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Provisional summary record of the 3277th meeting

Held at the Palais des Nations, Geneva, on Thursday, 23 July 2015, at 3 p.m.

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Present:

Chairman:	Mr. Singh
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. Kolodkin
	Mr. Laraba
	Mr. McRae
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Immunity of State officials from foreign criminal jurisdiction (agenda item 2) (*continued*) (A/CN.4/686)

The Chairman invited the members of the Commission to continue with the consideration of the fourth report by the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction.

Ms. Jacobsson said that the Special Rapporteur's thorough analysis of the practice of domestic courts was valuable: it revealed the inconsistencies in that practice. She was pleased to see the in-depth analysis of the articles on the responsibility of States for internationally wrongful acts and of "single act, dual responsibility", but she agreed with Mr. Nolte that the Commission should not be delving into the substance of sovereignty. She welcomed the intended focus of future work on the limits and exceptions to immunity: now that the Commission had concluded the early stages of its work, it needed to discuss the most sensitive issues. There was an important link between exceptions to immunity and procedural rules that also needed to be addressed.

For the definition of an act performed in an official capacity, the Special Rapporteur appeared to start from the assumption that only acts over which criminal jurisdiction could be exercised by a foreign court were relevant. She clearly described the chief characteristics of criminal acts and the direct link between such acts and the person who committed them. However, the phrase "by its nature constitutes a crime", in draft article 2 (f), was potentially ambiguous.

Draft article 6, paragraph 3, which emphasized the fact that immunity *ratione materiae* applied to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, appeared superfluous, since the same point was made in paragraph (7) of the commentary to draft article 4.

In conclusion, she said that was in favour of sending the two draft articles to the Drafting Committee.

Mr. Vázquez-Bermúdez said that in her fourth report, the Special Rapporteur took a major step forward in the treatment of the topic by advancing an analysis of the material and temporal elements of immunity *ratione materiae*. With regard to the concept of an "act performed in an official capacity", which was at the heart of the analysis, the Special Rapporteur pointed out in paragraph 32 of her report that contemporary international law did not provide a definition of such an act. She then passed in painstaking review the criteria for identifying the act that might be found in national judicial practice. However, the identification of common elements in such practice and in domestic legislation would have been useful.

Based on her analysis, the Special Rapporteur proposed a definition of an "act performed in an official capacity" in which he endorsed the first part but, like others, had problems with the second. The problems revolved around the description of the criminal nature of the act involved and stemmed from a slight mistranslation from the Spanish. The wording might be improved along the lines sketched out by Mr. Caflisch.

A consequence of the criminal nature of the act was what the Special Rapporteur described as "single act, dual responsibility". The impact of exceptions to immunity, to be covered in her next report, would be of crucial importance for the content and scope of the act. The Commission would have to decide whether acts of State officials that constituted crimes could be performed in an official capacity. Acts *ultra vires*, acts *jure gestionis* and international crimes might also constitute exceptions to the immunity of State officials, although the latter issue would require detailed study. As

the Special Rapporteur had pointed out, in their joint separate opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judges Higgins, Kooijmans and Buergenthal had questioned whether serious international crimes could be regarded as official acts, because they were neither normal State functions nor functions that a State alone could perform. Committing torture, for example, was not a normal function of the State: it was an international crime committed by a State official. That did not mean, however, that the act could not be attributed to the State for the purposes of responsibility of the State for internationally wrongful acts. He agreed with the Special Rapporteur that the assertion that an international crime could not be considered as having been performed in an official capacity could perversely, and doubtless unintentionally, give rise to an understanding of international crimes as acts that were not attributable to the State and could only be attributed to the perpetrator.

With regard to the temporal element of immunity *ratione materiae*, he agreed with the Special Rapporteur that it was not controversial, and that immunity *ratione materiae* could be applied at any time after the commission of an act, whether the official remained in office or had left office. With regard to draft article 6, describing the temporal scope of immunity *ratione materiae*, he considered paragraph 3, stipulating that such immunity applied to former members of the troika, to be an important provision that should not be consigned to the commentary. Yet it might be better placed in draft article 5, which concerned the persons who enjoyed immunity *ratione personae*.

He fully supported the future workplan, covering limits and exceptions to immunity and procedural issues, but would suggest that some safeguards would have to be included to prevent politically motivated criminal trials.

