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Summary record of the 3326th meeting

Topic:
<multiple topics>

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be possible to apply it provisionally between a State that had only just begun the process of acceding to the treaty and individual parties. In that case, the consent of all parties to the treaty to its provisional application with respect to the acceding State would be needed. If the treaty included *erga omnes* obligations, would the consent of all parties be required for it to apply provisionally? Similarly, would the consent of all parties to a treaty establishing an international organization be required for it to apply provisionally with respect to a State acceding to it?

58. With regard to the termination of provisional application, the 1978 Vienna Convention was interesting for a number of reasons. In its article 29, alongside "notice of its intention not to become a party", it contained the term "reasonable notice of termination". The 1969 Vienna Convention did not provide for the latter. It might be worth looking more closely at the provisions of the 1978 Vienna Convention on provisional application. The draft guidelines already agreed by the Drafting Committee were fairly general in nature, and the Commission's work on the topic might benefit from a more detailed approach.

59. Some treaties, including the Wheat Trade Convention, 1986, had provisions on provisional application that determined the status of a State applying the treaty provisionally as a party or provisional party to the treaty, but others were silent on the matter. Could there be said to be a general rule that a State provisionally applying a treaty that had come into force was a party to that treaty, or should each case be looked at individually? Given its significance in practice, the issue was one that the Special Rapporteur might wish to examine.

The meeting rose at 11.45 a.m.

3326th MEETING

Friday, 22 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, 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. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Organization of the work of the session (*concluded*)*

[Agenda item 1]

1. The CHAIRPERSON said that the Enlarged Bureau had met to consider the programme of work for the remainder of the session. Given that, to date, only the English and Spanish versions of the fifth report of the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/701) had been issued, several members had expressed concern that the Commission was scheduled to consider the report before it had been translated into all the official languages. Following extensive consultations, it had been agreed that the Special Rapporteur would introduce her fifth report on 25 July 2016, as indicated in the programme of work, and that any member wishing to take the floor on the topic could do so on the understanding that the discussion on the topic would not be concluded nor would the Special Rapporteur summarize the discussion on the topic at the current session. In short, the discussion of the topic would begin during the current session and would continue during the sixty-ninth session in 2017. The CHAIRPERSON said he took it that the Commission wished to adopt the programme of work on that understanding.

It was so decided.

Provisional application of treaties (*continued*) (A/CN.4/689, Part II, sect. G, A/CN.4/699 and Add.1, A/CN.4/L.877)

[Agenda item 5]

Fourth report of the Special Rapporteur (*continued*)

2. The CHAIRPERSON invited the members of the Commission to resume their consideration of the fourth report of the Special Rapporteur on the provisional application of treaties (A/CN.4/699 and Add.1).

3. Mr. MURPHY said that he wished to thank the Special Rapporteur for his fourth report on the topic and for his detailed introduction of it at the Commission's 3324th meeting. In chapter II of his report, the Special Rapporteur had examined the relationship of provisional application to the other provisions of the 1969 Vienna Convention. Although that analysis was generally interesting, it was perhaps a bit too focused on the questions that had been raised by a few delegations in the Sixth Committee. Although it was certainly appropriate and important to pay attention to the views of States, the Commission worked best when it approached its topics holistically, engaging in research and analysis pertinent to the project as a whole, rather than trying to address points of interest raised by only a few States. Thus, while the issues addressed in chapter II of the fourth report might have provided answers to those States, for the most part, the analysis it contained did not appear to lead anywhere, and it was not at all clear that the questions asked by those States were actually the ones addressed in the report. For example, paragraph 72 indicated that "a number of delegations" had referred to the importance of addressing the relationship between article 60 of the 1969 Vienna Convention and provisional application. Yet the five States that had purportedly raised that point (Canada, Greece, Ireland, Kazakhstan and Romania) had not actually asked the Commission for an analysis of article 60. Rather, they had been interested in knowing how an agreement to apply a treaty provisionally was terminated or suspended, without ever having expressly claimed that article 60 was relevant when answering that question. On the contrary,

* Resumed from the 3321st meeting.

their comments seemed implicitly to assume that the other parts of the 1969 Vienna Convention, including article 60, were not directly applicable to the provisional application of treaties and that there was or could be a unique regime associated with article 25 of the Convention that governed the termination or suspension of an agreement to apply a treaty provisionally.

