EAN 978-2-233-00883-1

Deuxième question / *Second question*

Provisional Measures

Mesures provisoires

Rapporteur : **Lord Collins of Mapesbury**

3ème commission

La commission est composée de MM. Arrighi, Bogdan, Cançado Trindade, Mme Damrosch, MM. Dogauchi, Greenwood, Guillaume, Matscher, Keith, Sir Peter North, MM. Ranjeva, Ress, Torres Bernárdez, van Loon, Yankov, Yee.

Les travaux préparatoires figurent aux pages 259 à 289 de l'Annuaire volume 77-I.

EAN 978-2-233-00883-1

EAN 978-2-233-00883-1

DRAFT RESOLUTION

The *Institute of International Law*,

Considering that the availability of provisional and protective measures is a general principle of law in international law and in national law,

Considering that it would contribute to the development of international law and national law if principles relating to the grant of provisional and protective measures were adopted by the Institute,

Adopts the following guiding principles:

1. It is a general principle of law that international and national tribunals may provide discretionary remedies to maintain the status quo pending determination of disputes or to preserve the ability to grant effective relief.

2. These remedies are available if the applicant can show that (a) it has a prima facie case on the merits; (b) there is a real risk that irreparable injury will be caused to the rights in dispute before final judgment; (c) the potential injury to the applicant outweighs the potential injury to the respondent; and (d) the measures are proportionate.

3. In cases of urgency an order may be made without hearing the respondent (ex parte), but the respondent has a right to be notified promptly and to object to the order.

4. In national legal systems an applicant for provisional relief is in principle liable for compensation of a party against whom the relief is issued if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court may order an undertaking or bond or other security to secure the respondent's right to compensation if it is ultimately decided that the order should not have been made.

5. The order is binding. It must be subject to variation or discharge.

6. An international or a national tribunal may make such orders if it has *prima facie* jurisdiction over the merits (unless in the case of arbitral tribunals, the parties have excluded the right to apply for such measures).

7. A national court may make orders for provisional or protective measures in relation to assets, or to acts, within its territory even if a court in another country has jurisdiction over the merits. A court may order provisional measures in relation to acts and property abroad provided this does not infringe upon the exclusive jurisdiction of foreign courts.

8. Where the provisional measure is ordered by a court with jurisdiction over the merits and the party to whom the provisional measure is addressed has been given notice of the order prior to enforcement, courts of other States

should where possible lend their cooperation and recognise and enforce such measures.

9. In commercial arbitration proceedings, an application may be made to courts of the State of the seat of the tribunal or the court of any other State in support of the effectiveness of such proceedings.

10. International courts and tribunals may make orders for measures aimed at the non-aggravation of the dispute.

11. Provisional measures in international tribunals are binding on the parties and States are under an obligation to give effect to provisional measures addressed to them by international courts and tribunals.

***

PROJET DE RESOLUTION

L*'Institut de Droit international,*

Considérant que la disponibilité de mesures provisoires et de mesures de protection fait partie des principes généraux du droit, tant en droit international qu'en droit national,

Considérant que l'adoption par l'Institut de principes relatifs à l'octroi des mesures provisoires et de mesures de protection pourra contribuer au développement du droit international ainsi que du droit national,

Adopte les principes directeurs suivants*:*

1. C'est un principe général du droit que les tribunaux, tant internationaux que nationaux, peuvent accorder des recours discrétionnaires pour maintenir le statu quo en attendant la solution d'un différend ou pour préserver la possibilité d'accorder une réparation efficace.

2. De tels recours sont disponibles si le demandeur peut démontrer que (a) il y a une forte présomption du bien-fondé de sa demande; (b) il existe un risque réel qu'une atteinte irréparable soit infligée aux droits litigieux avant le prononcé du jugement définitif; (c) le préjudice potentiel pour le demandeur l'emporte sur le préjudice potentiel pour le défendeur; et (d) les mesures respectent le principe de proportionnalité

3. En cas d'urgence, une décision peut être prise sans entendre le défendeur (« *ex parte* »), mais ce dernier a le droit d'être informé rapidement et de s'opposer à la mesure.

4. Dans les systèmes juridiques nationaux, le demandeur de mesures provisoires est en principe tenu d'indemniser une partie contre laquelle la décision est rendue si le tribunal décide par la suite que la mesure n'aurait pas dû être accordée. Si les circonstances le justifient, le tribunal peut exiger du requérant qu'il prenne un engagement ou qu'il fournisse une garantie afin de préserver le droit à l'indemnisation du défendeur s'il est par la suite décidé que la mesure n'aurait pas dû être accordée.

EAN 978-2-233-00883-1

5. La mesure ordonnée est contraignante. Elle pourra être modifiée ou annulée.

6. Un tribunal international ou national peut ordonner de telles mesures s'il existe une forte présomption qu'il est compétent sur le fond (à moins que, dans le cas des tribunaux arbitraux, les parties n'aient exclu le droit de demander de telles mesures).

7. Un tribunal national peut accorder des mesures provisoires ou des mesures de protection concernant des biens ou des actes localisés sur son territoire même si un tribunal d'un autre pays est compétent sur le fond. Un tribunal peut accorder des mesures provisoires concernant des actes et des biens localisés à l'étranger, à condition de ne pas porter atteinte à la compétence exclusive des tribunaux étrangers.

8. Lorsque la mesure provisoire est ordonnée par un tribunal compétent sur le fond et que la décision ordonnant cette mesure a été notifiée à la partie à laquelle elle s'adresse avant l'exécution de la mesure, les tribunaux d'autres États devront, autant que possible, prêter leur concours et reconnaître et exécuter cette mesure.

9. Dans les procédures d'arbitrage commercial, une demande peut être présentée aux tribunaux de l'Etat du siège du tribunal d'arbitrage ou au tribunal de tout autre Etat, afin d'assurer l'efficacité de telles procédures.

10. Les tribunaux et les juridictions internationales peuvent prendre des mesures tendant à ne pas aggraver le différend.

11. Les mesures provisoires ordonnées par les tribunaux internationaux sont contraignantes pour les parties et les États sont obligés de donner effet aux mesures provisoires qui leur sont adressées par les tribunaux et juridictions internationaux.

Jeudi 7 septembre 2017 (après-midi)

La séance est ouverte à 14 h 30 sous la présidence de M. *Sreenivasa Rao*.

The *President* welcomed the Members. He congratulated them on their effective collaboration and noted the important benchmark constituted by the adoption of the new rules of the *Institut*. He introduced the topic under discussion: Provisional Measures. He praised the report for its clarity and indicated that it would be presented by the 3rd Commission's Rapporteur before the draft Resolution was opened for consideration. Finally, he welcomed to the session a newly elected member, Mr Fernández Arroyo. The President gave the floor to the Rapporteur.

The *Rapporteur* thanked the President for his introduction. He observed that the 3rd Commission had been established during the Naples Session in 2009. However, most of the work on the report had been accomplished over the past two years. He specifically acknowledged the important contribution of Mr van Loon who had penned the draft Resolution currently under

consideration. The ambitious character of the report was evident in the various materials it had gathered from a variety of disciplines such as public and private international law, investment arbitration, commercial law. This was reflective of a decision by the Commission not to limit the scope of the work undertaken. Instead, the Commission sought to bring those disciplines together so as to find potential common themes in order to make a valuable contribution to the codification of international law. The report therefore showed that there existed general principles regarding the granting by international and national courts and tribunals of provisional measures. Reflecting on his own daily experience as a judge and referring to the very recent jurisprudence on the matter (see paragraphs 4-8), the Rapporteur underscored the importance of the topic.

The Rapporteur continued with his first substantial remark as to the availability of provisional measures as general principles of law. He recalled in that regard the famous separate opinion by the International Court of Justice's President Jiménez de Aréchaga in the 1976 *Aegean Sea Continental Shelf* dispute as well as the numerous opinions of Mr Cançado Trindade on the matter and which he had usefully shared with the Commission. In his second remark, the Rapporteur stressed the courts' and tribunals' inherent powers to grant measures even in the absence of any expressed mention of such powers in their respective statutes. However, national courts were usually statutorily endowed with such a competence. That was, to his knowledge, a judge-made prerogative only in English law. The situation was quite different in international law as a number of constitutional instruments did not give international courts and tribunals express powers to grant provisional measures. Recalling Shabtai Rosenne's early scholarly opinion positing the need for express powers, the Rapporteur was however of the opinion that it was perhaps no longer a true reflection of the current state of international law. He specifically referred to the 2005 *Mamatkulov and Askarov v. Turkey* case where the European Court of Human Rights had asserted its inherent powers despite its statute's silence on the matter. He further mentioned the Iran-US Claims Tribunal and its similar jurisprudential attitude.

