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International Law Commission

Seventy-fifth session (first part)

Provisional summary record of the 3662nd meeting
Held at the Palais des Nations, Geneva, on Friday, 3 May 2024, at 10 a.m.

Contents

Present:

Chair:	Mr. Vázquez-Bermúdez
Members:	Mr. Akande
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. 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 10.10 a.m.

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

Mr. Savadogo, recalling that the Commission's study covered both contentious and advisory proceedings, said that the title of the topic raised a few doubts in his mind. He questioned the appropriateness of using the term "disputes" as, while it was true that advisory proceedings were fully adjudicatory in that they were accompanied by the guarantees necessary for the proper administration of justice, they did not involve a claim or a party. Consequently, a request for an advisory opinion did not involve a dispute, even if the opinion issued by the court or tribunal in question might contribute to settling one. The term "party" was also incongruous in the context of advisory proceedings, as there were no parties as such, but participants. The title of the topic, "Settlement of disputes to which international organizations are parties", was arguably open to debate. It might be useful to include an explanation of the title of the topic in a commentary or footnote. In any case, he would support the consensus reached within the Commission.

As duly explained by the Special Rapporteur in his second report, the United Nations Convention on the Law of the Sea provided that international organizations having competence over matters governed by the Convention could become parties to that instrument and parties to disputes before the International Tribunal for the Law of the Sea, including the Seabed Disputes Chamber. However, other international agreements on the law of the sea also conferred jurisdiction on the Tribunal and *locus standi* on international organizations. Although both the Tribunal and the Chamber were competent to give advisory opinions upon request, an examination of the *ratione personae* and *ratione materiae* jurisdiction of the Chamber showed that international organizations could appear before it in disputes relating to part XI of the Convention.

Regarding the *ratione personae* jurisdiction of the Seabed Disputes Chamber, article 20 of the statute of the International Tribunal for the Law of the Sea provided that the Tribunal was open to States parties to the United Nations Convention on the Law of the Sea and to entities other than States parties in any case expressly provided for in part XI of the Convention or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which was accepted by all the parties to that case. For its part, article 1 (2) of the Convention defined States parties as States which had consented to be bound by the Convention and for which the Convention was in force and provided that the Convention applied, *mutatis mutandis*, to the entities referred to in article 305 (l) (b), (c), (d), (e) and (f) which became parties to the Convention. Therefore, under article 305 (1) (f) of the Convention, international organizations could become States parties to the Convention, in accordance with annex IX, article 1 of which defined international organizations as intergovernmental organizations constituted by States to which its member States had transferred competence over matters governed by the Convention, including the competence to enter into treaties in respect of those matters. To date, the European Union was the only international organization that had become a party to the United Nations Convention on the Law of the Sea.

Access to the Seabed Disputes Chamber was regulated by article 37 of the statute of the International Tribunal for the Law of the Sea, which provided that the Chamber was open to States parties, the International Seabed Authority and the other entities referred to in part XI, section 5. The other entities in question were those listed in article 187 of the Convention. Consequently, those entities, which included international organizations, could have access to the Chamber. Article 7 of annex IX to the Convention provided that international organizations were free to choose one or more of the means available to them for the settlement of disputes in relation to the Convention, namely the International Tribunal for the Law of the Sea, an arbitral tribunal constituted in accordance with annex VII, or a special arbitral tribunal constituted in accordance with annex VIII. Part XV of the Convention, on settlement of disputes, applied *mutatis mutandis* to any dispute between parties to the Convention where one or more of the parties was an international organization.

The Seabed Disputes Chamber had compulsory *ratione materiae* jurisdiction for the settlement of disputes relating to the seabed. That compulsory jurisdiction was independent

of a State party's choosing one or more of the means of dispute settlement set out in article 287 (1) of the United Nations Convention on the Law of the Sea. The Chamber's jurisdiction was established in article 187 of the Convention, which categorized the disputes in which international organizations, as States parties to the Convention, could appear as a party before the Chamber. The first category involved disputes between States parties concerning the interpretation or application of part XI of the Convention, annexes III and IV thereto and the provisions of the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. Disputes falling within that category were comparable to those over which the International Tribunal for the Law of the Sea had jurisdiction under article 288 of the Convention. Thus, the jurisdiction of the Chamber was said to coexist with the general provisions of part XV of that instrument.

