**Statement by Mario Oyarzábal*

on the First Report on the Settlement of International Disputes to which International Organizations are Parties by August Reinisch, Special Rapporteur (A/CN.4/756, 3 February 2023)

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Thank you, Mme. Chair.

My intervention today will be structured as follows. Firstly, I will make some general observations on the Report and the topic itself. Secondly, I will address the questions posed by the Special Rapporteur (SR) concerning the type of disputes that should be the object of our work. Thirdly, I will share my views on the proposed definitions. And finally, I will refer to the desirable outcome and the possible way forward.

First and foremost, I wholeheartedly congratulate SR Reinisch for this exceptionally well-researched, well-articulated fairly exhaustive yet brief Report. We are extremely privileged to have "the" expert on the topic lead our work. To what was already said by other colleagues, I find it commendable the balance struck between reflecting the normative and practical developments in the field, and depicting the state of the art of the academic debate.

Several members highlighted the importance of the topic. For efficiency reasons, I will only say that, despite their valuable contribution, the proliferation of international organizations (IOs) has not come without problems, such as the complexities of settling disputes to which they are parties, particularly those that the SR refers to as having a "private law character". I believe that part of our work is to tackle these problems proactively, and provide practical legally-sound solutions.

I will focus now on what I consider to be the most critical issue for this session, which concerns the type of disputes that should be included in the scope of our work.

I support, in general, the approach proposed by the SR to include the disputes with private parties. The first reason may be a logical one: if they are not included, it is unclear what the added value of the work of the Commission would be.

Responses to the questionnaire may shed more light as to the types of international disputes that most commonly arise and the methods used to settle them. But at first glance, it appears that the means of dispute settlements contained in Article 33 of the UN Charter, originally envisaged for disputes between States, are normally applied to disputes

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between IOs and States and between IOs, perhaps with some particularities and adaptations. If I am correct, and unless the responses reveal serious problems not addressed by the current legal framework, the contribution of guidelines that address solely international disputes will necessarily be limited. If, as the SR says "in practice, the most pressing questions relate to the settlement of disputes of a private law character" (para. 24), it sounds counterintuitive to focus on less pressing questions. I could go further and say that the focus of ILC's work should primarily be on disputes between IOs and private parties.

This would provide us an opportunity to attend to the longstanding problem of lack of access to justice in disputes involving IOs. The SR himself identified in his previous academic work the "increasing awareness concerning accountability gaps"[1], an observation widely shared in academia,[2] which has also been discussed in the jurisprudence[3], and by this Commission in its previous work.

We are all aware that this discussion is inextricably linked to the issue of immunities, and I agree that this file is not the right place to open this discussion in a broad manner, or that of the international responsibility of IOs for that matter. It would be a Pandora's box that will presumably not take us very far. Instead, we should choose a path that allows us to circumvent potential *cul-de-sacs*.

From a policy perspective, the current legal framework, which does not incentivise, much less oblige IOs to settle their disputes, has contributed to "eroding their legitimacy and

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[1] August Reinisch, 'To What Extent Can and Should National Courts "Fill the Accountability Gap"?', *International Organizations Law Review* 10, no. 2 (20 June 2014): 572–87, https://doi.org/10.1163/15723747-01002016.

[2] Kate Nancy Taylor, 'Shifting Demands in International Institutional Law: Securing the United Nations' Accountability for the Haitian Cholera Outbreak', *Netherlands Yearbook of International Law* 45 (December 2014): 157–95, https://doi.org/10.1007/978-94-6265-060-2_7; Heike Krieger, 'Addressing the Accountability Gap in Peacekeeping: Law-Making by Domestic Courts As a Way to Avoid UN Reform?', *Netherlands International Law Review* 62, no. 2 (1 July 2015): 259–77, https://doi.org/10.1007/s40802-015-0032-z; Gloria Ramos-Fuentes and Patricio Masbernat, 'Una aproximación al principio quid pro quo como fundamento y límite de las inmunidades de jurisdicción de las organizaciones internacionales', *Revista de derecho (Coquimbo. En línea)* 29 (26 August 2022): e3851–e3851, https://doi.org/10.22199/issn.0718-9753-3851; Bruce Rashkow, 'Above the Law: Innovating Legal Responses to Build a More Accountable U.N.: Where Is the U.N. Now', *ILSA Journal of International and Comparative Law* 23, no. 2 (2017 2016): [i]-374.
Karel Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap Diversity or Cacophony: New Sources of Norms in International Law Symposium', *Michigan Journal of International Law* 25, no. 4 (2004 2003): 1159–82; R. Freedman, 'UN Immunity or Impunity? A Human Rights Based Challenge', *European Journal of International Law* 25, no. 1 (1 February 2014): 239–54, https://doi.org/10.1093/ejil/cht082.