The Rapporteur dedicated his third remark to the question of the binding character of interim measures. While noting the undisputed binding character of measures granted at the domestic level in light of the existence of sanctions in case of non-implementation, he acknowledged the rather uncertain status of the question under international law. He recalled the seminal and recent pronouncement by the International Court of Justice on the matter in its *LaGrand* decision regarding a dispute opposing Germany to the United States. However, he stressed the dire problems faced at the implementation stage in dualistic national jurisdictions as illustrated by the US state jurisdictions' failure to comply with the Court's order in the *LaGrand* and the following *Avena* cases. He further made reference to

EAN 978-2-233-00883-1

similar issues arising under British law, before the Privy Council in particular, with regard to measures indicated under European law.

The Rapporteur next observed that however binding, interim measures did not have a *res judicata* character (or *caractère de la chose jugée*). That had two main consequences: first, the order for provisional measures could be altered in the case of a change of circumstances; second, said order was not a judgment which meant that it was not enforceable under private international law. Only in the Brussels and Lugano regimes were those orders nonetheless enforceable provided that the defendant had been properly notified of the order and had had the opportunity to contest it.

The Rapporteur's fourth remark dealt with the relationship between interim measures and jurisdiction over the merits. Domestic courts did not need to establish prior jurisdiction either because it could be done posteriorly or because while the order related to assets in the court's jurisdiction, it was instrumental for proceedings before another court. In the latter case, the Rapporteur interpreted the International Court of Justice's order in the *Timor Leste* dispute as having aided, in practical terms, the concomitant arbitration proceedings. In that regard, he further referred to the growing trend in anti-suit measures in arbitration. In contrast, international courts and tribunals could only indicate provisional measures on the basis of a *prima facie* jurisdiction. That had been clearly stated by Sir Hersch Lauterpacht in his separate opinion to the 1957 *Interhandel* case and then followed by the Court's majority in later decisions. ITLOS and the Iran-US claims Tribunal subsequently shadowed the Court's approach.

In his fifth remark, the Rapporteur examined the conditions under which provisional measures could be granted. At the outset, he noted that those conditions were uniformly found across all systems.

The first condition was the degree of urgency, along with necessity, of the request and/or of the contemplated prejudice to be suffered.

Second, the underlying merits of the case needed to be, to various extents according to the jurisdiction in question, assessed by the judge. Raising pervasive issues in both domestic and international law, that meant that requests for interim measures, whatever their chance of success, were often strategically used by a party as a tool for further negotiation. Diverse thresholds were found across jurisdictions: in England, for instance, the applicant needed to demonstrate that a serious issue was to be tried, while in the United States the likelihood of success in the proceedings was the relevant criterion. The UNCITRAL regime's test posited a reasonable chance of success on the merits. In their jurisprudence, the ICJ and ITLOS required the asserted right to be "at least plausible".

The third condition for a grant of provisional measures was, in the Rapporteur's opinion, a general principle in international and national law concerning the irreparable character of the anticipated prejudice or harm.

While there was a wide debate regarding the terms' interpretation, in particular in international law, national jurisdictions had settled on the idea that to be irreparable, the prejudice could not be monetarily compensated.

Fourthly, the judge would proceed to a balance of convenience, that is, assessing the risk to the rights of the applicant against that to those of the defendant. In domestic law, that difficult balancing exercise could be mitigated through the provision by the applicant of some form of security to compensate any damage flowing from an order having been wrongly granted. In the United States, the security took the form of a bond while in England that of an undertaking to compensate. In international law, the question of undertakings had not been clearly settled. The International Court of Justice had twice refused to order measures on the basis of appropriate behavioural undertakings by the defendant (see the *Great Belt* case and the *Belgium v. Senegal* case). In his dissent to the latter case, Sir Christopher Greenwood had observed that financial undertakings were rather rare in international law.

The fifth condition related to the problematic relationship between interim measures and the rights at issue. While, in national courts, the application was usually directly related to the rights at stake, it was less so the case at the international level. That explained the need for the Permanent Court of International Justice to recall that orders for provisional measures might only be granted regarding rights that formed the subject matter of the dispute submitted to the Court (see *Polish Agrarian Reform and German Minority* case). That was reiterated in recent decisions by the ICJ (see report, paragraphs 171-174). While ITLOS had followed the same approach, the Rapporteur noted that Article 290 of the UN Convention on the Law of the Sea allowed for the granting of provisional measures not only to protect the rights at issue but also to prevent serious harm to the marine environment.

The Rapporteur also touched upon the related issue of the prevention of the aggravation of the dispute through the granting of provisional measures, which involved the question of the existence of a free-standing power for the court or tribunal to do so. In its *Eastern Greenland* decision, the Permanent Court derived such competence from Article 41 of its Statute, a stance reiterated by its successor to this day, and also adopted by ITLOS.

For purposes of concision, the Rapporteur refrained from introducing the question of extraterritorial measures which were in any event dealt with at length in the report. Besides and to conclude, he noted that the report did not look at the compatibility of interim measures with human rights as that fell within the scope of the 4th Commission and its Rapporteur Mr Basedow's work on "Human Rights and Private International Law".

The *President* thanked the Rapporteur for his excellent and succinct summary and opened the floor for discussion of the draft Resolution.

EAN 978-2-233-00883-1

Mr *Cançado Trindade* thanked the Rapporteur for the exposition he had just made. In his perception, the draft Resolution faithfully reflected the substantial final report of the Rapporteur. He supported in particular paragraphs 10 and 11 of the draft Resolution, as they stood, although he thought that paragraph 1 could be clarified. He added that he would summarise his reasoning in that respect. The *autonomous legal regime* of provisional measures of protection had been quite discernible to him. He had been drawing attention to it, over the past two decades, in several individual opinions, successively in the Inter-American Court of Human Rights and in the International Court of Justice. The notion of victim (or of *potential* victim), or an injured party, could thus emerge also in the context proper to provisional measures of protection, parallel to the merits (and reparations) of the *cas d'espèce*. Provisional measures of protection generated obligations (of prevention) for the States concerned, which were distinct from the obligations which emanated from the judgments of the court as to the merits (and reparations) of the respective cases. That ensued from their autonomous legal regime, as he conceived it.

Mr Cançado Trindade said that, in his perception, there was a pressing need nowadays to refine and to develop conceptually this autonomous legal regime - focused, in particular, on the contemporary expansion of provisional measures, the means to secure due and prompt compliance with them, and the legal consequences of non-compliance - to the benefit of those protected thereunder. There was the need for a prompt determination of breaches of provisional measures of protection, irrespective of subsequent proceedings as to the merits of the case at issue. In effect, in his understanding, the determination of a breach of a provisional measure of protection was not - and should not be - conditioned by the completion of subsequent proceedings as to the merits of the case at issue. The legal effects of a breach of a provisional measure of protection should in his view be promptly determined, with all its legal consequences. In that way, its anticipatory rationale would be better served.

Mr Cançado Trindade opined that there was no room for raising here alleged difficulties as to evidence, as for the ordering of provisional measures of protection, and the determination of non-compliance with them, it sufficed to rely on *prima facie* evidence (*commencement de preuve*). And it could not be otherwise. Furthermore, the rights that one sought to protect under provisional measures were not necessarily the same as those vindicated as to the merits. Likewise, the obligations (of prevention) were new or additional ones, in relation to those ensuing from the judgment on the merits.

There was yet another point which Mr Cançado Trindade deemed fit to single out, namely, that contemporary international tribunals had, in his understanding, an inherent power or *faculté* to order provisional measures of protection, whenever needed, and to determine, *ex officio*, the occurrence of a breach of provisional measures, with its legal consequences. The fact that

in practice international tribunals generally indicated provisional measures only *at the request* of a State party, in his view did not mean that they could not order such measures *sponte sua, ex officio*. That ensued from, or seemed to be in line with, paragraph 10 of the draft Resolution.

In sum, Mr Cançado Trindade observed that the autonomous legal regime of provisional measures of protection was configured by the *rights* to be protected (not necessarily identical to those vindicated later at the merits stage), by the *obligations* emanating from the provisional measures of protection, generating autonomously State *responsibility*, with its legal consequences, and by the presence of (potential) victims already at the stage of provisional measures of protection.

