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Held at the Palais des Nations, Geneva, on Wednesday, 30 July 2014, at 3 p.m.

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Present:

Chairman:	Mr. Gevorgian
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Laraba
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Korontzis	Secretary to the Commission

The meeting was called to order at 3 p.m.

Provisional application of treaties (agenda item 8) (*continued*) (A/CN.4/675)

Mr. Šturma said that, since the topic of the provisional application of treaties was very important from the point of view of both the theory and the practice of international law, the Commission's work on it should culminate in a set of guidelines, or conclusions, which might also shed light on issues not elucidated by article 25 of the Vienna Convention on the Law of Treaties.

He agreed with the Special Rapporteur first, that the provisional application of treaties produced certain legal effects and could create certain rights and obligations under international law and, secondly, that the Commission did not need to concern itself with domestic legislation. The Special Rapporteur's intention to collect more information on State practice before presenting any conclusions therefore seemed rather illogical. The paucity of information supplied should not prevent the Special Rapporteur from presenting at least some draft conclusions.

The key point which should be clarified in respect of article 46, paragraph 1, of the Vienna Convention was whether the limitations which internal law placed on a State's ability to agree to the provisional application of a treaty should be regarded as known to other States, or whether they had to be notified.

As for the temporal aspect of provisional application referred to in paragraph 35 (a) of the report, it should be noted that, in the practice of the European Union, the provisional application of treaties from the time of their adoption, albeit rather unusual, had proved its worth in practice. However, some States' constitutions permitted provisional application only after the ratification of a treaty.

He was unconvinced by the analysis of unilateral acts as a legal basis for provisional application in paragraphs 37 to 41 of the report. The declarations made in the *Nuclear Tests (Australia v. France)* case had been independent acts governed solely by the intentions of the State and they had created a new legal situation for it, whereas acts by States in relation to an international treaty did not seem to be fully autonomous, because they depended on a treaty for their provisional application. The statement in paragraph 55 that the scope of the obligations [arising from provisional application] might not exceed what was expressly set out in the treaty was correct and should be reflected in one of the conclusions.

The issue of reservations in the context of provisional application was also closely linked with the expression of will. A distinction should be drawn between treaties which included an opt-in or opt-out clause on provisional application and those that did not. It was probably only the latter type of treaty to which States could formulate a reservation on signature or ratification.

The Special Rapporteur's suggestion that article 70 of the Vienna Convention applied to the termination of provisional application required more detailed examination. Whether termination released the parties from any obligation further to perform the treaty (para. 1 (a)) would depend on the reasons for and circumstances of the end of provisional application. The report correctly reflected the legal consequences of a breach of a provisionally applied treaty. The principle *inadimplenti non est adimplendum* would apply only if a State failed to notify other States of its intention not to become a party to the treaty. Furthermore, as the case concerning the *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* had confirmed, the consequences of a breach of a treaty (termination or suspension) were not automatic. The regime of responsibility would indeed apply to cases where a State breached obligations arising from the provisional application of a treaty. The conclusion that article 12 of the articles on responsibility of States for internationally wrongful acts covered provisional application had been supported by the 2009 decision of

the Permanent Court of Arbitration in the case *Yukos Universal Limited (Isle of Man) v. the Russian Federation*.

Lastly, he hoped that the Special Rapporteur would provide a more precise plan of future work.

Mr. Murphy, after commending the Special Rapporteur's desire to develop further information regarding State practice, agreed with other members that often the Commission did not receive information from States systematically. The Special Rapporteur might therefore need to find some information himself and other information from the scholarly literature. There might not be a significant amount of State practice and expectations would need to be adjusted accordingly.

