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International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3518th meeting
Held at the Palais des Nations, Geneva, on Monday, 10 May 2021, at 11 a.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 11.05 a.m.

Provisional application of treaties (agenda item 4) (*continued*) (A/CN.4/737 and A/CN.4/738)

The Chair invited the Commission to resume its consideration of the sixth report of the Special Rapporteur on the provisional application of treaties (A/CN.4/738).

Ms. Escobar Hernández said that she was grateful to the Special Rapporteur for his excellent and well-balanced sixth report, which, together with the compilation of comments and observations received from Governments and international organizations prepared by the Secretariat (A/CN.4/737), provided an excellent basis on which the Commission would be able to complete its work on the topic at the current session.

She was broadly supportive of the draft Guide to Provisional Application of Treaties and the draft model clauses proposed in the report. The Special Rapporteur had succeeded in addressing a range of general issues that had been under discussion throughout the Commission's work on the topic. Those issues included the voluntary character of provisional application, the question of whether international organizations should be explicitly mentioned in the text, the flexibility of provisional application, and the overarching aim of the project, which was not to set out a position for or against recourse to provisional application but to provide useful guidance in the event of such recourse.

With regard to draft guideline 1, she supported the Special Rapporteur's proposal to insert the words "by States and international organizations" at the end of the sentence, as that would ensure that the full scope of the Commission's work on the topic was reflected. Although she did not consider draft guideline 1 to be redundant, she would not object to merging it with draft guideline 2. The new draft guideline thereby created could be entitled "Scope and purpose of the present Guide" [*Alcance y objetivo de la presente Guía*].

Concerning draft guideline 2, it made sense to include a reference to article 25 of the 1969 Vienna Convention on the Law of Treaties, which served as a good frame of reference for understanding the draft Guide. That said, she could see merit in Mr. Grossman Guiloff's proposal that the words "the principles contained in" should be inserted after "on the basis of". The reasons that Mr. Grossman Guiloff had put forward for that proposal were worthy of consideration and could at least be reflected in the commentary. Some of the suggestions made by States regarding the draft guideline could certainly be incorporated into the commentary as well.

With regard to draft guideline 3, she was broadly supportive of the text adopted on first reading and agreed with the Special Rapporteur's decision not to propose any changes thereto. In her view, it was not a problem that some of the terms used in the text did not appear in article 25 of the 1969 Vienna Convention. First, the intention behind the use of the word "may" was clearly explained in the commentary; the use of that word had the benefit of emphasizing that, in accordance with the wishes repeatedly expressed by States, the draft Guide was intended neither to alter the entirely voluntary character of provisional application nor to promote or reinforce recourse to that mechanism. Second, in her view, the use of the phrase "the States or international organizations concerned" reflected international practice. That phrase encompassed a broad range of States, which was particularly important in the case of multilateral treaties, since, as a rule, such treaties were open to States that had not been "negotiators" in the strict sense of the word but had subsequently acceded to them; those States might also have an interest in provisional application. In any case, the draft guideline dealt with a distinct aspect of the topic and should under no circumstances be merged with draft guideline 4.

With regard to draft guideline 4, she had no objection to subparagraph (a), which concerned agreement to provisional application through a separate treaty. However, she wished to note that the agreement on the provisional application of certain provisions of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention pending its entry into force (Agreement of Madrid), which was cited in a footnote to the commentary to draft guideline 4 as an example of agreement through a separate treaty, was in fact an agreement reached by consensus at the Conference of the High Contracting Parties to the Convention held in Madrid

in 2009. The Agreement of Madrid was therefore an example that should be cited in relation to subparagraph (b) and not subparagraph (a).

She generally agreed with the rationale behind draft guideline 4 (b), but its wording raised two concerns. First, the use of the formulation "a resolution adopted by an international organization or at an intergovernmental conference" struck her as somewhat restrictive, since it seemed – at a literal level, at least – to exclude the possibility that provisional application could be agreed at a conference or meeting of the parties, as had been the case with the Agreement of Madrid. Although such conferences or meetings might still fall under the general category of "an intergovernmental conference", their special character warranted an explicit mention in the draft guideline, particularly in view of their increasing frequency. The Special Rapporteur might wish to supplement the examples provided in the commentary with a reference to such institutional instruments.

