Provisional

For participants only

12 July 2024

Original: English

International Law Commission
Seventy-fifth session (first part)

Provisional summary record of the 3673rd meeting
Held at the Palais des Nations, Geneva, on Friday, 31 May 2024, at 10 a.m.

Contents

Present:

Chair:	Mr. Vázquez-Bermúdez
Members:	Mr. Akande
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Oral
	Ms. Orosan
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo

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)

Report of the Drafting Committee (A/CN.4/L.998 and A/CN.4/L.998/Add.1)

Ms. Okowa (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic "Settlement of disputes to which international organizations are parties" (A/CN.4/L.998 and A/CN.4/L.998/Add.1), said that the Special Rapporteur's mastery of the subject, guidance and cooperation had greatly facilitated the Committee's work. During the five meetings that the Committee had held on the topic, between 6 and 9 May and on 27 May 2024, the Committee had considered the draft guidelines proposed by the Special Rapporteur in his second report (A/CN.4/766), together with a number of reformulations that he had proposed to the Committee in response to suggestions made or concerns raised during the plenary debate and in the Committee's discussions. The Committee had provisionally adopted a total of four draft guidelines and had adopted only the English-language version of the text.

In order to better structure the text, the Committee had decided to arrange the draft guidelines under different parts. Draft guidelines 3, 4, 5 and 6 were under Part Two, entitled "Disputes between international organizations as well as disputes between international organizations and States", as adopted by the Committee. As a consequence of that decision, a Part One entitled "Introduction" had also been adopted by the Committee. Draft guidelines 1 and 2, which had been provisionally adopted by the Commission at its seventy-fourth session, would thus go under Part One, should the Commission adopt that change.

Draft guideline 3 had been adopted by the Committee with changes to the text and title proposed by the Special Rapporteur in the second report. The main questions faced by the Committee had been the use of the term "international disputes"; whether it was appropriate for the draft guideline to refer to two elements, namely the parties to the dispute and the applicable law; and the use of the term "other subjects of international law". The Committee had thoroughly discussed those questions, which had also been alluded to during the plenary debate. The Committee had been of the view that the draft guideline should not contain text that resembled a definition but should set out the scope of Part Two. The title of draft guideline 3 had been changed to "Scope of the present Part" to better align it with the text of the provision.

Concerning the deletion of the phrase "arising under international law", several members had taken the view that either that phrase, as originally proposed in the second report, or the phrase "governed by international law", as contained in the syllabus for the topic (A/71/10, annex), was useful and necessary in the light of, *inter alia*, the approach taken in the syllabus, in particular in paragraph 3 thereof, which employed the phrase "arise from a relationship governed by international law"; the Manila Declaration on the Peaceful Settlement of International Disputes; the commentaries to draft guidelines 1 and 2, provisionally adopted by the Commission at its seventy-fourth session; and the views and concerns expressed by States during the debate held in the Sixth Committee at the seventy-eighth session of the General Assembly. In addition, it had been emphasized that the Commission, in its commentary to article 10 of the articles on the responsibility of international organizations, had acknowledged the sensitivity surrounding the question of whether the internal rules of international organizations constituted international law. The importance of a dispute's having a basis in international law had been highlighted and the view had been expressed that the provision should cover disputes arising due to a breach of an obligation under international law, such as a treaty. Members had stressed that omitting a reference to international law in draft guideline 3 would have an impact on the future work on the topic, as well as practical implications. It had been pointed out that the Commission would at some point have to deal with the question of the applicable law during its work on the topic, that omitting the reference to international law would cause uncertainty and that the benefits of that omission would not outweigh its costs.

Other members had acknowledged that grouping the different types of disputes to which international organizations were parties would be helpful but had considered that such

grouping would only be clear and unambiguous if it focused solely on the parties to the dispute. According to those members, grouping disputes by reference to the parties and the applicable law, or the parties and the law under which the dispute arose, would give rise to confusion because it was not always clear whether a dispute arose under international law or was of a private law character. Further, disputes to which international organizations were parties at times involved or were triggered or governed by both international law and national law, as, for example, in certain disputes concerning headquarters agreements.

