputes governed by international law arising between international organizations and other international subjects.” He supported the proposal put forward by Mr. Paparinskis for the insertion of a second paragraph outlining the definition of non-international disputes.

Chapter II of the report provided a very nuanced and comprehensive overview of the practice of settling disputes involving international organizations as parties. It contained legal explanations and practical examples that were very useful for the Commission’s consideration of the topic, and they would also offer an excellent basis for the future commentaries.

Paragraph 44 of the report mentioned “the stabilization and association committees and cooperation councils provided for in some European Union treaties with third States” as means of mediation or conciliation. However, those were decision-making bodies of the association established between the European Union and the third State concerned, and were composed of representatives of each party. They were accordingly a venue for political dialogue and direct negotiations, rather than means of settlement that required the intervention of third parties. Nevertheless, as some of those bodies could adopt binding decisions, they could play a role in defining modalities for the settlement of disputes outside the framework of those bodies.

In paragraph 49 of the report, reference was made to internal enquiries, which offered a means of assessing the merits of a claim. While the findings made by such processes might be useful for determining the facts of a case and the strength of the legal arguments involved, they should not be referred to as means of dispute settlement because they did not provide a solution in themselves. Nevertheless, they could support the claims of a party and thus be invoked in direct negotiations or other means of settlement.

In relation to so-called binding advisory opinions, paragraph 102 of the report mentioned that only one opinion of the International Court of Justice had been issued on that basis. He would like to add that on 10 November 2023 the International Labour Organization (ILO) had requested an advisory opinion from the Court, asking whether the right to strike was protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). That request had originated in a persistent dispute on the subject between an ILO body, the Committee of Experts on the Application of Conventions and Recommendations, and ILO members, as well as between members *inter se*. In particular, a part of the membership had consistently rejected the Committee's view that ILO Convention No. 87 protected the right to strike. In 2012, ILO members had been unable to agree on the list of cases of non-compliance to be submitted to the supervision of the Conference Committee on the Application of Standards, which had therefore been prevented from exercising its function. Since 2013, the Conference Committee had therefore discontinued its examination of cases concerning the right to strike. As the discussions on the subject had not led to agreement between members and ILO, in 2023 the ILO Governing Body had decided to request an advisory opinion in the light of the need to resolve the dispute in a manner consistent with the ILO Constitution.

Article 37 (1) of the ILO Constitution suggested that the advisory opinions issued by the International Court of Justice had a binding effect, and that was in fact the position of ILO and its membership. According to an International Labour Office note on the binding legal effect of the Court's advisory opinions, the binding nature of such opinions delivered at the request of ILO had been generally acknowledged and accepted for more than 100 years by all tripartite constituents (Governments, employers and workers) without exception. Although that had been the first time that ILO had requested an advisory opinion from the Court under article 37 of the ILO Constitution, it had submitted six such requests to the Permanent Court of International Justice.

Paragraph 151 of the report mentioned that a number of human rights courts were authorized to give advisory opinions. While the report stated that the European Court of Human Rights could provide them under Protocol No. 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, it did not address the possibility of doing so under Protocol No. 16 to the Convention, which had entered into force in 2018. Under article 1 of Protocol No. 16, the European Court could "give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms" defined in the Convention or the protocols thereto. Nevertheless, that mechanism was not intended to settle disputes arising between the Council of Europe and its member States, although it could play an indirect role in that regard.

Paragraph 152 of the report mentioned that, in the inter-American human rights system, only the Inter-American Commission on Human Rights had actually requested opinions from the Inter-American Court of Human Rights. In that regard, in May 2016, the Secretary General of the Organization of American States had requested an advisory opinion, but the Court had ultimately declined to provide one, as it considered that the answer could prejudge the outcome of a contentious case that could be brought on the basis of the same facts. States could submit requests for an advisory opinion to the Court, as Chile and Colombia had done with respect to the climate emergency and human rights.

The report also addressed the possibility of settling international disputes through the courts of regional economic integration organizations. In that context, paragraph 162 of the report referred to the annulment actions that could be brought by European Union member States against institutions and bodies of the European Union. In that regard, he would like to note that in 2021 the General Court of the European Union had annulled two decisions adopted by the Council of Europe that had been challenged by Frente POLISARIO, precisely through annulment actions. The decisions concerned had approved two international

agreements concluded between the European Union and Morocco, namely the 2019 Sustainable Fisheries Partnership Agreement and a 2019 preferential tariff agreement applicable to products originating in Western Sahara. The General Court had found in favour of Frente POLISARIO, considering that the group had *locus standi* and that the agreements concluded between the European Union and Morocco were not in conformity with the right to self-determination of the people of Western Sahara. To date, the appeals brought by the European Commission and the Council of Europe were still pending before the Court of Justice of the European Union.

Chapter II of the report concluded with the proposed draft guideline 4, which summarized the practice of dispute settlement. Although he did not object to its content, he wondered whether it could be qualified as a guideline as such, as it was descriptive in character and did not contain a normative proposition. That had also been noted by a number of colleagues. It might be preferable instead to provide added value by developing model clauses for each means of settlement, although that could be done at a later stage of the Commission's consideration of the topic.