4. With regard to chapter II of the fourth report, the substantive analysis it contained was too cursory in its consideration of the rules set forth in the 1969 Vienna Convention, and the Commission should refrain from including such partial analysis in its draft guidelines or commentaries. For example, with regard to the issue of reservations, paragraph 23 of the report described only a portion of the applicable rules, namely article 19 of the Convention, but did not address other important rules that appeared in articles 20 and 23. Moreover, it would have been useful to consider whether article 25 was partly or wholly a self-contained regime within the Convention, as some States seemed to assume. If that regime was wholly self-contained, then other articles of the Convention were not directly relevant to article 25, although they could provide some guidance by analogy. Arguably, the rules on termination or suspension set forth in article 60 had no relevance for article 25 because paragraph 2 of the latter itself set forth the rule on termination. The drafting history of article 25 provided some guidance in that respect. In its 1966 draft articles on the law of treaties,[439] the Commission had opted to omit from what had then been article 22 a provision regarding the termination of the application of a treaty which had been brought into force provisionally, deciding instead to leave the point to be determined by the agreement of the parties and the operation of the rules regarding the termination of treaties.[440] However, the United Nations Conference on the Law of Treaties had chosen to insert a termination provision into that article, which was subsequently contained in article 25, paragraph 2. That suggested that the Commission's approach, which relied on the rules regarding the termination of treaties, was not acceptable to States and that another approach specifically addressing termination in article 25 was preferred. Other proposals for termination to be included in article 25, such as the one to limit the time period of provisional application, had failed. It should be remembered that, although the Commission had wished to refer to the provisional "entry into force" of a treaty, the United Nations Conference on the Law of Treaties had preferred provisional "application", reinforcing the idea that the agreement being described in article 25 was a unique creature. Ultimately, there did not seem to have been any belief expressed at the Conference that the provisions contained in other parts of the Convention relating to termination also governed the termination of an agreement to apply a treaty provisionally. As a practical matter, a State wishing to terminate a bilateral agreement to apply a treaty provisionally did not need to refer to the complicated rules of part V, section 3, of the 1969 Vienna Convention; rather, the State simply notified the other State of its intention not to become a party to the treaty. A more complicated question was whether a State could suspend an agreement to apply a treaty provisionally or whether, if that agreement was a multilateral one, a State could suspend it with respect to one or more of the other States that were parties to it. In his view, it could be argued that article 25 established the exclusive means by which a State could, of its own initiative, end its obligation to apply a treaty provisionally.

5. The discussion of invalidity that began in paragraph 40 of the fourth report was thought-provoking; its particular focus on the relevance of internal law was sensible, and the treatment of the *Yukos* case and the corresponding decision of the Netherlands national court was very timely. Mr. Kolodkin's analysis in that regard had been pertinent and thoughtful; however, he agreed with the Special Rapporteur and other Commission members that it would be best not to attempt to reach any particular conclusions with respect to that case while it was still under way.

6. It was vital to separate out three different scenarios concerning the relationship between internal law and an agreement to apply a treaty provisionally. The first scenario described a situation in which the agreement to provisionally apply a treaty itself made reference to internal law; in such situations, internal law was relevant for understanding the scope of the agreement. That was the issue that had arisen in the *Yukos* case in relation to article 45 of the Energy Charter Treaty, which was cited in paragraph 51 of the Special Rapporteur's fourth report. That scenario had no connection to the issue of whether a State could plead its internal law so as to escape from an international obligation; rather, it concerned the nature of the international obligation itself. The second scenario was one in which an agreement to apply a treaty provisionally was silent with regard to internal law but in which a State sought to argue that its consent to the agreement was invalid, owing to a provision of its internal law regarding competence to conclude international agreements. That scenario was analogous to article 46 of the 1969 Vienna Convention. Of course, the ability of a State to escape from an agreement to apply a treaty provisionally by merely notifying the other parties usually made it unnecessary for the State to invoke its internal law for that purpose. The issue could be relevant, however, if the objective was to establish that the agreement was void *ab initio*, in which case no breach could have occurred for which reparation was due. The third scenario described the situation in which an agreement on provisional application was silent with respect to internal law but in which a State sought to invoke its internal law as justification for its failure to perform its international obligations. That scenario was analogous to article 27 of the 1969 Vienna Convention, which provided that a party to a treaty could not invoke the provisions of its internal law as justification for its failure to perform a treaty. Again, the issue could be relevant if the objective of the State was to establish that no breach of the obligation to apply the treaty provisionally had occurred for which reparation was due.

7. Draft guideline 10, which apparently addressed only the third scenario, given that it was closely modelled on article 27 of the 1969 Vienna Convention, should perhaps address all three scenarios. Since there were many treaty provisions on provisional application that referred

[439] The draft articles on the law of treaties adopted by the Commission at its eighteenth session (1966) with commentaries thereto are reproduced in *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*

[440] *Ibid.*, p. 210 (para. (4) of the commentary to draft article 22).

to internal law, draft guideline 10 could make it clear that internal law was relevant under the first scenario. Saying as much would not require deciding in what way internal law was relevant; everything depended on the language of the agreement to apply the treaty provisionally. The third scenario was addressed by the first sentence of proposed draft guideline 10 and was unobjectionable. Even if there was not much State practice to support that sentence, it seemed logical that a State should not be allowed to plead its internal law in order to justify a failure to perform any of its international obligations.