Those members had felt that a definition of "international disputes" with two elements – the parties to the dispute and the applicable law – would not provide clarity. The phrase "arising under international law" was considered to be important but lacking clarity and causing conceptual problems. Members had emphasized the importance of avoiding debates about terminology, such as "international disputes" and "non-international disputes", which could obscure the substance of the disputes themselves. A definition of "international disputes" had therefore been considered unnecessary. It had also been considered that precision and clarity could be better achieved if the text focused solely on the parties to the dispute. In that connection, it was stressed that the purpose of draft guideline 3 was to outline the scope of the other draft guidelines to be placed in Part Two. All disputes to which international organizations were parties that did not fall within the scope of Part Two would be addressed in subsequent parts of the draft guidelines.

The Committee had decided to delete the phrase "arising under international law" on the understanding that the commentary would explain the law applicable to the disputes that fell under draft guideline 3. It had been understood that the commentary would also provide an explanation regarding disputes related to the rules of the international organization and the fact that the text of draft guideline 3 was specifically for the purposes of the draft guidelines on the topic. Some members had reserved their position on the deletion of the phrase "arising under international law" and on the lack of a reference to "international law" in the text.

The Committee had also decided to delete the phrase "other subjects of international law", which had been contained in the original proposal by the Special Rapporteur. Members had expressed differing views on whether the term should be retained and had acknowledged the lack of consensus among them on who the subjects of international law were, with some members considering that the term was limited to entities with international legal personality, others considering that it included individuals and yet others stating that it could include entities that were members of international organizations but were neither States nor international organizations. It had been recalled that the Commission had used the term "other subjects of international law" in its previous work, but with a very narrow group of actors in mind.

Several members had been in favour of retaining the phrase "other subjects of international law" because, if it was deleted, the scope of the provision would be narrowed, the provision would be less complete and the commentary would need to explain the Commission's plans regarding disputes of a private law character and the future work on the topic as a whole.

Several other members had been of the view that the term should be deleted, considering that it was too broad or general, making the scope of the provision too wide; that if it was retained, the phrase "arising under international law" should also be retained, as there was a link between the two; that its retention would create ambiguity, given the lack of consensus on the scope of the term "other subjects of international law"; and that the term referred to exceptional situations involving disputes with international organizations and would thus be better addressed in the commentary.

The Committee had decided to delete the term "other subjects of international law", considering that disputes between such subjects and international organizations under draft guideline 3 would be more appropriately dealt with in the commentary. It had been understood that the commentary would address in detail the identity of the subjects of international law that could be parties to such disputes and the issue of disputes between international organizations and members of the organizations that were neither international organizations nor States. It had also been understood that draft guideline 3, as adopted by the

Committee, was without prejudice to the consideration of disputes of a private character in other draft guidelines.

After the adoption of the text of draft guideline 3, some members, explaining their position, had said that, while they had joined the consensus, they were not persuaded of the benefit of the shift from including references to both the applicable law and the parties to the dispute in the text to focusing solely on the parties to the dispute. A number of members had also expressed concerns regarding the overall approach to the topic, finding that the aim of draft guideline 3 remained unclear, as it lacked purpose and specificity. They doubted that guidelines consisting of broad, generic statements would achieve the purpose of providing practical guidance and, making reference to the syllabus for the topic, had expressed the view that a more specific and detailed approach would be preferable.

The discussion of the text of draft guideline 4 had revolved around two fundamental issues: first, whether provisions of a descriptive nature were appropriate and desirable in the Commission's outputs and, consequently, whether a more prescriptive approach should be taken in draft guideline 4; and second, the content of the recommendation to be contained in the draft guideline, if it was changed to contain normative text. In that connection, some members had expressed concerns regarding the substance of the text proposed by the Special Rapporteur.