In chapter III, the Special Rapporteur presented some policy recommendations that supported his view that arbitration and judicial means should be made more widely available for the settlement of international disputes. While that approach might play an important role in avoiding protracted disputes, and might even be necessary for the settlement of disputes in which individuals had the right to an effective remedy, he shared the reservations expressed by several colleagues concerning the content of the proposed draft guideline 5.

Indeed, while the Special Rapporteur explained why judicial means of settlement should be more widely available, he did not clarify why they should be more extensively used. In ideal circumstances, the most effective way to settle a dispute would be through negotiations leading to a mutually agreed solution. Other means of settlement also presented advantages that might be particularly important for the parties, and a wide choice of means should therefore be available. While in some cases judicial settlement might provide the weaker party with a last resort for obtaining redress, as it created a more level playing field between the parties, it was not necessarily the avenue that would be pursued first, owing to its costs and associated complexities. In some cases, the possibility of judicial settlement or arbitration could operate as an incentive for the parties to reach an agreed solution prior to embarking on such proceedings. In any event, it should be borne in mind that negotiations between more powerful and less powerful parties often did not serve the interests of the rule of law.

Against that backdrop, he agreed with other members that the advantages and complexities of non-judicial means of settlement should also be addressed in detail. The Commission could examine ways in which to counter the imbalances that affected the capacity of weaker parties to engage in a variety of means of dispute settlement.

He fully agreed with the content of draft guideline 6. However, it might be advisable to emphasize that the guarantees applicable to the establishment of the tribunal and the quality of adjudicators ran in parallel to those relating to due process in the conduct of the proceedings.

He took note of the programme of work described in the last chapter of the report and asked the Special Rapporteur to consider the inclusion of the issues he had mentioned with regard to disputes between international organizations and individuals. Finally, he supported the referral of all the proposed draft guidelines to the Drafting Committee.

**Mr. Ouazzani Chahdi** said that he appreciated the Special Rapporteur's well-written, easy-to-read and well-documented report, which included many references. It followed on from the first report, in which the Special Rapporteur had defined the scope of the topic, taking the Commission's previous work into account, and had proposed two draft guidelines.

He recalled that the Commission had decided to change the title of the topic at its seventy-fourth session in order to include disputes between international organizations and private parties, which were generally governed by national law, within the concept of disputes to which international organizations were parties. In the second report, the Special Rapporteur focused solely on international disputes, leaving the examination of

non-international disputes for the third report. The Special Rapporteur had taken account of the questionnaire responses, as contained in the memorandum by the secretariat (A/CN.4/764), and of the discussions in the Sixth Committee. It should be noted that a record 48 delegations had commented on the topic at the seventy-eighth session of the General Assembly. Most delegations had been in favour of the wording of draft guideline 1 and the commentary thereto. However, a number of delegations had stressed the need to strike a balance between the privileges and immunities of international organizations and the right to a remedy, pointing out that the immunities of international organizations should not lead to a denial of justice. A significant number of States had also expressed interest in the development of model clauses, although some of them had called for caution and restraint regarding the use of such clauses in contracts or national law instruments.

In chapter I of the report, the Special Rapporteur described international disputes as disputes between international organizations as well as between international organizations and States or other "subjects of international law", an expression that appeared in draft guideline 3 and had been much criticized. Among the typical examples of international disputes, the Special Rapporteur cited disputes concerning the interpretation and application of headquarters agreements and other bilateral or multilateral treaties concluded by international organizations, and also those stemming from alleged violations of customary international law or other obligations under international law which, if proven, would entail international responsibility. However, contractual disputes with service providers and suppliers in connection with the procurement activities of international organizations were considered to be non-international disputes. Nevertheless, the Special Rapporteur recognized that it was sometimes difficult to make a precise distinction between an international dispute and a non-international dispute, in part because the nature of a dispute could change, as described in chapter I (A) of the report.

Chapter II of the report was intended to summarize the rich variety of practice concerning the settlement of disputes. To that end, the Special Rapporteur gave an overview of the disputes to which international organizations were parties and analysed the way in which they had often been settled by recourse to the means referred to in draft guideline 2 (c), namely negotiation, consultation or other amicable settlement, mediation and conciliation, enquiry or fact-finding, arbitration and judicial settlement.

Negotiation, which was provided for in many treaties on privileges and immunities and headquarters agreements, was presented in the report as a stage that preceded recourse to other means of dispute settlement such as arbitration. However, paragraph 32 cited a number of cases where negotiation was provided for as an exclusive form of dispute settlement, not as a prelude to arbitration. The importance of negotiation in the settlement of disputes was emphasized by the Special Rapporteur, who stated that in practice, disputes regularly appeared to be settled successfully through negotiations and consultations among the disputing parties. That had been confirmed by the United Nations Legal Counsel and by the replies of States and international organizations to the questionnaire. However, despite such observations in favour of negotiation and other amicable forms of dispute settlement, the report devoted only a few pages to them, while elaborating on arbitration and judicial settlement in much greater detail. The Special Rapporteur could have placed more emphasis on negotiation and other amicable and diplomatic means of settling disputes, including good offices.

With regard to arbitration, many constituent agreements, headquarters agreements and multilateral treaties concluded by international organizations contained arbitration clauses. Although the actual practice of arbitration involving international organizations remained limited, the report gave several examples of disputes that had been submitted to arbitration on the basis of such clauses, particularly disputes between international organizations and host States.