8. Chapter III of the fourth report presented an interesting discussion of the practice of various international organizations regarding provisional application. The detailed and extensive research evident in that chapter of the report and in the addendum thereto demonstrated the Special Rapporteur's strong commitment to pursuing as much information as possible on the topic. Although that information was interesting, it was not clear where it was leading or how exactly it would contribute to the future work of the Commission on the topic.

9. The last paragraph of the fourth report indicated the Special Rapporteur's intention to propose some model clauses in a subsequent report. While model clauses could be helpful to States, their real value would lie in the Commission's analysis of their meaning, since that would help States in understanding which clause to select in a particular case. However, it might be a challenge for the Commission to explain the meaning of different model clauses; doing so might run afoul of the meaning already ascribed by States to such clauses in existing treaties. Thus, advancing a model clause based on article 45 of the Energy Charter Treaty and explaining what that clause meant might prove quite problematic, and the same might also be true of other clauses. An alternative – though perhaps less helpful – approach might be for the Commission simply to provide a list of commonly used clauses, without attempting to analyse their meaning.

10. Mr. McRAE thanked the Special Rapporteur for his fourth report, which included a good deal of interesting material and set out a number of matters for the Commission to consider. It was surprising to note, however, that the report had a somewhat episodic character, given that the Special Rapporteur seemed to respond to questions raised in the Sixth Committee rather than following a coherent plan of his own, and he echoed the comments that had been made by Mr. Murphy and Mr. Nolte in that regard.

11. The question of the relationship of the provisions on provisional application to other provisions of the 1969 Vienna Convention was an important one. Although, generally speaking, he did not disagree with many of the conclusions reached by the Special Rapporteur, it was often unclear why or on what basis the he had reached those conclusions. With regard to reservations, for example, the Special Rapporteur had concluded that a State provisionally applying a treaty could make a reservation and that another State could object to that reservation. He himself could agree with those propositions, and other Commission members had indicated their agreement with them as well. The question was why was that the case. The Special Rapporteur had stated that, in his view, nothing would prevent a State from formulating reservations to a treaty as from the time of its agreement to the provisional application of the treaty. But what was the basis for that statement? It seemed that a prior point to be made was that the provisional application of a treaty, although provisional in nature, was nonetheless an application of that treaty. In other words, the parties that applied a treaty were entitled to all of the rights and benefits of the treaty, and if the treaty allowed for the formulation of reservations, then any State that applied the treaty provisionally had the same right to make reservations as any other party to the treaty. Of course, it would be different if the State applying the treaty provisionally was provisionally applying only part of the treaty and if the provisions of the treaty that governed reservations were not contained in that part.

12. Those considerations led to an important point, namely that a State applying a treaty provisionally was in the same position as that of a party to that treaty once the latter had entered into force. Consequently, the question concerning how the rules for provisional application related to other provisions of the 1969 Vienna Convention was, in a sense, a false question. To the extent that the provisions of the Convention applied to a treaty in force, they were automatically applicable to a treaty being applied provisionally in the same way that they would apply if the treaty were in force – the only difference being that the treaty was not yet in force, at least for the States that were applying it provisionally. States that agreed to apply a treaty provisionally could not be subject to specific rules that were different than those applicable to the parties to a treaty, except in the case where article 25 was considered to provide for the establishment of a separate regime. But what would be the basis for such a consideration? One might therefore question the conclusion reached by the Special Rapporteur in paragraph 33 of his fourth report that a State could formulate reservations to a treaty that was to be applied provisionally if doing so was expressly permitted by that treaty and if there were reasons to believe that the latter's entry into force would be delayed for an indefinite period of time. Since a State that was applying a treaty provisionally had the same rights as a State that was a party to that treaty, the normal rules relating to reservations applied, and the question of whether provisional application would last for an indefinite period of time was not really relevant. The same reasoning was valid, in principle, for the other provisions of the 1969 Vienna Convention, which were applicable in the same way to a treaty that was applied provisionally as they were to a treaty that had already entered into force. However, there was one important qualification to that statement, since the scope of the rights of a State that was provisionally applying a treaty, unlike those of a party to that treaty, depended on the terms of the treaty that provided for provisional application or on the separate agreement providing for such application. In other words, whether a State applying a treaty provisionally was permitted to make reservations depended, first, on the terms governing the provisional application of the treaty and, second, on the terms relating to reservations that were set out in the treaty being provisionally applied.