Given those considerations, the Committee had decided to reformulate draft guideline 4. The title of the draft guideline had also been adopted with changes.

The Committee had decided to replace the words "International disputes to which international organizations are parties" in the text originally proposed with "Disputes between international organizations or between international organizations and States". The word "international" before "disputes" had been deleted as a consequence of the discussion in relation to draft guideline 3 and the decision to focus on the parties to the dispute. Several members had reiterated their position expressed during the plenary debate that draft provisions formulated by the Commission should be prescriptive or at least recommendatory and had referred to the notion of the normative value added by the Commission's output. In their view, the text originally proposed merely described a factual situation and could thus erode the relevance of the draft guideline. They considered that descriptions were more appropriate for inclusion in the commentary.

While addressing the reformulation of the draft guideline, the Committee had engaged in an in-depth discussion of whether international organizations had an obligation to peacefully settle disputes and, if so, what the nature and content of that obligation were and what role the Commission should play in delineating the obligation. Members of the Committee had generally agreed that the obligation to peacefully settle disputes was an obligation of means and not an obligation of result and had thus exercised caution when drafting the text to avoid any suggestion of an obligation of result. There had been general agreement that the Committee should adopt a text with normative character, with some members suggesting that the words "are settled", as originally proposed by the Special Rapporteur, were descriptive and should be replaced with "shall be settled" or "should be settled". Those members had said that the draft guideline should be consistent with Article 33 of the Charter of the United Nations and with the Manila Declaration on the Peaceful Settlement of International Disputes. In their view, such wording would be in line with States' obligation to peacefully settle their disputes and with the Commission's role in progressively developing international law. Other members had voiced concerns about the use of obligatory terms such as "shall be settled", noting that Article 33 of the Charter and the Manila Declaration were related to the maintenance of international peace and security and that it was not apparent that a parallel general obligation for international organizations had been established under international law.

The Committee had considered that it was important to avoid appearing to create an international obligation that did not currently exist under international law. Some members had emphasized that the purpose of the draft guidelines, as stated in the commentary to draft guideline 1, was to restate the existing practice of international organizations and to develop recommendations for the most appropriate way of handling the settlement of disputes to which international organizations were parties. The Committee had considered replacing the

words “are settled” with “may be settled”, a formulation that had been deemed by some members to convey normativity without the connotation of a general obligation, while also introducing the idea of capacity in practice to settle disputes and freedom of choice. Other members had considered the phrase too soft to reflect normativity. The phrase “are to be settled”, used in guideline 12 of the guidelines on the protection of the atmosphere, had also been discussed. As a compromise, the Committee had decided on the formulation “should be settled”, which conveyed a stronger recommendation with normative content without creating a legal obligation. It had been understood that the commentary would explain in detail the meaning of the phrase “should be settled” for the purpose of draft guideline 4.

Two important elements had been added to the draft guideline: the phrases “in good faith and in a spirit of cooperation” and “that may be appropriate to the circumstances and the nature of the dispute”, which had been inspired by paragraph 5 of the Manila Declaration. Several members had recalled that paragraph 4 of the syllabus expressly referred to the Manila Declaration and its potential usefulness to the Commission’s work on the topic. The addition of those two phrases had been important for achieving consensus on the adoption of draft guideline 4. The Committee had agreed that the phrase “in good faith and in a spirit of cooperation” provided the draft guideline with content and direction and enriched the recommendation it contained, and that the phrase “that may be appropriate to the circumstances and the nature of the dispute” provided the recommendation with enough flexibility not only to accommodate the vast typology of disputes to which international organizations could be parties, but also to adequately reflect the fact that, in some situations, international organizations might not be free to choose from among all the various means of dispute settlement. The Committee had considered that the phrase encapsulated the idea that some disputes were clearly more likely to be resolved by a particular means – for example, negotiation – or even that means of dispute settlement could be used in combination, and therefore appropriately conveyed the open-ended nature of the provision.

