

Chapter XII

PROVISIONAL APPLICATION OF TREATIES

A. Introduction

251. At its sixty-fourth session (2012), the Commission decided to include the topic “Provisional application of treaties” in its programme of work and appointed Mr. Juan Manuel Gómez Robledo as Special Rapporteur for the topic.¹⁴²⁰ At the same session, the Commission took note of an oral report, presented by the Special Rapporteur, on the informal consultations held on the topic under his chairpersonship.¹⁴²¹ The General Assembly subsequently, in resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work.

252. At its sixty-fifth session (2013), the Commission had before it the first report of the Special Rapporteur,¹⁴²² which sought to establish, in general terms, the principal legal issues that arose in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The Commission also had before it a memorandum by the Secretariat,¹⁴²³ which traced the negotiating history of article 25 of the Vienna Convention on the Law of Treaties (1969 Vienna Convention), both within the Commission and at the United Nations Conference on the Law of Treaties in 1968 and 1969, and included a brief analysis of some of the substantive issues raised during its consideration.

253. At its sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur,¹⁴²⁴ which sought to provide a substantive analysis of the legal effects of the provisional application of treaties.

254. At its sixty-seventh session (2015), the Commission considered the third report of the Special Rapporteur,¹⁴²⁵ which continued the analysis of State practice and considered the relationship of provisional application to other provisions of the 1969 Vienna Convention, as well as the question of provisional application with regard to international organizations. The Commission also had before it a memorandum,¹⁴²⁶

prepared by the Secretariat, on provisional application under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 1986. The Commission referred six draft guidelines, proposed by the Special Rapporteur, to the Drafting Committee. The Commission subsequently received an interim oral report for information only,¹⁴²⁷ presented by the Chairperson of the Drafting Committee, on draft guidelines 1 to 3, which had been provisionally adopted by the Drafting Committee.¹⁴²⁸

B. Consideration of the topic at the present session

255. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/699 and Add.1), which continued the analysis of the relationship between provisional application and other provisions of the 1969 Vienna Convention and of the practice of international organizations with regard to provisional application. The addendum contained examples of recent European Union practice on provisional application of agreements with third States. The report included a proposal for a draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty.¹⁴²⁹

256. The Commission considered the fourth report at its 3324th to 3329th meetings, from 20 to 27 July 2016. At its 3329th meeting, on 27 July 2016, the Commission referred draft guideline 10, as contained in the fourth report of the Special Rapporteur, to the Drafting Committee.

257. At its 3342nd meeting, on 9 August 2016, the Chairperson of the Drafting Committee presented the report of the Drafting Committee on “Provisional application of treaties”, containing draft guidelines 1 to 4 and draft guidelines 6 to 9, as provisionally adopted by the Drafting Committee at the sixty-seventh and sixty-eighth sessions of the Commission, respectively (A/CN.4/L.877). The Commission took note of the draft guidelines as presented

¹⁴²⁰ At its 3132nd meeting, on 22 May 2012 (see *Yearbook ... 2012*, vol. II (Part Two), para. 267). The topic had been included in the long-term programme of work of the Commission at its sixty-third session (2011), on the basis of the syllabus contained in annex III to the report of the Commission on its work at that session (*Yearbook ... 2011*, vol. II (Part Two), p. 175, paras. 365–367 and annex III, p. 198).

¹⁴²¹ *Yearbook ... 2012*, vol. II (Part Two), pp. 67–68, paras. 142 and 144–155.

¹⁴²² *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/664.

¹⁴²³ *Ibid.*, document A/CN.4/658.

¹⁴²⁴ *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675.

¹⁴²⁵ *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687.

¹⁴²⁶ *Ibid.*, document A/CN.4/676.

¹⁴²⁷ The statement by the Chairperson of the Drafting Committee is available from the website of the Commission (<http://legal.un.org/ilc>).

¹⁴²⁸ *Yearbook ... 2015*, vol. II (Part Two), p.80, para. 251.