Mr Cançado Trindade concluded that provisional measures of protection had moved from *precautionary* to *tutelary*. The duty of compliance with provisional measures of protection brought to the fore another element configuring their autonomous legal regime in its component elements, namely: non-compliance and the prompt engagement of State responsibility; prompt determination by the Court of breaches of provisional measures of protection; and the ensuing duty of reparation for damages resulting from those breaches.

Mr *Wolfrum* shared his colleagues' views on the excellence of the Rapporteur's research. He expressed his admiration for the diversity of sources used in the report, rarely seen in literature yet also valuably transpiring in the presentation, a diversity which undoubtedly benefited the work. However, he wished to raise a number of problems or limitations. First, he wondered whether provisional measures could finally settle the dispute. While that was not the case in German law, he indicated that there were a number of cases in international law where orders for provisional measures directly or indirectly settled the dispute, raising the issue of an order constituting a premature decision on the merits. The literature on the topic had not convinced him otherwise. With regard to the threshold for the establishment of a *prima facie* jurisdiction, he observed that the approaches differed in domestic and international law. In particular, and speaking in a personal capacity, he opined that the ITLOS case law was not fully nor always consistent in that regard. He pondered about the seemingly contradictory nature of the measures' binding character being subjected to the decision on the merits. Referring to what he called a "psychological barrier", he further expressed his disbelief at the possibility for a jurisdiction to declare its incompetence at the merits stage after an order on provisional measures had been granted. While he fully supported the idea that provisional measures were binding, he queried whether that entailed for the jurisdiction an obligation of monitoring the implementation of the measures. In the case of ITLOS, he drew attention to the fact that such a specific monitoring procedure existed for provisional measures but not, strangely enough, for decisions on the merits. To finish and referring to the example of

EAN 978-2-233-00883-1

seabed drilling, he invited further work on the question of whether and under which conditions a breach of an order for provisional measures would lead to international responsibility or liability.

Mr *Basedow* congratulated the Rapporteur on a very comprehensive Report which touched on many details and covered sources from across the globe. As a preliminary remark on the issue of final settlement of the case, he first stressed the importance of the parties' wish to continue the proceedings. In intellectual property law, for instance, the order usually settled the legal dispute – except when the applicant made a request for compensation – inasmuch as the infringement had stopped. In general, in international law an order for provisional measures might clarify the legal issue between the parties and constitute an incentive for them to end the dispute. Mr Basedow raised a question regarding the First Principle of the draft Resolution which mentioned the maintenance of the *status quo* as one of the two aims of provisional measures. Again, he doubted that that was the case for the majority of intellectual property cases, or in family law with children or spouse maintenance where effective relief was in fact at stake. His second question related to the Fourth Principle and its possible applicability to international legal systems. He further suggested the inclusion of a sentence providing guidance to courts for future cases where compensation was deemed appropriate. His third question dealt with the Ninth Principle of the draft Resolution which appeared to refer to anti-suit injunctions by state courts against a party bound by an arbitral agreement. In any case and referring to the *West Tankers* and *GazProm* cases, he advised supplementing the paragraph with a mention of provisional measures granted by tribunals themselves.

Mr *Treves* also expressed his admiration for the report through which he had learnt a lot. He first commented on the Second Principle of the draft Resolution. He understood that in the light of recent ICJ and ITLOS jurisprudence, *prima facie* jurisdiction could now be thought as a fully-fledged prerequisite. However, he pressed for a more nuanced approach by adding a sentence such as "not prejudicing on the merits". As to the Tenth Principle of the draft Resolution, he recalled the *Pulp Mills* case where the ICJ subjected the indication of a provisional measure for the purpose of the non-aggravation of the dispute to the existence a link to the rights at issue.

Speaking in a personal capacity, the *Secretary-General* thanked and congratulated the Rapporteur and the Commission for their outstanding work. He opined that the draft Resolution was ready for adoption. Valuably summarising and clarifying the conditions for the granting of provisional measures, he believed that the draft Resolution was an important contribution to the work of the *Institut.* However, he wished to comment on the issue of the binding character of provisional measures. While he agreed that they were in general binding in interstate and human rights-related disputes, he defended the view that that was not always the case, depending on what the

instrument establishing the jurisdiction of the court or tribunal has determined specifically for the scope of those measures. He specifically referred to Article 47 of the ICSID Convention which, although following Article 41 of the Statute of the ICJ, explicitly used the verb "to recommend" instead of "to indicate". Mr Kohen defended the view that, for this reason, provisional measures in the context of ICSID arbitration, are not binding. Emphasising the generality of the draft Resolution under consideration which should encompass all cases irrespective of various interpretations, he therefore advocated for the inclusion of the following saving clause at the outset of its paragraph 5: "Unless otherwise established in the relevant instrument establishing the jurisdiction of the tribunal, (…)". In line with this amendment, he further supported the deletion of the Eleventh Principle.

Mr *Kazazi* expressed his admiration and gratitude for the written and oral report. In relation to the Fifth Principle of the draft Resolution, he noted that, for monitoring purposes, measures granted by national jurisdictions were subjected to specific judicial or statutory time frames. In light of the quasi-absence of any monitoring procedure in international law, he wondered which timeline, if any, framed the granting of provisional measures at that level. He then advised supplementing the Fourth Principle with a clarification on the matter of security with regard to international legal disputes.

Mr *Lee* echoed his colleagues' congratulations on the report whose comprehensiveness benefited him very much. His first question was of a terminological nature. Throughout the report, he noticed that several expressions were used to refer to the subject matter, such as "provisional measures", "interim measures" or "discretionary remedies". While he welcomed that innovative and instructive method as it highlighted the various circumstances at stake, he wondered whether the Rapporteur favoured any expression over others, in particular for the purposes of the draft Resolution. He further commented on the absence of any reference to Asian or African case law. Only with those, he opined, could the plenary ensure that the granting of provisional measures by international and national tribunals was indeed a general principle of law.

M. *Torres Bernárdez*, membre de la troisième commission, tient à exprimer sa reconnaissance pour le tour de force accompli par le Rapporteur avec son rapport et le projet de résolution. Si la référence à plusieurs systèmes juridiques peut prêter à confusion, il ne peut que souligner et se féliciter de la clarté dudit projet. Il adhère par ailleurs au principe du caractère obligatoire des mesures conservatoires. Pour ce qui est de la compétence *prima facie*, cette prédétermination ne vaut que pour les cas où le tribunal n'a pas encore décidé de sa compétence sur le fond. Cette méthode découle donc en grande partie de la pratique de la Cour internationale de Justice devant laquelle les Etats introduisent le plus souvent leurs requêtes en début de procédure. Se faisant partiellement l'écho du

commentaire du Secrétaire général, il note le caractère très général, voire holistique, du projet de résolution qui ne peut donc prendre en compte toutes les spécificités de chaque juridiction, tel le Tribunal sur le droit de la mer dont la compétence en matière de mesures conservatoires peut reposer sur la seule protection de l'environnement marin. Il propose pour finir un amendement au Premier Principe du projet de résolution, suggérant de supprimer les mots « de droit » dans l'expression « principe général de droit ».

Mr *Francioni* congratulated the Rapporteur on his wonderful work whose excellent scholarship had greatly benefited all Members. Recalling the plural and interactive context in which tribunals and courts worked, and building upon a possibility already alluded to by Mr Torres Bernárdez, he wished to draw the plenary's attention to the issue of *res judicata* where the tribunal which had competence on the merits was different from the one which had granted provisional measures. In particular, he wondered whether there was any limit imposed on the scope of merits jurisdiction when the parties requested new provisional measures at this stage. He suggested complementing the draft Resolution on that specific matter whose occurrence could become systematic in future practice.

Being also a member of the 3rd Commission, Sir Kenneth *Keith* said that he wished to draw from his experience in national jurisdictions and at the International Court of Justice to come back to the issue of the effect of the grant of provisional measures on the potential settlement of the dispute. Picking up from Mr Wolfrum and referring to the *Great Belt* and *Timor Leste* cases mentioned by the Rapporteur, he pointed to a similar case in fisheries matters before a domestic court. Following on from Mr Treves' comment, he recalled the *Nuclear Tests* dispute in which Australia undeniably had to demonstrate a strong case on the merits in its request for provisional measures against France in 1973. With regard to the issue of inherent powers, he was of the view that not only were they justified in order to protect the rights of the parties but also in view of the judge's responsibility to deal with the matter at hand.