With regard to judicial settlement, the report contained an analysis, in broad terms, of practices in Latin America, Europe and Africa but, as Mr. Nguyen had rightly pointed out, Asian organizations and their dispute settlement mechanisms were largely underrepresented. The Special Rapporteur could have devoted much more attention to them in the report.

The Special Rapporteur pointed out that contentious proceedings before the International Court of Justice were not open to the United Nations, its specialized agencies or other international organizations. However, the General Assembly and the Security Council, as well as a number of specialized agencies, could request advisory opinions from the Court; on that point, the Special Rapporteur indicated that the advisory procedure was used as an indirect means of settling disputes involving international organizations. In reality, that situation had arisen in compensation for the Court's inaccessibility to international organizations. The exclusion of international organizations from contentious proceedings before the Court had been the subject of criticism and calls for reform. For example, the Institute of International Law had adopted a resolution in that regard as early as 1957 and the International Law Association had also raised the issue. The Commission itself had alluded to the issue in its work on the articles on the responsibility of international organizations. Given the circumstances, he wondered whether the Special Rapporteur had considered presenting a draft guideline on the accessibility of the Court to international organizations. The Commission should not miss the opportunity to join in the call for contentious proceedings before the Court to be opened up to international organizations. The Special Rapporteur acknowledged, in paragraph 133 of the report, that opening the Court's contentious jurisdiction to international organizations seemed to remain a crucial reform issue.

With regard to the draft guidelines proposed, he agreed that the term "other subjects of international law" in draft guideline 3 should be either clarified or deleted. The word "international" should be deleted from the title of draft guideline 3, since it had been deleted from the title of the topic. Draft guideline 4 was merely a descriptive statement and should be reviewed. He agreed that, in draft guideline 5, the phrase "Arbitration and judicial settlement should be made available and more widely used" should be amended to read "Arbitration and judicial settlement could be made available and more widely used". The words "more widely" should also be deleted from that phrase. Moreover, devoting a draft guideline solely to arbitration and judicial settlement risked sidelining amicable means of dispute settlement, contrary to Article 33 of the Charter. It could also imply a hierarchical relationship among different means of dispute settlement. To compensate for the fact that the Special Rapporteur preferred to focus solely on arbitration and judicial settlement, he proposed that the words "*sauf lorsque les moyens amiables ne permettent pas de régler le différend en question*" [except where the dispute in question cannot be settled by amicable means] should be inserted in the draft guideline. With that addition, it would be clear that the Commission was not prioritizing arbitration and judicial settlement. In that regard, it should be noted that international organizations tended to choose the least costly means of dispute settlement, namely amicable means such as negotiations.

It would have been useful if a bibliography had been inserted at the end of the second report. Elodie Weil's 2021 thesis *L'obligation de règlement des différends à la charge des organisations internationales* (The Obligation of International Organizations to Settle Disputes) and the 2009 publication *L'État de droit en droit international* (The Rule of Law in International Law) by the French Society of International Law were important works that could be useful references for the Commission's work on the topic.

He supported the referral of the draft guidelines proposed in the second report to the Drafting Committee.

**Ms. Galvão Teles** said that the Special Rapporteur was to be commended for his comprehensive second report on disputes to which international organizations were parties.

The second report focused on international disputes to which international organizations were parties, which were defined in draft guideline 3 as "disputes between international organizations as well as disputes between international organizations and States or other subjects of international law arising under international law". They encompassed disputes relating to the interpretation of the constitutive treaties of international organizations, including the scope of the powers of such organizations and their organs; the interpretation and application of headquarters agreements, including the scope of the privileges and immunities of the staff of international organizations; and the treaties to which international organizations were parties, such as the United Nations Convention on the Law of the Sea or the Energy Charter Treaty. Several examples of such disputes were referenced

in the second report, and the means used to address them covered the entire range of dispute settlement methods, from negotiation and consultations to mediation, arbitration and judicial settlement.

The Special Rapporteur added that disputes of an international character could also arise in cases involving the alleged violation of rules of customary international law or other obligations under international law, which presumably covered disputes arising in relation to general principles of law. A question that did not seem to have been addressed in the second report was whether those other obligations whose violation gave rise to a dispute of an international nature included obligations established in the legal instruments adopted by international organizations; in other words, whether the internal legal order created by each international organization was considered to be part of international law for the purposes of defining an international dispute.

The dual nature of international organizations as actors established under international law that were subject to international rights and obligations and, at the same time, entities that established their own legal order that was more or less autonomous from the rest of the international legal system had been discussed in academic literature. The International Court of Justice had recognized the special character of the constitutive treaties of international organizations as having a "conventional and at the same time institutional" character and as creating "new subjects of law endowed with a certain autonomy" in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. Accordingly, it was important for the Commission to consider, as part of the topic at hand, disputes that might arise in relation to rights and obligations set out in the legal order of international organizations, including disputes relating to so-called secondary instruments of international organizations such as decisions, regulations and, where relevant, institutional practices.