He concurred with the Special Rapporteur's conclusion that the provisional application of a treaty undoubtedly created a legal relationship and therefore had legal effects and that those effects extended beyond the obligation expressed in article 18 of the Vienna Convention. The Special Rapporteur could, however, have been more systematic in his legal analysis, starting with the Commission's views prior to the Vienna Conference, and moving on to the views expressed at the Conference and also subsequent case law, scholarly literature and the positions taken by States. The information was scattered around the second report or the 2013 memorandum prepared by the Secretariat, but it could usefully have been consolidated. He agreed with the Special Rapporteur's intention not to carry out a comparative study of national laws regarding the ability of States to apply a treaty provisionally. Such a study would be helpful in establishing a customary rule of international law or a general principle of law but less useful when the issue concerned divergent national processes for entering into treaty commitments.

In section III of the second report, some assertions were right, others doubtful and still others incorrect. He agreed with the assertions in paragraphs 32 and 33 that the source of the obligation to apply a treaty provisionally might arise from a provision of the treaty or a parallel agreement, that the intention to apply a treaty provisionally might be expressed or tacit and that the exact scope of the legal obligation created depended in the first instance on what that provision or parallel agreement stated. In paragraph 35 the Special Rapporteur listed four types of situation in which provisional application might occur, but it would be desirable to indicate examples for each. It was not clear how a scheme under which a State was required to opt out rather than opting into the scheme, such as article 45 of the Energy Charter Treaty, fitted into the situations listed. It seemed that there might be no examples of the fourth type of situation, although Ms. Jacobsson had suggested that actions by the Syrian Arab Republic, set out in paragraph 66, might fall into that category.

He could not endorse the Special Rapporteur's view that the law on unilateral acts of States was a set of background rules governing the provisional application of treaties or at least governing some of the four situations. The Special Rapporteur should first clarify to which of the four situations he thought that body of law related. He mentioned "unilateral declaration" in the context of the situation described in paragraph 35 (c), but he might also apply it to the situations in paragraph 35 (b) or (d), since all three situations involved some kind of unilateral act. It was confusing to suggest that the law on the provisional application of treaties was different for the situation described in paragraph 35 (a) than for the other situations. Moreover, he doubted whether the law on unilateral acts of States was directly relevant to the topic. In each of the four situations, there was a treaty, there was a rule of the Vienna Convention relating to provisional application of that treaty and there was a decision by a State to accept provisional application; once that acceptance occurred, there arose a treaty-based obligation between multiple States, not just an obligation for one State. Such a situation was not like the unilateral act issued in the *Nuclear Tests* cases or the scenarios studied by the Commission for the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations of 2006; the existence of a treaty

made all the difference. In ratifying a treaty, or agreeing to apply a treaty provisionally, a State technically engaged in a unilateral act, but neither act should be placed under the heading "unilateral acts of States". The provisional application of a treaty remained a treaty-based relationship and the State took advantage of an arrangement for provisional application that had been agreed upon by all the States associated with that treaty.

He considered that the form an agreement took was irrelevant to the scope of the rights and obligations assumed by a State. What mattered was the content of the underlying treaty and the content of the States agreement to apply that treaty provisionally. He questioned the assertions made in paragraphs 53 to 55 of the report, in particular that in the situations described in paragraphs 35 (b) and (c) the nature and scope of the obligation arose from the unilateral declaration of the State. That assertion was not in keeping with the example of the Arms Trade Treaty given by the Special Rapporteur in paragraph 56. When a State submitted its declaration accepting provisional application of the Arms Trade Treaty, it could not provisionally apply whichever articles of the treaty it wished. It could provisionally apply only articles 6 and 7 and it must apply both, not one or the other. The nature and scope of the obligation was not set by the unilateral declaration of the State alone, but by that declaration in conjunction with the underlying treaty and, in his view, with article 25 of the Vienna Convention, either as treaty law or as a rule of customary international law.