La présidence change à 15 h 55. Le troisième vice-président, M. Kazazi, assure à présent le rôle de président de séance.

The *President* congratulated the plenary on a fruitful first round of discussion. He gave the floor to the Rapporteur for his reactions.

The *Rapporteur* thanked the Members for their helpful comments. While he agreed in substance with Mr Cançado Trindade's comments, he expressed doubt as to whether international courts could in fact grant provisional measures *ex officio*. With regard to Mr Wolfrum's intervention, he welcomed the numerous practical points offered and agreed that, in practice, the grant (or denial) of provisional measures did settle the case. He further stressed that while a decision on provisional measures was always without prejudice

to the decision on the merits, a stronger case in the latter would increase the possibility of the former, in particular when the same judge adjudicated incidental proceedings and those on the merits.

As to whether a jurisdiction could monitor the implementation of the provisional measures it had granted, the Rapporteur pointed out that that was not the case under English law. However, he admitted his lack of familiarity with other legal systems on the matter. He referred to the *Avena* case where he believed the United States were deemed responsible, at the merits stage, for not respecting an earlier order for provisional measures.

Taking up Mr Basedow's comment, the Rapporteur agreed that provisional measures often led to settlement of the case. He thanked the Member for his reference to intellectual property case law and justified the absence of any mention of family law by the Commission's cautious attitude deriving from the lack of expertise of its Members on the topic. He clarified that the Ninth Principle of the draft Resolution did not encompass anti-suit injunctions – a broad topic whose substance was examined by the Rapporteur himself in the nineties – but rather dealt with the use of orders granted by national courts to support, strengthen or enforce provisional measures indicated by arbitral tribunals.

Agreeing with Mr Treves with regard to the fact that merits should not be the object of a judge's analysis at the provisional measures stage, the Rapporteur could not help but note the thin line existing between the two. That found illustration in the widespread practice among lawyers who used their application for an order before national or international courts to actually present the merits of the case.

The Rapporteur was not entirely convinced by the Secretary-General's suggestion of amendment inasmuch as, in his opinion, the word "recommend" (used in Article 47 of the ICSID Convention) was similar to that of "indicate" used in other instruments whose bodies had stated the binding character of their order for provisional measures.

The Rapporteur was favourable, if a consensus emerged, to Mr Kazazi's proposal to extend the Fourth Principle's applicability to international tribunals. However, he pointed out that that would be a *de lege ferenda* development.

Regarding the absence of Asian or African sources in the report raised by Mr Lee and admitting the rather Eurocentric perspective of the report, the Rapporteur explained that the Commission was solely comprised of private and public international lawyers thus having only limited knowledge of national case law. He welcomed any input in that regard.

The Rapporteur expressed his reluctance at acceding to Mr Torres Bernárdez' and other Members' requests to delete the reference to "general principles of law" in the First Principle of the draft Resolution, as said

EAN 978-2-233-00883-1

reference was one of the principal contributions of the draft Resolution to the codification of the subject matter.

Answering Mr Francioni's comments, the Rapporteur underscored the fact that provisional measures orders did not have the force of *res judicata*, therefore allowing any other jurisdiction to grant another order with respect to the same facts or dispute.

With regard to the various comments on the law of the sea, the Rapporteur admitted his lack of knowledgeability on the topic but did welcome any amendment as long as it did not derogate from the draft Resolution's generality. The Rapporteur echoed Sir Kenneth Keith's view on the fact that provisional measures applications were often introduced for tactical purposes.

The *President* thanked the Rapporteur for his comprehensive responses. As there were no further comments on the report, the President gave the floor to Members for a discussion of the draft Resolution, principle by principle. The discussion started with the First Principle, which read: "It is a general principle of law that international and national tribunals may provide discretionary remedies to maintain the status quo pending determination of disputes or to preserve the ability to grant effective relief."

Mr *Oxman* congratulated the Rapporteur and the Third Commission on their excellent report and the draft Resolution. He reassured them that his suggested amendments were designed to speed up the adoption of the Resolution. He admitted to having difficulties in understanding the true meaning of the First Principle, and more particularly its legal consequences. If the intention of the First Principle was only descriptive, he did not envision any problem. However, if the intention was for it to be a normative text, then he had trouble understanding the norm proposed. He argued that the assertion of such a principle would not be well received in many States unless a "general principle of law" was a principle of law of that very country. If the First Principle was a principle transcending boundaries, that would lead to normative difficulties. Therefore, in order for the Principle's rationale to really stand out, he proposed changing the opening text to read "international and national tribunals generally have the express or implied authority to provide discretionary remedies". He also suggested the inclusion of a footnote indicating that there might be additional independent purposes for provisional measures that were expressly provided for in relevant instruments, as in environmental law. If no reference to a series of treaties providing for exceptions in that regard was possible, he alternatively suggested the use of broader wording, such as "international and national tribunals have authority to grant provisional measures for environmental purposes independent of other purposes".

Mr Oxman made specific reference to the UN Convention on the Law of the Sea, which authorizes provisional measures to prevent serious harm to

the marine environment, and to the Convention's 1995 Implementation Agreement, which authorizes provisional measures to protect fish stocks.

M. *Mahiou* souhaite faire deux remarques sur ce premier principe. La première concerne l'aspect très restrictif du pouvoir reconnu aux tribunaux, qui serait de maintenir le *statu quo*, alors que les mesures provisoires visent parfois à aller au-delà. Sa seconde remarque est relative à la formulation. Plutôt que d'affirmer que « c'est un principe général du droit que les tribunaux… », il conviendrait de dire « *en principe*, les tribunaux, tant internationaux que nationaux, peuvent accorder des mesures provisoires ».

The *Rapporteur* expressed his reluctance to abandon the concept of a "general principle of law". While he recognised that some tribunals, such as immigration or other special tribunals, might not have that power, he emphasised the fact that the wording of the first Principle was not absolute. However, he was disposed to accept Mr Oxman's suggested footnote. In response to the remarks made by Mr Mahiou, he agreed that provisional measures might sometimes go beyond the *status quo*. That said, the wording as it stood did not undermine the possibility of such an order. The removal of the expression "general principle of law" should be discussed by the plenary.

The *President* asked the Rapporteur to address the point made by Mr Torres Bernárdez.

The *Rapporteur* was of the opinion that he had already responded in part, since Mr Torres Bernárdez' point was the same as comments made by others. It seemed to him that there was a minority of three Members who wished to delete the expression "general principle of law" and that the majority favoured keeping the formulation as it was in the draft.

Mr *Koroma* congratulated the Rapporteur on his excellent report. Since the Principle under discussion posits the existence of a general principle of law valid in both international and national legal systems, he suggested that it be rephrased so that the emphasis be put on "grant effective relief" rather than "maintain the status quo".

The *Rapporteur* agreed with the proposed amendment and, for the time being, took note of it pending the reaction of other colleagues. He moved on to the Second Principle which read: *"*These remedies are available if the applicant can show that (a) it has a *prima facie* case on the merits; (b) there is a real risk that irreparable injury will be caused to the rights in dispute before final judgment; (c) the potential injury to the applicant outweighs the potential injury to the respondent; and (d) the measures are proportionate.*"* The Rapporteur began by indicating that Mr Oxman had proposed changing "potential" to "risk of" in letter (c) both times the word appeared, and, at the end of letter (d), to add "to the risks". Those were amendments he approved.

Mr *Koroma* observed that it would be better to use the expression "if the applicant shows that there exists a *prima facie* case" instead of "if the applicant shows that it has".

EAN 978-2-233-00883-1

In the absence of any other comment on the Second Principle, the *President* invited Members to comment on the Third Principle, which provided: "In cases of urgency an order may be made without hearing the respondent (ex parte), but the respondent has a right to be notified promptly and to object to the order."

Mr *Basedow* repeated a comment he had made earlier along with others regarding the fact that provisional measures were at times granted for purposes which went beyond the *status quo*. To broaden the text's scope, he proposed slightly modifying the text and adding "*in particular* to maintain the status quo".

The *President* remarked that the comment concerned the First Principle.

The *Rapporteur* replied that the change seemed unnecessary, since, as it stood, the assertion covered the vast majority of legal systems.

Mr *Oxman* queried whether it would not be appropriate to add, at the beginning of the Third Principle, "in case of *special urgency*".

The *President* observed that the Rapporteur had noted the suggestion. As there were no further comments on the Third Principle, the President invited Members to comment on the Fourth Principle, which provided: "In national legal systems an applicant for provisional relief is in principle liable for compensation of a party against whom the relief is issued if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court may order an undertaking or bond or other security to secure the respondent's right to compensation if it is ultimately decided that the order should not have been made."