[3] Belgian Court of Cassation General Secretariat of the ACP Group v BD. (21 December 2009) Cass No C.07.0407.F Belgian Court of Cassation, Western European Union v Siedler, Appeals Judgment Cass No S.04.0129.F (21 December 2009), ILDC 1625 (BE 2009) ECtHR, Beer and Regan v Germany, App No 28934/95, (18 February 1999) ECtHR, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland, App No 45036/98 (30 June 2005) ECtHR, Stichting Mothers of Srebrenica and Others against the Netherlands, App No 65542/12 (11 June 2013) ECtHR, Waite and Kennedy v Germany, Application No. 26083/94 (18 February 1999).

support for their immunities"[4]. From a reputational point of view, a clear image of compliance with international law is an essential facet of an IO's legitimacy[5]. The impression that an IO is legitimate is important to its to secure cooperation and support from its member States[6], and other stakeholders. More importantly, that IOs have "international legal personality" means that they are the subjects of rights and obligations on the international plane. There can be no rights without primary or secondary obligations. There can be no rights without accountability.

Theoretically, although a State may enjoy immunity before a foreign court, it may still be sued before its own courts. Diplomats may also in principle be made accountable before the courts of their home State. The problem with IOs is that where the headquarters agreement provides for functional or personal immunity, no forum remains available for justice to be made or relief to be sought. Moreover, while the existence of an international rule providing for State immunity for commercial activity can no longer be affirmed, the distinction between a public and a private act has little direct relevance in determining the extent of immunities of an IO. Immunities remain essential for the performance by IOs of their functions, and yet may result in gross denial of justice for persons who contract with or are affected by a tort committed by the organisation or its personnel. This is a major reason why disputes between IOs and private parties must be taken up, and I commend the SR for proposing it.

If the Commission accepts to follow this path, I agree with Mr. Grossman and Madam Mangklatanakul that all disputes between IOs and private parties should be included, also those of administrative, contractual and delictual nature.

I recall that the Commission is not precluded by its Statute from entering the field of private international law (Art. 2.1) and, thus, there is no impediment to go beyond the typically "international" disputes, as Ms. Okowa just stated.

I am of course aware of the myriad of disputes that we would be addressing, which raises practical issues. We will have to consider whether it is feasible to develop one set of guidelines able to encompass the diversity of issues arising from a breach of a contractual obligation to gross human rights violations. Moreover, disputes arising out of employment, contracts and torts have their own particularities and doctrinal and jurisprudential development. Labour disputes between IOs and their personnel are a good illustration, as a practice has developed, to implement administrative tribunals to settle them. Disputes related to human rights violations are also unique, in view of the high values at stake. But they all have one thing in common. When injury is caused to a private party and there is no mechanism for the individual to seek redress, the person's right to

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[4] Kristina Daugirdas, 'Breaking the Silence: Why International Organizations Should Acknowledge Customary International Law Obligations to Provide Effective Remedies'. Sachi Schuricht, co-author. *AIIB Y. B. Int'l L.* (2020): 54-87.
[5] Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations', *European Journal of International Law* 25, no. 4 (1 November 2014): 991–1018, https://doi.org/10.1093/ejil/chu087.
[6] Ibid.

access to justice is violated. From this perspective at least, the difference appears more of degree than of substance.

A variety of human rights treaties explicitly provide for an international legal right to access to justice at least for violations of human rights law, such as Article 2(3) of the International Covenant on Civil and Political Rights, Article 13 of the European Convention on Human Rights, Article 47 of the 2000 Charter of Fundamental Rights of the European Union, Article 25 of the American Convention on Human Rights, and Article 7(1) (a) of the African Charter on Human and People's Rights. A more general international legal right to access to justice extending beyond human rights violations to other types of disputes is also recognised, albeit to a more limited extent, for example in Article 8 of the Universal Declaration of Human Rights, Article 14 of the Covenant, Article 8 of the American Convention, Article 7(1)(b)-(d) of the African Charter, Article 12 of the Arab Charter on Human Rights, and Art. 5 of the 2012 ASEAN (Association of Southeast Asian Nations) Human Rights Declaration.

Furthermore, there is widening recognition that the right of access to justice may have established itself as a general principle, even when the relationship with other principles, such as immunity, is developing[7]. This being the case, any dispute for which access to justice is not provided for, either in the form of actual access to a court or an alternative dispute settlement mechanism, raises an issue of international law and a potential human right violation. Therefore, I am not convinced by the arguments about focusing on disputes that raise "only" issues of public international law.