In the case of *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, the Court had been called upon to rule on the legal value of the decisions adopted by the International Whaling Commission, to determine whether they created novel obligations for member States and to identify how they might affect the determination of the purpose of the whaling programme of Japan. Various regional fisheries management organizations had established dispute settlement mechanisms, consisting mostly of *ad hoc* review and expert panels, to resolve disputes concerning, *inter alia*, the management of fishing operations, the allocation of fishing opportunities and the adoption of measures relating to compliance and enforcement. Numerous disputes concerning the interpretation and application of legislative acts of the European Union had been brought before the Union's Court of Justice. Such disputes should also be considered to be international disputes for the purposes of the draft guidelines, and that fact should be made clear in the commentary to draft guideline 3.

An additional question that arose in relation to disputes concerning the scope of instruments of international organizations was whether the organizations concerned should have a right to participate in the relevant dispute settlement proceedings. The question was pertinent because, as several examples in the second report indicated, disputes on the legality and scope of such instruments were often tangential to other disputes between member States and appeared indirectly before international courts and tribunals. It would be interesting to consider whether the participation of the international organization whose instrument was being interpreted had been admitted in all the cases identified by the Special Rapporteur and to discuss further whether a right to participate could be derived from those practices and the principles of the rule of law and legal certainty.

A further question that deserved consideration in relation to the definition of the scope of international disputes was that of the nature of disputes concerning the responsibility of international organizations for wrongful acts. In his second report, the Special Rapporteur stated that the espousal of a tort claim for personal injury or property damage by either a State or an international organization through diplomatic or functional protection rendered the claim an international dispute. He also noted that tort or delictual disputes of a private law character were non-international disputes. It was not clear whether the expression "private law character" in that statement referred to the field of law that applied to a dispute or to the actors involved. Thus, the question remained as to whether disputes involving the responsibility of international organizations for internationally wrongful acts committed against private individuals that were not endorsed by their States of nationality under

diplomatic protection fitted within the category of international or non-international disputes. The crux of the question was whether the determining factor for characterizing a dispute should be the national or international character of the applicable or invoked legal norms or the status of the parties involved, so that only disputes involving exclusively States and international organizations would be international.

A paradigmatic example of a situation where that clarification would be useful was the dispute that had arisen concerning the cholera outbreak in Haiti that had followed the deployment of United Nations peacekeepers to that country in 2010. To the extent that the victims were individuals and their claims had not been espoused by a State, the dispute was of a non-international character. However, the substance of and legal claims in the dispute, which involved the violation by an international organization of its obligations under human rights law, implied that the dispute should be classified as international. That matter could be addressed in the Special Rapporteur's subsequent report. Nonetheless, it was important for the Commission's purposes to know in which category such disputes belonged.

The discussion in the second report of the possibility for individuals to bring disputes against the European Union before its Court of Justice and against the Central American Integration System before the Central American Court of Justice seemed to indicate that the legal basis of a dispute was what conferred its international character, a position which she supported and which should be made explicit. The position that the Commission adopted in that respect was important, particularly in the light of intensifying discussions about whether international organizations could and should join regional systems of human rights protection. The classification of such disputes as "arising under international law" would place them within the purview of draft guideline 5.

The approach adopted by the Special Rapporteur to distinguish between international and non-international disputes was made even less certain, as already noted by some members, by the reference to "other subjects of international law" in draft guideline 3, which risked contradicting the Special Rapporteur's methodology. Such a broad term could be read as extending the scope of the draft guidelines to include international disputes between international organizations and individuals, including disputes arising under an international human rights treaty that was binding on an international organization, such as, for example, regional integration organizations that became parties to the Convention on the Rights of Persons with Disabilities. Disputes could also have a hybrid character, in that they initially stemmed from a "private law" relation but nevertheless involved the ascertainment of internationally recognized obligations that were binding on an international organization as a matter of customary international law, such as certain labour disputes. In any event, the Special Rapporteur could have elaborated further on what he meant by "other subjects of international law" and what types of international disputes could arise between them and international organizations.

The four draft guidelines proposed in the second report reflected a laudable effort to synthesize a wide range of practices into a succinct text that could be used as a reference in future disputes. Generally speaking, some harmonization was needed, as the draft guidelines currently had a mixture of normative, non-normative, descriptive, recommendatory and policy elements. Some of the ideas behind the draft guidelines might not be realistic, even if they were desirable as a matter of principle; a prime example was the idea of amending the Statute of the International Court of Justice to allow international organizations to become parties to contentious proceedings before the Court. The draft guidelines could be more open, comprehensive and complete, without reflecting a predetermined hierarchy or preference among methods of dispute settlement. A reference to advisory opinions could be added to the text of draft guideline 4, as an example of the possible uses of judicial means that were addressed in the report and were reflective of a widely representative practice. Alternative methods of dispute settlement should also be addressed.