¹⁴²⁹ The text of draft guideline 10, as proposed by the Special Rapporteur in his fourth report, reads as follows:

“Draft guideline 10. *Internal law and the observation of provisional application of all or part of a treaty*

“A State that has consented to undertake obligations by means of the provisional application of all or part of a treaty may not invoke the provisions of its internal law as justification for non-compliance with such obligations. This rule shall be without prejudice to article 46 of the Vienna Convention on the Law of Treaties.”

by the Drafting Committee.¹⁴³⁰ It is anticipated that the Commission will take action on the draft guidelines and commentaries thereto at the next session.

258. At its 3347th meeting, on 12 August 2016, the Commission decided to request from the Secretariat a memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered with the Secretary-General in the last 20 years, that provide for provisional application, including treaty actions related thereto.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE FOURTH REPORT

259. The Special Rapporteur, in introducing his fourth report, began by providing a recapitulation of the previous work undertaken on this topic. He also drew attention to the interest that States have shown in the topic, referring both to the debate in the Sixth Committee and to States' submission of information in response to the questions

¹⁴³⁰ The text of the draft guidelines provisionally adopted by the Drafting Committee reads as follows:

"Draft guideline 1. *Scope*

"The present draft guidelines concern the provisional application of treaties.

"Draft guideline 2. *Purpose*

"The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of Article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

"Draft guideline 3. *General rule*

"A treaty or a part of a treaty may be provisionally applied, pending its entry into force, if the treaty itself so provides, or if in some other manner it has been so agreed.

"Draft guideline 4. *Form*

"In addition to the case where the treaty so provides, the provisional application of a treaty or part of a treaty may be agreed through:

"(a) a separate agreement; or

"(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference.

"Draft guideline 5."

"...

[* The Drafting Committee decided to keep draft guideline 5 on unilateral declarations in abeyance and to return to it at a later stage.]

"Draft guideline 6. *Commencement of provisional application*

"The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

"Draft guideline 7. *Legal effects of provisional application*

"The provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

"Draft guideline 8. *Responsibility for breach*

"The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

"Draft guideline 9. *Termination upon notification of intention not to become a party*

"Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization shall be terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty."

contained in chapter III of the Commission's report on the work of its sixty-seventh session.¹⁴³¹

260. The fourth report continued the analysis of the relationship between provisional application of treaties and other provisions of the 1969 Vienna Convention, with the aim of shedding more light on the legal regime of the former. The focus was placed on analysing the relationship between provisional application and the provisions on reservations, invalidity of treaties, termination or suspension of the operation of a treaty as a consequence of its breach under article 60, State succession, State responsibility, and an outbreak of hostilities under article 73.

261. As regards reservations, the Special Rapporteur observed that he had not found any treaty that provided for the formulation of reservations as from the time of provisional application, nor any provisional application provision that referred to the possibility of formulating reservations. The question was whether it was possible for a State to formulate reservations at the time of agreeing to provisional application in cases in which the treaty was silent thereon. In the Special Rapporteur's view, nothing seemed to prevent a State from formulating reservations from the moment it decided to provisionally apply a treaty for two reasons. First, provisional application of treaties produces legal effects. Second, the purpose of reservations was precisely to exclude or modify the legal effects of certain provisions for a State.

262. The Special Rapporteur observed that he had decided to analyse the relationship that may exist between provisional application and the regime of invalidity of treaties, taking into account the suggestions made by both States and Commission members. He focused on the relationship between provisional application and article 46 of the 1969 Vienna Convention, in the light of article 27, which he had addressed in his third report.¹⁴³² He concluded, first, that the principle that a State cannot invoke its internal law as a justification for its failure to perform a treaty also applied with respect to treaties that were provisionally applied. Thereafter, he proceeded to examine the limits of provisional application under internal law in the light of article 46. He recalled that this issue had been raised in the arbitral awards in the *Yukos*¹⁴³³ and *Kardassopoulos*¹⁴³⁴ cases, but noted that it would be premature to draw any conclusions, considering, in particular, that there could be more developments in the *Yukos* case. Nevertheless, from the point of view of international law, the Special Rapporteur considered it possible to conclude that, in addition to the regime established under article 27 of the 1969 Vienna Convention, States should make sure

¹⁴³¹ *Yearbook ... 2015*, vol. II (Part Two), p. 14, para. 30.