But even if the view is not shared regarding the legal standing of access to justice as a general principle, a line may be difficult to draw in practice, as in disputes arising under domestic law, internationally protected human rights are often at play. The most obvious example is a dispute arising in an IO's workplace out of an allegation of discrimination on grounds of race, sex and religion or belief, which are rights explicitly protected by Articles 55 and 56 of the UN Charter, the Universal Declaration of Human Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, the UN Convention on the Elimination of Discrimination against Women, and the 1981 UN General Assembly Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief. The question may be, then, how we define the "internationality" of the disputes between an IO and a private party which are the object of the guidelines.

Yet there is another, strategic reason, why DS with private parties should be taken up. In his Report, the SR describes judicial developments in Europe and Latin America which have led in certain cases to limiting the immunities that IOs enjoy (paras. 6 and 8). In Argentina, for example, the Supreme Court made immunities of IOs conditional upon the right of access to justice as early as 1983[8]. It shows that the immunity of IOs, once

[7] Benedetto Conforti, 'The Judgement of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity', *The Italian Yearbook of International Law Online* 21, 1 (2011): 133-142, doi: https://doi.org/10.1163/22116133-90000213 at 141.

[8] In *Cabrera, Washington JE v. Comisión Técnica Mixta de Salto Grande* the Court found Art. 4 of the 1977 Seat Agreement concluded between Argentina and the Commission to be unconstitutional as it

absolute, has been eroding, in cases of gross human rights violations notably, but also in private law cases. This development may seriously jeopardise the capacity of IOs to perform their functions in an independent and efficient manner[9]. Therefore, we may well have an opportunity here to define the contours of IOs' obligations to solve their disputes by providing adequate means of DS. This would in the interest, not only of the private parties, but also of the IOs to prevent their immunity from being challenged in domestic courts. I would go even further and say that it would also be in the interest of States to avoid being called to respond for the acts of the IO.

Having said this, I believe that our final decision should be informed by the Memorandum of the Secretariat, and the responses to the questionnaire. We could also proactively reach out to MS and IOs to seek their views on this issue as needed.

Mme. Chair,

I will now address the question whether "policy" or "non-legal" disputes should be included. The Report states that "it appears most useful to define disputes in a way that is sufficiently wide so as to encompass non-legal disputes" (para. 70). The SR justifies his choice in that "a number of disputes between international organisations and their members may be of a more political nature, especially when they concern policy decisions and their implementation" (para. 67).

Despite their importance, it appears difficult to think about policy disputes systematically and, even more, about the possible avenues for solving them, in the same way that one thinks of "legal" disputes. Also, unlike "legal" disputes, the scope of what would fall under the scope of "policy" disputes is unclear. Almost any difference of criteria between states and IOs could be included. Think about the recent budget discussions at the International Labor Organization (ILO), where several member States questioned the inclusion of programs referring to gender identity and sexual orientation issues[10]; or some MS's criticism of the Office of the High Commissioner for Human Rights for elaborating

exempted the Commission from the jurisdiction not only of the Argentine courts but also of any foreign or international tribunal, thus resulting in plain denial of justice and of the right of access to the judge. In the Court's view, the said provision is void as it derogated from a peremptory norm of customary international law (from which no derogation is permitted as reflected in Art. 53 of the Vienna Convention on the Law of Treaties) which sets a limit to the right to enter into international agreements providing for jurisdictional immunity in line with international instruments that guarantee a sufficient and adequate judicial protection in private law cases (e.g. Arts. 8 and 10 of the Universal Declaration of Human Rights; Arts. 3 and 14 of the International Covenant on Civil and Political Rights; Art. 8, 1948 American Declaration of the Rights and Duties of Men; and Art. 8 of the American Convention on Human Rights). The Cabrera precedent has been reiterated by the Court in several cases, although without articulating analysis of the strict requirements necessary for the emergence of jus cogens. Argentine Supreme Court, *Cabrera, Washington J. E. v. Comisión Técnica Mixta de Salto Grande* (5 December 1983), Fallos 305:2150 at 2167-2169. See Raul E. Vinuesa, 'Direct Applicability of Human Rights Conventions within the Internal Legal Order: The Situation in Argentina', in Benedetto Conforti and Franco Francioni (eds.), *Enforcing International Human Rights in Domestic Courts*, The Hague, Martinus Nijhoff, 1997: 149-159 at 154.

[9] Jean-Marc Sorel, Hélène Ruiz Fabri, Linos-Alexandre Sicilianos, *L'Effectivité des organisations internationales: mécanismes de suivi et de contrôle*, Sakkoulas/Pedone, 2000.

[10] See: 347th Session of the Governing Body of the ILO, Geneva, 13–23 March 2023. GB.347/PFA/PV/Draft at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_876656.pdf.

a Report without the consent of the State concerned[11]. How can the ILC possibly address the myriad of policy disputes that may arise between an IO and its MS, with third parties and between IOs?

