Statement by Mr. Mario Oyarzábal*

on the Second Report on the Settlement of International Disputes to which International Organizations are Parties by August Reinisch, Special Rapporteur (A/CN.4/766, 1 March 2024)

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Thank you, Chair.

First and foremost, and as I did last year, I want to start by congratulating and thanking Special Rapporteur (SR) Reinisch for the encyclopedic work he has put before us. Again, the Report is exhaustively researched and well-articulated, and it has carefully integrated the normative, practical, and academic developments in the field. From this point of departure, I still have some substantive comments and proposals I wish to convey to the SR and the Commission.

My intervention today will be structured as follows. Firstly, I will make some general observations on the Second Report of the SR and the Memorandum prepared by the Secretariat. Secondly, I will address the Draft Guidelines proposed by the SR.

Beginning with my general comments, I welcome the decision of the SR to circumscribe his Second Report only to international disputes and to address non-international law disputes in his Third Report next year. Doing otherwise would have been technically confusing and practically impossible.

The Memorandum portrays a clear reality: there is no conflict revolving around the settlement of international disputes. The responses provided by both States and IOs show that disputes between IOs and States are rare, and between IOs rather inexistent. Moreover, the Memorandum also illustrates that these international disputes, when they arise, are mostly solved by negotiation. Against this backdrop, it could be argued that there is no business case for the ILC to embark on complex and detailed work on the settlement of "international disputes", other than adopting guidelines that reflect current practice and bring some extra clarity on the matter.

Conversely, the Memorandum shows that there is a rich and diverse practice of non-international disputes. Moreover, it reveals that conflicts and tensions, such as the one between immunity and access to justice, deserve attention and the ILC could provide added value for better addressing them. It also reinforces the decision made by the Commission last year, which counted on my support, to include non-international disputes or "disputes of a private law character" in the scope of our work.

A second general comment that I would like to make concerns the inclusion of Advisory Opinions (AOs) as a means of dispute settlement in the SR's Second Report. Here, I would advocate for a clearer differentiation between the advisory and adjudicative

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function of international courts and tribunals. The topic we are addressing concerns dispute settlement and, therefore, any references to advisory proceedings should be made with caution.

Despite recent scholarship that has argued the contrary, the advisory function has inherent features that should not be overlooked, in particular, its non-binding legal nature. The consent of the State concerned in a given dispute is a fundamental prerequisite of international adjudication, as well as an underpinning principle of international law.[1] The "binding" AOs pointed out by the SR in his Report are not an exception to, but rather an example of this rule. In the examples provided, States have consented to be bound by the Advisory Opinion at the time of ratifying the relevant instruments. While some of the examples provided by the SR of AOs related to disputes involving IOs are landmark cases with longstanding effects on international law, they should not be seen as "regular" means of dispute resolution.

Now let me turn to the analysis of the proposed draft guidelines.

With regards to **draft guideline 3**, I consider that overall, it constitutes a good starting point for defining the scope of what should be considered "international disputes". By focusing on the parties to the disputes rather than on the subject matter, it brings much-needed clarity to the Commission's work. Nevertheless, there is one important issue that, in my view, should be clarified.

In my opinion, it is not clear what should be understood by the construct "other subjects of international law", *who* are those subjects, and *who* are included in or excluded from the scope of the Draft Guidelines. When dealing with subjectivity, traditional international law textbooks usually include under the umbrella of "other subjects" a wide variety of actors, ranging from the International Committee of the Red Cross to individuals.[2]

I recall the concerns that arose during the discussions of a somewhat similar issue in the SR's First Report draft guideline 2(a) last year, which includes "other entities" as being able to establish international organizations (IOs). Some delegations raised this issue and asked for clarification in the Sixth Committee.[3]

In the same vein, a practical issue could be raised here with the reference to "other subjects of international law", and how to delimit the scope of the disputes that would fall under the scope of draft guideline 3.

There is a burgeoning scholarship on the issue of non-state actors in international law. Much has been written, on "insurgents and belligerents", and the validity of the arrangements they may enter into, as well as concerning the application of international humanitarian law to their acts. The same could be said about other "subjects". There is a well-established and diverse literature on the international legal standing of corporations, which can sue States before Arbitral Tribunals, and whose operations are increasingly under the scrutiny of international norms. The picture is much clearer when it comes to individuals, who have been consistently recognized since the 1950s as "subjects of international law".

[1] Monetary Gold Removed from Rome in 1943 (Preliminary Question) (Italy v. France, UK, and USA), 1958 ICJ Reports, 19.
[2] Shaw, Malcolm N. International Law. 6th ed. Cambridge: Cambridge University Press, 2008.
[3] Second Report of the SR, para. 7.