Moreover, he doubted that acceptance by a State of compulsory jurisdiction by the International Court of Justice was a unilateral act within the meaning of the Commission's Guiding Principles of 2006. The analogy between such acceptance and the provisional application of treaties was not a good one. In its judgment in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility*, the Court was giving its opinion on the ability of the United States to modify a declaration in the context of the specific language of the two United States declarations, read in conjunction with article 36 of the Court's Statute. The Court was not issuing a general statement about unilateral declaration or even generally about declarations accepting the Court's compulsory jurisdiction. By contrast, any declaration relating to provisional application must be read in the context of the specific language of the underlying treaty, which might or might not allow the declaring State to amend the scope and content of its declaration and must be read in the context of article 25, paragraph 2, of the Vienna Convention.

He did not accept the distinction drawn by the Special Rapporteur, in paragraphs 59 to 64 of the report, between the obligations resulting from provisional application that produced effects exclusively in the domestic sphere of the State that had opted for such a mechanism and obligations that produced effects at the international level. The fact that some treaties spoke largely to the conduct of a State within its domestic sphere, whereas others spoke to a State's conduct in the international sphere had no relevance to either the ratification of the treaty or its provisional application. Moreover, the Special Rapporteur was incorrect in saying that States provisionally applying articles 6 and 7 of the Arms Trade Treaty had undertaken to do so only in the domestic sphere; in his view, they had undertaken to apply the articles in the international sphere as well. A far more important issue was that there were presumably some aspects of a treaty that were not provisionally applied, because they presupposed the actual entry into force of the agreement. For example, if a treaty envisaged referral of disputes to a new treaty body, but that treaty body existed only after entry into force, presumably obligations within the treaty in respect of the treaty body were not provisionally operative.

Section III. D of the report addressed the termination of the provisional application of a treaty. He would have preferred to see a discussion of article 25, paragraph 2, of the Vienna Convention, which appeared to allow for termination upon notification with no

requirement of any waiting period. Moreover, while the notification should apparently indicate a lack of intention to become a party to the treaty, article 25 did not say that a State could not act arbitrarily. That being so, he doubted that paragraph 82 of the report was correct, since it relied heavily and, in his view, inappropriately on the Commission's 2006 Guiding Principles. The report should also have discussed whether it made any difference that the underlying treaty, once a State became a party, expressly forbade termination, expressly allowed for termination at will or after a specified period of time or was silent as to termination. His own view was that any provisions in the underlying treaty on termination were irrelevant to whether a State could terminate provisional application. According to article 25, paragraph 2, of the Vienna Convention, a State could terminate readily, no matter what the underlying treaty said, principally because it could not be regarded as bound, under a provisional scheme, to aspects of the treaty that related to adherence, withdrawal or termination of the treaty itself. Contrary to the Special Rapporteur's assertion in paragraph 81, the provisional application of a treaty was not subject to a requirement that the State should explain to the other States for which the treaty applied provisionally whether the decision to terminate had been taken for reasons other than its intention not to become a party. Article 25 of the Vienna Convention had been crafted in a way that allowed a State to escape rather easily from provisional application: all it need do was to give notice pursuant to paragraph 2 of the article. There were no other requirements and no ability to see what political or other factors motivated the notification.

He agreed with the Special Rapporteur's assertions in paragraphs 71, 80 and 83 to 85. He was also largely in agreement with section IV of the report, which concerned the legal consequences of a breach of a treaty that was provisionally applied. He questioned, however, the statement in paragraph 89 that there was a "universally recognized international legal principle *inadimplenti non est adimplendum*". The principle was, in fact, highly contested, at least in the sense of whether it had survived the emergence of modern treaty law under the Vienna Convention. One example of the contested nature of the principle could be seen in the case before the International Court of Justice concerning *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, where the parties had robustly litigated for and against the principle, and the Court had found it unnecessary to determine whether that doctrine formed part of contemporary international law. The Special Rapporteur had not indicated whether he intended to develop guidelines or model clauses. His own opinion was that a modest set of guidelines or conclusions would be helpful, starting with the language of article 25 of the Vienna Convention and then addressing several of the points set forth in the first and second reports, in addition to further issues, such as the provisional application of treaties by international organizations.