The second category concerned disputes between a State party and the International Seabed Authority involving either acts or omissions of the Authority or of a State party alleged to be in violation of part XI or the annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith – which had been duly mentioned by the Special Rapporteur – or acts of the Authority alleged to be in excess of jurisdiction or a misuse of power.

The third category involved disputes between parties to a contract – including the natural or juridical persons referred to in article 153 (2) (b) – concerning the interpretation or application of a contract, plan of work or acts or omissions of a party to the contract relating to activities in the "Area" – the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction – and directed at the other party or directly affecting its legitimate interests.

The fourth category referred to disputes between the International Seabed Authority and a prospective contractor concerning the refusal of a contract or a legal issue arising in the negotiation of the contract. During negotiations at the third United Nations Conference on the Law of the Sea, it had been suggested that not only contractors but also natural or juridical persons who might be concerned by disputes arising from the conclusion of the contract should be able to be parties to dispute settlement proceedings. A claimant could be a natural person who had been refused a contract or who had encountered a legal issue during the negotiation of a contract. However, some States had taken the view that access to proceedings should be limited to those contractors who had fulfilled financial obligations, such as the payment of fees, or who had been sponsored by the State of which they were a national.

The fifth category concerned disputes between the International Seabed Authority and a State party, a State enterprise or a natural or juridical person sponsored by a State party, as provided for in article 153 (2) (b) of the United Nations Convention on the Law of the Sea, where it was alleged that the Authority had incurred liability as provided for in annex III, article 22. Under that article, the Authority had responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions. That category of dispute also included any failure by the Secretary-General or staff of the Authority to comply with the prohibition established in article 168 (2) of the Convention on having a financial interest in any activity relating to exploration and exploitation in the Area and on disclosing confidential information. When such facts were alleged, a State party, a State enterprise or a natural or juridical person could submit a claim for compensation to the Authority.

The sixth category involved any other disputes for which the jurisdiction of the Seabed Disputes Chamber was specifically provided in the Convention.

International organizations could likewise appear as parties to disputes in contentious proceedings before the International Tribunal for the Law of the Sea under legal instruments other than the United Nations Convention on the Law of the Sea. First, the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law of 31 October 2021, in its article 2, empowered the Commission to request advisory opinions from the Tribunal. Second, the International Agreement to Prevent Unregulated Fishing in the High Seas of the Central Arctic Ocean of 3 October 2018, in its articles 9 and 10, provided for the signature of the Agreement by the European Union and its accession thereto. Its article 7 stated that the provisions relating to the settlement of disputes set forth

in part VIII of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995 (the 1995 Agreement) – which referred to part XV of the Convention – applied, *mutatis mutandis*, to any dispute between parties relating to the interpretation or application of the Agreement. Third, the Convention on Cooperation in the Northwest Atlantic Fisheries of 18 May 2017, in its article 1 (d), defined a "Contracting Party" as any State or regional economic integration organization which had consented to be bound by the Convention, and for which the Convention was in force, and provided that the Convention applied, *mutatis mutandis*, to any entity referred to in article 305 (1) (c), (d) or (e) of the United Nations Convention on the Law of the Sea. Fourth, the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean of 14 November 2009 was open for signature, ratification, acceptance and approval by regional economic integration organizations and applied, *mutatis mutandis*, to any entity referred to in article 305 of the United Nations Convention on the Law of the Sea which became a party to the Convention. Under its article 34, parties to the Convention were required to attempt to resolve any disputes by amicable means, failing which the provisions relating to the settlement of disputes set out in part VIII of the 1995 Agreement would apply. Lastly, 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 of 19 June 2023, in its article 1 (11), defined "Party" as a State or regional economic integration organization that had consented to be bound by the Agreement and for which the Agreement was in force. In its article 1 (12), a "regional economic integration organization" was defined as an organization constituted by sovereign States of a given region to which its member States had transferred competence in respect of matters governed by the Agreement and which had been duly authorized, in accordance with its internal procedures, to sign, ratify, approve, accept or accede to the Agreement. Under article 60 of the Agreement, disputes concerning the interpretation or application of its provisions were to be settled in accordance with the provisions for the settlement of disputes provided in part XV of the United Nations Convention on the Law of the Sea. The means of dispute settlement listed in part XV included not only judicial and arbitral settlement but also exchange of views, conciliation and the compulsory procedures entailing binding decisions.