¹⁴³² A/CN.4/687 (see footnote 1425 above), paras. 60–70.

¹⁴³³ Permanent Court of Arbitration, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, interim award on jurisdiction and admissibility, 30 November 2009, Case No. AA 227, available from <https://pca-cpa.org/Cases>; see also the joined cases in The Hague District Court, *The Russian Federation v. Veteran Petroleum Limited, The Russian Federation v. Yukos Universal Limited and The Russian Federation v. Hulley Enterprises Limited* (www.italaw.com/sites/default/files/case-documents/italaw7255.pdf), 20 April 2016).

¹⁴³⁴ International Centre for Settlement of Investment Disputes (ICSID), *Ioannis Kardassopoulos v. Georgia*, decision on jurisdiction, 6 July 2007, Case No. ARB/05/18; available from <https://icsid.worldbank.org/Cases>.

that there were no limitations relating to their competence to conclude treaties in accordance with article 46, when agreeing to provisional application, in order to give legal certainty to such provisional application.

263. Concerning the termination or suspension of a treaty as a result of a material breach, the Special Rapporteur reiterated his view that provisionally applied treaties produce legal effects as if the treaties were in force, thus producing obligations that needed to be complied with under the principle of *pacta sunt servanda*. As such, the circumstances concerning termination or suspension of a treaty as provided for in article 60 of the 1969 Vienna Convention were also relevant for provisionally applied treaties.

264. Turning to the question of the succession of States and provisional application of treaties, the Special Rapporteur noted that the articles on the provisional application of treaties contained in the Vienna Convention on Succession of States in Respect of Treaties (1978 Vienna Convention) illustrated the practical utility of such provisions in enhancing legal certainty in situations of political instability. He therefore concluded that this issue did not merit a different treatment for the purpose of the current topic.

265. Section III of the report contained information on the practice of international organizations in relation to provisional application of treaties. The Special Rapporteur described the depositary practice of the United Nations and the registration of treaties under Article 102 of the Charter of the United Nations with regard to provisional application. Noting the relevance of such practice in obtaining a clearer understanding of provisional application on the basis of State practice, the Special Rapporteur suggested that the Commission might wish to recommend to the Sixth Committee that the 1946 regulations on registration of treaties¹⁴³⁵ be updated to better reflect contemporary practice.

266. The fourth report contained one draft guideline, on internal law and the observation of provisional application of all or part of a treaty, and reflected article 27 of the 1969 Vienna Convention. It aimed to complete the previously proposed guideline on the legal effects of provisional application, while also taking into account article 46 of the 1969 Vienna Convention.

267. Concerning future work on the topic, the Special Rapporteur observed that he intended to address certain pending issues, such as the provisional application of treaties that enshrine the rights of individuals, and propose model clauses.

2. SUMMARY OF THE DEBATE

(a) General comments

268. Generally, members reiterated that the provisional application of treaties constituted an important aspect of the law of treaties and that the topic was of great practical

significance for States. Some members observed that the information and analysis in the report were interesting and served to shed further light on the regime of provisional application. However, other members were of the view that more examples of practice were needed in order to substantiate the conclusions drawn. Furthermore, recognizing that the aim of chapter II of the report had been to address questions raised by Member States, which was important, several members nevertheless stressed that the Commission needed to approach the topic in a comprehensive and systematic manner.

269. Concerning methodology, some members welcomed the analysis of the relationship between provisional application and other provisions of the 1969 Vienna Convention. They noted, however, that, while agreeing in general with the conclusions, many of them were reached by way of analogy, while the practice behind them was not always clear. In addition, it was pointed out that it was not clear in what way the analysis undertaken by the Special Rapporteur would be reflected in the outcome of the topic: for example, whether there would be one guideline regarding each article analysed or an overarching guideline regarding the relationship between article 25 and other articles of the 1969 Vienna Convention. Doubts were also expressed by several members concerning the value of this methodological approach. In this regard, the view was expressed that it would be useful to analyse whether article 25 of the 1969 Vienna Convention was partly or wholly a self-contained regime within the Convention. It was recalled that various proposals considered at the United Nations Conference on the Law of Treaties, in particular with regard to the question of termination of provisional application, seemed to support such a proposition. If it were to be concluded that article 25 was a wholly self-contained regime, the other articles, while not being of direct relevance, could provide some guidance by analogy.