Lastly, recalling Mr. Hmoud's argument that the justification for immunity *ratione materiae* was similar to the justification for the immunity of consular officials, which was acknowledged to be for the benefit of the State and with a view to the effective exercise of functions, he pointed out that in the preamble to the 1963 Vienna Convention on Consular Relations, reference was nevertheless made to the principle of the sovereign equality of States.

Mr. Hmoud said that his point had been that any test concerning the moment when immunity *ratione materiae* should come into play should be based on the need to ensure the effective exercise of the functions of the State.

Mr. El-Murtadi said that the report was devoted to an analysis of the normative elements of immunity *ratione materiae*, both temporal and substantive, and it proposed appropriate conclusions and draft articles. It focused on the characteristics of an act performed in an official capacity as a fundamental issue in dealing with immunity *ratione materiae* and as a well established term covering specific acts. The Special Rapporteur had deviated neither from the previous work done by the Commission on draft article 4, paragraph 2, nor from the ruling of the International Court of Justice in the *Arrest Warrant* case and the decisions of the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia.

Many approaches could have been taken to such a complex topic, but the Special Rapporteur had sought to keep within the scope, namely to focus on the immunity of State officials and on immunity from foreign jurisdiction. The importance of considering the most serious crimes, and therefore of complementarity and consistency with the Rome Statute of the International Criminal Court, came into play. In that very specific context, there was no need to delve into the distinctions between State immunity and immunity *ratione personae* or between criminal jurisdiction and civil jurisdiction, or to devise exhaustive lists of acts performed in an official capacity,

with all the difficulties and differences in national and international law that that would bring up.

The proposed future programme of work emphasized the importance of addressing the limits and exceptions to immunity, a very complex and interesting subject. He looked forward to discussing it and was in favour of referring the draft articles to the Drafting Committee.

Mr. Gómez-Robledo thanked the Special Rapporteur for her fourth report, which constituted another step in the right direction in terms of achieving the objective pursued by the Commission in considering the topic. She had decided to deal separately with immunity *ratione materiae* and immunity *ratione personae*, an approach that first required establishing the criteria for identifying an act performed in an official capacity. While he understood her reasons for favouring such an approach, the topic could also be addressed from a methodological perspective that took as its starting point the rules of attribution relating to State responsibility. That approach entailed first determining whether the alleged act met the required threshold of being a serious crime, then considering whether to recognize jurisdictional immunity or, alternatively, exceptions thereto. Among other things, such an approach would resolve the issue of the differences between the acts of the State and its agents and the acts of private individuals performed in an official capacity.

In addition to the practice of the various courts referred to in paragraph 35 of the report, the Special Rapporteur might wish to consider the jurisprudence of the Inter-American Court of Human Rights, in particular in relation to rules of attribution. Doing so would also broaden the regional focus of the project. In the same vein, it might be helpful to examine the arbitration case concerning *Francisco Mallén (United Mexican States) v. United States of America*, which dealt specifically with the difference between an act performed in a private capacity and one performed in an official capacity.

When the Special Rapporteur analysed, in her fifth report, the question of limits and exceptions to the immunity of State officials from foreign criminal jurisdiction, the primary focus should not be on elucidating the nature — whether criminal, civil or administrative — of any offences committed by an official acting in an official capacity, but on ascertaining whether the seriousness of such offences might, by virtue of the law of the forum State or international law, give rise to exceptions to the general rule of jurisdictional immunity.

He fully endorsed the Special Rapporteur's position on immunity in respect of international crimes, as set out in paragraph 124 of the report. It was a matter of common sense that it was never a function of the State to commit crimes of any kind, much less serious crimes under international law. Accordingly, if it was accepted that there were limits to jurisdictional immunity, in particular in respect of the most serious international crimes that constituted *jus cogens* norms, then immunity was no more than a procedural remedy for the protection of the functions of a State that dispatched its officials to perform acts in an official capacity. In other words, as had been pointed out by several speakers, immunity did not mean impunity.

Provisional application of treaties (agenda item 5) (*continued*)

Mr. Kittichaisaree thanked the Special Rapporteur for his third report on the provisional application of treaties, which provided valuable insights into the topic and a useful basis for discussion.

Referring to paragraph 10 of the report, he said that, while he agreed with the Special Rapporteur that the final outcome of the Commission's work on the topic should not be affected by the domestic law of States, it was important to bear in mind

that the provisional application of a treaty would depend in part on the provisions of domestic law and the particular circumstances pertaining in each State. He would therefore have welcomed in section II of the report a more detailed analysis of the views expressed by States.

