Cluster II

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

Subsidiary means for the determination of rules of international law (Chapter V)

Statement by Denmark on behalf of the Nordic countries

Xx October 2024

Mr./Madam Chair,

I have the honour of delivering this statement on behalf of the five Nordic countries: Finland, Iceland, Norway, Sweden – and my own country, Denmark.

IV - Settlement of disputes to which international organizations are parties

First, the Nordic countries would like to welcome the work on the settlement of disputes to which international organizations are parties and the draft guidelines, which we believe is a suitable outcome for this purpose. We would also like to offer a few observations in this regard. As a general observation, the Nordic countries see merit in underlining the principle of free choice of means of dispute settlement.

During this session the Commission provisionally adopted draft guidelines 3, 4, 5 and 6, with commentaries, concerning the scope of Part two of the draft guidelines, the settlement of disputes in good faith and in a spirit of cooperation, accessibility of means of dispute settlement, and core requirements of the rule of law for arbitration and judicial settlement.

Like last year, the Nordic countries note that the draft guidelines include a slightly modified definition of "international organization", compared to the one used in the draft articles on the responsibility of international organizations. In the interest of consistency, the Nordic countries would see merit in proceeding with the previous definition, with room for further elaboration in the commentaries as regards certain aspects identified by the Special Rapporteur.

As regards the scope of the work, the Nordic countries wish to reiterate the position expressed last year by which they welcomed the broadening of the scope from "Settlement of international disputes to which organizations are parties" to "Settlement of disputes to which international organizations are parties". However, we agree with the Special Rapporteur in that a distinction between international and non-international disputes may still be useful for the purpose of the draft guidelines. This does not mean that such a distinction must necessarily be reflected in the final outcome of the work, but for the further work of the Commission on this topic it presently appears useful.

Regarding *draft guideline 3*, we support the proposal to outline the scope of Part Two by reference to the parties to the dispute, rather than the law applicable. We support that

further explanations on what constitutes an international dispute are dealt with in the commentaries.

We welcome *draft guideline 4* as a basic principle in the settlement of disputes between international organizations or between international organizations and States. We note with appreciation that the draft guideline does not give priority to any specific means of dispute settlement. We agree with the view expressed by some members of the Commission that lack of use of third-party adjudication may often be a policy choice rather than an effect of shortcomings of existing law. The reference to means "that may be appropriate to the circumstance and the nature of the dispute" recognizes the need for specific solutions and that some treaties and constituent documents may include obligations regarding settlement of specific disputes.

Regarding the accessibility of dispute settlement means, which is addressed in *draft guideline 5*, we agree with the overall recommendation to make the means of dispute settlement referred to in draft guideline 2 more widely accessible. The term "accessible" refers not only to a normative perspective but includes also the practicable use of different forms of settling disputes. However, we are hesitant as to whether the express mention of arbitration and judicial settlement, notwithstanding the qualification "as appropriate", in the draft guideline is justified. As noted by some Commission members, judicial settlement is in fact available to international organizations in many circumstances, and voluntary arbitration by agreement is always available. Moreover, highlighting arbitration and judicial settlement may risk leaving the impression that this is somehow preferable to other means, which need not be the case. In line with the principle of freedom of choice of means of dispute settlement, we therefore suggest deleting the terms "including arbitration and judicial settlement, as appropriate" in draft guideline 5.

Finally, as regards *draft guideline 6*, we welcome the inclusion of a clear reference to the requirements of independence of adjudicators as well as due process concerns in relation to arbitration and judicial settlement.

To conclude, the Nordic countries wish to express their appreciation once again for the work done so far by the Commission on this topic and to thank the Special Rapporteur for his excellent work so far. We look forward to continuing the debate in the Sixth Committee.

V - Subsidiary means for the determination of rules of international law

Mr./Madam Chair,

I will now turn to the topic of "Subsidiary means for the determination of rules of international law".

I would like to thank the International Law Commission and the Special Rapporteur, Mr. Charles C. Jalloh, for the work done thus far on the topic subsidiary means for the determination of rules of international law.

The Nordic countries welcome the Commission's attention to this important topic and support the approach of working towards a set of draft conclusions.

The Nordic countries would like to make the following general comments as regards the Special Rapporteur's second report and the Commission's work on the topic during its seventy-fifth session:

First of all, we recall our support for the important contributions made by the Commission in promoting conceptual clarity and consistency in the application of the term "source of law" in the context of the Commission's engagement with Article 38 of the ICJ Statute thus far. While there is no single operative definition of the term "source of law" in international legal practice or theory, it is clear that subsidiary means referred to in Article 38 (1) d are of a different nature than "sources of law" insofar as this term is applied as a reference to *formal* sources of law.