The *Secretary-General* alerted Members that the authoritative text of the draft Resolution was the English version, and that the French translation contained a number of inaccuracies. He urged Members not to raise those translation inaccuracies during the plenary session as they would be corrected at a later stage.

The *Rapporteur* returned to Mr Basedow's earlier comment suggesting the addition of an element *de lege ferenda* providing guidance for courts in the matter of attribution of compensation. While the addition would result in a less balanced formulation, he appreciated its potential appropriateness.

Mr *Basedow* wished to further explain his views. He had proposed including a reference to Article 38(c) of the Statute of the International Court of Justice as it provided a legal basis for comparative findings which, in his opinion, were essential for international adjudication. He recognised that his proposition was perhaps *de lege ferenda* but found it important to promote a broader perspective to international judges.

The *Rapporteur* appreciated that the proposition was intended to be included in the preamble rather than the First Principle.

EAN 978-2-233-00883-1

Mr *Koroma* proposed modifying the formulation so that it read "is in principle liable for compensation *from* a party".

The *Rapporteur* suggested an alternative wording: "an applicant for provisional relief is in principal liable *to compensate a party*" and asked whether that would meet the concerns raised by Mr Koroma.

Mr *Koroma* agreed with the Rapporteur's suggested wording.

The *President* declared that the discussion would move on to the Fifth Principle, which provided: "The order is binding. It must be subject to variation or discharge."

M. *Ranjeva*, bien qu'il soit membre de la Commission, demande une précision sur le caractère obligatoire des mesures conservatoires. Selon lui, toute l'ambiguïté réside dans l'adoption d'une approche fondée seulement sur l'objet des mesures conservatoires alors qu'il faudrait plutôt se concentrer uniquement sur la question de la direction du procès. Tout en reconnaissant le caractère simpliste et plutôt terre à terre de son explication, M. Ranjeva estime qu'elle permet une meilleure compréhension des décisions de la Cour internationale de Justice en la matière, et en particulier en l'affaire *LaGrand* où la Cour a suivi un raisonnement inutile trop compliqué à ce sujet.

Mr *Koroma* believed that the Fifth Principle, as it was presently worded, was correct. As to the analysis of the Court's case law, he recalled that its pronouncement on the binding character of provisional measures directly derived from the facts at stake, namely two death row cases. He finally suggested one minor change, which was to substitute the full stop by a comma: "The order is binding**,** it must be subject…".

The *Rapporteur* agreed with the proposed change.

Mr *van Houtte* opined that the wording should be: "The order is binding *but* it is subjected to variation or discharge".

In his personal capacity, the *Secretary-General* suggested an amendment to the draft. He still considered that the Resolution should take into account those jurisdictions whose constitutional instruments did not expressly provide for the binding nature of their provisional measures. Returning to Article 47 of the ICSID Convention which he had mentioned in an earlier comment, he stressed that, while that provision, and other similar ones, were of course subject to interpretation, they did not deal with the protection of human rights but rather with that of commercial interests where monetary compensation was possible. That therefore justified a more open stance on the matter, and hence a broader formulation such as the one he proposed. He finally underlined the weight that provisional measures, even if not binding, carried with them, as he recalled Sir Hersch Lauterpacht's separate opinion in the *South West Africa* case regarding the legal value of recommendations adopted by the United Nations General Assembly. Although not binding, States must, in good faith, give those resolutions due consideration.

EAN 978-2-233-00883-1

Mr *Sreenivasa Rao* thanked the Rapporteur for his excellent report. He suggested two changes in the wording of the Fifth Principle. First, he proposed the use of the term "may" rather than "must" in the phrase "must be … discharge". Second, he suggested deleting the word "discharge" from the sentence. He wondered whether the *Institut* should promote a narrower Resolution than the one they were working on, or if a more nuanced understanding should be preferred. A possible way to reconcile both positions would be to distinguish arbitral and national jurisdictions from international courts and tribunals. Finally, he suggested that the Fifth Principle be drafted as follows: "The order is binding, *unless* a specific provision provides for the contrary", which went along with the position of the Secretary-General.

Mr *Symeonides* wished to make two editorial points. First, he suggested replacing the word "must" with "is" so that the phrase read "[t]he order is binding. It *is* subject…". Second, he proposed replacing "variation" with "modification".

M. *Kamto* félicite chaleureusement le Rapporteur et les membres de sa commission pour le remarquable travail effectué sur un sujet qui semblait pourtant impossible, comme le montre la discussion sur le cinquième principe. Il s'agit en effet d'une institution qui connaît des régimes divers au niveau international et national. C'est un véritable tour de force qui mérite d'être salué. Cela étant posé, il rejoint le point de vue exprimé par M. *Sreenivasa* Rao et est par ailleurs très sensible à l'argument défendu par le Secrétaire général. Sa position est d'autant plus pertinente qu'il s'agit de cas prévus conventionnellement, qui ne peuvent donc souffrir aucune contestation. Si un instrument juridique auquel des justiciables sont parties prévoit que les mesures provisoires n'ont pas de force contraignante, on ne saurait l'interpréter autrement. De sorte que la proposition de M. Sreenivasa Rao permet de régler le problème en réaffirmant le principe du caractère obligatoire tout en l'atténuant par l'ajout de « à moins qu'il n'existe des limitations conventionnelles ». Il soutient donc la proposition du Secrétaire général telle qu'amendée par M. Sreenivasa Rao.

Mr *Vinuesa* admitted to feeling rather confused. He thought that the Fifth Principle only addressed national systems, which was an uncontroversial statement, in addition to the concomitant problematic redundancy of the Eleventh Principle.

Mr *Oxman* suggested solving the problem by limiting the Resolution's scope to certain jurisdictions only. He urged the Drafting Committee to formulate a chapeau or a preamble to that effect. That would solve almost all of the problems he had identified with the draft.

The *Rapporteur* agreed that the Fifth and Eleventh Principles should be consolidated. He approved the inclusion of the term "*is* subject to" and of a paragraph in the preamble to the effect that "all principles of this Resolution

EAN 978-2-233-00883-1

are subject to counter-indication in the constitutive instrument or national law applicable". He also agreed to substituting "variation" with "modification".

Mr *Koroma* welcomed the Rapporteur's willingness to find a consensus on the text. He further suggested adding "and" in the following phrase: "subject to modification *and* discharge".

As there were no further comments on the Fifth Principle, the *President* invited Members to comment on the Sixth Principle, which provided: "An international or a national tribunal may make such orders if it has *prima facie* jurisdiction over the merits (unless in the case of arbitral tribunals, the parties have excluded the right to apply for such measures)."

Sir Kenneth *Keith* asked whether the brackets could be deleted. He expressed his support for the Rapporteur's proposed addition in the preamble.

The *President* suggested that the discussion then move on to the Seventh Principle: "A national court may make orders for provisional or protective measures in relation to assets, or to acts, within its territory even if a court in another country has jurisdiction over the merits. A court may order provisional measures in relation to acts and property abroad provided this does not infringe upon the exclusive jurisdiction of foreign courts." There were no comments on the Seventh Principle.

The discussion moved on to the Eighth Principle, which provided: "Where the provisional measure is ordered by a court with jurisdiction over the merits and the party to whom the provisional measure is addressed has been given notice of the order prior to enforcement, courts of other States should where possible lend their cooperation and recognise and enforce such measures."

M. *Kamto* propose d'ajouter le membre de phrase suivant au principe examiné : « …, les tribunaux des autres Etats devront *reconnaître cette mesure et autant que possible, prêter leur concours à son exécution* ». Il lui semble en effet plus logique d'évoquer la reconnaissance avant l'exécution.

The *Rapporteur* stated that he would further discuss the wording of the Principle with Mr van Loon. He stressed the *de lege ferenda* nature of the Principle as it only found application in the Brussels and Lugano systems.

Mr *Oxman* noted that the Eighth Principle could only be applicable within national jurisdictions. He drew attention to the fact that in the United States, national courts were not obliged to enforce an order granted by a foreign court, unless they found it appropriate.

The *President* suggested that the discussion move on to the Ninth Principle, which provided: "In commercial arbitration proceedings, an application may be made to courts of the State of the seat of the tribunal or

EAN 978-2-233-00883-1

the court of any other State in support of the effectiveness of such proceedings."