13. On the question of the relevance of internal law to the provisional application of treaties, the discussion in the Special Rapporteur's fourth report was interesting but

did not clarify the matter and, to some extent, even confused it. At first glance, the provisions of the 1969 Vienna Convention on the relevance of a State's internal law to the question of competence to enter into treaties or on the extent to which a State could invoke its internal law in order to justify the non-performance of its obligations seemed to apply to provisional application. Consequently, if the treaty or the agreement permitting provisional application said nothing about the matter, those were the principles that were applicable. On the other hand, if the treaty or agreement established specific rules concerning the relevance of internal law to any aspect of provisional application, then those provisions must apply. That was precisely the situation in *Yukos* to which the Special Rapporteur had devoted some attention in his fourth report and on which other Commission members had focused during the debate. The Energy Charter Treaty had its own rules on provisional application, and article 45 of those rules stipulated that a State could provisionally apply the Treaty to the extent that such application was not inconsistent with its constitution, laws or regulations. In other words, under the Energy Charter Treaty, internal law did have a role to play in provisional application. In a sense, then, the *Yukos* case did not reveal anything about the rules relating to provisional application, since it was an interpretation of how the Energy Charter Treaty provided for provisional application. The divergence of views concerning the relationship between paragraphs 1 and 2 of article 45 of the Treaty was interesting from the perspective of treaty interpretation, but it did not, at least as outlined in the Special Rapporteur's fourth report, shed any light on the law relating to provisional application more generally. Thus, it was unclear why the Special Rapporteur considered that the *Yukos* case reflected the possible existence of a conflict arising out of the incompatibility between the constitution of a State and the provisional application of the Energy Charter Treaty. Since the Treaty provided for the relevance of the constitution of the State concerned, the only conflict was over the interpretation of paragraphs 1 and 2 of article 45.

14. However, it was noteworthy that, among other elements cited in the fourth report, such as the 1978 Convention and the practice of the European Union, the Special Rapporteur's discussion of the *Yukos* case revealed the existence of a considerable body of material on practice with respect to provisional application. Thus, the Drafting Committee had been proceeding to develop guidelines on the meaning and application of the law and practice of the provisional application of treaties on the basis of article 25 of the 1969 Vienna Convention without a full understanding of the ways in which States had been providing for provisional application in their practice. In short, the Commission had been working with only a partial picture of the situation. The Special Rapporteur's fourth report provided an opportunity to examine that practice and to draw some conclusions from it. It would nevertheless be useful to undertake a more exhaustive analysis of the provisions of treaties or agreements that provided for provisional application by examining the following: the circumstances in which provisional application was permitted; the extent to which such provisions merely tracked article 25 of the 1969 Vienna Convention or deviated from it; whether such provisions provided for the provisional application of only part of a treaty, and if so, whether they indicated which part of the treaty was concerned or whether they left that decision up to the State; whether there was some consistency in the types of provisions that could be applied provisionally; and the extent to which such provisions placed limitations on the exercise of rights by a State that applied a treaty provisionally. A comparison of the provisions of agreements providing for provisional application that conditioned such application on internal law, whether constitutional or not, would also be helpful, as it would provide a context for the discussion of the *Yukos* case. Determining whether article 45 of the Energy Charter Treaty was a unique provision or whether a similar provision had been included in other treaties would enable the Commission to situate that case with regard to State practice on provisional application, which was quite different from the question of what the Permanent Court of Arbitration or the District Court of The Hague had said in that case or might say in the future. Ultimately, it was possible that a review of practice could disprove the notion that a State that applied a treaty provisionally was in the same position as a party to the treaty.

15. There was a further issue on which some light might be provided, one that arose out of the Special Rapporteur's discussion of reservations. In his fourth report, the Special Rapporteur had emphasized that, if there appeared to be no State practice involving the provisional application of a treaty to which a State had entered reservations, the reason might be simply that States were not likely to include provisions to which they wished to formulate reservations in the articles of a treaty that they were applying provisionally. That was an interesting insight and suggested that a State that was provisionally applying a treaty could not be equated completely with a State that was a party to a treaty, since the latter could pick and choose between the treaty provisions it wished to apply only by means of formulating reservations. A State that applied a treaty provisionally could, in principle, choose which provisions to apply and could also formulate reservations – so long as the agreement according to which the States concerned permitted provisional application did not prevent them from doing so. At the same time, that issue highlighted the fact that the Commission still did not have an adequate theory about provisional application and its relationship to the full application of a treaty.