Another point is that the object of the ILC is “the progressive development of international law and its codification” (Art. 1.a, ILC Statute) and in dealing with non-legal disputes we may be overstepping our mandate as Ms. Okowa also pointed out. Finally, despite the value of finding avenues to solve disputes of a political nature, to include them would pay lip service to the SR’s ambition that the topic be “delimited in order to remain sufficiently focused” (para. 19).

Mme. Chair, I address now the definitions proposed by the SR.

Starting with the definition of IO, I could support sending guideline 2(a) to the Drafting Committee, in which case I am of the rather firm opinion that the reference to the “international legal personality” of an IO must be maintained in the definition. I fear what deleting that reference could do to the questions of immunities and of international responsibility which is attached to the concept of having legal personality on the international plane; and even for domestic law purposes, international legal personality being a prerequisite for entering into a seat agreement and enjoying legal personality at the domestic level. It could also harm the idea, that not for obvious is less important, that IOs have an international legal personality that is distinct from that of the States which created them and that are members of them, with all the implications that that may have, including in terms of the argument for joint or subsidiary responsibility or liability of the MS under international and domestic law.

Moreover, I concur with Mr. Grossman that the word “entity” should be replaced by “international organisation” if the first part of the proposed draft guideline 2(a) is kept, to make it clear that the IOs addressed in the guidelines are those established by States, by IOs and between States and IOs. This would save also from diving into the unsettled debate of whether subnational and other entities have the international legal standing to enter into a treaty and establish or join an IO in their own right, when domestic constitutional law gives them the capacity to act on the international plane. The capacity of Italian regions to enter into international agreements first come to mind[12]. Also, the Argentine Constitution gives the provinces treaty-making power provided that certain conditions are met.[13] But this issue remains highly contested, even domestically in

[11] See ‘Joint Statement Delivered by Cuba on Behalf of 69 Countries at the 50th Session of the Human Rights Council’, accessed 15 April 2023, http://geneva.china-mission.gov.cn/eng/zgylhg/202206/t20220616_10703983.htm.

[12] Article 117 of the Italian Constitutions provides that “In the areas falling within their responsibilities, Regions may enter into agreements with foreign States and local authorities of other States in the cases and according to the forms laid down by State legislation”.

[13] “The provinces are empowered to set up regions for the economic and social development and to establish entities for the fulfilment of their purposes, and *they are also empowered, with the knowledge of Congress, to enter into international agreements provided they are consistent with the national foreign policy and do not affect the powers delegated to the Federal Government or the public credit of the Nation*. The City of Buenos Aires shall have the regime which is to be established to that effect.” (Art. 124, Argentine Constitution as amended in 1994) [emphasis added].

countries which provide the said capacity, and I think that the ILC is better off avoiding any idea that we are opening the door for non-IOs to participate in the process of creation of an IO.

Regarding the definition of "dispute", for the reasons already expressed and those of other colleagues, I believe that policy disputes should be excluded from the scope of our work and, thus, I would leave them out of the definition proposed in draft guideline 2(b).

Finally, concerning the definition of "dispute settlement", my first comment is that the DS mechanisms will ultimately depend on the scope of our work, as different types of disputes may require different DS mechanisms. Should we decide the inclusion of labour disputes, for instance, administrative tribunals would most likely need to be added. I nevertheless support sending draft guideline 2(c) to the Drafting Committee on the understanding that any such definition may have to be revised at a later stage. I also wonder if the proposed suggestion that the Commission focuses on arbitration and adjudication, as per paragrapgh 82 of the Report, may be premature, before deciding on the scope of our work and assessing the complexities of the different types of disputes.

To conclude this point, I agree on the importance of the question whether IOs have a legal obligation to submit disputes to a DS mechanism and/or to settle them, raised by Mr. Grossman. I shall not elaborate as we are dealing with definitions here, but it would be important that the SR addresses this matter at an early stage of his future work.

Finally, and concerning the outcome of the Commission's work, I concur with elaborating guidelines, and also with Messrs. Forteau and Vázquez Bermúdez that model treaty clauses could be helpful for States and IOs when creating an IO or entering into a seat agreement. Should we so decide, the guidelines would and should be directed not only to IOs, as indicated in paragrapgh 27 of the Report, but also to States. Also contract clauses could be elaborated if disputes with private parties are included.

At long last, I believe that a decision should be made by the Commission whether to include disputes with private parties from an early stage. This would provide a clear direction regarding the future work to be undertaken by the SR, who may ideally be able to provide substantive draft guidelines, or at least an analysis of the practice of the settlement of the said disputes and the problems most commonly encountered thereof, for this Commission's consideration in 2024.

Before concluding, I thank Mr. Reisnich once again for his excellent work on this first Report. My thanks also go to you, Mme. Chair, and to the rest of my colleagues for a rich and fruitful debate.