Would disputes between these non-state actors and an IO fall within the scope of draft guideline 3? What about disputes arising between an IO and entities that may have been accepted as members of the organization pursuant to that organization's rules, but that are not a subject of international law? Are they excluded from draft guideline 3?

The inclusion of the reference to disputes "arising under international law" in draft guideline 3 does not help us much here. The SR draws from Sir Michael Wood's definition of international dispute when he introduced the topic which referred to "…disputes that are international, in the sense that they arise from a relationship governed by international law."[4] Following his reasoning, a claim of an individual against an IO for a human rights violation in a domestic tribunal would be a "non-international dispute" that could, eventually, be transformed into an international dispute if the State does not uphold the IO's immunity. Conversely, disputes between a State and an IO arising from a relationship governed by a private contractual instrument would be excluded, as would seemingly be the case also of disputes between an IO and a non-state entity member of the IO to which the internal rules of the IO may be applicable, but not other rules of international law.

In light of the above, while keeping an open mind, I am of the opinion that the reference in draft guideline 3 to disputes between an IO and "other subjects of international law arising under international law" should be further clarified and reformulated as needed if not deleted altogether.

Moving to the **draft guideline 4**, my concern is twofold. First, on its nature being descriptive rather than prescriptive. Both SR Reinisch[5] and this Commission[6] have defined the concept of "guideline" as a "toolbox in which addressees should find answers to practical questions". I respectfully submit that, as currently formulated, draft guideline 4 falls short of providing much guidance to States and IOs regarding the means of dispute settlement that they could or should have recourse to.

Secondly, that amicable means of dispute settlements are "widely used" while adjudicative means are "less frequently resorted to" does not depict the more nuanced landscape that the SR's Report and the Secretariat's Memorandum actually reveal.

That negotiation is widely employed is clear. As noted by the SR, this means of dispute settlement is included in privileges and immunities treaties,[7] headquarters agreements,[8]

[4] Ibid. para 13. and Michael Wood, "The settlement of international disputes to which international organizations are parties", Yearbook of the International Law Commission, 2016, vol. II (Part Two), p. 387, annex A ("[…] disputes that are international, in the sense that they arise from a relationship governed by international law.").

[5] First Report on the settlement of international disputes to which international organizations are parties, by August Reinisch, Special Rapporteur, para. 27.

[6] Report of the International Law Commission on the work of its sixty-third session, *Yearbook of the International Law Commission, 2011*, vol. II (Part Three), para. (4) of the introduction to the Guide to Practice on Reservations to Treaties.

[7] Article VIII Section 27 Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, Berne, 11 June/1 July 1946, RS 0.192.120.1, 1 UNTS 163; Article 26, paragraph 2 Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea, 2167 UNTS 271

[8] Article VIII Section 21 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, Lake Success, 26 June 1947, 11 UNTS 12; Article 33, paragraph 2 Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany regarding the Headquarters of the Tribunal, 2464 UNTS 147.

and other instruments[9]. It has also been resorted to in different kinds of disputes.[10] On the contrary, mediation and conciliation — which are included with negotiation as means "falling short of binding third-party adjudication" — do not enjoy the same level of acceptance and use in the settling of international disputes. In fact, mediation and conciliation are rarely used for the settlement of international disputes involving IOs.

Something similar happens with the adjudicative means. While there are important limitations to the use of judicial settlement stemming from restrictions on legal standing and lack of reference to it in treaties involving IOs, recourse to arbitration is more commonly provided for in constituent agreements of IOs,[11] in privileges and immunities agreements[12], as well as in headquarters, host, and similar agreements.[13] Moreover, there have been several uses or attempts to use these arbitral clauses.[14]

In other words, some means of dispute settlement categorized as "less frequently resorted to" in the draft guideline are in fact employed with greater frequency than other means classified as "widely used". More importantly, this guideline should provide guidance to IOs and States as to the means of dispute settlement they should have recourse to, rather

[9] Article 27(1) Agreement of 11 March 1946 between the Swiss Federal Council and the International Labour Organization concerning the legal status of the International Labour Organization in Switzerland, 15 UNTS 382; Article 48 Agreement between the Swiss Confederation and the World Trade Organization to determine the legal status of the Organization in Switzerland, 2 June 1995, WT/GC/1.