The proposed text of draft guideline 4 included a statement on the practice of international organizations. While that information might be useful, it was better suited to the commentary than to the text of the draft guideline itself because it did not provide any guidance or a recommended course of action for future disputes. It could be argued that draft guideline 4 did not reflect the ingenious and creative ways in which States and international organizations had coped with the jurisdictional limitations they faced. As currently worded,

the draft guideline indicated that arbitration and judicial settlement were often not provided for and were therefore resorted to less frequently. However, it could also be argued that in spite of the fact that arbitration and judicial settlement were often not provided for, they had nevertheless been resorted to in indirect and creative ways, as noted in the report. The use of the word "therefore" in the draft guideline thus seemed questionable. Moreover, the report contained a brief discussion of the existence of "dormant" judicial entities, whose inactivity might indicate that, in certain circumstances, the availability of arbitral and judicial settlement would not lead to its more frequent use. It could be more useful, and a better fit with the chosen format for the output on the topic, to provide a draft guideline affirming the availability of all means of dispute settlement referenced in draft guideline 2 (c) to resolve international disputes and the freedom of choice among those means. In the light of those suggestions, the text of draft guideline 4 could be amended to read: "International disputes to which international organizations are parties can be settled by any of the means of dispute settlement laid down in draft guideline 2 (c)." To reflect the change in content, the title could also be revised to read "Settlement of international disputes".

Draft guideline 5, in addition to setting out a policy preference for improving the availability of access to arbitration and judicial settlement of disputes, could provide further details as to how that access could be guaranteed. As noted in the report, it could be achieved through the inclusion of arbitration clauses in constitutive treaties or treaties to which organizations were parties, as well as through *ad hoc* arbitration agreements between organizations and other parties in a dispute. That information could be added in a new second paragraph in the draft guideline. In relation to the actual policy preference, however, it was questionable to what extent the draft guideline reflected the preferences of States and international organizations. In the light of the responses to the questionnaire, especially questions 3 and 4, it was apparent that States and international organizations considered non-judicial or "amicable" means of dispute settlement to be more useful. Similarly, in response to question 6, none of the replying States mentioned the possibility of increasing the availability of arbitration or judicial settlement as a way to improve the current system. However, they did mention other means of improvement: Jordan, for example, mentioned the use of online dispute resolution as a faster, more efficient and less expensive means in comparison to traditional dispute resolution methods. Likewise, a number of international organizations explicitly mentioned the high costs of arbitration processes in their responses to the questionnaire. Thus, even if arbitration was made more widely available, States and international organizations would not necessarily opt to use it more widely, which was seemingly the intended purpose of the draft guideline. An additional question for consideration was whether "judicial settlement", in the context of draft guideline 5, referred solely to international dispute settlement before international courts and domestic courts or other judicial mechanisms set up by international organizations, or whether it included access to the national courts of member States, in which case considerations relating to the immunity of international organizations would become relevant and need to be addressed.

With regard to draft guideline 6, she agreed with the Special Rapporteur that the concept of the rule of law could serve as a powerful normative justification for finding effective means to settle disputes to which international organizations were parties. In fact, as noted in the report, the concept had been used, *inter alia*, to foster accountability where the control of acts of international organizations was not promptly available. However, in the current context, the term "rule of law requirements" was in need of qualification. As noted in paragraph 206 of the report, the term "rule of law" did not have a clearly defined and generally accepted meaning. Aside from the varying definitions adopted in different national legal systems, the existence of a unitary, overarching definition of "rule of law" at the international level remained contested. For instance, a persistent question in international legal doctrine was whether there was an international rule of law, since the concept, which had originally been developed to apply at the national level, presupposed the existence of permanent institutions and mechanisms to enforce its application. Another important issue was the dichotomy between the procedural and substantive dimensions of the rule of law, especially regarding equality before the law at the international level, where substantive inequality seemed to be a persistent issue. With that in mind, the Commission should decide whether to use definitions of the rule of law previously employed by the United Nations in

different contexts, such as the ones mentioned in paragraphs 207 and 208 of the report, or to come up with a functional definition for the purposes of the topic at hand.

The reference to the "independence and impartiality of adjudicators" and "due process" as separate rule of law requirements was bound to create some confusion. Instead, emphasis should be placed on "access to a fair trial" and "respect for due process guarantees", as those general expressions encompassed the independence and impartiality of adjudicators, equality before the law, non-discrimination and the right to be heard, among other fundamental procedural guarantees. Lastly, a question to be considered in respect of draft guideline 6, which reaffirmed the rule of law requirements to which adjudicatory dispute settlement means must conform, was whether that draft guideline should come under the section of the draft guidelines dealing with international disputes or whether it might better fit into a more general section of the draft guidelines, acknowledging that the same requirements should also apply to non-international disputes. In fact, it might be worthwhile to propose a new draft guideline on general principles that applied to the settlement of all disputes involving international organizations, which could also refer to the right of international organizations to participate in disputes concerning the legality of their instruments.

She supported sending all the proposed draft guidelines to the Drafting Committee, taking into account the important comments and suggestions made in the plenary debate.

**Mr. Akande** said that the Special Rapporteur's second report on the settlement of disputes to which international organizations were parties contained a wealth of materials, particularly on adjudicatory means of settling such disputes. As he agreed with much of what had already been said in the course of the debate, he would focus on one issue that he considered to be important for the Commission's work on the topic, namely the categorization of disputes to which international organizations were parties. At its previous session, the Commission had decided to broaden the scope of the topic by deleting the word "international" before the word "disputes" in the topic's title, so that it no longer related exclusively to "the settlement of international disputes" to which international organizations were parties but covered a broader range of disputes. In his second report, the Special Rapporteur had divided the topic into "international" and "non-international" disputes, dealing with the former at the current session and proposing to cover the latter at the subsequent session. It was wise to divide the topic into different types of disputes and to address particular draft guidelines to particular kinds of disputes. However, in his view, the starting point should not be the categories "international" and "non-international", but rather the content of the dispute in question. He did not find such categories to be particularly helpful. Given that the word "international" had been deleted from the title of the topic, he was not certain that its reappearance advanced the Commission's work.