270. Other members were of the view that the direction of the topic depended on whether or not the 1969 Vienna Convention applied to provisional application. They did not agree with the assumption that article 25 constituted, in whole or in part, a self-contained regime, with the possible exception of paragraph 2 governing the termination of provisional application. They stressed that provisional application of a treaty, although provisional, was nonetheless an application of a treaty. In their view, it was therefore futile to analyse the relationship between provisional application and the provisions of the 1969 Vienna Convention. To the extent that the provisions of the 1969 Vienna Convention applied to a treaty in force, they were also applicable to a treaty being applied provisionally, with one important qualification—the rights and obligations of a State provisionally applying the treaty depended on the terms of the agreement providing for provisional application. However, the view was also expressed that it could not simply be presumed that the legal effects of the provisional application of a treaty were exactly the same as those deriving from a treaty that was in force. It was suggested that a comparative analysis of conventional practice would assist in clarifying the matter.

271. In addition, while it was observed that several of the provisions of the 1969 Vienna Convention could be of relevance for the topic, caution was expressed by

¹⁴³⁵ Regulation to give effect to Article 102 of the Charter of the United Nations, adopted by the General Assembly on 14 December 1946 (United Nations, *Treaty Series*, vol. 1, p. XIII), as modified by resolutions 364 (IV) B of 1 December 1949, 482 (V) of 12 December 1950 and 33/141 A of 19 December 1978.

some members against reaching conclusions by simple analogy without taking account of State practice. It was regretted that no comprehensive overview of conventional practice regarding provisional application had been provided, without which it was difficult to fully understand the intricacies of the topic. While it was acknowledged that it was not the Commission's task to codify the entire range of treaty practice that existed in relation to provisional application, which seemed to be both wide-ranging and diverse, the Commission could usefully contribute to the topic by addressing those circumstances on which a treaty or agreement providing for provisional application was silent.

272. Some members observed further that it was important, when considering provisional application, to take into account the different nature and characteristics of each treaty. Open and closed multilateral treaties and bilateral agreements might raise different issues that needed to be carefully examined. That was equally true for treaties establishing international organizations.

(b) *Reservations*

273. Concerning the relationship between provisional application and the reservation regime under the 1969 Vienna Convention, some members reiterated that provisional application of a treaty produced the same legal effects as if the treaty were in force. Consequently, they agreed with the Special Rapporteur's assertion that nothing would prevent a State, in principle, from formulating reservations as from the time of its agreement to the provisional application of a treaty. In addition, it was observed that it could be presumed that a State that had formulated a reservation intended it to apply not only when the treaty entered into force, but also to the provisional application of the treaty. It was suggested that such presumption be reflected in the draft guidelines. According to another view, article 19 of the 1969 Vienna Convention, which stipulated when reservations could be formulated, did not refer to provisional application. Consequently, formulating a reservation as from the time of the agreement to provisionally apply a treaty would be inconsistent with article 19 of the 1969 Vienna Convention.

274. Furthermore, some understood the report as examining the question of reservations to an agreement to apply a treaty provisionally rather than addressing reservations to the treaty itself. It was suggested that it would have been better to have examined whether a reservation to a treaty could exclude or modify the treaty, not only after its entry into force but also during its provisional application. It was also pointed out that declarations whereby a State agreed to apply a treaty provisionally within the limits of its internal law, in cases where the treaty was silent on such limiting provisions, could be considered to constitute reservations.