Mr. Nolte said that, before addressing specific points in the report, he should mention that he had submitted an expert opinion on some aspects on the topic of the provisional application of treaties in an arbitral proceeding under the Energy Charter Treaty. That had given rise to Interim Award on Jurisdiction and Admissibility of November 2009, in the *Yukos* case before the Permanent Court of Arbitration. The Special Rapporteur might wish to assess the award in his next report. He shared Mr. Forteau's view that the Special Rapporteur should undertake an assessment of the available practice and take a more inductive approach to the topic. The proposition, in paragraph 14 of the report, that the provisional application of a treaty undoubtedly created a legal relationship and therefore had legal effects was not very clear, but its author was the Commission itself, in its commentary to the 1966 draft articles on the law of treaties. There were, however, several differences between the 1966 commentary and the terminology used in the second report on the provisional application of treaties; and those differences made it clear why the Commission should make an effort to formulate a clearer statement.

First, the 1966 commentary said that the clauses providing for the provisional application of a treaty had legal effect, not that provisional application as such had a legal effect. However, in his view, it should be made clear that provisional application had a legal effect only if a pertinent agreement on such application had been established between the signatories. Such an agreement typically derived from a clause providing for provisional application, but it must always be ascertained whether a particular clause was binding on the parties and was meant to create a binding obligation to apply the treaty provisionally.

Secondly, the 1966 commentary and the formulation in the report was that the former stated that clauses providing for provisional application brought the treaty into force on a provisional basis. However, the Vienna Conference had not accepted the Commission's proposal regarding the notion that such clauses brought the treaty into force on a provisional basis. It was thus not clear what the Special Rapporteur meant when he said that provisional application had legal effects.

Thirdly, whereas the 1966 commentary spoke of the bringing into force of the treaty, the second report referred to the creation of a legal relationship. It was not clear whether such a relationship would be treaty-based or based on a unilateral promise or a general principle of law, such as good faith. He shared the doubts expressed by other members as to whether clauses that provided for provisional application should be construed as expressing unilateral promises that would be legally binding under the principles adopted by the Commission in 2006. The Commission should seek clarity in that regard.

Although, understandably, the Special Rapporteur did not wish to use more specific terminology, he should make it clear that the term "provisional application" did not have any inherent legal effects: it was the agreement between the parties to apply a treaty provisionally that created the legal relationship, and, while it might be that some additional legal effects from the agreement by the parties to provisionally apply a treaty might derive from general principles of law or other sources, such effects would indeed be derivative. Moreover, it was not just a matter of words; it went to the heart of the practice of agreeing on clauses providing for provisional application. States agreed on such clauses because they wished to apply the treaty before the internal procedures authorizing the State's consent to be bound had been completed. That wish was understandable; but it was equally understandable that a Government could not undertake a binding commitment that it was not authorized to undertake under its domestic law.

Under article 27 of the Vienna Convention, a State could not invoke provisions of its internal law for its failure to perform a treaty, but the article was not helpful in determining whether an agreement to provisionally apply created a legal obligation other than on the basis of the treaty itself, which had not yet entered into force. Article 25 of the Vienna Convention did not clearly state — and it was the task of the Commission to determine — whether article 27 constituted a rule of interpretation according to which, in case of doubt, the parties to a treaty containing a clause that provided for the provisional application of that treaty were thereby intending to create an obligation to provisionally apply the treaty until notice of termination under article 25, paragraph 2. There was much to be said in favour of such an interpretation of article 25, but its scope was necessarily restricted. The term "provisional application" did not have a fixed meaning or a particular legal character; everything depended on the specific agreement of the parties.