Regarding the categorization of State practice set out in paragraph 25, he enquired whether all States in category (f), namely those that allowed provisional application subject to certain conditions, could, like the Netherlands, also be classified under category (a) as States whose domestic laws or constitutions contained specific provisions regulating provisional application. If not, he would like to know how provisional application operated in those States. It would also be helpful if the Special Rapporteur could clarify the relevance of the different categories, in particular in terms of their relationship to the draft guidelines proposed in section V.

He would welcome further clarification of the Special Rapporteur's conclusion in paragraph 5 that a State could undertake to apply a treaty provisionally through a unilateral declaration, even in the absence of the agreement of other potential States parties and of any specific relevant provisions in the treaty. The example provided in paragraph 120, namely the unilateral declaration by Syria to apply provisionally the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, could not fully explain the notion of the use of unilateral declarations for the provisional application of treaties under article 25 of the 1969 Vienna Convention on the Law of Treaties.

As to the Special Rapporteur's assertions in paragraphs 35 and 36 of the report that provisional application did not amount to consent to be bound by a treaty and that, prior to the expression of consent, the treaty was only a text that served as evidence of what States had negotiated, it could equally be argued that, through the provisional application of a treaty, the instrument became more than a negotiated text and that the State was already giving its consent to be bound by the treaty, subject to its relevant internal procedures. In other words, provisional application could be interpreted as an exceptional modality used to express consent to be bound by a treaty.

He agreed with those members who were of the view that the assertion in paragraph 122 that article 25 the rules of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations reflected norms of customary law had not been substantiated sufficiently. There was a need for more detailed analysis. As Mr. McRae had noted, the provisional application of the 1947 General Agreement on Tariffs and Trade was not an example of article 25 of the 1969 Vienna Convention on the Law of Treaties.

Turning to the draft guidelines, he said that he agreed with Mr. Forteau that, for the sake of consistency and clarity, it would be advisable to take a close look at the language used in draft conclusions 6 and 7 on the topic "Subsequent agreements and practice in relation to the interpretation of treaties" and to consider using conclusions in the present topic instead of guidelines. The rationale behind and choices made in the draft guidelines were not always clear. A future commentary could resolve some of those problems, as could a more thorough introduction in future reports to any draft guidelines or conclusions.

Regarding draft guideline 1, he wondered whether, in the light of the extensive debate on the matter, the Special Rapporteur intended to include a reference to unilateral declarations of States, which appeared not to be covered at present. If so, where did he envisage incorporating such a reference? He also wondered why draft guideline 1 gave a prominent place to the internal law of States, given the Special Rapporteur's assertion in paragraph 10 of the report that the final outcome of the Commission's work should not be affected by domestic legislation.

While he welcomed the inclusion of draft guideline 2 and its reference to the provisional application of parts of a treaty, he nonetheless found its wording confusing when read together with draft guideline 1. The phrase "may be derived from the terms of the treaty", which was used in draft guideline 2, seemed to be broader in scope than "when the treaty itself so provides", which was used in draft guideline 1 and which reproduced verbatim the language of article 25, paragraph 1 (a), of the 1969 Vienna Convention. To prevent confusion, the Special Rapporteur should stay close to the wording of article 25, including paragraph 1 (b), of the 1969 Vienna Convention, which was "the negotiating States have in some other manner so agreed".

As had already been noted by other speakers, draft guideline 4 failed to indicate what kind of legal effects the provisional application of a treaty would have. Such an important question should not be left for the commentary; the guideline itself needed to be substantiated by the practice of States and/or international organizations, as well as by case law.

As had been further noted by a number of other speakers, the third report was unclear as to the legal effects of the termination of provisional application. The Special Rapporteur should clarify whether there were differences between the legal obligations arising from the provisional application of a treaty and the express consent to be bound by the treaty and, if so, what those differences were. It would also be helpful if he could address the question of whether the termination process was identical for the two regimes. In some circumstances, the legal obligations arising from provisional application of a treaty might continue even after the entry into force of the treaty concerned. Accordingly, the assertion in draft guideline 5 that such obligations continued to apply until the treaty entered into force should be elaborated upon in the commentary.

Regarding draft guideline 6, since not all breaches of an international obligation necessarily engaged the international responsibility of a State or international organization, the wording of the text should be amended. Noting that the law of treaties and the law of State responsibility were separate regimes that differed in scope, he said that the draft guideline should deal with them accordingly.