275. Some members observed that the analysis on reservations had been limited to article 19 of the 1969 Vienna Convention and expressed the hope that the Special Rapporteur would examine the other relevant rules under the Convention. It was also noted that the formulation of reservations in relation to provisional application raised other complex but practical questions that merited further

consideration, including regarding the form, nature and effects of such reservations. In addition, some members considered that the question of reservations in relation to provisional application was not devoid of practical examples, and several references were made to reservations formulated in the context of multilateral commodity agreements. Attention was also drawn to the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third session,¹⁴³⁶ which also contained, together with its commentaries, some useful elements, in particular guidelines 2.2.1, 2.2.2 and 2.6.11. It was recommended that the question of reservations in the context of provisional application be further examined and possibly reflected in the draft guidelines.

(c) *Invalidity of treaties*

276. Some members welcomed the fact that the question of the relevance of internal law for provisional application had been examined. They observed that, in doing so, the Special Rapporteur had focused on one aspect of the 1969 Vienna Convention, namely article 46 concerning the provisions of internal law regarding competence to conclude treaties. They also found the discussion in the report on the *Yukos* case timely and agreed with the Special Rapporteur that the Commission should not attempt to reach any conclusions with respect to the case, on the one hand, because it was ongoing, and, on the other, because it was based on a treaty regime that could not be generalized. Several members, however, pointed out that the Special Rapporteur had not, in his analysis concerning internal law, fully clarified the different situations involved or the legal consequences that resulted therefrom. In that regard, it was observed that, while article 46 of the 1969 Vienna Convention was an important part of the topic, articles 27 and 46 of the Convention constituted an integral whole and provided evidence that internal rules of fundamental importance were integrated into the proper appreciation of the law of treaties. In order to fully appreciate the interplay between international law and internal law in the context of provisional application, it was suggested that three different situations needed to be distinguished. The first was where an agreement on provisional application itself qualified provisional application by reference to internal law, in which case the latter was relevant for understanding the scope of the agreement on provisional application. The question was not about validity or invalidity of a treaty or of primacy of international or internal law but one of treaty interpretation. The second situation was analogous to article 46, that is, where a State argued that its consent to be bound by the agreement was invalid because of a provision of its internal law regarding its competence to conclude international agreements. The third situation was equivalent to article 27 and concerned the situation where a State sought to invoke its internal law as a justification for its failure to perform its international obligations. Some members stressed that it was the first scenario that was often the most important, and contentious, aspect of provisional application. It was therefore considered essential that the issue be reflected in the draft guidelines, on the basis of further analysis.

¹⁴³⁶ *Yearbook ... 2011*, vol. II (Part Two), pp. 26 *et seq.*, para. 75, and *ibid.*, vol. II (Part Three). The text of the guidelines constituting the Guide to Practice is annexed to General Assembly resolution 68/111 of 16 December 2013.

277. In addition, several members were of the view that articles 27 and 46 applied to provisional application and should also be reflected in the draft guidelines. However, the view was also expressed that it was necessary to analyse the relevance of internal law in relation to provisional application differently from when a treaty was in force, while taking into account the question of whether provisional application produced legal effects that other States relied on. It was suggested that the question of whether or not the term “manifest” in article 46 should be interpreted in a more flexible manner in the case of provisional application be examined, taking into account State practice. Furthermore, some members observed that applying procedural guarantees and limitations concerning consent to be bound by a treaty *mutatis mutandis* to provisional application would render the regime of provisional application meaningless. In many cases, provisional application was resorted to precisely because the constitutional procedures to be bound by the treaty had not yet been completed. Only if a decision to provisionally apply a treaty contradicted an internal rule of fundamental importance concerning competence to be bound by a treaty would it be possible to talk about invalidity.

(d) *Termination or suspension of the operation of a treaty as a consequence of its breach*

278. Regarding termination of provisional application, some members agreed with the conclusion of the Special Rapporteur that article 60 could apply to provisional application on the basis that it produced the same legal effects as if the treaty were in force. At the same time, however, the view was expressed that it was unlikely that a State would make use of the procedure that was envisaged in article 60, when article 25, paragraph 2, provided a less burdensome alternative.