That was clearly so because, in the case of a clause on provisional application, the agreement of the parties concerned the power of a particular State body to bind the State, in a situation in which further domestic procedures were still necessary for the whole treaty to become binding. Governments could not enter into binding commitments, even on a provisional basis, if they indicated that there remained domestic hurdles to be removed or preconditions to be fulfilled in their legal system. That was why certain standard clauses were formulated in such a way as to limit any possible obligation under a clause providing

for provisional application, in order to ensure that any such obligation did not go beyond what was permitted under domestic legislation. If Governments could not rely on such an understanding, they would not be prepared to incur the risk of agreeing on the provisional application of a treaty except by way of long and complicated clauses, in which their limitations under domestic law would be spelled out. Such a consequence would not be helpful in practice. Governments should be able to agree that they would apply the treaty as far as they could under their domestic legislation without having to explain the details of such legislation at the international level. Even if it was not immediately clear to the signatory States to what extent a particular signatory would be able to provisionally apply the treaty, the parties might well accept such lack of clarity in return for the expectation that some parts of the treaty would be implemented in the preliminary phase.

For the reasons stated by Mr. Forteau, Mr. Murphy and others, the statement, in paragraph 82 of the report, that provisional application could not be revoked arbitrarily was questionable. True, the principle of *bona fides* applied, but a signatory State did not have to give a reason when it notified another signatory State that it was terminating the provisional application of a treaty. Such termination could be due to domestic political processes, for example, and should not be viewed as violating the principle of *bona fides*. In that connection, he recalled Mr. Forteau's assertion that the recent award in the *Matter of the Bay of Bengal maritime boundary arbitration between the People's Republic of Bangladesh and the Republic of India* before the Permanent Court of Arbitration had confirmed Mr. Forteau's doubts about the proposition adopted by the Commission in 2013 that a subsequent agreement under article 31, paragraph 3 (a), of the Vienna Convention need not necessarily be binding. Refuting that assertion, he drew attention to the fact that the Arbitral Tribunal had quoted the pertinent part of the Commission's report for 2013 and had simply said that it did not consider the particular exchange of letters in that case to be sufficiently authoritative to constitute a subsequent agreement between the parties. Thus it had not said that a subsequent agreement under article 31, paragraph 3 (a) must be binding: it had not contested the Commission's proposition. Further countering Mr. Forteau's position, he pointed out that an agreement on the provisional application of a treaty was characteristically a formal treaty action, which was not necessarily the case for subsequent agreements or subsequent practice under article 31, paragraph 3, of the Vienna Convention.

The second report had provided an excellent basis for the Commission's debate. The main aspects of the topic that needed to be explored in future reports were the establishment of proper interpretation of clauses providing for the provisional application of treaties, and in particular whether the signatories intended thereby to create a legally binding obligation; the practical elements of treaty making; the importance for Governments of respecting domestic laws and procedures; and the need to circumscribe the provisional application of treaties in such a way that the mechanism remained a useful tool for signatory States, without either deterring or creating false expectations.

Mr. Kamto said that the Special Rapporteur's approach was too cautious; his intention not to draw conclusions until he had received more information on State practice might hamper his work, because past experience had shown that most States ignored questions from the Commission, or reacted only once the Commission had gone so far as to draft some articles, guidelines or conclusions. There was a sufficient amount of case law to shed light on at least some aspects of the topic under consideration.

The legal validity of a provisional application clause had to be ascertained from the standpoint of international law and in light of domestic law, since the provisional application of a treaty could certainly not produce legal effects unless the conditions for the validity of a treaty opposable *vis-à-vis* the parties were met, especially those of article 24, paragraph 4, of the Vienna Convention. If that were the case, provisional application would begin in principle as soon the text of the treaty was adopted.