There were no comments on the Ninth Principle. The President invited Members to comment on the Tenth Principle which provided: "International courts and tribunals may make orders for measures aimed at the non-aggravation of the dispute."

Mr *Koroma* agreed with the Principle inasmuch as it valuably reflected one of the reasons for granting provisional measure, that is, to prevent the aggravation of a dispute.

Mr *Sreenivasa Rao* queried the kinds of measures that were contemplated by the draft Resolution. He suggested adding a paragraph in the preamble addressing the various purposes for which provisional measures could be granted.

The *Rapporteur* disagreed with Mr Sreenivasa Rao's proposal. He opposed the view that a list of the various types of measure was needed.

M. *Mahiou* sollicite une clarification au sujet du dixième principe. Ce principe se contente d'évoquer les « tribunaux et les juridictions internationales ». Est-ce à dire que les tribunaux nationaux n'ont pas ce pouvoir ?

The *Rapporteur* replied that he had no doubt that they did, although national tribunals could only grant measures provided for by their own legislation.

Mr *van Houtte* concurred with the Rapporteur as there could be no aggravation of the dispute in the context of arbitration. In his view, the Principle applied to both arbitral tribunals and national courts.

The *Rapporteur* agreed to submit the proposed amendment for a vote. He mentioned being aware of that particular line of reasoning in arbitration which seemed, to his knowledge, not to be found in other judicial case law.

The *President* remarked that the Tenth Principle mentioned "international courts and tribunals" but concurred with the Rapporteur as to leaving the matter under advisement for the time being.

In the absence of further comments on the Tenth Principle, the President opened the discussion on the Eleventh Principle, which provided: "Provisional measures in international tribunals are binding on the parties and States are under an obligation to give effect to provisional measures addressed to them by international courts and tribunals."

Mr *Wolfrum* remarked that the Principle stipulated that it was "binding on the parties *and* States". He wondered whether there was any difference to be made between a State and a party. In any case, the discrepancy should be rectified.

The *Rapporteur* proposed the following wording: "are binding *and the parties* have an obligation".

EAN 978-2-233-00883-1

Mr *Sreenivasa Rao* added that the Principle should mention "provisional measures *of* international tribunals". He considered that the word "parties" could cover private parties, State parties, individuals and juridical entities.

The *Rapporteur* agreed.

The *Secretary-General*, still speaking in a personal capacity, reiterated his opposition to a provision without any kind of exception to the binding character of provisional measures, and proposed deleting the Principle.

The *Rapporteur* reassured the Secretary-General and other concerned Members that the Fifth and Eleventh Principles would be consolidated and that the preamble would include a saving clause following their suggestions.

Mr *Koroma* wished to amend the Principle and proposed "provisional measures *granted by* international tribunals are binding". Regarding the word "parties" and in light of the draft Resolution's applicability to jurisdictions such as the International Criminal Court, he expressed the view that States and parties should be mentioned.

Mr *Oxman* proposed a drafting amendment to put a full stop after "parties". He assumed that that would be fixed by the Drafting Committee before the adoption of the draft Resolution.

La séance est levée à 18 h 00.

Vendredi 8 septembre 2017 (matin)

La séance est ouverte à 9 h 40 sous la présidence de M. *Sreenivasa Rao*.

The *President* welcomed Members to the final substantive session in relation to the 3rd Commission and declared that, having completed the initial substantive review, the plenary now had the revised draft and was ready to proceed to a vote on the Resolution.

DRAFT RESOLUTION REVISED 1

The *Institute of International Law*,

Considering that a broad comparison of practices of international courts and tribunals and of national courts and tribunals indicates that the availability of provisional and protective measures ("provisional measures") is a consistent element of those practices,

Considering that the law and practice of national courts are sufficiently uniform so as to give rise to general principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice,

Considering that it would contribute to the development of international law and national law if principles relating to the grant of provisional measures were adopted by the Institute,

Adopts the following guiding principles:

EAN 978-2-233-00883-1

PROVISIONAL MEASURES

1. It is a general principle of law that international and national tribunals may grant interim relief to maintain the status quo pending determination of disputes or to preserve the ability to grant final effective relief.[1]

2. Provisional measures are available if the applicant can show that (a) there is a *prima facie* case on the merits; (b) there is a real risk that irreparable injury will be caused to the rights in dispute before final judgment; (c) the risk of injury to the applicant outweighs the risk of injury to the respondent; and (d) the measures are proportionate to the risk.

3. In cases of special urgency an order may be made without hearing the respondent (*ex parte*), but the respondent has a right to be notified promptly and to object to the order.

4. International courts and tribunals may make orders aimed at the non-aggravation of the dispute.

5. In national legal systems an applicant for provisional measures is in principle liable to compensate the party against whom the measures are ordered if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court may order an undertaking or bond or other security to secure the respondent's right to compensation if it is ultimately decided that the order should not have been made.

6. An order for provisional measures made by an international court or tribunal or national court is binding, subject to modification or discharge by the court or tribunal which made it.

7. An international or a national court or tribunal may make such orders if it has *prima facie* jurisdiction over the merits.

8. A national court may make orders for provisional measures in relation to assets, or to acts, within its territory even if a court in another country has jurisdiction over the merits. A court may order provisional measures in relation to acts and property abroad provided this does not infringe upon the exclusive jurisdiction of foreign courts.

9. Where provisional measures are ordered by a national court with jurisdiction over the merits and the party to whom the order is addressed has been given notice of the order prior to enforcement, courts of other States should recognize such order and where possible lend their cooperation to enforce it.

10. In commercial arbitration proceedings, an application may be made to courts of the State of the seat of the tribunal or the court of any other State in

[1] There may be independent purposes of provisional measures that are expressly provided for in relevant instruments, such as the prevention of serious harm to the marine environment under Article 290(1) of the UN Convention on the Law of the Sea or the prevention of damage to fish stocks under Article 31(2) of the Agreement on Implementation of the Law of the Sea Convention with respect to straddling and highly migratory fish stocks.

support of the effectiveness of provisional measures ordered in such proceedings.

11. These guiding principles are subject to particular provisions contained in the constituent instruments of international courts and tribunals, or in national law, as the case may be.

***

PROJET DE RESOLUTION REVISE 1

L'Institut de Droit international,

Considérant qu'une comparaison extensive de la pratique des cours et tribunaux nationaux, ainsi que des cours et tribunaux nationaux, révèlent la constance de la possibilité pour les tribunaux d'ordonner des mesures provisoires et conservatoires,

Considérant que le droit et la pratique des tribunaux nationaux sont suffisamment uniformes pour générer des principes généraux de droit au sens de l'article 38 (1) (c) du Statut de la Cour internationale de Justice,

Considérant que l'adoption de principes relatifs à l'ordonnance de mesures conservatoires par l'Institut contribuerait au développement du droit international ainsi que du droit national,

Adopte les principes directeurs suivants :

1. C'est un principe général de droit que les tribunaux, tant nationaux qu'internationaux, peuvent octroyer des mesures conservatoires afin de préserver le statu quo en attendant la décision sur le fond du différend ou pour assurer l'effectivité de la décision au fond de l'affaire qui sera rendue.[1]

2. Les mesures provisoires peuvent être ordonnées si le requérant peut prouver que (a) les droits invoqués en l'espèce sont plausibles ; (b) qu'il y a un risque de préjudice irréparable pouvant affecter les droits en cause avant la décision finale sur l'affaire ; (c) que le risque de préjudice encouru par les droits invoqués par le requérant l'emporte sur le risque de préjudice aux droits invoqués par le défendeur ; et (d) que les mesures requises sont proportionnées au risque de préjudice encouru.

3. Dans des cas d'extrême urgence, des mesures conservatoires et provisoires peuvent être ordonnées sans qu'il ne soit besoin d'entendre le

[1] Des causes spécifiques d'octroi de mesures provisoires peuvent être prévues par le texte des instruments pertinents. Tel est le cas de la prévention d'un dommage grave au milieu marin en vertu de l'article 290 (1) de la Convention des Nations Unies sur le Droit de la Mer. C'est le cas également de la prévention du dommage aux stocks de poissons en vertu de l'article 31 (2) du l'Accord aux fins de l'application des dispositions de la Convention de Nations Unies sur le droit de la mer du 10 décembre 1982 relatives à la conservation et à la gestion des stocks de poissons dont les déplacements s'effectuent tant à l'intérieur qu'au-delà de zones économiques exclusives (stocks chevauchants) et des stocks de poissons grands migrateurs, adopté le 4 août 1995.

défendeur (*ex parte)*. Néanmoins, le défendeur a le droit de se voir notifié immédiatement les mesures indiquées et de formuler, le cas échéant, des objections y relatives.