In the light of the above, the Commission might wish to revise proposed draft guidelines 4 and 5 so that they better reflected international practice, which offered international organizations with standing access to legal avenues other than judicial or arbitral settlement.

Mr. Sall, commending the Special Rapporteur on the quality of his second report on the settlement of disputes to which international organizations were parties, said that he agreed with other members of the Commission that clarification was needed, in either proposed draft guideline 3 or the commentary thereto, of the term "other subjects of international law". Furthermore, the draft definition of "international disputes" as "disputes … arising under international law" was somewhat tautological. He suggested using alternative wording such as "disputes … involving rules of international law".

On the text of proposed draft guideline 4, he first wished to say that he agreed with those members who had noted that it was overly descriptive, rather than prescriptive or even indicative, and lacked even a minimal element of normative guidance. Secondly, the French translation of the expression "binding third-party adjudication", "*règlement par un tiers dont la décision est contraignante*", could be improved: if, as he presumed, it referred to judicial or arbitral settlement, that should be made clear. Thirdly, it could be inferred from the wording of the proposed draft guideline that negotiation had special status among means of dispute settlement, as it was the only one expressly mentioned, although the others were all equivalents. Either they should all be enumerated or comprehensive wording – which would be his preference – should be used.

There was a problem of both form and substance in proposed draft guideline 5. He was not convinced that the text addressed "access", as such, to arbitration and judicial settlement, as was indicated in the title; the wording needed to be improved or clarified. In terms of the substance, there seemed, as in other parts of the proposed draft guidelines, to be

a presumption in favour of judicial settlement, with the suggestion that it should be made available and more widely used.

That presumption continued in proposed draft guideline 6, in which, as Mr. Ouazzani Chahdi had underlined, non-adjudicatory means were disregarded and arbitration and judicial settlement were highlighted. Furthermore, the concept of "requirements of the rule of law" should be replaced by a less lofty expression, as the discussion concerned only arbitration and judicial settlement, meaning that the requirements were simply those of judicial independence and impartiality. While he agreed with Mr. Nesi and Mr. Paparinskis on that point, he did not necessarily support the wording suggested by the latter, which referred to the "good administration of justice". The requirements concerned principles related to the very legitimacy of justice, rather than its practical functioning or day-to-day management.

In general, the proposed draft guidelines seemed to focus strongly on arbitration and judicial settlement, which were regularly referred to, while the other means of settlement were not mentioned in any provision. The codification of non-adjudicatory means of dispute settlement could certainly be challenging, because of their sometimes informal or even secret nature, but the impression given in the proposed draft guidelines of the predominance of adjudicatory means was questionable for at least three reasons.

Firstly, the wording of Article 33 of the Charter of the United Nations, the spirit of which was reflected in the Commission's work on the topic under consideration, established an equivalence between the different means of settlement. The provision, which was based on a pragmatic and utilitarian logic and focused resolutely on the single purpose of putting an end to a dispute, left States a great deal of freedom to choose the means of settlement that they deemed appropriate. It was generally agreed among experts that all means of settlement were equally valid, without any presumption of favour or qualitative hierarchy.

Secondly, there were several declarations in that sense in international case law: in its 1929 judgment in *Free Zones of Upper Savoy and the District of Gex*, the Permanent Court of International Justice had declared that: "The judicial settlement of international disputes … is simply an alternative to the direct and friendly settlement of such disputes between the Parties." In 1991, the International Court of Justice, in *Passage through the Great Belt (Finland v. Denmark)*, had urged the Parties to resort to "any negotiation … with a view to achieving a direct and friendly settlement". More recently, in 2013, the same Court's President had argued that: "There is no question that negotiation and, ultimately, agreement between disputing States constitutes the most efficient and direct way to resolve disputes. In such scenarios, it may well be that the judicial intercession by the Court is avoided altogether, and the relations between disputing States ultimately improved by way of peaceful agreement." On another occasion in the same year, he had indicated that: "Negotiation between disputing States remains the most effective and direct means to resolve international disagreements, provided that such an avenue ultimately leads to an agreement between the parties."