The Committee had decided to delete the second and third sentences of the text as originally proposed by the Special Rapporteur; she would further address some of the reasons for that decision in her discussion of draft guideline 5. The second sentence had been deleted mainly because of the concerns raised by several members that the phrase “falling short of” indicated or implied a hierarchy among the means of dispute settlement enumerated in draft guideline 2 (c). It had been considered that neither international law nor the current practice of international organizations and States, as described in the memorandum by the secretariat on the topic (A/CN.4/764), provided support for such a hierarchy.

The third sentence of draft guideline 4, as originally formulated, had been deleted for two reasons. Firstly, some members of the Committee had not been convinced that arbitration and judicial settlement were “often not provided for” and had offered several examples of third-party adjudication mechanisms resorted to by international organizations. Secondly, there had been a concern that the sentence made the draft guideline overly concentrated on arbitration and judicial settlement. Additionally, the word “therefore” alluded to causality and consequence between availability and use, whereas there was no certainty that wider availability would translate into increased use of third-party adjudication by international organizations. The prevailing view in the Committee had been that the limited use of third-party adjudication seemed to be a policy choice by international organizations and States.

The commentary would make clear that draft guideline 4, as adopted by the Committee, comprised two elements. It provided, firstly, that disputes should be settled by appropriate means, as defined in draft guideline 2 (c), taking into account the choice of means, and secondly, that disputes should be settled in good faith and in a spirit of cooperation. The draft guideline could thus constitute a basic principle for the settlement of disputes between international organizations or between international organizations and States. The title of draft guideline 4 adopted by the Committee, “Resort to means of dispute settlement”, was considered to more appropriately reflect the content of the draft guideline.

One of the fundamental issues that had permeated the debate on draft guideline 5 had been a perceived hierarchization of the means of dispute settlement set forth in draft guideline 2 (c) in the original proposal by the Special Rapporteur. Possible imbalances between the parties to a dispute and the principle of freedom of choice with regard to means

of dispute settlement had been mentioned by some members to justify a reformulation of the text originally proposed. The phrase “should be made available and more widely used” had been replaced with “should be made more widely accessible”; the word “accessible” had been introduced because the phrase originally proposed had been considered to run counter both to the law, as set forth in Article 33 of the Charter of the United Nations, and to the practice of international organizations and States. Some members had said that recommending wider use of arbitration and judicial settlement ran counter to current practice, as reflected in the replies to the Special Rapporteur’s questionnaire, and should thus be avoided. Other members had added that the recommendation as originally drafted could not be justified on the basis of a perceived benefit of third-party adjudication over alternative means of dispute settlement in situations of imbalance between the parties and that, in certain contexts, third-party adjudication could even exacerbate that imbalance.

While some members of the Committee had not been opposed to an express recommendation that arbitration and judicial settlement should be made more widely available, others had opposed the idea of specifically mentioning it in the text. They had emphasized that judicial settlement was in fact available to international organizations in many circumstances and that voluntary arbitration by agreement was always available to international organizations. The Special Rapporteur’s original proposal might thus have been understood as a recommendation that international organizations should accept wider access to compulsory arbitration. It had been agreed that the real challenge regarding third-party adjudication was inaccessibility rather than unavailability. The two terms were not synonymous, as “inaccessibility” had a closer connection to, for example, cost, capacity and other practical issues. It had been considered preferable to focus the provision on accessibility, on the understanding that the commentary would explain the differences between availability and accessibility.

The Committee had debated whether an express mention of arbitration and judicial settlement should be included in the draft guideline. As in the discussions on draft guideline 4, some members had been unconvinced that a concentration on arbitration and judicial settlement was warranted and, accordingly, had found that the original proposal by the Special Rapporteur was not balanced. The current practice of international organizations and States, as set forth in the memorandum by the secretariat and the Special Rapporteur’s second report, did not seem to support such a concentration. The importance of alternative means of dispute settlement had been emphasized. Additionally, a number of members had perceived there to be a gap in the logical flow of the draft guidelines; draft guideline 4 referred to all the means of dispute settlement envisaged in draft guideline 2 (c), only to be followed by a draft guideline 5 that focused on arbitration and judicial settlement, to the exclusion of alternative means. An express reference to the other means mentioned in draft guideline 2 (c) had therefore been considered desirable.