16. Although chapter III of the fourth report raised many interesting points, the practice described therein covered a wide variety of questions, and it was unclear exactly what conclusions the Special Rapporteur had drawn from it. The practice of the United Nations Secretary-General in discharging his functions as treaty depositary and in relation to treaty registration, which were set forth in Article 102 of the Charter of the United Nations, was interesting insofar as it related to provisional application; however, statistics provided only partial information, whereas what was needed was an analysis of the nature of those actions, as well as a comparison of the actions of the Secretary-General as depositary with those of other depositaries. As far as model clauses were concerned, experience had shown that it was a delicate task, and one that the Special Rapporteur seemed to underestimate. Finally, with regard to draft guideline 10, he shared the views of Mr. Murphy and the other Commission members who had pointed out

that very little in the fourth report related directly to the draft guideline. Indeed, it was unclear where much of the report was leading in terms of the substantive output of the Commission's work; it had therefore come as a surprise to discover the proposed draft guideline 10 at the end of the report. To the extent that it reiterated – albeit in different terms – article 27 of the 1969 Vienna Convention, its wording was unobjectionable. The same could not be said with regard to its expediency. If, in fact, the content of article 27 was reproduced in the draft guidelines, while other provisions of the Convention were not, that might give the impression that those provisions were not applicable to provisional application. It would no doubt be more appropriate to include in the project a general guideline indicating that, unless they were excluded by the agreement on provisional application, the provisions of the 1969 Vienna Convention – to the extent that they were relevant – were applicable to the provisional application of treaties.

17. In conclusion, although he was not opposed to referring draft guideline 10 to the Drafting Committee, he was of the view that the Commission needed clearer guidance from the Special Rapporteur on the question of the relationship of provisional application to the other provisions of the 1969 Vienna Convention.

18. Mr. KAMTO thanked the Special Rapporteur for his fourth report, which, like its predecessors, was concise, easy to read and dealt with some of the most important questions concerning the topic. He had pointed out at the beginning of the discussion on the topic that the Commission should consider the question of provisional application in terms of how it related to internal law, in particular in the light of article 46 of the 1969 Vienna Convention. He was therefore gratified to note that the Special Rapporteur had devoted special attention to that question in his report and had eventually been persuaded by delegations in the Sixth Committee of the merits of doing so – an approach that had subsequently been endorsed by most Commission members.

19. Generally speaking, he was of the view that the Special Rapporteur and the Commission should first settle the question of whether the provisional application of a treaty or part of a treaty was subject to different rules than those governing a treaty that had entered into force. Failing that, it would be necessary to continue the exercise undertaken by the Special Rapporteur in his fourth and previous reports on the topic, which was to study the relationship between provisional application and all the other provisions of the 1969 Vienna Convention. However, the need for such an exercise was questionable, as it was implicitly based on the false assumption that provisional application could modify the nature of a treaty. In fact, a treaty remained a treaty, irrespective of whether it was applied after its entry into force or whether States agreed to apply it provisionally. The only aspect of provisional application that the Convention clearly excluded from the general law of treaties was that of termination, which was governed by article 25, paragraph 2. In all other respects, a treaty that was applied provisionally was subject to the same rules as a treaty that had entered into force; those rules were applicable to States that had consented to such application, and they produced the same legal effects. Neither the nature, the force or the legal effects of those obligations were modified by their provisional application. For that reason, it was not surprising that States in the Sixth Committee had agreed that the provisional application of a treaty produced legal effects, as was pointed out in paragraph 5 of the Special Rapporteur's fourth report. That did not prevent States that wished to apply a treaty provisionally from freely determining, in that context, the scope of their obligations in relation to the treaty as it would apply when it entered into force.

20. Those considerations were also valid for article 46 of the 1969 Vienna Convention, on the provisions of internal law regarding competence to conclude treaties, which was at the heart of the topic; however, he did not share the Special Rapporteur's views in that regard. At the outset, the statement contained in paragraph 44 of his fourth report to the effect that article 46 entailed the need to determine, prior to agreeing on provisional application, whether doing so would violate a rule of internal law of fundamental importance, thereby providing grounds for the invalidity of the treaty, might just as well apply to a treaty that had entered into force. Furthermore, from the standpoint of the general law of treaties embodied in the 1969 Vienna Convention, there was absolutely no justification for not applying article 46 to a treaty that was being applied provisionally.

21. Paragraphs 45 and 46 of the fourth report, as well as paragraph 47, contained errors of reasoning. First of all, paragraph 45 indicated that it would be neither correct nor reasonable to subject States that agreed to the provisional application of a treaty to a so-called obligation to know their own internal law, since article 46 of the 1969 Vienna Convention referred only to the violation of a provision of internal law regarding the competence to conclude treaties. However, whether the matter concerned a treaty that had entered into force or a treaty that was being applied provisionally, the problem was the same: in most States, it was the Chief Executive who negotiated treaties, and it was the parliament that ratified them whenever the treaties dealt with areas that fell within the scope of its competence. If, under a State's constitution, the provisional application of a treaty or parts of a treaty was subject to parliamentary ratification, the problem went beyond strict application and clearly involved competence to conclude treaties. In that case, the application of article 46 was perfectly justified. Paragraph 45 also indicated that article 27 of the 1969 Vienna Convention made no distinction between the provisions of internal law and stipulated that a party could not invoke the provisions of its internal law as justification for its failure to perform a treaty. Once again, that was a general provision that was applicable both to a treaty that had entered into force and to a treaty that was applied provisionally. Yet, the Special Rapporteur continued to engage in a partial reading of article 27, ignoring its second sentence, which specified that the rule it contained was without prejudice to article 46, which necessarily involved consideration of that article. Instead, he concluded his analysis in paragraph 45 by stating that nothing in article 25 of the 1969 Vienna Convention entailed the obligation for States contemplating provisional application to proceed, as a prerequisite, to a determination concerning the internal law of any of the parties involved on the basis of article 46. In the case concerning the *Land and Maritime*