Thirdly, in the course of the Commission's own work on the topic, the equivalence of means of settlement had been regularly highlighted: in his first report on the topic (A/CN.4/756), the Special Rapporteur himself had clearly stated that the choice of means of settlement was open, and encouraged consideration to be given to non-adjudicatory means. He had written, in paragraph 82 of his first report, that: "… as a result of the frequent inaccessibility of judicial or arbitral forms of dispute settlement, disputes involving international organizations are often settled by recourse to other methods", having noted previously that "parties to a dispute are free to choose which method of dispute settlement they consider appropriate; there is no obligation to move to binding third-party adjudication if other means fail to bring about a settlement."

As the Special Rapporteur noted in paragraph 9 of his second report, during the debate in the Sixth Committee of the General Assembly on the report of the International Law Commission on the work of its seventy-fourth session, delegations had "emphasized the free choice of such means and added other means, such as good offices", testifying once again to the extremely inclusive and open nature of the dispute settlement methods.

If greater attention was paid to non-adjudicatory means of settlement, the extent of the obligation to negotiate before referral to an international court, which might weigh on an

international organization, would no doubt be identified – a question addressed by the Special Rapporteur in paragraph 29 *et seq.* of his second report. Although scarce, there was some relevant settled jurisprudence, of the International Court of Justice in particular, in that respect.

Two cases that might have been illuminating in that connection were mentioned in the second report: one was the 1988 advisory opinion of the International Court of Justice concerning the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, in the case concerning the Observer Mission of the Palestine Liberation Organization to the United Nations in New York. In that case, the Court had found that the dispute between the United Nations and the United States of America had "not [been] settled by negotiation" or "other agreed mode of settlement". The other was a 2005 decision of the Court of Justice of the Economic Community of West African States (ECOWAS) on a dispute between different organs of the Community, which concluded that the ECOWAS Parliament had failed to attempt amicable settlement prior to referral to the Court.

He agreed with the Special Rapporteur that international organizations seemed to have a preference for non-adjudicatory means of settlement. He would therefore have liked to see more attention paid to cases in which friendly settlement had failed, in order to identify the point at which a case could be referred to a court. He was in favour of referring the proposed draft guidelines to the Drafting Committee.

Mr. Reinisch (Special Rapporteur), summing up the debate on his second report on the settlement of disputes to which international organizations were parties, said that he was grateful to members for their well-researched contributions to the discussion. In respect of proposed draft guideline 3, he had understood that, as noted in paragraph 261 of the report of the International Law Commission on its seventy-fourth session (A/78/10), work on the topic in 2024 would comprise an "analysis of the practice of the settlement of disputes between international organizations and States, as well as between international organizations". He nevertheless recognized that there might be some uncertainty as to the precise delimitation of the topic and the most suitable wording for draft guideline 3. In the debate, members had commented, in particular, on the nature of potential parties to international disputes and the legal basis for considering a dispute to be "international". Mr. Akande had remarked that the forums where disputes were settled might serve as a third distinguishing element, while Mr. Nesi and Mr. Nguyen considered that the "subject factor" was crucial for the determination of the international nature of disputes.

Opinions seemed to vary on the question of the potential parties. Several members supported the proposed wording, including the reference to "other subjects of international law". Others had remarked that the scope of "other subjects of international law" was unclear, as it could include labour disputes between organizations and their staff or human rights claims by individuals against international organizations. Other members appeared to suggest that only international organizations and States should be mentioned. Others would have preferred to limit the scope of "other subjects of international law" to a small circle, such as the Holy See, the International Committee of the Red Cross (ICRC) and, potentially, insurgents, while another group wished to see the inclusion of individuals. Mr. Nesi took the view that disputes with individuals should be excluded, arguing that individuals were participants in international legal processes, not subjects of international law.