4. Les juridictions internationales peuvent ordonner des mesures provisoires et conservatoires visant la non-aggravation du différend.

5. Dans les ordres juridiques nationaux, la partie ayant obtenu des mesures provisoires et conservatoires doit en principe compenser la partie à l'encontre de laquelle elles ont été ordonnées si, subséquemment, le tribunal détermine que ces mesures n'auraient pas dû être accordées. Dans des circonstances appropriées, le tribunal peut ordonner un dépôt de garantie ou d'autres sûretés pour garantir le droit du défendeur à compensation s'il s'avère éventuellement que les mesures visées n'auraient pas dû être octroyées. Le tribunal peut également enjoindre à une partie à s'engager à adopter un comportement donné.

6. Les mesures provisoires et conservatoires ordonnées tant par les tribunaux ou internationaux sont obligatoires, sous réserve de leur modification ou levées par le tribunal les ayant ordonnées.

7. Une juridiction nationale ou internationale peut ordonner des mesures provisoires et conservatoires s'il a *prima facie* compétence sur le fond de l'affaire.

8. Un tribunal national peut ordonner des mesures provisoires portant sur des biens situés dans le territoire de l'Etat du for ou des actes s'y déroulant, même si un tribunal d'un pays tiers a compétence pour connaître du fond de l'affaire. Un tribunal peut ordonner des mesures provisoires et conservatoires portant sur des biens situés dans un Etat tiers ou des actes s'y déroulant, à condition de ne pas porter atteinte à la compétence exclusive des tribunaux de cet Etat.

9. Lorsque des mesures provisoires et conservatoires sont ordonnées par un tribunal national ayant compétence sur le fond de l'affaire et qu'elles ont été notifiées à la partie défenderesse avant leur exécution, les tribunaux des Etats tiers doivent les reconnaître et, si possible, prêter leur concours à leur mise en œuvre.

10. Dans les procédures relatives à l'arbitrage commercial, une partie peut demander aux juridictions de l'Etat du siège du tribunal ou de tout autre Etat l'indication de mesures à même d'assurer l'effectivité des mesures provisoires ordonnées par le tribunal arbitral.

11. Les principes directeurs susmentionnés s'appliquent sous réserve de dispositions particulières contenues dans les instruments constitutifs des cours et tribunaux internationaux, ou éventuellement de celles contenues dans les ordres juridiques nationaux.

The *President* read Principle 1 and the footnote to Principle 1, he called for a vote by show of hands and announced the following results:

Principle 1: 25 votes in favour, 0 votes against, 2 abstentions.

Footnote to Principle 1: 29 votes in favour, 0 votes against, 1 abstention.

M. *Mahiou* précise que son abstention lors du vote du principe 1 tient au fait que celui-ci limite indûment l'objet et la finalité des mesures conservatoires au maintien du *statu quo*.

The *Rapporteur* read Principle 2.

Sir Christopher *Greenwood* raised a technical point regarding the reference to "the applicant" in Principle 2. He believed that this was intended to mean the applicant for provisional measures, rather than the party initiating the case. Significantly, in international law, either the claimant or respondent could apply for provisional measures, as was particularly apparent in the practice of the International Court of Justice. He proposed that references to the applicant and respondent be replaced, respectively, with references to "the party seeking provisional measures" and "the other party".

The *Rapporteur* confirmed that the word "applicant" was intended to mean the applicant for provisional measures. The Drafting Committee would take the proposal into account, possibly by way of an additional footnote, and would review any other drafting changes that such amendment might require.

The *President* called for a vote by show of hands on Principle 2, as amended by the addition of the explanatory note to be added, and announced the following results: 32 in favour, 0 votes against, 0 abstentions.

The President, after reading out each Principle, called for a vote by show of hands and announced the following results:

Principle 3: 32 votes in favour, 0 votes against, 0 abstentions.

Principle 4: 29 votes in favour, 0 votes against, 1 abstention.

Principle 5: 31 votes in favour, 0 votes against, 0 abstentions.

Principle 6: 31 votes in favour, 0 votes against, 0 abstentions.

Le *Secrétaire général*, s'exprimant en sa qualité de membre, explique avoir voté en faveur du principe 6 car il doit être lu en conjonction avec le nouveau principe 11, qui préserve les situations spéciales prévues par certains traités régissant la compétence d'organes juridictionnels, tels que la Convention de Washington de 1965 et de la Convention des Nations Unies sur le droit de la mer de 1982. Il s'est déjà référé au caractère de recommandation des mesures provisoires prises par les tribunaux CIRDI et rappelle que la Convention de Montego Bay prévoit la possibilité de révision ou de révocation des mesures conservatoires prises par un tribunal (le TIDM) par un autre tribunal (le tribunal arbitral établit sur la base de l'Annexe VII de la CNUDM).

EAN 978-2-233-00883-1

M. *Kamto* explique avoir voté en faveur du principe 6, mais indique que sa rédaction actuelle est trompeuse car elle laisse entendre que le caractère obligatoire des ordonnances en indication de mesures conservatoires dépendrait de leur modification ultérieure. Il suggère dès lors que le principe soit scindé en deux phrases distinctes.

The *President*, speaking in his personal capacity, shared the concern at the implication that it was the binding effect of the provisional measures that was subject to a further judgment being made subsequently.

The *Rapporteur* agreed with the point and confirmed that the Drafting Committee would address it.

The *President* noted that there was a typographical correction to be made to Principle 7, by deleting the word "is" where it appeared before "has". After reading Principle 7 as corrected, he called for a vote by show of hands and announced the following results: 31 votes in favour, 0 votes against, 0 abstentions.

The President, after reading each Principle, called for a vote by show of hands and announced the following results:

Principle 8: 31 votes in favour, 0 votes against, 0 abstentions.

Principle 9: 32 votes in favour, 0 votes against, 0 abstentions.

Principle 10: 30 votes in favour, 0 votes against, 1 abstention.

Principle 11: 32 votes in favour, 0 votes, against, 1 abstention.

The President read the first paragraph of the preamble, and gave the floor to Mr Basedow.

Mr *Basedow* was in favour of the first paragraph of the preamble. He observed that the "consistent element" described in this paragraph had been developed not only in the practice of courts and tribunals but also by statute. In Germany, for example, recourse to provisional measures in respect of the subject matter of the dispute was enshrined in paragraph 935 of the Code of Civil Procedure. He therefore recommended making reference to "the law and practice of" international courts and tribunals.

The *Rapporteur* agreed that this point, which was made in the second preambular paragraph, should also be made in the first paragraph. He read the paragraph as amended.

The *President* called for a vote by show of hands on preambular paragraph 1 as amended, and announced the following results: 31 votes in favour, 0 votes against, 0 abstentions.

The President, after reading each paragraph, called for a vote by show of hands and announced the following results:

Preambular paragraph 2: 29 votes in favour, 0 votes against, 1 abstention.

Preambular paragraph 3: 32 votes in favour, 0 votes against, 1 abstention.

EAN 978-2-233-00883-1

Mr *Sreenivasa Rao,* speaking in his personal capacity, suggested that to give appropriate emphasis to the relevant part of preambular paragraph 3, the order of the sentence should be reversed so as to read: "*Considering* that the adoption of principles relating to the grant of provisional measures would contribute to the development of international law and national law."

Mr *Oxman* suggested using the phrase "courts and tribunals" in Principle 1 for consistency with other parts of the text, and to use the plural of the word "risks" in Principle 2.

The *President* called for a vote by show of hands on the Resolution as a whole and announced the following results: 32 votes in favour, 0 votes against, 0 abstentions.

The President congratulated the Rapporteur for the successful completion of his work on the Resolution adopted, and reminded Members that there would be a vote by roll-call prior to the close of the Hyderabad Session.

La séance est levée à 10 h 20.

Vendredi 8 septembre 2017 (après-midi)

La séance est ouverte à 17 h 00 sous la présidence de M. *Kazazi*, troisième Vice-président.

The *President* made sure that Members had received hard copies of the draft Resolution prepared by the 3rd Commission. He thanked the Commission and the Drafting Committee for their work under time pressure, and gave the floor to the Secretary-General.

The *Secretary-General* thanked the 3rd Commission for its work. He called for a nominal vote on the Resolution, namely as to whether Members were in agreement with the adoption of the Resolution on provisional measures.