As the Nordic Countries noted in last year's statement, Article 38 (1) d refers to something qualitatively different from the latter, namely a *material* source; i.e. helpful, material evidence that may assist in and influence interpretation and provide added perspective. We are happy to note that these concerns have been reflected in the formulation of Draft Article 6, paragraph 1, which stipulates in clear language that subsidiary means are not a source of international law and that their function is to assist in the determination of the existence and content of rules of international law.

The Nordic countries would also like to reiterate the importance of promoting clarity in distinguishing between analysis *lex lata* and theoretical assessments of the practical effects of decisions and teachings as seen from a sociological or anthropological perspective. The causes of law, i.e. the factors that may influence the growth of international law, must not be confused with the formal sources of law.

The Nordic countries agree that the practice of the ICJ has had strong impact on the clarification and progressive development of international law. We welcome that, and we strongly support the role of the ICJ as an essential gravitation point for the international legal system as such, and promotion of systemic integration of this system. This fact has been rightly reflected in Draft Conclusion 4, paragraph 1, provisionally adopted during the seventy-fifth session.

But this observation is not to be confused with a claim that the practice of the Court is itself a formal source of rights and obligations for States not party to a dispute, as for instance also recalled in Article 59 of the statute where it is stipulated that a decision of the court has no *binding* force except between the parties and in respect of the particular case. In this regard the Nordic countries support the wording of Draft Conclusion 7, which refers to the "absence of legally binding precedence in international law", unless otherwise provided for in a specific instrument or rule of international law.

We further recall our view that it is important to distinguish between various roles and functions that teachings and judicial decisions may play and to be clear on the functions that Article 38 (1) d is concerned with. Teachings and judicial decisions may inspire political

action and legal reasoning that may lead to the creation of new rules of international law; A judicial decision by the ICJ is formally binding between the parties to the case, as reflected in Article 59 of the ICJ Statute and similar effects may apply for decisions by other courts and tribunals as well. However, these functions are not to be equated with the specific function which Article 38 (1) d is concerned with, which is the use of these elements as auxiliary means for the determination of rules, nor is it an argument to say that subsidiary means are equivalent to sources of the law. Article 38 (1) d is concerned with the relevance of teachings and judicial decisions as evidence to support the identification or determination of the existence and content of a rule of international law. We are happy to note that this distinction appears to be reflected in Draft Conclusion 6, paragraph 2, provisionally adopted by the Commission during the seventy-fifth session.

As to the scope of Article 38 (1) d, care should also be taken to the issue of what constitutes a judicial decision or teachings. The Nordic countries support the general approach taken with regards to the definition of decisions of courts and tribunals in Draft Conclusion 4. Including also the important distinction drawn between decisions of international courts and tribunals and those of national courts and tribunals. As rightly observed in the commentary to Draft Conclusion 4, special considerations apply with regards to decisions of the latter institutions.

As for the term "teachings of the most highly qualified publicists of the various nations", the Nordic countries recall our position that this – eread in its context - refers not to the most highly qualified persons *simpliciter*, but to the most highly qualified persons in international law specifically. We note that Draft Conclusion 5, which seeks to define the concept of teachings for the purposes of the draft conclusions, refers to the coinciding views of persons with competence in international law from the various legal systems and regions of the world, as especially relevant. It is unclear, however, why this reference would need to be qualified by the term "especially". The Nordic countries consider that the draft conclusions should avoid suggesting that materials from persons not experts in international law might serve as subsidiary means for the determination of international law as this might invite an unnecessary diversion from the original object and purpose of Article 38 (1) d.

Lastly, I also recall our support for the Commission's engagement with the question of whether there may be categories of subsidiary means beyond those listed in the text of Article 38 (1) d. We welcome the Commission's further examination of this issue in future work.

The provisionally adopted formulation in Draft Conclusion 2 (c) "any other means generally used to assist in determining rules of international law", is very broad and inclusive. As highlighted in the report, this formulation avoids the danger of being too restrictive as to future developments and does remove any collateral risks of exclusion of factors that may at some point in time prove useful as additional auxiliary means. At the same time, however, there are certain useful and, in our view, important requirements that must be met. The threshold "generally used" indicates that a degree of qualification and usage in practice must be satisfied. Moreover, the reference to "assist in" is an important

reminder of the auxiliary function of subsidiary means. Furthermore, the question of their relative weight is also to be carefully considered to ensure jurisprudential legitimacy and broad acceptance by the international community.

The Nordic countries reiterate our appreciation to the Commission for engaging with the topic of subsidiary means for the determination of rules of international law. We will continue to collaborate with the Commission on the topic with great interest.

Thank you!