The issue was clearly not only a matter of wording, but reflected different views on the groups that might have rights and obligations under international law and thus could be qualified, at least to some extent, as subjects of international law. Mr. Paparinskis had suggested that it might be preferable to delete any reference to the potential parties to such disputes, other than the international organizations themselves, as only subjects of international law could be parties to an international dispute and thus any reference to "subjects of international law" would be redundant. He had also suggested that the commentary to proposed draft guideline 3 should explain that the Commission had in mind a narrow group of actors such as the Holy See, ICRC and entities which had not yet been constituted as States, which would be very different from claimants against international organizations before investment or arbitration tribunals or human rights courts.

There appeared to be broad consensus that international law provided the basis for settling disputes of an international character. Many members, though not all, had been content with the proposed wording, “arising under international law”; Mr. Paparinskis had suggested the alternative formulation “governed by international law”.

He noted that international organizations and States were mentioned expressly because most of the practice reflected in the second report dealt with disputes between organizations and States and the rare cases of disputes between international organizations. While such explicit reference might be unnecessary and did not add anything to the core qualification of international disputes as disputes arising under international law, the guideline reflected the fact that one of the parties was an international organization; that might make it possible to avoid mentioning other potential parties. He would be happy to discuss the alternative suggestions in the Drafting Committee.

He was aware that the proposed wording of the draft guideline left open the question of whether “international disputes” might include human rights claims based on customary international law or general principles of law or, in the future, on treaties acceded to by international organizations, or staff claims against their employer organizations. Ms. Galvão Teles and Mr. Grossman Guiloff had noted that there had been decades-long controversies over whether the legal relationships between international organizations and their staff fell under international or non-international law, as they were ultimately treaty-based or internal, and akin to the law governing the domestic civil service. There was general agreement that internal staff law was independent of national administrative or employment law and that the latter might only be relevant to the extent that it could be seen to constitute a general principle of law that might address issues not regulated in the internal staff law of an international organization. However, that did not solve the underlying disagreement over whether internal staff law should be classified as international or non-international. There were certainly good reasons to consider that the claims against international organizations led to international disputes, which would suggest there was a need to refine or adopt a more detailed approach to the analysis of practice and to recommend the inclusion of a subgroup of international disputes. It might, however, be relevant to note that, from a practical perspective, whether individuals performing work for an international organization were staff members or contractors, their situation in respect of access to a dispute settlement mechanism was very similar.

Mr. Akande had noted the need to avoid adopting an approach that might encourage debates about terminology or taxonomy, and to focus instead on comprehensively addressing all types of disputes to which international organizations were parties, in line with the reformulated title of the topic. For practical purposes, it would be preferable to avoid highly theoretical discussions about the nature of disputes between staff members and international organizations and to focus rather on the common need to secure access to justice and due process guarantees for individuals, regardless of their status as staff members or contractors working for international organizations.

On proposed guideline 4 and the analysis of the practice of settling international disputes to which international organizations were parties, he agreed that Ms. Mangklatanakul’s proposal to change the title from “Practice of dispute settlement” to “Practice of international dispute settlement” captured the content of the proposed guideline, but he wished to point out that the change would also have to be applied to the titles of the other guidelines. If a broad distinction between international and other disputes was to be maintained, it might be advisable to word the title of the chapter so as to make the insertion of “international” in individual titles superfluous. It should nevertheless be clear that the subject discussed in the report was “international disputes”.

As to the content of the extensive, though not exhaustive, section discussing actual dispute settlement practice, he noted that members had characterized it with adjectives ranging from “encyclopaedic” and “Herculean” to “tedious”. He acknowledged that both compiling it and reading the outcome had been demanding. Members had, however, recognized the crucial need for it, as it allowed for a better understanding of how dispute settlement worked and how it could be improved. The more frequent references to certain regions were simply a result of the differences between the regions: he could not alter the fact that the practice of judicial means of dispute settlement in the African and Latin

American regions was disproportionately rich. He was, nevertheless, grateful to all members who had provided examples of dispute settlement or promised to provide additional examples, including Mr. Huang for giving details of the practice concerning dispute settlement through "regional agencies or arrangements".

As many Commission members had observed, the draft text did not contain a recommendation or other normative language; rather, it was intended to reflect practice. Many members had noted the descriptive nature of proposed guideline 4, several of them voicing doubt as to whether guidelines should contain factual findings while others questioned whether draft guideline 4 offered sufficient normative content or added value. Some had therefore suggested that the words "are settled" should be replaced with "can generally be settled", "should be settled" or "may be settled". While he was open to accommodating the wishes of Commission members, he did question whether normative language was a prerequisite for a text that was intended to become a set of guidelines.