The Members and Associates who voted in favour were Mrs Bastid-Burdeau, Messrs Bogdan and Caflisch, Lord Collins of Mapesbury, Mrs Damrosch, Mr Kazazi, Sir Keith Kenneth, Messrs Kirsch, Ko, Kohen, Orrego Vicuña, Ranjeva, Ronzitti, Schrijver, van Loon, Verhoeven, Vinuesa, Wolfrum, Basedow, Benvenisti, Mrs Boisson de Chazournes, Messrs Fernández Arroyo and Francioni, Mrs Gannagé, Sir Christopher Greenwood, Messrs Mälksoo, Murase, Oxman, Soons, Symeonides and van Houtte.

The Resolution was adopted: 32 votes in favour; 0 votes against, 0 abstentions. The President, the Secretary-General and the Members extended their thanks to Lord Collins of Mapesbury.

La séance est levée à 17 h 10.

EAN 978-2-233-00883-1

Troisième commission

MESURES PROVISOIRES

Rapporteur : Lord Collins of Mapesbury

RESOLUTION FINALE

L'*Institut de Droit international*,

Considérant qu'une comparaison étendue du droit et de la pratique des juridictions internationales et nationales démontre que la possibilité pour ces juridictions d'indiquer des mesures provisoires et conservatoires (« mesures provisoires ») est un élément constant de ce droit et de cette pratique,

Considérant que le droit et la pratique des juridictions nationales sont suffisamment uniformes pour être considérés comme des principes généraux de droit au sens de l'article 38, paragraphe 1, lettre c), du Statut de la Cour internationale de Justice,

Considérant que l'adoption de principes relatifs à l'indication de mesures provisoires contribuera au développement du droit international autant que du droit national,

Adopte les principes directeurs suivants :

1. Un principe général de droit veut que les juridictions internationales et nationales puissent indiquer des mesures provisoires pour préserver le *statu quo* en attendant la décision sur le fond du différend ainsi que pour permettre à la juridiction concernée de rendre une décision effective sur le fond.[1]

2. Des mesures provisoires peuvent être indiquées si le requérant peut établir que : a) la demande principale paraît fondée *prima facie* ; b) il y a un risque de préjudice irréparable aux droits en cause avant que n'intervienne la décision finale ; c) le risque de préjudice aux droits du requérant l'emporte sur le risque de préjudice aux droits du défendeur ; et que d) les mesures sont proportionnées aux risques de préjudice.

3. Dans des cas d'extrême urgence, des mesures provisoires peuvent être indiquées sans qu'il ne soit nécessaire d'entendre le défendeur (*ex parte*).

[1] Des causes spécifiques d'octroi de mesures provisoires peuvent être prévues par le texte des instruments pertinents. Tel est le cas de la prévention d'un dommage grave au milieu marin en vertu de l'article 290 (1) de la Convention des Nations Unies sur le Droit de la Mer. C'est le cas également de la prévention du dommage aux stocks de poissons en vertu de l'article 31, paragraphe 2, de l'Accord aux fins de l'application des dispositions de la Convention de Nations Unies sur le droit de la mer du 10 décembre 1982 relatif à la conservation et à la gestion des stocks de poissons dont les déplacements s'effectuent tant à l'intérieur qu'au-delà de zones économiques exclusives (stocks chevauchants) et des stocks de poissons grands migrateurs, adopté le 4 août 1995.

EAN 978-2-233-00883-1

Toutefois, le défendeur a le droit d'être notifié immédiatement des mesures indiquées et de formuler des objections.

4. Les juridictions internationales peuvent indiquer des mesures provisoires visant à éviter l'aggravation du différend.

5. Dans les ordres juridiques nationaux, la partie ayant requis des mesures provisoires doit en principe indemniser la partie visée par ces mesures si, subséquemment, le tribunal détermine que ces mesures n'auraient pas dû être indiquées. Si les circonstances le justifient, le tribunal peut imposer un comportement donné, un dépôt de garantie ou d'autres sûretés pour garantir le droit du défendeur à être indemnisé s'il s'avère en définitive que les mesures visées n'auraient pas dû être indiquées.

6. Les mesures provisoires indiquées par les juridictions internationales et nationales sont obligatoires. Elles peuvent être modifiées ou levées par le tribunal qui les a indiquées.

7. Une juridiction internationale ou nationale peut indiquer des mesures provisoires si elle est compétente *prima facie* sur le fond.

8. Un tribunal national peut indiquer des mesures provisoires portant sur des biens situés dans le territoire de l'Etat du for ou sur des actes qui s'y sont produits même si un tribunal d'un Etat tiers est compétent pour connaître du fond de l'affaire. Ce pouvoir peut être exercé à condition de ne pas porter atteinte à la compétence exclusive des tribunaux étrangers.

9. Lorsque des mesures provisoires sont indiquées par un tribunal national ayant compétence sur le fond de l'affaire et qu'elles ont été notifiées au défendeur avant leur exécution, les tribunaux des Etats tiers doivent les reconnaître et, si possible, prêter leur concours à leur exécution.

10. Dans les procédures relatives à l'arbitrage commercial, une partie peut demander aux juridictions de l'Etat du siège du tribunal ou de tout autre Etat d'indiquer des mesures permettant d'assurer l'effectivité de celles émanant du tribunal arbitral.

11. Les principes directeurs qui précèdent s'appliquent sous réserve des dispositions particulières contenues dans les actes constitutifs des juridictions internationales ou, le cas échéant, de celles contenues dans les ordres juridiques nationaux.

***

EAN 978-2-233-00883-1

Third Commission

PROVISIONAL MEASURES

Rapporteur : Lord Collins of Mapesbury

FINAL RESOLUTION

The *Institute of International Law*,

Considering that a broad comparison of the law and practice of international and national courts and tribunals indicates that the availability of provisional and protective measures ("provisional measures") is a consistent element of that law and practice,

Considering that the law and practice of national courts are sufficiently uniform so as to give rise to general principles of law within the meaning of Article 38, paragraph (1), letter (c), of the Statute of the International Court of Justice,

Considering that the adoption of principles relating to the grant of provisional measures would contribute to the development of international law and national law,

Adopts the following guiding principles:

1. It is a general principle of law that international and national courts and tribunals may grant interim relief to maintain the *status quo* pending determination of disputes or to preserve the ability to grant final effective relief.[1]

2. Provisional measures are available if the applicant for such measures can show that:

(a) there is a *prima facie* case on the merits; (b) there is a real risk that irreparable injury will be caused to the rights in dispute before final judgment; (c) the risk of injury to the applicant outweighs the risk of injury to the respondent; and (d) the measures are proportionate to the risks.

3. In cases of special urgency an order may be made without hearing the respondent (*ex parte*), but the respondent is entitled to be notified promptly and to object to the order.

4. International courts and tribunals may make orders aimed at preventing the aggravation of the dispute.

5. In national legal systems an applicant for provisional measures is in principle liable to compensate the party against whom the measures are ordered if the court thereafter determines that the relief should not have

[1] There may be independent purposes of provisional measures that are expressly provided for in relevant instruments, such as the prevention of serious harm to the marine environment under Article 290, paragraph (1), of the United Nations Convention on the Law of the Sea or the prevention of damage to fish stocks under Article 31, paragraph (2), of the Agreement on Implementation of the Law of the Sea Convention with respect to straddling and highly migratory fish stocks, adopted on 4 August 1995.

been granted. In appropriate circumstances, the court may order an undertaking or bond or other security to secure the respondent's right to compensation if it is ultimately decided that the order should not have been made.

6. An order for provisional measures made by an international or national court or tribunal is binding. It is subject to modification or discharge by the court or tribunal which made it.

7. An international or national court or tribunal may make such orders if it has *prima facie* jurisdiction over the merits.

8. A national court may make orders for provisional measures in relation to assets or acts within its territory even if a court in another country has jurisdiction over the merits. Such provisional measures may be ordered provided that they do not infringe upon the exclusive jurisdiction of foreign courts.

9. Where provisional measures are ordered by a national court with jurisdiction over the merits and the party to whom the order is addressed has been given notice of the order prior to enforcement, courts of other States should recognize such order and where possible lend their cooperation to enforce it.

10. In commercial arbitration proceedings, an application may be made to the courts of the State of the seat of the tribunal or the court of any other State in support of the effectiveness of provisional measures ordered in such proceedings.

11. These guiding principles are subject to particular provisions contained in the constituent instruments of international courts and tribunals, or in national law, as the case may be.