Boundary between Cameroon and Nigeria, the International Court of Justice had been called upon to examine the conditions governing the application of article 46 of the 1969 Vienna Convention. With regard to the argument of Nigeria, the basis of which was ignorance of the country's constitutional law concerning competence to conclude treaties, after recalling the content of article 46, the Court explained that the rules concerning the authority to sign treaties for a State were constitutional rules of fundamental importance. However, it noted that a limitation of a Head of State's capacity in that respect was not manifest in the sense of article 46, paragraph 2, unless it was at least properly publicized, stating that this was particularly so because Heads of State belonged to the group of persons who, in accordance with article 7, paragraph 2, of the Convention, in virtue of their functions and without having to produce full powers, were considered as representing their State. It was clear that the provisions of articles 27 and 46 constituted an indivisible whole and that the rules of internal law of fundamental importance were part of the law of treaties, since, not only were they mentioned in the 1969 Vienna Convention and could therefore not be ignored, but if their observance was not taken into account in assessing the validity of a treaty, the Court would not have entertained arguments on the basis of article 46 as it had done in the above-mentioned case.

22. Second, he questioned the statement contained in paragraph 47 of the fourth report to the effect that the debate in both the Commission and the General Assembly had made it clear that no reference to internal law under any circumstances should be included in the draft guidelines, so as not to create the false impression that the provisional application regime would be subordinated to the internal law of States. While it was true that several Commission members had seemed to be leaning in that direction, the Special Rapporteur did not specify which States in the Sixth Committee had supported that position. Furthermore, he seemed to defend an erroneous understanding of the reference to internal law in relation to the provisional application of treaties. For example, the Special Rapporteur recalled at the beginning of paragraph 46 of his fourth report that he had concluded his analysis of article 27 of the 1969 Vienna Convention – not that of article 46 thereof – in his third report, indicating 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".[441] Yet, it was obvious that, if a State had already provisionally applied a treaty, it would be inappropriate for it to subsequently invoke its internal law as justification for the non-performance of its obligations. Otherwise, article 27 was to be read in conjunction with article 46. Next, as highlighted by the conclusions drawn from *Yukos* and *Kardassopoulos* v. *Georgia*, the Special Rapporteur seemed to equate the way in which reference was made to internal law in article 46 of the 1969 Vienna Convention with the limitations imposed by internal law on the scope of provisional application that the parties were free to conclude. As Mr. Murase had stated during the consideration of the first report on the topic[442] and again at the current session, those cases were rather particular, in that the reference to internal law that they contained was based on article 45 of the Energy Charter Treaty and not on article 46 of the 1969 Vienna Convention on the Law of Treaties. And, whereas the latter referred to a rule of internal law of fundamental importance, the former provided that the parties agreed to apply the Energy Charter Treaty provisionally, insofar as such provisional application was not inconsistent with their constitution, laws and regulations, thereby encompassing practically all the rules of internal law. There was thus no reason to extract a general rule from those cases, since States were free to determine the extent of their obligations and could include in a treaty any provisions that they wanted, within the limits of international law, notably, those stipulating that such provisions could not contravene *jus cogens*. The Special Rapporteur seemed to defend that concept of internal law and to reject the idea of the applicability of article 46 to the provisional application of a treaty. Yet, he himself was of the view that article 46 applied in that case, like it did in the case of a treaty that had entered into force, and could not be excluded by a simple "without prejudice" clause, as was proposed in draft guideline 10. That draft guideline should therefore be recast by dividing it into two paragraphs, one that would reproduce the first sentence of article 27 and the other, based on article 46, that would apply the general law of treaties to the particular situation of provisional application. With those remarks, he was in favour of referring draft guideline 10 to the Drafting Committee.

23. Since the discussion concerning articles 60 and 73 of the 1969 Vienna Convention and the practice of international organizations had not led to the formulation of any draft guidelines, he would reserve his comments on those questions until the Commission's work on the topic had advanced further.