279. Some members pointed out that article 25, paragraph 2, implied a different and more flexible regime than the one set forth in the 1969 Vienna Convention with regard to treaties that were in force. It was recalled that the diplomatic conference leading to the 1969 Vienna Convention incorporated the termination clause in article 25, rather than relying on the general termination provisions included in the Convention. The view was expressed that article 25, paragraph 2, established the exclusive means by which a State could, on its own initiative, end its obligation to apply a treaty provisionally. In that respect, at least with regard to termination, provisional application constituted a self-contained regime. It was nevertheless also observed that, unlike the other termination rules in the 1969 Vienna Convention, article 60 was also relevant with regard to provisional application since the two articles operated in different ways. While article 25, paragraph 2, would bring to an end any effects which the treaty had with respect to the State notifying the termination in its relations with the notified States, article 60 could be invoked as a ground for suspending or terminating the provisional application of a treaty only in relations between the affected State and the defaulting State.

280. Regarding the analysis of the relationship between provisional application and article 60 of the 1969 Vienna Convention, it was recalled that its paragraph 3

set out the conditions under which a material breach of a treaty would occur after its entry into force. It was pointed out that the Special Rapporteur should therefore have addressed the question of whether a material breach of a treaty that was provisionally applied could occur under the same circumstances as those provided for in article 60. In addition, it was observed that the report had not distinguished between the termination of the treaty as such and the termination of provisional application, the latter resulting in the suspension of a treaty provided for in the same provision. As a consequence, the question of whether a material breach of a treaty that was provisionally applied entitled the parties to invoke the breach as a ground for not only suspending the provisional application of the treaty but also for terminating the treaty itself had not been addressed. It was suggested that the analysis of articles 25 and 60 be further elaborated on the basis of State practice, with a view to formulating draft guidelines reflecting both the issue of termination and that of suspension, thereby clarifying how the relationship among the various parties was affected.

281. Furthermore, concerning the question of what type of violation constituted a material breach for the purpose of article 60, paragraph 3, it was pointed out that the Special Rapporteur’s conclusion that a trivial violation of a provision that was considered essential could constitute such a breach was not entirely correct. Attention was drawn to a recent award in which an arbitral tribunal had concluded that termination of a treaty owing to a material breach was warranted only if the breach defeated the object and purpose of the treaty. It was, however, also suggested that the question of whether or not the term “material breach” in article 60 should be interpreted in a more flexible manner in the case of provisional application be examined. In addition, the view was expressed that it was not possible to talk of material breach in the context of provisional application but rather of non-performance of treaty obligations, and that the effects of a material breach under article 60 of the 1969 Vienna Convention were not applicable since no contractual treaty relationship existed at that time. The view was also expressed that the relationship between provisional application and other forms of termination provided for in the 1969 Vienna Convention also merited consideration.

(e) *Cases of succession of States, State responsibility and outbreak of hostilities*

282. Some members agreed with the Special Rapporteur that although the information on succession of States contained in the fourth report was important, it was not necessary to address such questions further, for the purpose of the topic. Attention was nevertheless drawn by some other members to the relevant articles in the 1978 Vienna Convention, which took into account the nature and the characteristics of a treaty, in particular whether it was a bilateral agreement or an open or closed multilateral treaty, and whether the treaty in question was in force. It was also suggested that an examination of State practice would be valuable. Furthermore, some members supported addressing the question of succession in the draft guidelines.

(f) *Draft guideline 10*

283. Concerning draft guideline 10, some members recognized that it was based on article 27 of the 1969 Vienna Convention and therefore unobjectionable as such. Others were of the view that the draft guideline needed to be broadened to take into account situations in which an agreement to provisionally apply a treaty limited the provisional application by referring to internal law.