There were a number of ways in which disputes to which international organizations were parties could be divided. One was to divide them by reference to the parties, so that disputes between international organizations and between international organizations and States, on the one hand, would be distinguished from disputes between international organizations and private entities, on the other. A second way would be to divide them by reference to the applicable law; disputes "arising under international law", to use the language proposed in draft guideline 3, or "governed by international law" could be distinguished from disputes of a private law character. Third, the disputes could be grouped by reference to the forums in which they arose or in which their settlement was sought. None of those methods of classifying disputes was inherently superior to the others; the Commission should be guided by whatever made the most sense for the purpose of making useful recommendations that promoted the settlement of disputes to which international organizations were parties. Care should be taken to avoid adopting an approach that might encourage debates about terminology or taxonomy that obscured the actual content of the project. It was that risk of interminable debate about terminology that made him hesitant to use the labels "international" and "non-international" to describe disputes.

While there were thus at least three ways of dividing up disputes and organizing the Commission's work on the topic, it seemed that the Special Rapporteur's approach was to combine two of those methods. International disputes were defined in draft guideline 3 both on the basis of the parties to the dispute and on the basis of the applicable law. The fact that

the Special Rapporteur took both factors into account was also clear from paragraph 21 of the report, in which he acknowledged that disputes between international organizations and between such organizations and States could be of a non-international character when they arose from a contractual relationship.

Some members of the Commission had suggested that the division should be made solely on the basis of the law under which the dispute arose. Some read draft guideline 3 as suggesting just that, because they understood the inclusion of "other subjects of international law" to mean that the range of parties to the disputes covered by the draft guideline was not limited; for those members, it would include individuals, corporations, perhaps even NGOs, insofar as they asserted rights under international law. It was unclear whether that was what the Special Rapporteur had intended. In any event, dividing up disputes by reference to the law under which they arose was not particularly helpful. First, disputes did not necessarily raise legal issues under only a single system of law. It might be tempting to distinguish between disputes under international law and disputes of a private law character, but those were not mutually exclusive characteristics of a dispute. The report already noted that disputes of a private law character could be transformed into disputes under international law by the espousal of claims. The key point was that international law also had something to say about disputes of a private law character involving international organizations, even though they remained disputes between an organization and a private party. International organizations could have an international law obligation to provide for modes of settlement of disputes of a private law character, as was the case under a number of treaties on privileges and immunities, including the Convention on the Privileges and Immunities of the United Nations. Furthermore, as the Special Rapporteur pointed out, the International Court of Justice had indicated in *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* that human rights considerations might also require international organizations to provide means of settlement for disputes that could be regarded as having a private law character. Second, it would not always be clear whether disputes arose under international law or were of a private law character. For example, it was unclear whether disputes between employees of an organization that raised issues regarding the rules of the organization arose under international law or were of a private law character. In his view, it was precisely because international law had something to say about disputes of a private law character that the Commission was dealing with such disputes. He would therefore counsel against an unqualified opposition between those categories.

His view was that the best way of dividing up the Commission's work on the topic was by reference to the nature of the parties to the dispute, not by reference to the law that applied to the dispute. Disputes that arose between international organizations and between international organizations and States, on the one hand, would thus be distinguished from those that arose between international organizations and private parties, including individuals, corporations and NGOs, on the other. There were characteristics of the parties that made it more useful to group disputes in such a way. When disputes arose between international organizations and private parties, the disparity between the parties was usually such that it did not matter whether the dispute had originally been of a private law character or a human rights dispute. Moreover, disputes between international organizations and between international organizations and States typically, though not exclusively, arose out of certain forms of relationship between those parties, which could be very different from the relationships that might exist between international organizations and private parties, such as a relationship of membership, the presence of headquarters in the State or some other treaty relationship. Grouping together all relationships that raised issues of international law did not acknowledge those differences. To sum up, he would suggest that, first, the Commission should not use the labels "international disputes" and "non-international disputes"; second, it should divide disputes solely on the basis of the nature of the parties thereto; and third, it should distinguish between disputes between international organizations and between international organizations and States, on the one hand, and disputes between international organizations and private parties, on the other.

One category of potential parties to a dispute would or could be left out of his proposed method of division, namely entities that were not international organizations, States or private parties. For example, disputes could arise between international organizations and members of such organizations that were not States or international organizations, such as customs

entities that were members of the World Trade Organization. It was also possible to imagine a dispute between an international organization and a non-State armed group. His proposed first category of disputes could include disputes between international organizations and their members, whether those members were States, international organizations or other entities. Alternatively, his proposed second category could be expressed not as disputes between international organizations and private entities but as disputes between international organizations and "other entities", in contrast to the first category.

Regarding the other draft guidelines, he agreed with other members that the descriptive nature of draft guideline 4 was problematic. If draft guideline 5 was simply about disputes between international organizations and between those organizations and States, then he shared the view expressed by other members that the Commission should not recommend the wider use of arbitration and judicial settlement. However, different considerations might apply if disputes between international organizations and private parties arising under international law were included in that category, in which case he would be more inclined to agree with the view taken by the Special Rapporteur.