24. Mr. PETRIČ thanked the Special Rapporteur for his fourth report and for his oral presentation of it. The analysis in his report of States' reactions to the Commission's work illustrated their significant interest in the topic, which was not surprising, in view of the potential relevance of the provisional application of treaties to their practice. Given the frequent recourse to provisional application in contemporary international relations, it was important for the Commission's final output on the topic to be solidly based on State practice and not primarily on hypothetical considerations and conclusions. It was also true, however, as had been pointed out by the Special Rapporteur, that in many respects, practice concerning the provisional application of treaties was either meagre – for instance, in terms of the formulation of reservations to provisionally applied treaties – or else controversial – as in the case of the invalidity of treaties, particularly with regard to article 46 of the 1969 Vienna Convention. Although the practice of States was developing steadily, it remained very diverse, as reflected in States' legal and constitutional systems, some of which generally admitted provisional application, whether explicitly or implicitly, while others allowed it only under certain conditions or else prohibited it. That was the reality that limited the possibility of establishing clear guidelines, in spite of the frequent use of provisional application.

[441] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/687, p. 67, para. 70.

[442] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664.

25. The limited and heterogeneous nature of State practice was what had led the Special Rapporteur to analyse the relationship between the provisional application of treaties, as provided for in article 25 of the 1969 Vienna Convention, as well as other provisions, including those relating to reservations, the invalidity of treaties (in particular the effect of the provisions of internal law regarding competence to conclude treaties), the termination or suspension of the operation of a treaty as a consequence of its breach and State succession. The Special Rapporteur's analysis, which also addressed the views and requests expressed by States in the Sixth Committee and those expressed by members during the previous debate in the Commission, was persuasive and well substantiated, though in many ways not conclusive. At least at the current stage of the Commission's work, it had not revealed enough substance for the elaboration of draft guidelines and probably would not do so in the future. Yet, even if, in some cases, the Special Rapporteur's conclusions were based more on legal reasoning than on State practice, they were useful and shed light on the important and topical problem of the provisional application of treaties.

26. Concerning the provisional application of multilateral treaties, there were various scenarios that should be analysed more thoroughly. A State could apply a multilateral treaty provisionally when the treaty had already entered into force for other States or when it had not yet entered into force, for example because the required number of ratifications had not yet been reached. In the latter case, the State applying the treaty provisionally might or might not have itself ratified the treaty. The consequences of the various situations envisaged in the fourth report should be analysed in greater detail. It would also be useful to distinguish more clearly between the provisional application of bilateral treaties, the provisional application of multilateral treaties and the provisional application of treaties concluded by international organizations.

27. He agreed with the Special Rapporteur's analysis of the formulation of reservations in the context of provisional application. Since provisional application was based on an agreement, the formulation of reservations should, in principle, be possible, unless reservations were expressly prohibited by the treaty, as was indicated in paragraph 23 of the fourth report. In paragraph 32 of his report, the Special Rapporteur had correctly indicated that provisional application constituted a treaty in all senses of the term, given that it was the result of an agreement, and he had consequently concluded that nothing would prevent a State from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty. However, since the question of reservations was a particularly thorny issue, it would be helpful to develop guidelines to guide the practice of States in that area.

28. As to the relationship between provisional application and the regime of invalidity of treaties, the Special Rapporteur had focused his analysis on article 46 of the 1969 Vienna Convention, which referred to the impact of the provisions of internal law on competence to conclude treaties. In other words, the Special Rapporteur had addressed the possible conflicts between the internal law of a State and the State's provisional application of a treaty. That was the most controversial aspect of the topic, as illustrated by the analysis of the jurisprudence in the *Yukos* case that was cited in the fourth report, which had already been discussed extensively by several Commission members and to which he had nothing more to add. He agreed with the view that, insofar as no final decision had yet been delivered in that case, and although it was likely to set a precedent, the Commission should not draw conclusions from its jurisprudence and should certainly not take a position on its material merits.

29. In general, he wished to stress that the procedural formalities prescribed by internal law, compliance with which was a prerequisite for the entry into force of a treaty for a State, related to substantive issues and were a fundamental aspect of the separation of powers and sovereignty of States, as well as a guarantee of legality and respect for the rule of law in their treaty relations. Thus, the procedural guarantees and limitations set forth in internal law with regard to entering into treaty relations should be respected *mutatis mutandis* when a State agreed to apply a treaty provisionally, because such an agreement also constituted a treaty relationship, and it would hardly be acceptable to States for the constitutional oversight of provisional application to be less stringent than that of ordinary treaty relations. As a result, he had several difficulties with draft guideline 10 in its present form; however, he supported its referral to the Drafting Committee for redrafting in the light of the comments made. In particular, the important substance of article 46 of the 1969 Vienna Convention should not be reduced to a "without prejudice" clause, and he shared the view expressed by Mr. Murase and other Commission members that draft guideline 10 should be based more firmly on research, and in particular, that a comparison should be made of the constitutional provisions of States, since the limitations on provisional application that were contained in internal law seemed to be the central and most controversial aspect of the topic.