[10] Including claims by States for the injury caused to its nationals by an IO (see, for instance, *Exchange of Letters constituting an agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals (New York, 20 February 1965), United Nations, Treaty Series, vol. 535, p. 197.*); claims by an IO for the injury caused to its agents by a State (see, for instance, *UNSC, "Letter Dated 14 June 1950 from the Minister for Foreign Affairs of the Government of Israel to the Secretary-General concerning a Claim for Damage Caused to the United Nations by the Assassination of Count Folke Bernadotte and a Reply Thereto from the Secretary-General", [14 June 1950] UN Doc S/1506*); and disputes between IOs and the State where its headquarters are located (see, for instance, *Dispute between the PCA and the Netherlands concerning the allocation of office space in the Peace Palace*, where nine rounds of consultation took place), among others.

[11] Article XIV(2) Constitution of the United Nations Educational, Scientific and Cultural Organization, signed on 16 November 1945, 4 UNTS 275; Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (with annexes), Washington, opened for signature 20 August 1971, entered into force 12 February 1973, 1220 UNTS 22; International Maritime Satellite Organization (INMARSAT) Convention, adopted 3 September 1976, entered into force 16 July 1979, 1143 UNTS 105; Article XXIX(c) Articles of Agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference in Bretton Woods, signed on 22 July 1944, 2 UNTS 3; Article IX(c) Articles of Agreement of the International Bank for Reconstruction and Development, 2 UNTS 134; Article 64 Articles of Agreement of the Islamic Development Bank, 12 August 1974

[12] Article 32 Agreement on the Privileges and Immunities of the International Criminal Court, New York, 9 September 2002, 2271 UNTS 3.

[13] Article VIII Sec. 21 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, Lake Success, 26 June 1947, 11 UNTS 12; Article 27 Agreement of 11 March 1946 between the Swiss Federal Council and the International Labour Organization concerning the legal status of the International Labour Organization in Switzerland, 15 UNTS 382; Article VII Sec. 31 Agreement between the International Civil Aviation Organization and the Government of Canada regarding the Headquarters of the International Civil Aviation Organization, Montreal, 14 April 1951, 96 UNTS 176; Article XVII Section 35 Agreement regarding the headquarters of the Food and Agriculture Organization of the United Nations (with annex and map), Washington, 31 October 1950, 1409 UNTS 522, among others.

[14] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France (France – UNESCO)*, Arbitral Award of 14 January 2003, XXV UNRIAA, pp. 231-266; *European Molecular Biology Laboratory (EMBL) v. Germany*, Arbitration Award, 29 June 1990, 105 ILR (1997), pp. 1-74; Dispute between the PCA and the Kingdom of the Netherlands concerning the allocation of office space to the PCA by the Carnegie Foundation in the Peace Palace (See Kingdom of the Netherlands in the Memorandum prepared by the Secretariat, response to question 2); *District Municipality of La Punta (Peru) v. United Nations Office for Project Services (UNOPS)*, PCA Case No. 2014-38.

than describing the current state of affairs. This leads to draft guideline 5.

Indeed, **draft guideline 5** is intrinsically linked to the previous one. It recommends increasing the "availability" and "use" of adjudicative means of dispute settlement. Some comments can also be made on this point.

Making arbitration and judicial settlement available involves, on the one hand, the inclusion of adjudicative means of dispute settlement in more treaties and agreements and, on the other, the removal of existing barriers for IOs to appear as parties in contentious cases before judicial organs. I agree that the inclusion of arbitration or judicial settlement clauses in treaties and agreements involving IOs could be encouraged, as a subsidiary means for settling disputes when negotiations fail, as it is already the case pursuant to several treaties.[15] I will elaborate on this later in more detail. Conversely, the removal of *locus standi* barriers should be done with caution, and only upon balancing carefully the benefits of allowing IOs to appear in contentious cases before the judicial organs *vis-à-vis* the risk of subjecting the court to unmanageable amounts of disputes that may jeopardize its effectiveness and run contrary to the objectives for which a court or tribunal was created in the first place.

Now, on that arbitration and judicial settlement should be "more widely used" for the settlement of international disputes to which IOs are parties, I believe that this guideline should be tailored to the needs and preferences of the IOs and States and avoid advocating for the expansion of the arbitration market. As evidenced in the Memorandum prepared by the Secretariat, almost every State[16] and most IOs[17] considered amicable over adjudicative means to be more useful for settling international disputes. Telling States and IOs to solve their disputes in a manner different to the one they consider the most useful seems counterintuitive and is likely to be ignored by its addressees. Furthermore, this recommendation would not be coherent with the tendency in many domestic legal systems of fostering amicable means of dispute settlement[18], in order to avoid the "winner-loser" dichotomy and other problems that litigation often brings about. It should also be considered that adjudicative means like arbitration are costly. In times when several IOs are going through a financial and liquidity crisis, and many States adhere to the "zero-nominal growth policy", serious justification should be provided for encouraging IOs to use more widely the means of dispute settlement that States and IOs have so far not considered to be warranted in addition to being more costly than the amicable means that they prefer. In sum, I believe that arbitration and judicial settlement should only be promoted when and after amicable means of dispute settlement have failed to provide the desired results.