Lastly, regarding matters that were not covered in the draft guidelines, if the Commission was dealing with disputes between international organizations and between international organizations and States, it might wish to make recommendations about the typical kinds of disputes that arose in that category, in addition to more general draft guidelines on dispute settlement. For example, it could provide specific guidance regarding disputes between international organizations and members of those organizations arising under the organizations' constituent instruments and rules, disputes relating to headquarters agreements and disputes concerning privileges and immunities. Providing guidance about those types of disputes might help to meet the needs of international organizations and States, which had indicated in their questionnaire responses that those were the types of dispute that typically arose.

**Mr. Huang** said that, in his statement on the current topic at the Commission's seventy-fourth session, he had stressed the importance of fully taking on board the views of Member States, as expressed in the Sixth Committee, their replies to the Special Rapporteur's questionnaire and their comments and suggestions on the work done by the Commission thus far, to ensure that the outcome of the Commission's work on the topic reflected the prevailing State practice. Unfortunately, Member States had not been very forthcoming with their responses to the questionnaire, with only 11 States providing replies. The Commission should continue to urge more Member States to provide feedback and should perhaps give them more time to reply. He wished to thank the Special Rapporteur for his well-prepared second report on the topic, which deserved praise for its rich content, clear arguments and appropriate level of detail.

The definition of "international disputes" proposed in draft guideline 3 was based on the definition of that term in the syllabus for the topic, which had been examined and approved by the Commission in 2016. He basically agreed with it. Unlike the definition contained in the syllabus, however, the definition in draft guideline 3 limited the scope of international disputes to those arising under international law. In their replies to the Special Rapporteur's questionnaire, Member States used other terms to describe such disputes. The Special Rapporteur should therefore further examine the definition of "international disputes", stating clearly that the legal basis of such disputes was international law, rather than domestic law, and that the core of such disputes was related to rights and obligations under international law.

The question of the definition of "international disputes" gave rise to two issues. The first was whether the scope of such disputes was limited to disputes between subjects of international law or also included disputes between international organizations and private individuals. The second was whether the nature of such disputes was limited to legal disputes or also covered other disputes, including political or policy disputes. He agreed in principle with the Special Rapporteur's proposal that the scope of the disputes considered should cover disputes involving law, fact and policy, because international disputes to which international organizations were parties were rarely of a purely legal nature. Political disputes also involved legal issues and legal disputes also touched on political issues, making the two inseparable and hard to distinguish. The Special Rapporteur frequently referred to underlying

disputes in his second report. In that regard, it was necessary to consider whether international disputes derived from underlying non-international disputes could also be accommodated by the definition contained in draft guideline 3.

Another important issue concerning the definition of "international disputes" was the distinction between international and non-international disputes. As was rightly pointed out in the second report, drawing such a distinction was challenging. However, as many members had pointed out, the matter was not a trivial one, as it could determine the future direction of the Commission's work on the topic. Non-international disputes could present themselves in different ways, depending on the scope of the mandate of the international organizations that were parties to the dispute, their modes of conduct, whether they enjoyed functional immunity and, to a large extent, the limits of the domestic law that regulated the dispute. The question of whether the formulation of guidelines on such non-international disputes could have unintended consequences for the relevant domestic law regime required careful study. In addition, certain non-international disputes could involve international law and could even eventually lead to international disputes as a result of an inappropriate settlement or the waiver of immunity. How such disputes, which were in a state of flux, should be addressed in the draft guidelines was a thorny issue. Moreover, in the second report and in the discussions among members of the Commission, the term "non-international disputes" had sometimes been used interchangeably with the term "disputes of a private law character", which was a generalization of the term "non-international disputes". That sort of simplistic generalization was not conducive to a comprehensive and objective handling of such a sensitive issue.

Two factors should be carefully considered when distinguishing between international disputes and non-international disputes. The first was the domestic legal personality of international organizations, which was the reason why non-international disputes arose. As the Special Rapporteur pointed out in paragraph 17 of the report, non-international law disputes occurred because international organizations often also had domestic legal personality. The second factor was the law applicable to the disputes. As noted in paragraph 21 of the report, the choice of a relationship governed by national law would affect the nature of the dispute. In his view, domestic law should apply when the parties to the dispute chose to apply it in their contractual relationship, when the parties chose to apply it in cases involving tort claims or compensation for personal injury, and when the dispute related to taxation, financial policy and other factors related to a country's public policy. In distinguishing between international disputes and non-international disputes, emphasis should be placed on the fundamental nature of the dispute and the law that should apply to it.

He looked forward to a well-defined and careful delineation of the term "non-international disputes" in the Special Rapporteur's third report, as well as to the clarification of the distinction between international disputes and non-international disputes. He also hoped to see a detailed enumeration of specific scenarios involving non-international disputes to which international organizations were parties that should be addressed by the Commission. In addition, he wished to reiterate his position that disputes of a non-international nature should be excluded from the topic. It had been his consistent view that the participation of international organizations in international disputes as subjects of international law, on the one hand, and their participation in non-international disputes as equal subjects of domestic law, on the other, were two situations of a completely different nature. The latter could be addressed through domestic law or under private international law and therefore should not be discussed together with the former. The inclusion of non-international disputes in the topic not only represented a deviation from the original intent of the project, but also had possibly complex implications for private international law, international finance law and even the development of the domestic laws of Member States.