In the light of those considerations, the scope of draft guideline 5 had been broadened through the addition of text encompassing all the means of dispute settlement envisaged in draft guideline 2 (c). In order to reach a consensus, the Committee had decided to retain an express reference to third-party adjudication but to adjust it by placing the words “including arbitration and judicial settlement” immediately after a general reference to the means of dispute settlement. That formulation, which was a compromise solution, had been adopted on the understanding that the commentary would address the concerns raised in relation to alternative means. Some members, however, remained unpersuaded that judicial settlement and arbitration should be highlighted in the text.

The addition of the expression “as appropriate” after the reference to arbitration and judicial settlement served two purposes: to help alleviate the concerns raised regarding the specific mention of certain means of dispute settlement and to circumvent any potential challenges arising from draft guideline 3, as adopted by the Committee, and the fact that it now focused solely on the parties. The commentary would address the question of the law applicable to disputes to which international organizations were parties and would make clear that the draft guideline did not prejudge the discussion in the Commission regarding the applicable law.

Lastly, the Committee had decided to replace the term “international disputes” with the phrase “disputes between international organizations or between international

organizations and States” for consistency with draft guidelines 3 and 4, and to change the title of draft guideline 5 to “Accessibility of means of dispute settlement” in order to better reflect the content of the draft guideline.

The text of draft guideline 6, as adopted by the Committee, was based on a revised proposal by the Special Rapporteur intended to streamline the drafting and align the provision with the other draft guidelines adopted at the current session. Differing views among members regarding the importance of rule of law requirements in arbitration and judicial settlement of disputes had resulted in extensive discussion as to whether those requirements should be reflected in the draft guidelines. While the Special Rapporteur’s proposal had referred to “the rule of law, including the independence and impartiality of adjudicators and due process”, some members had expressed a preference for retaining only the reference to the rule of law in the draft guideline and elaborating on specific procedural guarantees in the commentary. Ultimately, the Committee had decided not to refer to the rule of law but rather to emphasize the judicial guarantees of independence, impartiality and due process. The Special Rapporteur had confirmed that those guarantees would be referred to in the commentaries as the core elements of the observance of the rule of law in a dispute settlement context.

The view had been expressed that the reservations about using the term “rule of law” were not due to the vagueness of the concept or the guarantees it encompassed but reflected a preference for using more technical terms, given that the addressees of the guidelines would generally be arbitrators, judges and persons involved in setting up or using dispute settlement mechanisms. An alternative considered had been to include a reference to “the good administration of justice”, a technical formulation that had been used by the International Court of Justice in its decisions, including, for example, those delivered in 2020 in the two appeals against decisions of the Council of the International Civil Aviation Organization. However, that wording was not without difficulties; in particular, its French equivalent, “*la bonne administration de justice*”, could be read narrowly as referring to how proceedings were conducted and not, for example, to the comportment of adjudicators. The Committee had also considered including the term “integrity” in addition to “independence” and “impartiality”, but had decided that the latter two terms were sufficient to address the point.

The Committee had decided to use the word “shall” in the draft guideline, thereby phrasing the provision in mandatory terms even though it was intended to be a guideline, because the need to respect the relevant procedural requirements was clearly an obligation. Some members of the Committee had considered that the need to respect procedural requirements was obvious and that there was no need for a provision expressly referring to the observance of such requirements. It had also been noted that the use of mandatory phrasing would avoid giving the impression that there were circumstances in which the independence and impartiality of adjudicators and due process were not required in arbitration or judicial settlement.