Previous outcomes of the Commission's work had not often taken the form of guidelines, but those that had, such as the Guide to Practice on Reservations to Treaties, the Guide to Provisional Application of Treaties and the guidelines on the protection of the atmosphere, had generally contained normative content. He therefore agreed with the view expressed by members that guidelines had traditionally been of a normative nature.

However, a good argument could be made for the inclusion of guidelines that were merely descriptive. As the guidelines were intended to provide guidance that was of practical use to States, international organizations and other users in an area in which scholars and practitioners perhaps had little experience, information about the different forms of dispute settlement and the different degrees to which they were used might in itself be of value. While some members had suggested that such information could be placed in the commentary, it seemed to have broader value as guidance, as it would make potential users aware of the different forms of dispute settlement that could be provided for or resorted to. It had been clear from the outset of the Commission's discussions on the topic that its work should encompass information on practice as well as recommendations. For the benefit of users, the Commission should not shy away from providing that important information in the guidelines themselves.

He acknowledged that the phrase "falling short of" – which a number of members had criticized as suggesting that there was a hierarchy of dispute settlement means or that so-called non-legal forms of dispute settlement were less valid or useful – could have a negative connotation, and he would be happy to discuss alternative formulations in the Drafting Committee to indicate that the "other means of dispute settlement" referred to in the second sentence of proposed draft guideline 4 did not constitute binding third-party adjudication. What that sentence had been intended to express was that, as the replies to the questionnaire on the topic and his independent research had shown, the so-called non-legal forms of dispute settlement were indeed more widely used. Similarly, the third sentence had been intended to reflect the finding that, in practice, arbitration and judicial settlement were less frequently used.

The Commission would not be able to resolve, with the means available to it, the interesting question that had been raised as to whether the less frequent resort to adjudicatory forms of dispute settlement noted in the third sentence of proposed draft guideline 4 resulted from the fact that they were not often provided for, as Mr. Fife had commented was suggested by the use of the words "and therefore", or from a deliberate policy choice of international organizations and parties involved in disputes with them. The less frequent use of adjudicatory forms of dispute settlement could indeed be the result of either the non-availability of such consent-based forms of dispute settlement or the deliberate non-use of such forms. Clearly, where those forms were completely unavailable, they could not be used, and that fact would therefore to some extent lead to their less frequent usage. Where they were available, any preference that might exist for not using them would be hard to clearly ascertain. The question of how best to express the empirically observable fact that arbitration and judicial settlement were not often resorted to could be discussed in the Drafting Committee.

Proposed draft guidelines 5 and 6 both contained recommendations, and members seemed to have agreed in principle that they could therefore form valid guidelines. Different views had, however, been expressed with respect to the desirability of recommending greater use of arbitration and judicial dispute settlement in draft guideline 5. While some members had agreed that adjudicatory forms of dispute settlement should be made available and used more frequently for rule of law purposes, others had been hesitant to prioritize those forms in any way and had argued, for example, that the repeatedly reaffirmed assertion that the order of the peaceful means of dispute settlement set out in Article 33 of the Charter of the United Nations was not meant to suggest a logical sequence, and that the recognized freedom of States to choose any of those peaceful means, as affirmed in the Manila Declaration on the Peaceful Settlement of International Disputes, should also apply to disputes to which international organizations were parties. Yet other members had seemed to suggest that the perceived preference of organizations and States to settle their disputes by means other than arbitration and judicial settlement should be normatively endorsed. Some members had referred to practical considerations relating to factors such as cost and the potential for political antagonization that might make arbitration and judicial settlement less attractive than their non-adjudicatory counterparts, and others had stressed that the preferred form of dispute settlement might depend on the type of dispute in question. Those were all important points. It was clear that the Commission's recommendations would need to be based on a careful assessment of policy considerations.