Chapter II of the second report, on the practice of settling international disputes to which international organizations were parties, was comprehensive and informative. It covered the different means of pacific settlement stipulated in Article 33 of the Charter of the United Nations except, unfortunately, "resort to regional agencies or arrangements". Such practice, albeit limited, still had important practical value. In future, the Special Rapporteur should focus on recent practice in Africa or Asia, where regional agencies or regional

solutions had been used to settle international disputes to which international organizations were parties, including relevant practice involving the Peacebuilding Commission.

The practice discussed in the second report mainly involved disputes between international organizations and their member States or secretariat staff, whereas disputes between international organizations and non-member States were rarely mentioned. Disputes between international organizations and subjects of international law other than States and international organizations were not referred to at all. To ensure a comprehensive and in-depth study of the topic, and with a view to reaching agreement on the definition of "other subjects of international law" within the Commission, the Special Rapporteur should, in his third report, give more consideration to "external disputes" to which international organizations were parties. Insurgent and belligerent groups were some of the other subjects of international law with which international organizations engaging in humanitarian assistance often came into contact; it was thus imperative to study how international organizations settled their disputes with those groups.

In the second report, the Special Rapporteur referred to negotiation, consultation and other methods of settlement as "informal dispute settlement techniques" and described them as "falling short of binding third-party adjudication". Whether that expression was appropriate merited further discussion. It was not advisable for the Commission to compare the value of different methods of settlement. While third-party adjudication, such as arbitration and judicial settlement, required the consent of States as a principle, non-judicial settlement through methods such as negotiation, mediation and good offices was frequently used in practice and led to more acceptable results. In the Commission's work on the topic, more consideration should be given to international organizations' lack of access to traditional methods of international dispute resolution, a factor mentioned in the 2016 syllabus, and the Commission should identify methods of dispute settlement that were in keeping with the nature of international organizations as non-State entities. Multiple examples of practice involving international organizations had shown that non-adjudicatory negotiation and consultation did not jeopardize the partnership between the parties and, in the long run, could lead to more effective and long-lasting settlement.

In draft guideline 5, it was recommended that arbitration and judicial settlement should be more widely used for the settlement of disputes. It was true that, compared with negotiation and consultation, arbitration and judicial settlement were less often used to settle disputes. However, that situation had occurred over time, reflecting the autonomous choice of international organizations, and the fact that the outcomes were more acceptable to them. He had reservations about whether it was necessary to recommend certain methods of dispute settlement to international organizations. As a guide proposing solutions to practical issues, the draft guidelines should provide assistance and guidance in relation to practice, rather than limiting it, in accordance with the need to fully respect the will of States and international organizations.

Mediation, as a non-compulsory third-party dispute settlement method, was increasingly favoured by various parties. Several international organizations were developing or revising rules for mediation. More attention should be paid to the part played by mediation in settling international disputes and resolving disagreements. In addition to arbitration and judicial settlement, the Commission should emphasize that conciliation, mediation and good offices should also be made more available as methods of dispute settlement. Some States had proposed that a special intergovernmental legal body should be established for international dispute settlement through mediation – the International Organization for Mediation – to provide new options for the peaceful settlement of international disputes. The proposal had received a positive response from many States. Furthermore, mediation was increasingly being "integrated" or "mixed" with arbitration and judicial settlement. According to the 2021 International Arbitration Survey published jointly by Queen Mary University and White & Case LLP, international arbitration was the preferred method of resolving cross-border disputes for 90 per cent of the respondents, but only 31 per cent preferred arbitration on a stand-alone basis and nearly 60 per cent employed arbitration in conjunction with other alternative dispute resolution methods. In practice, some arbitration forums and international commercial tribunals had also developed a sophisticated and complete set of institutional rules for the coordinated application of arbitration and mediation

and of litigation and mediation. For example, articles 54 to 56 of the 2024 arbitration rules of the Shanghai International Arbitration Centre and articles 43 to 46 of the 2022 arbitration rules of the Beijing Arbitration Commission provided for mediation by arbitral tribunal. Another example was the set of guidelines for the "one-stop" diversified international commercial dispute resolution platform issued by the Supreme Court of China in 2023, which established a "one-stop" settlement mechanism connecting litigation, mediation and arbitration, fully leveraging the advantages of each. In view of that diversified and integrated practice, he hoped that, in future, the Special Rapporteur would more comprehensively consider the reinforcing role that a portfolio of dispute settlement processes could play.

With regard to draft guideline 6, he essentially agreed that dispute settlement should be conducted in a manner consistent with the rule of law. However, the concept of "rule of law" was very broad and had no internationally agreed definition. Draft guideline 6 listed independence, impartiality and due process as the general requirements; whether that was sufficient to cover the basic principles of all dispute settlement processes probably merited further study.

He was in favour of submitting all four draft guidelines proposed by the Special Rapporteur in the second report to the Drafting Committee, even though differing opinions on them had been expressed during the plenary debate. He believed, based on previous experience, that differences among members regarding the draft guidelines would be appropriately resolved in the Drafting Committee.

*The meeting rose at 12.55 p.m.*