As to future work on the topic, he encouraged the Special Rapporteur to study the practice of relevant regional organizations. In addition, it would be useful to clarify the way in which reservations pursuant to articles 19 to 23 of the 1969 Vienna Convention covered provisional application. A study on the legal effects of the termination of provisionally applied treaties that granted rights to individuals would also be a valuable addition. He would caution, however, against developing model clauses on the provisional application of treaties, in view of the potential difficulties posed by disparities between national legal systems.

He suggested that, before being sent to the Drafting Committee, the draft guidelines should be amended, taking into account the comments made in plenary.

Mr. Nolte said that, if the Commission viewed the provisional application of a treaty as legally binding, it should express its position very clearly. After all, the words "provisional application" could be interpreted as meaning that a treaty should be applied only *de facto* and provisionally, in other words before it produced any legal effects. He therefore suggested that draft guideline 4 might be recast to read: "The agreement to provisionally apply a treaty has the effect that the treaty is legally binding." Such a formulation would serve the purpose of encouraging States not to circumvent internal procedures when agreeing to provisional application.

States would be very cautious about applying a treaty if there was any risk that the assumption of a legal obligation would be contrary to their own domestic procedures or other rules. Such procedures, and domestic law more generally, formed

the very context for agreements on provisional application, but that did not mean that they had an effect on the international obligations arising from such agreements. It was important, however, that the interpretation of international agreements took into account the context from which they originated.

That was particularly true when agreements on provisional application of a treaty contained an explicit reference to domestic law, as was the case with the Energy Charter Treaty, article 45 of which stipulated that the Treaty was to be applied provisionally only to the extent that it was not inconsistent with domestic laws or regulations. In other words, the obligation created by provisional application went no further than what was permissible under the domestic law of the parties to the Treaty. That was perfectly compatible with article 27 of the Vienna Convention on the Law of Treaties.

He failed to understand why the tribunal in the *Yukos* case and the Special Rapporteur, in paragraph 66 of his report, considered that a treaty could not allow domestic law to determine the content of an international legal obligation unless the language of the treaty was clear and admitted no other interpretation. Apart from the fact that the language of article 45, paragraph 1, of the Energy Charter Treaty could hardly be clearer, he was not aware of any rule according to which a particular interpretation was possible only if it was unambiguous. He therefore suggested deleting the final clause of draft guideline 1 and adding a second sentence, to read: "The agreement to provisionally apply a treaty may limit the extent of the provisional application, in particular by making reference to internal law in whole or in part." He agreed with previous speakers that the Special Rapporteur should not analyse the domestic law of States regarding the provisional application of treaties.

Draft guidelines 2 and 3 should be redrafted to reflect the fact that the "terms of the treaty" were only one of several means of interpreting it. The guidelines should mention either different forms of agreement or different means of interpretation; they should not conflate the two. More generally, he would prefer the outcome of the work to be in the form of conclusions rather than guidelines, as the task at hand was limited to deriving conclusions, for the purpose of interpretation, from diverse sources and materials.

Mr. Caflisch said that it was worth asking whether the Commission could and should go further than article 25 of the 1969 Vienna Convention. While the article appeared to cover cases in which negotiating States agreed explicitly to the provisional application of a treaty in a given State, it was not clear how one should interpret a situation in which such agreement was not explicit. Could it be assumed that there was a tacit agreement, which would remain within the scope of article 25, or would the agreement amount to a unilateral commitment that, if violated, would not result in the given State failing to comply with article 25? Since the Commission had set out with the aim of clarifying the scope of article 25 and facilitating its implementation, it would be preferable to stick to that objective.

Section III of the Special Rapporteur's report might usefully have dealt with the relationship of provisional application to article 60 of the 1969 Vienna Convention and to texts on the termination or invalidity of treaties. Article 46 of the Convention was of particular interest in cases where a State agreed to provisional application without concern for its own internal law, including its constitution. In that connection, it would be helpful to have a general idea of the interplay between provisional application agreements and the internal law of States, particularly constitutions, and to consider the applicability of article 46 to problems related to the validity of such agreements.

With the exception of draft guideline 4, which should be either deleted or developed in line with the suggestion by Mr. Šturma, he agreed with the referral of the guidelines to the Drafting Committee. Lastly, he would be grateful to receive more information on the proposed content of the Special Rapporteur's fourth report.

Mr. Petrič said that the Commission's task was to explain what provisional application was, to establish a framework for it in international law and to clarify its legal effects and its relationship to the relevant provisions of the 1969 and 1986 Vienna Conventions on the law of treaties. The task was all the more important as provisional application agreements were increasingly being used to allow treaties to produce effects as quickly as possible.