Unlike the Special Rapporteur, he considered that it would be useful to conduct a comparative study of the requirements of domestic law with regard to the provisional application of a treaty, since in most countries the validity thereof was a matter of constitutional law. That view was further borne out by the fact that the Permanent Court of Arbitration had found that the legal validity of article 45 of the Energy Charter Treaty was an issue not of public international law, but of the constitutional law of one of the signatories to the dispute which the Special Rapporteur mentioned in paragraph 29 of his report. The Special Rapporteur was wrong to rely on the statement of the Permanent Court of International Justice quoted in paragraph 18 of his report, because the laws that were "merely facts" were not devoid of effects under international law. Moreover article 27 of the 1969 Vienna Convention, stating that a party might not invoke the provisions of its internal law as justification for failure to perform a treaty, was without prejudice to article 46 thereof which attributed direct effects under international law to certain provisions of a State's internal law. In view of the findings of the International Court of Justice in paragraph 265 of its judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, the Commission should determine what constituted a rule of internal law of fundamental importance for the signing of a treaty and what constituted the proper manner of publicizing it.

In France and almost all of the French-speaking countries, while the power to conclude treaties lay with the executive branch of Government, some categories of treaties had to be ratified by Parliament. In those countries a treaty could be applied provisionally only if it pertained to a matter falling within the exclusive jurisdiction of the executive, or if the Parliament had given its prior authorization. The Special Rapporteur should look into those aspects in order to formulate draft conclusions, guidelines or articles on the conditions governing the validity of provisional application clauses.

Although article 25 of the Vienna Convention specified that provisional application stemmed from an agreement between the parties or the negotiating States, there was no formal prohibition on a State making a unilateral declaration regarding provisional application outside that rule. The issue which would then arise would be the effects which that declaration would produce, especially when the treaty was silent on the matter of provisional application. With reference to paragraph 60 of the report, it would be interesting to know whether, by means of a unilateral declaration of commitment to apply a treaty provisionally, a State could create obligations for other States before the entry into force of that treaty, when those States had not signed the provisional application clause.

A distinction should be drawn between the provisional application of bilateral and multilateral treaties. As far as the latter was concerned, provisional application gave rise to a variety of situations with regard to States which had taken part in all or some of the negotiations, States which had participated in negotiations and those which had not, States which had decided to apply the treaty provisionally and States which had acceded to a treaty already in force. In accordance with article 19 of the Vienna Convention, a reservation could be formulated when a treaty was signed, in other words during its provisional application. That was another aspect which the Special Rapporteur should explore.

Mr. Kittichaisaree said that, since the provisional application of a treaty would depend, *inter alia*, on the provisions of domestic law and the particular circumstances of each State, the identification of State practice, as reflected in domestic laws, would be instructive.

It was unclear how the Special Rapporteur had arrived at the conclusion, in paragraph 14 of his report, that provisional application had legal effects beyond the obligation not to defeat the object and purpose of the treaty in question, as set out in article

18 of the Vienna Convention. The Special Rapporteur alluded to reservations in paragraph 25; however, it would be useful to determine whether the rules on reservations contained in articles 19 to 23 of the Vienna Convention covered provisionally applied treaties as well. The Special Rapporteur might find it helpful to look at the practice of States that considered the provisional application of treaties to be merely a gentleman's agreement without legal effects. As to paragraphs 48 and 49, he should have explained why States attending the Vienna Conference on the Law of Treaties had opted for the term "provisional application" rather than "provisionally enter into force". In paragraphs 60 to 68 of the report the Special Rapporteur drew a distinction between the obligations resulting from provisional application that produced effects exclusively in the domestic sphere and those that produced effects at the international level. Nevertheless, it would be interesting to know why he had not considered the possibility of drawing a distinction between the rights created at the domestic level by the provisional application of treaties and those created at the international level earlier in the report. It was also unclear why the Special Rapporteur had presumed that article 70 of the Vienna Convention applied *mutatis mutandis* to the regime resulting from the termination of provisional application.

He looked forward to receiving answers on those matters in the Special Rapporteur's next report.

The meeting rose at 4.20 p.m. to enable the Drafting Committee on Identification of customary international law to meet.