30. The importance of that research work would also help to produce model clauses, which could not be made without a clear understanding of the impact of internal law on provisional application. Furthermore, he endorsed the view that, since States must agree to provisional application, they could also establish limits to it on the basis of their internal law. As Mr. Kolodkin had stated, they could abrogate their procedural rules governing the entry into force of treaties by agreeing to the provisional application of a treaty without forfeiting their right to consent to provisional application and to regulate and limit it. In that respect, the experience of Brazil, as had been recounted by Mr. Saboia, offered a telling example of State practice. The analysis that had been proposed by Mr. McRae and Mr. Murphy also deserved further consideration in the Commission's future work on the topic.

31. The Special Rapporteur had provided a very interesting analysis of the problems associated with provisional application in the context of State succession, which had been largely based on articles 27 and 28 of the 1978 Vienna Convention. Those articles established a very precise distinction between multilateral and bilateral treaties and, with regard to multilateral treaties, between the so-called "open" and "closed" multilateral treaties, to which reference was made in article 17, paragraph 3, of the 1978

Vienna Convention and which required the consent of all the parties to the treaty in order for another State to apply the treaty provisionally. Based on additional research and analyses of practice, it would be useful to formulate some guidelines concerning provisional application in the context of succession. To that end, a study of the practice of decolonized States and States that had become independent after 1990 could be very helpful.

32. Finally, in chapter III of his fourth report, which covered the practice of the United Nations and other international organizations on the provisional application of treaties, the Special Rapporteur concluded in paragraph 174 that the provisional application of treaties by international organizations was an important part of the practice of the law of treaties. Although the information contained in that chapter was interesting, the Special Rapporteur's research had regrettably not yielded any draft guidelines or even any personal conclusions. It was to be hoped that the Commission's work on the current topic, which was a difficult one, would lead to the adoption of guidelines, as well as perhaps a number of model clauses.

The meeting rose at 11.25 a.m.

3327th MEETING

Monday, 25 July 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, 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.

Provisional application of treaties (*continued*) (A/CN.4/689, Part II, sect. G, A/CN.4/699 and Add.1, A/CN.4/L.877)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the fourth report of the Special Rapporteur on the provisional application of treaties contained in document A/CN.4/699 and Add.1.

2. Mr. FORTEAU said that he largely endorsed the comments made by many earlier speakers, in particular Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte and Sir Michael, with regard to the methodology followed by the Special Rapporteur and the difficulties which it was causing.

3. As had been noted several times previously, the Special Rapporteur's role was not confined to studying subjects in which States had expressed an interest during debates in the Sixth Committee; it was first and foremost to provide an up-to-date account of practice, case law and writings with respect to each element of the topic. The first essential step was to take stock of the pertinent material – primarily treaty practice in the current case – because an inductive approach was, by definition, essential when codifying international law.

4. In that connection, it was regrettable that, after four years of work on the subject, the Commission was still lacking a detailed survey of treaty practice in relation to provisional application. The examples that had been given were concerned exclusively with the practice of international organizations. The upshot was that the Commission's work on the topic had reached a dead end, especially in the Drafting Committee, because it was impossible to formulate texts that faithfully reflected practice without knowing exactly what that practice was. In 2014, he had emphasized the need for the Commission to gather relevant practice and had pointed out that, rather than waiting for States to provide information on their practice, the Special Rapporteur should seek it out. Three examples would serve to illustrate the serious problems caused by the absence of a preliminary, systematic survey of relevant treaty practice.

5. First, in paragraph 118 of his fourth report, the Special Rapporteur referred to the "diversity of provisional application clauses"; in paragraph 129 he said that "States use a very wide variety of formulas to agree to provisional application of treaties" and in paragraph 132 he even went so far as to say that this practice was "anarchic". In those circumstances, blindly stumbling on with the topic entailed a risk that the Commission would codify rules that gave an imperfect or distorted image of current practice.

6. Second, consideration of the few elements of practice provided by the Special Rapporteur in his fourth report demonstrated the need to consider that practice in more detail before any conclusions could be drawn. As Mr. Kolodkin had explained, the precedent of the 1978 Vienna Convention revealed that the Commission should proceed with caution. That precedent, to which chapter II, section D of the fourth report was devoted, showed that different solutions could apply depending on the nature of the treaty. In that regard, it would have been helpful if, in that section of his report, the Special Rapporteur had presented the origins of the solutions identified in the 1978 Vienna Convention by scrutinizing the Commission's work and the *travaux préparatoires* leading to the Convention, in order to gauge the size of the problems which lay ahead and to see whether it might be necessary to adopt rules with variable geometry in light of the nature of the treaties (bilateral, multilateral, reciprocal, non-reciprocal, standard-setting or an agreement establishing an international organization or an arbitral tribunal). One example that sprang to mind in that context was the provisional application of the arbitration agreement in 2005 in the *Arbitration*