At the same time, there was a balance to be struck between the practical need for provisional application and democratic control over treaty-making, which was the reason for the gap between signature and ratification in States governed by the rule of law. Provisional application was an exception to the rule whereby treaties that had been negotiated and signed entered into force only once all the procedures required by the constitution of a State had been completed.

Although States had the power to accept provisional application, to regulate it and even to prohibit it, he agreed with the Special Rapporteur that once a treaty was being provisionally applied, internal law could not be invoked as justification for failure to comply with the obligations deriving from provisional application. Provided that the internal law of a State did not prohibit them, provisional application agreements clearly came under international law and should be honoured in accordance with the *pacta sunt servanda* principle. Even if the internal law of a State did prohibit such agreements, a State that had agreed to provisional application could not subsequently dispute its validity by invoking internal law, regardless of whether the persons who had concluded the agreement on behalf of the State had done so *ultra vires*. There was therefore no urgent need to survey domestic law on the subject of provisional application, and there was no need to mention internal law in draft guideline 1, which would confuse rather than clarify matters. The Special Rapporteur should concentrate instead on researching the practice of States and international organizations.

He expressed support for the Special Rapporteur's intention to analyse the relationship between provisional application and articles 11, 18, 24, 26 and 27 of the 1969 Vienna Convention, and for the future workplan set out in paragraph 137 of his third report. Some of the issues chosen for analysis, such as the problem of reservations and interpretative declarations in the context of provisional application, or provisional application in the context of the succession of States with respect to treaties, particularly multilateral and closed treaties, might prove very challenging.

With regard to the termination of provisional application by notification of the intention not to become party to a treaty, he pointed out that the signatories to a treaty that were applying it provisionally would be bound by the principle of *bona fides* not to undermine the future treaty's entry into force. If one of them gave notice of its intention not to become a party to that treaty, could it still be said to be acting in accordance with that principle? A general statement that the provisional application of a treaty had legal effects did not suffice. The Commission should go further, clarifying what kind of legal effects might occur in different situations.

The significant differences between bilateral and multilateral treaties among States and treaties concluded by international organizations among themselves or with States might make it difficult to cover both situations in a single set of guidelines, as illustrated by the dubious inclusion of a reference to resolutions of international conferences in draft guideline 2. The Commission should initially concentrate on

provisional application under the 1969 Vienna Convention before considering it in the context of treaties concluded with or by international organizations. Once the extent of the differences between the two situations became clear, it could be decided how best to frame guidelines on them. The question also arose whether an agreement by States signatories to a treaty to establish an organ or take other measures to make that treaty function provisionally, as with the creation of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, could be considered an instance of provisional application of the treaty. In that particular case, the provisional application of the Comprehensive Nuclear-Test-Ban Treaty seemed to go over and above its purely preparatory function.

With regard to the draft guidelines, he expressed support for most of the suggestions made by Mr. Murphy. Draft guideline 4, as it stood, was devoid of meaningful content and of little use. While he would not oppose the transmission of all six draft guidelines to the Drafting Committee, he would prefer to see the comments made by the Commission at its present session reflected in a revised set of draft guidelines to be discussed at the last session. Lastly, he expressed appreciation for the excellent work done by the Special Rapporteur to date.

Sir Michael Wood said that the topic of provisional application of treaties was an area where the Commission could play a useful role in explaining and clarifying the law; that lent the topic considerable practical significance. He did not view the Commission's role as one of warning States to comply with their constitutions. He also wished to emphasize, in response to the remarks of Mr. Petrič, that ratification of treaties did not necessarily need to be subject to parliamentary control.

The draft guidelines set out in the Special Rapporteur's third report were well supported by research, materials and analysis, and he broadly agreed with them; some, however, could be expressed more clearly, particularly draft guideline 4. The Commission should take the position that, subject to specific provisions in a treaty, the rights and obligations of a State that had agreed to apply that treaty or part thereof provisionally were, for as long as the treaty was being provisionally applied, the same as if the treaty were in force. He expressed some disagreement with Mr. Nolte's views in that regard, including as to whether the issue was solely one of interpretation.

By agreeing to provisional application, a State undertook obligations that were binding under international law; however, it was not necessarily true that the possible relationship between provisional application and other rules of the law of treaties needed to be pursued further. Other such rules might well be relevant, but the Commission should focus on specifying the differences between a treaty when it was being applied provisionally and when it was in force for a particular State.

