Statement on behalf of the European Union and its Member States

by

Mr. Thomas Ramopoulos

Counsellor

Delegation of the European Union to the United Nations

at the Sixth Committee

on the Agenda item 79:

Cluster II: Report of the ILC on the work of its 75th session

Chp IV (Settlement of disputes to which international organizations are parties)

United Nations

New York

24 October 2024

– CHECK AGAINST DELIVERY –

Mr. Chairperson,

The European Union has the honour to address the Sixth Committee on the work of the International Law Commission (ILC) relating to the topic of **Settlement of disputes to which international organizations are parties** based on the second report prepared by Special Rapporteur Mr. August Reinisch.

The Candidate Countries Montenegro*, Serbia*, Albania*, Ukraine, the Republic of Moldova, Bosnia and Herzegovina* and Georgia, align themselves with this statement.

As an International Organization, the European Union is greatly interested in this topic, and welcomes the further work of the ILC on this important topic.

Building on its observations on the first report prepared by the Special Rapporteur and in view of the continuing work of the ILC on this topic, the European Union would like to make the following specific observations on draft guidelines 3 to 6 as well as the commentaries thereto for possible further consideration by the ILC.

Mr. Chairperson,

Draft guideline 2 addresses the use of terms. Draft guideline 2(c) provides that "means of dispute settlement" refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of resolving disputes. While draft guideline 4 refers to "the means of dispute settlement referred to in draft guideline 2, subparagraph (c)", draft guideline 5 refers to "[t]he means of dispute settlement", with the addition of "including arbitration and judicial settlement, as appropriate".

The European Union notes that draft guideline 2, in subparagraph (c), provides a definition of "means of dispute settlement", by listing such means in a non-

* *Montenegro, Serbia, Albania and Bosnia and Herzegovina continue to be part of the Stabilisation and Association Process.*

exhaustive manner. To the extent that other draft guidelines refer to means of dispute settlement, as defined in draft guideline 2, subparagraph (c), there would therefore be no need to specifically reference the guideline in which that definition is provided. Thus, in draft guideline 4 the words "referred to in draft guideline 2, subparagraph (c)" could be omitted. Moreover, given that the definition includes arbitration and judicial settlement, the addition of "including arbitration and judicial settlement, as appropriate" in draft guideline 5 would in principle be redundant.

At the same time, the European Union notes that, as explained in commentary (3) to draft guideline 5, while negotiations or consultations are practically always available, this is not the case for dispute settlement involving third parties. Against this background, the aim of draft guideline 5 appears to be to make the latter means of dispute settlement more "widely accessible" (or "practically available", as stated in commentary (3) to draft guideline 5), rather than those means of dispute settlement that are practically always available. However, the reference to "the means of dispute settlement, including arbitration and judicial settlement" appears to translate this aim in a manner essentially going beyond the aim.

Against this background, the European Union would suggest to consider specifying in draft guideline 5 those means of dispute settlement, which require being accessible more widely. A wider accessibility of means of dispute settlement involving third party adjudication would be without prejudice to the right of the parties to a dispute to determine the appropriate means of dispute settlement "of their own choice" (see Article 33 UN Charter), as recognized in commentary (3) to draft guideline 4. In the event the parties to a dispute had previously agreed to a system of mandatory adjudication, for instance in a public international law instrument setting up an international organization, their choice to determine the appropriate means of dispute settlement might be limited by the obligations undertaken therein.

This is for instance the case of the disputes between the Member States and the institutions of the European Union.

The European Union would like to reaffirm that, while the European Union has been established by public international law instruments, these instruments have established a new legal order. Under Article 344 of the Treaty on the Functioning of the European Union (TFEU), Member States undertook not to submit a dispute concerning the interpretation or application of the EU Treaties to any method of settlement other than those provided for in those Treaties. Hence, in accordance with the jurisprudence of the Court of Justice of the European Union, any internal disputes (be it between two or more EU Member States amongst themselves or between one or more EU Member State and the EU institutions) in relation to European Union law, including when implementing public international law obligations, fall within the exclusive jurisdiction of the Court of Justice of the European Union. While public international law principles can still be used for interpretative purposes by the Court of Justice of the European Union, these disputes are governed by European Union law and remain subject to the specificities of that legal framework.