In drafting the provision, the Committee had opted for a streamlined approach over proposals to refer to means of settlement “made available”, “available” or “accessible” and to specify that the provision concerned disputes between international organizations or between international organizations and States. The context of the provision, given its location in Part Two and when read in the light of draft guideline 3, made its scope of application clear. In addition, draft guideline 6 was considered to flow from draft guideline 5; while draft guideline 5 concerned the accessibility of arbitration and judicial settlement, draft guideline 6 referred to the requirements applicable to procedures before such mechanisms.

The Committee had discussed whether the scope of draft guideline 6 was appropriate and whether it should cover other means of dispute settlement. It had been generally agreed that the provision was not intended to create a hierarchy between the various means of dispute settlement but rather served to highlight the requirements that applied to arbitration and judicial settlement in particular. To emphasize the connection between draft guidelines 5 and 6, the Committee had considered a proposal to include draft guideline 6 as a second paragraph of draft guideline 5 but had decided to maintain draft guideline 6 as a stand-alone provision in view of the importance of its content and of the rule of law in general. Nevertheless, the requirements set forth in the draft guideline should apply to other means of dispute settlement, as appropriate. For example, the Committee had agreed that negotiation could not

be subject to a requirement of independence or impartiality of the participants, but the draft guideline was not intended to imply that the requirements of impartiality and independence did not apply to other means of third-party dispute settlement such as mediation and conciliation. Clarification to that effect would be provided in the commentary.

In line with the considerations she had outlined, the Committee had decided not to take up a proposal to divide draft guideline 6 into two paragraphs, the first addressing the relevance of rule of law requirements to dispute settlement in general and the second addressing the requirements of independence and impartiality of adjudicators and due process specifically in relation to arbitration and judicial settlement. It had chosen the title "Requirements for arbitration and judicial settlement" for draft guideline 6 in view of its simplicity and to avoid repeating the text of the provision. She hoped that the Commission would adopt draft guidelines 3, 4, 5 and 6 as presented.

The Chair invited the Commission to adopt the titles of Part One and Part Two of the draft guidelines on settlement of disputes to which international organizations were parties and the texts and titles of draft guidelines 3, 4, 5 and 6 as provisionally adopted by the Drafting Committee.

Part One

The title of Part One was adopted.

Part Two

The title of Part Two was adopted.

Draft guidelines 3 and 4

Draft guidelines 3 and 4 were adopted.

Draft guideline 5

Mr. Sall said that the title of the draft guideline in the French version of the text was not in line with the English and Spanish versions, since the term "accessibility" had been translated as "*caractère accessible*". For consistency, he suggested that those words should be replaced with "*accessibilité*".

Mr. Savadogo said that he too had noted the discrepancy and had raised the issue with Mr. Forteau. Having consulted various legal texts, including decisions of the International Court of Justice, Mr. Forteau had confirmed that "*caractère accessible*" was indeed the most widely used rendering of the English word "accessibility" and that the translation used in the French version of the title should therefore be retained.

Mr. Ouazzani Chahdi asked whether the French translation of the term had been discussed in the Drafting Committee and, if so, what decision had been reached.

The Chair said that the Drafting Committee had considered and adopted only the English text. It was for the different language groups to consider the translations into their respective languages.

Mr. Llewellyn (Secretary to the Commission) said that, although language issues could be addressed after the adoption of the English version, the Drafting Committee was encouraged to adopt the English, French and Spanish versions at the same time; that was why all three language versions were issued at the same time.

Draft guideline 5 was adopted.

Draft guideline 6

Draft guideline 6 was adopted.

The Chair said that the Special Rapporteur would prepare commentaries to draft guidelines 3, 4, 5 and 6 for inclusion in the Commission's annual report and that the commentaries should therefore be adopted during the second part of the seventy-fifth session.

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

The Chair said that the draft programme of work for the second part of the seventy-fifth session, as approved by the Bureau, had been circulated to the members. He took it that the Commission wished to approve the programme of work.

It was so decided.

The meeting rose at 11.10 a.m.