As his second report made clear, no preference for adjudicatory forms of dispute settlement could be derived from the general duty to settle disputes peacefully. Such a preference could be derived only from rule of law considerations, both as developed at the international level and as expressed in repeated calls for wider access to adjudicatory mechanisms, such as calls on States to accept the compulsory jurisdiction of the International Court of Justice. Members had not questioned that the jurisdiction of international arbitral and judicial dispute settlement mechanisms was consent-based and that therefore, like States, international organizations were free to decide whether to accept that jurisdiction. The question, rather, was whether or not the expression of such consent through treaty clauses providing for the jurisdiction of dispute settlement mechanisms should be recommended.

An advantage of binding third-party adjudication that had been pointed out in the second report and acknowledged by several members was that it offered a means of overcoming the direct influence that parties' different bargaining positions could have on the outcome of negotiations or other forms of non-adjudicatory dispute settlement, such as conciliation or mediation, that ultimately required the agreement of the disputing parties. However, as some members had noted, the costs involved in, the duration of and the expertise required for adjudicatory forms of dispute settlement could affect differently positioned parties to different degrees.

He had found it particularly interesting that some members had specifically questioned the wisdom of recommending the wider use of adjudicatory dispute settlement mechanisms while seeming to accept that it would be useful for such mechanisms to be more widely available. He fully concurred that costly, time-consuming, antagonizing litigation should be avoided as far as possible. Indeed, the avoidance of disputes, which should follow from compliance with the law, was preferable to the settlement of disputes. Dispute settlement served a necessary corrective function in situations where legal requirements had not been met; in that sense, the availability itself of dispute settlement might help induce compliance with the law. While he understood the distinction made by some members between the availability and the actual use of adjudicatory dispute settlement mechanisms and the view that the mechanisms that were the most appropriate should be the ones used, in his view, the wider availability of arbitration and judicial settlement would greatly contribute not only to the rule of law but also to successful dispute settlement even by other means.

Proposed draft guideline 6 and the considerations underlying it seemed to have been largely accepted by members. Some had even expressed the view that rule of law requirements also applied to all forms of non-adjudicatory dispute settlement. Various members had suggested adding a reference to integrity, noting that the Commission might need to elaborate on the notion, which was not yet sufficiently clear, of the rule of law in terms of international law; some had expressed doubt as to whether all requirements of the

rule of law would apply at the international level. However, the basic underlying policy recommendation that adjudicatory forms of dispute settlement should conform to rule of law requirements seemed to be undisputed. Mr. Paparinskis had suggested that the notion of the "good administration of justice", employed by the International Court of Justice, should be used as the umbrella concept for the draft guideline. The Drafting Committee could also consider whether the language of the draft guideline should be made stronger by replacing "should" with "shall".

The precise content of the rule of law as developed under national law and the extent to which it was applicable at the international level had been the subject of extensive debates not only among constitutional and international lawyers, but also legal philosophers and political scientists. He doubted that the Commission would be able to agree on its exact contours. However, as explained in his second report, the Commission would be justified in taking the 2012 declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels and the subsequent General Assembly resolutions adopted annually on the same topic as a generally agreed upon starting point, particularly in regard to universally accepted rule of law requirements for adjudicatory dispute settlement.

With respect to the Commission's future work on the topic, some members had considered the plan to finish the first reading in 2025 ambitious. Most members had agreed that in his next report he should turn to the settlement of non-international disputes, and several had stressed the need to address disputes between international organizations and private parties or individuals in particular. Many members had agreed with his suggestion that the draft guidelines should be revised in the light of States' comments before the end of the first reading. Drafting suggestions concerning the provisionally adopted draft guidelines 1 and 2 could perhaps also be discussed at the same time.

During the debate, many members had expressly supported the referral of proposed draft guidelines 3, 4, 5 and 6 to the Drafting Committee. Some reservations had been expressed regarding what was considered to be the disproportionate weight given to arbitration and judicial settlement in draft guidelines 4 to 6 and regarding the distinction between international and non-international disputes reflected in draft guideline 3, with it being suggested that draft guideline 3 should remain in the Committee pending the completion of the work on non-international disputes. He hoped that any reservations could be addressed in the Drafting Committee and would welcome a decision to refer the draft guidelines to that committee.

The Chair said he took it that the Commission wished to refer draft guidelines 3 to 6 to the Drafting Committee, as recommended by the Special Rapporteur.

It was so decided.

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

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

The meeting rose at 11.40 a.m.