284. Some members, however, expressed regret that the report did not fully substantiate the content of the draft guideline. For example, it was unclear whether the draft guideline reflected the rule set forth in article 27—that a State may not invoke its internal law to justify a failure to perform a treaty—or whether it concerned provisions of internal law regarding the competence to agree to apply a treaty provisionally, as the reference to article 46 seemed to indicate. Some members noted that the draft guideline could be understood to imply that internal law was always irrelevant, ignoring the fact that States might limit the provisional application of treaties by making reference to internal law. This was distinct from the impermissible invocation of internal law, as provided for in article 27, and it was considered important that the issue be reflected in the draft guidelines. The view was also expressed that article 46 of the 1969 Vienna Convention should be further elaborated in the draft guideline and that it was not sufficient to limit it to a “without prejudice” clause. Consequently, the draft guideline should address situations analogous to both articles 27 and 46.

285. Some members expressed the view that instead of incorporating certain provisions from the 1969 Vienna Convention into the draft guidelines, as draft guideline 10 attempted to do, it might be more appropriate to have a general guideline indicating that unless excluded by an agreement providing for provisional application, the provisions of the 1969 Vienna Convention, to the extent relevant, applied to the provisional application of a treaty.

(g) *Practice of international organizations in relation to application of treaties*

286. Several members found the information in the report pertaining to the practice of international organizations interesting. The Special Rapporteur was encouraged to expand the section on regional organizations, in particular regarding the African Union, to ensure a more inclusive approach. However, they observed that it was unclear what conclusions could be drawn from the information provided. Other members considered that the information provided was pertinent for the purpose of better understanding State practice. It was also pointed out that two very different forms of practice were discussed. Some members were of the view that whereas the information concerning practice in registering, depositing and publishing treaties did not seem relevant for the topic, the information on treaties to which an organization was a party was highly pertinent. It was this latter category that should be further elaborated. In that regard, some members called for a more in-depth comparative study on the provisional application of treaties involving States, on the one hand, and those involving international organizations, on the other.

287. Concerning the proposal for a recommendation to revise regulations and manuals of the Secretariat with regard to its registration and depository functions, some members doubted that the matter fell within the scope of the topic. While the view was also expressed that such a revision would be of value, it was suggested that the question could be considered at a later stage.

(h) *Future work*

288. Regarding future work on the topic, it was suggested that an exhaustive treatment of treaty provisions providing for provisional application was essential in order to gain a more in-depth understanding of the topic. It was observed that there seemed to be extensive State practice relevant for the topic, and that undertaking a comparative analysis of relevant treaty provisions could assist in understanding provisional application and its relationship with the full application of a treaty. In addition, it was pointed out that a comparison of provisions in agreements providing for provisional application that conditioned such application on internal law would be particularly useful.

289. The view was expressed that future work should also provide conclusions of the analysis already undertaken in respect of the relationship between provisional application and other provisions of the 1969 Vienna Convention. It was further suggested that the questions of interpretative declarations made by States provisionally applying a treaty and declarations made by States purporting not to apply a treaty provisionally could be examined in future reports.

290. Concerning the Special Rapporteur’s proposal to examine the question of the application of treaties that enshrine the rights of individuals, the view was expressed that the matter should be addressed with great care, taking into account State practice.

291. Several members welcomed the Special Rapporteur’s intention to prepare model clauses. Caution was nevertheless advised against attempting to analyse the meaning of each clause, which could affect the meaning already ascribed by States to such clauses in existing treaties. It was also pointed out that it might be more appropriate to develop an indicative list of model clauses.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

292. The Special Rapporteur recalled that, from the outset of the Commission’s consideration of the topic, a majority of the members had stressed the need to examine the relationship between article 25 of the 1969 Vienna Convention and its other provisions. Some members had indicated which provisions, in their view, were particularly relevant for this purpose, including articles 46 and 60. Such an analysis had been considered pertinent in order to shed more light on the regime of provisional application. It had been on this basis that the Special Rapporteur had prepared his fourth report. He indicated that this exercise would be completed in the fifth report, in which he would possibly address the relationship between provisional application and article 34 of the 1969 Vienna Convention, concerning third States. While he did not

intend to propose a draft guideline for every provision of the Convention that had been examined, he stressed that, together, the reports would serve to provide a better understanding of which articles were most relevant for the provisional application regime and, ultimately, provide the wider context in which article 25 operated.