Draft guideline 1 should be aligned with common article 25 of the two Vienna Conventions on the law of treaties, and the phrase beginning "provided that …" could perhaps be deleted. The topic should be concerned only with provisional application as a matter of international law, not with any effects that provisional application might have in domestic law. Neither internal law nor the rules of international organizations should be mentioned in draft guideline 1. Draft guideline 2 was unnecessarily complicated and should be omitted or simplified. It mattered little what form an agreement on provisional application took or how it was derived. Draft guideline 3 could also be simplified, and replacing the words "having regard to" with "in accordance with" would be an improvement. He hoped that, in draft guideline 4, the Drafting Committee would include the idea he had just laid out about the rights and obligations of States. With regard to draft guideline 5, he recalled the opinion that he had expressed in the past that there was no basis for suggesting that provisional application could not be revoked arbitrarily. The essence of provisional application was that it could be terminated relatively easily in many cases. He agreed with the

substantive content of draft guideline 6; however, it would follow naturally from draft guideline 4, if it was clearly drafted, that breaches of a treaty being applied provisionally engaged the responsibility of the State violating the treaty.

In its future work, the Commission should consider preparing model clauses that provided for the provisional application of treaties, which would be of practical importance to States and international organizations and would help the Commission achieve its aim of giving guidance. It might also avoid the practical problems and shortcomings identified by the Special Rapporteur from his study of the practice of States and international organizations. He concluded by expressing his willingness for the Commission to transmit the six draft guidelines to the Drafting Committee.

The Most-Favoured-Nation clause (*continued*) (A/CN.4/L.852)

The Chairman invited the Commission to resume its consideration of the topic "The Most-Favoured-Nation clause" and drew attention to the final report of the Study Group, contained in document A/CN.4/L.852.

Mr. McRae (Chairman of the Study Group) said that the final report now before the Commission incorporated written and oral comments received from Commission members and would appear as an annex to the Commission's annual report. The Study Group hoped that the Commission would adopt as its own the summary of conclusions contained in part V of the final report. The conclusions noted that Most-Favoured-Nation (MFN) clauses remained unchanged in character from the time the 1978 draft articles had been concluded. The core provisions of those draft articles continued to be the basis for the interpretation and application of MFN clauses, though they did not provide responses to all the interpretative issues that could arise. The conclusions underlined the importance and relevance of the 1969 Vienna Convention on the Law of Treaties as a point of departure in the interpretation of investment treaties.

The central interpretative issue in respect of MFN clauses related to the application of the *ejusdem generis* principle: the scope and nature of the benefit that could be obtained under a Most-Favoured-Nation provision depended on the interpretation of the provision itself. The application of MFN clauses to dispute settlement provisions in investment treaty arbitration had brought a new dimension to thinking about such clauses, as well as consequences not foreseen by parties in negotiating their investment agreements. Whether MFN clauses were to encompass dispute settlement provisions was ultimately up to the States that negotiated them. Explicit language could ensure that such clauses did or did not apply to dispute settlement provisions; otherwise, the matter was left to dispute settlement tribunals, interpreting Most-Favoured-Nation clauses on a case-by-case basis. The interpretative techniques reviewed in the Study Group's final report were designed to assist in that process. The Study Group recommended that the Commission should commend its final report to the attention of the General Assembly and encourage its widest possible dissemination. Lastly, he thanked all members of the Study Group for their contributions.

The Chairman said that he took it that the Commission wished to welcome with appreciation the final report on the work of the Study Group; to adopt as its own the summary conclusions contained in part V thereof; to commend the final report to the attention of the General Assembly; and to encourage its widest possible distribution.

It was so decided.

The Chairman said that he also took it that the Commission agreed to adopt the following resolution in tribute to the Study Group and its Chairman:

The International Law Commission,

Having welcomed with appreciation the report of the Study Group on the Most-Favoured-Nation clause,

Expresses to the Study Group and its Chairman, Mr. Donald M. McRae, its deep appreciation and warm congratulations for the outstanding contribution made in the preparation of the report on the Most-Favoured-Nation clause and for the results achieved by the Study Group;

Recalls, with gratitude, the contribution of Mr. A. Rohan Perera, who served as Co-Chairman of the Study Group from 2009 to 2011, as well as of Mr. Mathias Forteau, who served as Chairman in the absence of Mr. McRae during the 2013 and 2014 sessions.

The resolution was adopted by acclamation.

The Chairman announced that the Commission had concluded its consideration of the topic "The Most-Favoured-Nation clause".

The meeting rose at 5.35 p.m.