In any event, the European Union understands that, according to commentary (4) to draft guideline 5, the addition of "as appropriate" after "including arbitration and judicial settlement" in draft guideline 5 is to stress the absence of a hierarchy between the different means of dispute settlement and aligns with draft guideline 4, according to which different means of dispute settlement may be appropriate. The European Union considers that neither the definition of "means of dispute settlement" nor the recommendation in draft guideline 4 to settle disputes by the means of dispute settlement that may be appropriate to the circumstances and the nature of the dispute imply any hierarchy of means of dispute settlement. Thus, the addition of "as appropriate" appears to be essentially redundant.

The European Union welcomes the reference to the law and practice of regional economic integration organizations in paragraphs (5) and (6) of the commentary on draft guideline 3.

The European Union moreover welcomes draft guideline 4 according to which disputes within the scope of the draft guidelines "should be settled" in good faith and in a spirit of cooperation by the means of dispute settlement that may be appropriate to the circumstances and the nature of the dispute. This wording leaves sufficient flexibility to take account of the situation of regional integration organizations such as the European Union, where particular judicial means of dispute settlement are mandatory.

The European Union welcomes the reference to core elements of compliance with the rule of law in the context of dispute settlement in draft guideline 6 and agrees that they give specific expression to the concept of the rule of law. Draft guideline 6 is formulated as an obligation. Given that the requirements referred to in draft guideline 6 stem from the applicable rules of international law (see point 8 of the commentary on draft guideline 6), it could therefore be made clear that draft guideline 6 is not constitutive but rather declaratory of an obligation under international law.

The European Union moreover notes that the heading of draft guideline 6 refers to "[r]equirements for arbitration and judicial settlement". While this draft guideline focuses on certain core elements of the concept of rule of law, it does not lay down any other requirements pertaining to arbitration and judicial settlement (such as, in the case of arbitration, the appointment of arbitrators, for instance). In order to clarify its material scope, the heading of draft guideline 6 could be redrafted as follows: "**Rule of law** requirements for arbitration and judicial settlement".

Mr. Chairperson,

In conclusion, the European Union wishes to express its appreciation once again for the work done so far by the ILC on this important topic and is looking forward to continuing and contributing further to the debates on this matter in the 6th Committee.

Statement on behalf of the European Union and its Member States

by

Mr. Frank Hoffmeister

Director, Legal Department

European External Action Service

at the Sixth Committee

on the Agenda item 79:

Cluster II: Report of the ILC on the work of its 75th session

Chp V (Subsidiary Means for the determination of Rules of International Law)

United Nations

New York

24 October 2024

– CHECK AGAINST DELIVERY –

Mr. Chairperson,

It in an honour for me to address the 6th Committee, on behalf of the European Union, on **subsidiary means for the determination of rules of international law**.

The Candidate Countries Montenegro*, Serbia*, Albania*, Ukraine, the Republic of Moldova, Bosnia and Herzegovina* and Georgia, align themselves with this statement.

The European Union would like to congratulate the ILC and the Special Rapporteur, Mr. Charles Chernor Jalloh, with the progress made in the consideration of this important topic.

It welcomes the provisional adoption of draft conclusions no 4 to 8 on subsidiary means for the determination of rules of international law and the commentaries to them, and would like to present some first remarks in relation to them.

Mr. Chairperson,

The European Union supports the envisaged form of the final output of the work of the ILC on this topic. Indeed, "conclusions" would be the appropriate form, consistent with the output of the work of the ILC on other topics addressing the sources of international law and other related issues of international law.

On substance: first, the European Union welcomes that the commentary to paragraph 1 of draft conclusion 4 explicitly refers to the Court of Justice of the European Union (paragraph (3) of the commentary under footnote 85) as a

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* *Montenegro, Serbia, Albania and Bosnia and Herzegovina continue to be part of the Stabilisation and Association Process.*

regional judicial body. Indeed, the CJEU has substantial case-law dealing with matters of international law and its jurisprudence could be an instructive subsidiary means for the determination of rules of international law.

Second, as to paragraphs (4) and (5) of the commentary to paragraph 1 of draft conclusion 4: the European Union recalls its comments on the topic made in the 6th Committee last year concerning draft conclusion 2, where decisions of "courts and tribunals" are referred to. In view of the importance of the definition of the notion "courts and tribunals", the European Union suggests once again that additional explanations be added in the commentaries as regards what a "court or tribunal" is, and invites the Commission to consider doing so along the lines as proposed by the European Union previously. To recall, while accepting a broad notion of these terms, there should be some criteria that distinguish these from other bodies. Examples of these criteria could be: (1) whether the body is established by law, (2) whether the body's jurisdiction is compulsory and/or whether the body has the power to issue binding decisions for the parties to the dispute, (3) whether the body applies rules of law or decides on the basis of *ex aequo et bono* principles, (4) whether the body is independent and impartial. All other bodies which do not fulfil the criteria but yet their work may be useful for the determination of rules of international law, should fall under letter c) of draft conclusion 2 (i.e. "Any other means derived from the practices of States or international organizations").