293. The Special Rapporteur observed that several members had emphasized the practical value of this topic to States. While he agreed that the topic had to be treated systematically, he also considered it important to take into account and reflect the views and specific proposals of States in developing the topic.

294. The Special Rapporteur did not agree with the suggestion that article 25 might constitute a self-contained regime, as such a proposition might undermine the notion of the universality of international law and limit the legal effects that had been identified with regard to provisional application. The Commission should not address the topic as a matter of *lex specialis*. If, instead, it were recognized that a provisionally applied treaty produced legal effects as if the treaty were in force, as had indeed been acknowledged, the task would then be to identify the rules under general international law that would apply in particular situations and thereby provide guidance to States. In this regard, the Special Rapporteur found the proposal of elaborating a general draft guideline to provide that the 1969 Vienna Convention applied *mutatis mutandis* to provisionally applied treaties interesting.

295. The Special Rapporteur further noted that in considering the topic, drawing conclusions based on analogy had been warranted in the circumstances since, in his view, practice had been scarce or inaccessible. This methodology was not unusual.

296. While the Special Rapporteur fully agreed that it would be useful to undertake a comparative analysis of treaties providing for provisional application, he recalled the difficulties he had encountered in obtaining the relevant information. He elaborated on the relevance of the information provided by the Treaty Section of the Office of Legal Affairs in this regard. He explained that the Treaty Section had had to develop a specific tool in order to conduct the search that had led to the identification of treaties containing provisional application clauses, but clarified that such information was not accessible to external users. Likewise, he underscored that it was very difficult to identify all actions regarding provisional application given the limitations of the search criteria of the Treaty Series. The added value of the information provided in the fourth report was that it showed that there was a large number of treaties apparently containing provisional application clauses, as well as registration of actions linked to provisional application; at the same time, it revealed

the difficulty of obtaining such information. This was why it had not yet been possible to obtain an overview of practice on the subject.

297. The Special Rapporteur further underlined that the Commission seemed to be overlooking the fact that the regulations for the registration of treaties, the *Repertory of Practice of United Nations Organs*¹⁴³⁷ and the manuals on treaty law and practice¹⁴³⁸ were developed, not on the basis of the legal regime established by article 25, but on criteria that predated the 1969 Vienna Convention. This had an impact on the practice of States since they used such documents as a guide when referring to provisional application. Moreover, as advice given by the Treaty Section to States upon request also followed those criteria, it had the potential to mislead them. Therefore, State practice might very well deviate from the legal regime established under article 25.

298. As regards information reflecting the practice of regional organizations, the Special Rapporteur agreed that it would be useful to expand this section to include the African Union.

299. With regard to the discussion on reservations, the Special Rapporteur reiterated that he had not, either in the debate or in his research, come across any provision that specifically addressed the possibility of formulating a reservation in relation to provisional application. While some of the examples referred to during the debate merited further examination, others did not, in his view, constitute reservations as such. He further reiterated that the Guide to Practice on Reservations to Treaties was silent regarding provisional application, and that paragraph (5) of the commentary to guideline 2.2.2¹⁴³⁹ addressed the issue vaguely, as a hypothetical possibility, without referring to any practice on the matter.

300. The Special Rapporteur reiterated that articles 27 and 46 of the 1969 Vienna Convention, while referring to the internal law of States, indeed referred to two different aspects; however, they created a complementary regime. He concurred with those members who considered that both articles 27 and 46 should be reflected in the draft guidelines and noted that this had been his intention in proposing draft guideline 10. Furthermore, he also agreed that future draft guidelines should address situations in which an agreement to provisionally apply a treaty limited provisional application of the treaty by referring to internal law.

¹⁴³⁷ Available from <http://legal.un.org/repertory/>.

¹⁴³⁸ *Treaty Handbook* (United Nations publication, Sales No. E.12.V.1); *Final Clauses of Multilateral Treaties—Handbook* (United Nations publication, Sales No. E.04.V.3); and *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1, United Nations publication, Sales No. E.94.V.15).

¹⁴³⁹ *Yearbook ... 2011*, vol. II (Part Three), p. 111.