To wrap up on draft guidelines 4 and 5 and help our debates, I would suggest that the SR may consider the possibility that in draft guideline 4 the Commission encourages IOs to solve international disputes to which they are parties via negotiations and other amicable

[15] See footnotes 12, 13 and 14.
[16] Memorandum by the Secretariat, responses to Question 4 by Austria; Côte d'Ivoire; Jordan; Kingdom of the Netherlands; Morocco; Oman and the United Kingdom of Great Britain and Northern Ireland.
[17] Memorandum by the Secretariat, responses to Question 4 by Eurasian Group on combating money laundering; Organisation of African, Caribbean and Pacific States; Organisation for the Prohibition of Chemical Weapons, United Nations Conference on Trade and Development; United Nations Development Programme; United Nations Framework Convention on Climate Change; United Nations Office for Project Services; World Food Programme; World Trade Organization.
[18] For example, Argentinian Laws No. 26.589 and 24.635 establishing mediation as a mandatory prerequisite for initiating judicial proceedings; Colombian Law No. 2220; Peruvian Law No. 26.872: Bolivian Law No. 1770; among others.

means as appropriate, and that in draft guideline 5 recourse to adjudicative means are addressed in line with my comments above.

Finally, regarding **draft guideline 6**, I also have some comments that I would like to share. First, I cannot but agree with the SR that, as a matter of principle, adjudicative dispute settlement should conform to the rule of law. Yet, the construct "the requirements of the rule of law" may be too broad or vague. A link may be missing between the overarching rule of law principle and its precise requirements concerning international adjudication. As is acknowledged by the SR in his Report, "in national legal systems, the concept of the rule of law does not have a clearly defined and generally accepted meaning, which is also reflected in the partly divergent terminology used…",[19] and different legal traditions may emphasize different aspects of its procedural and substantive content. This could bring some uncertainty in its interpretation and application in a particular case and context. One option could be not to make express reference to the concept while further developing the concrete requirements of the rule of law down the line.

On this note, I would submit that integrity should also be explicitly mentioned in the suggested guideline alongside the requirements of impartiality and independence of arbitrators. While a few commentators have referred to integrity as the synthesis of independence and impartiality,[20] several others consider it a distinctive requirement in itself, usually linked to the ethics, honesty, quality and credibility of the arbitrators.[21] Moreover, several relevant soft law instruments refer to the "three Is". For instance, the OP13 of UNGA Resolution 67/1 mentioned by the SR in his Report states that "[w]e are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice". In the same vein, the Bangalore Principles' preamble reads: "Convinced also that the integrity, independence and impartiality of the judiciary are essential prerequisites for the effective protection of human rights and economic development." The Bangalore Principles also include three other principles, namely, propriety, equality, and competence and diligence. Also at the national level, for example, the United Kingdom refers to "the three core values of the judiciary: Three Is: Independence, Impartiality and Integrity."[22]

Lastly, it may be necessary to align the general scope of this draft guidelines which addresses both judicial and arbitral means of dispute settlement, with the limitation of the rule of law requirements to arbitrators only.

Mr. Chair,

Before concluding, I would like to wholeheartedly thank Mr. Reinisch one more time for his outstanding work on this Second Report. Also, I want to thank the rest of my colleagues for making this rich and fruitful debate possible. Thank you Chair.

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[19] SR's Second Report, p. 65.

[20] See for instance: Jaffae Alkhayer; Ashlesha Dash, "Grounds of the Challenge of Arbitrators: The Difference between Independence and Impartiality", International Journal of Law Management & Humanities 5 (2022): 1857

[21] William W. Park, "Arbitrator Integrity: The Transient and the Permanent", San Diego Law Review 46, no. 3 (August-September 2009): 629-704. Datuk Sundra Rajoo, "Importance of Arbitrators' Ethics and Integrity in Ensuring Quality Arbitrations", Contemporary Asia Arbitration Journal 6, no. 2 (November 2013): 329-348. Stephan Wilske, "The Duty of Arbitral Institutions to Preserve the Integrity of Arbitral Proceedings," Contemporary Asia Arbitration Journal (CAA Journal) 10, no. 2 (November 2017): 201-234

[22] https://www.judiciary.uk/about-the-judiciary/our-justice-system/three-is/