As regards paragraphs (7)-(11) of the commentary to paragraph 1 of draft conclusion 4, the European Union concurs with the qualification of the International Court of Justice (ICJ) as "the only international tribunal to date with general subject matter jurisdiction". While not implying a hierarchical relationship between the decisions of the ICJ and those of other international

tribunals, the European Union agrees with the Commission in pointing to the unrivalled legitimacy of the ICJ, described by the notion of "World Court".

Third, the European Union would like to address the nature and function of subsidiary means referred to in draft conclusion 6 and the related commentary.

Regarding the first paragraph of draft conclusion 6, and to reiterate its comments made in its previous statement on this topic, the European Union would like to confirm that it concurs that subsidiary means referred to in Article 38 (1) (d) of the Statute of the ICJ are not a source of international law. The European Union remains of the view that the Commission may wish to explain the differences between the two categories further by stressing that the role of subsidiary means is to assist in the interpretation, application and development of the will expressed by subjects of international law.

In terms of the placement of draft conclusion 6 (also contemplated by the Commission in paragraph (8) of the commentary to this conclusion), the European Union would like to propose to move this conclusion right after current draft conclusion 2, as draft conclusion 3. Its content is intrinsically related to that of draft conclusion 2 and having them next to each other could greatly enhance the coherence of the conclusions.

Fourth, the European Union notes that under paragraph (10) of the commentary to draft conclusion 7, the Court of Justice of the European Union (CJEU) is mentioned. Further to the examples cited by the Commission, the European Union would like to draw the attention of the Commission that the CJEU is competent to provide binding decisions also in reply to preliminary ruling

requests coming from national courts of the Union's Member States.[1] In these cases, the rulings of the CJEU are binding on the referring national court on points of law regarding the interpretation and validity of measures of Union law. These judgments in preliminary reference procedures "conclusively determine […] questions of [Union] law and [are] binding on the national court for the purposes of the decision to be given by it in the [national] proceedings".[2][3]

Fifth, concerning draft conclusion 8, while it is clear from the wording "*inter alia*" used in the chapeau of this conclusion that the list is not closed, and that other considerations can be taken into account when weighing the decisions of courts and tribunals, it may be useful to add some additional elements. Since this draft conclusion relates equally to international, regional and national courts and tribunals, the European Union would like to raise again the issue of the hierarchy of national courts. The European Union has raised this matter in its previous statement on the topic made in the 6th Committee last year, but it is noted that it has not been reflected in the current report. To recall, it is the view of the European Union that it could be clarified, potentially in the text of conclusion 8 but, in any event, in the commentary to this conclusion that when weighing the decisions of national courts and tribunals, the level of national courts should be taken into account. Not all court decisions necessarily carry the same weight and the context of the decision, including the placement of a court within the national court system, should be taken into account. Accordingly, the decisions of courts against whose decisions there is no judicial remedy under national law in a given case should enjoy the highest authoritative value. In turn, a national court's

[1] See Article 19 of the Treaty on European Union and Article 267 of the Treaty on the Functioning of the European Union.

[2] See the Order of the CJEU of 5 March 1986 in case 69/85, Wünsche, [ECLI:EU:C:1986:104], para. [3].

decision that has been overturned (or is currently on appeal) should not, as a matter of principle, be relied upon under Art. 38 (1) (d) of the ICJ Statute.

Mr. Chairperson,

In conclusion, the European Union wishes to once again express its appreciation for the work done so far by the ILC on this important topic. This topic is of particular importance for the European Union as an international actor who actively contributes to the formation of various sources of international law. Indeed, the European Union does not only have treaty-making powers, but in view of its special characteristics as an international organisation, it also contributes to the formation of customary international law (which was recognised by the ILC in its work on the related topic and is also subject to academic studies) and of general principles of law, as explained in the European Union's intervention on the work of the ILC on that topic.

The European Union will, thus, actively participate in the consideration of this topic and is looking forward to continuing further debates on the matter in the 6th Committee.

Thank you for your attention.