The second concern related to the use of the word "resolution" and to the Special Rapporteur's proposal to insert the words "if such resolution has not been opposed by the State concerned". Although she fully understood the philosophy behind the text that the Special Rapporteur was proposing, the manner in which it was worded would greatly restrict the types of acts through which provisional application could be agreed outside the treaty itself and any separate treaty. Regarding the use of the word "resolution", an instrument such as the Agreement of Madrid could not be understood to be "a resolution adopted by an international organization or at an intergovernmental conference" in the traditional sense. It should also be recalled that the Treaty on the Functioning of the European Union granted the Council of the European Union the power to authorize provisional application through a "decision", which was defined elsewhere in the Treaty as a distinct category of legal act. One solution might be to use the expression "resolution or any other decision" [*resolución o cualquier otra decisión*] and to include an explanation of its meaning in the commentary. As for the words that the Special Rapporteur proposed to insert, namely "if such resolution has not been opposed by the State concerned", such a condition left open the issue of resolutions that had a binding character and were not amenable to opposition. Once again, that issue arose in the context of the European Union as a consequence of the regime for the conclusion of treaties provided for in the Treaty on the Functioning of the European Union. Although that regime was a special case, the same issue might arise in the future in relation to agreements concluded by other international organizations. In that connection, there might be merit in considering Mr. Grossman Guiloff's proposal to add a "without prejudice" clause to the draft guideline.

Concerning draft guideline 6, she agreed with the Special Rapporteur's proposal to delete the words "as if the treaty were in force", which did not provide any added value.

As for draft guideline 7, as she had mentioned in previous statements on the topic, she did not believe that there were sufficient theoretical reasons for excluding the formulation of reservations in relation to provisional application, since it would be strange for a State to be willing to accept a more onerous regime during the period of provisional application than would apply to it after the entry into force of the treaty, once it had formulated its reservations. That possibility had been mentioned by some States, among them the Nordic countries. However, the formulation of reservations in relation to provisional application raised several practical issues. Some States had called for further reflection on the scope of the draft guideline, and others had drawn attention to the lack of relevant practice. She had no strong opinion as to whether the draft guideline should be retained. However, its retention would require a more detailed consideration, in the commentary, of the problematic issues raised by States. As for the wording of the draft guideline, she could see merit in considering the suggestion put forward by Mr. Reinisch.

Regarding draft guideline 9, she agreed with the Special Rapporteur's proposal to replace the words "of its intention not to become a party to the treaty", in paragraph 2, with "irrespective of the reason for such termination" and his proposal to add a new paragraph to the draft guideline. There was no reason to suppose that provisional application with respect to a State or international organization could not be terminated unilaterally. Although that form of termination was not mentioned explicitly in article 25 (2) of the 1969 Vienna Convention, relevant examples could be found in international practice. In her view, unilateral termination was consistent with the voluntary character of provisional application

and was a further demonstration of its flexibility. It was also consistent with the fact that provisional application of a treaty and its entry into force were ultimately two separate procedures. It therefore did not seem justified to apply the restrictive regime for the denunciation of, or withdrawal from, a treaty provided for in the 1969 Vienna Convention to the termination of provisional application.

It was true that the unilateral character of that form of termination of provisional application might create problems in relation to the rights of third parties. However, the addition of the new paragraph proposed by the Special Rapporteur would address that issue.

The question of when such unilateral termination of provisional application would take effect, however, was not clear. It would therefore be useful to reflect on Mr. Reinisch's comments regarding the period of "reasonable notice" specified in article 29 of the 1978 Vienna Convention on the Succession of States in respect of Treaties.

She fully supported draft guidelines 5, 8, 10, 11 and 12.

The draft model clauses were a useful addition to the draft Guide and were fully in line with the overarching aim of the Commission's work on the topic. As justified by the practical character of the draft model clauses, the Special Rapporteur had decided not to include a draft model clause for each and every scenario but to focus on those that presented the greatest interest and were encountered most frequently. The inclusion of references to practice, in the footnotes, was particularly useful, since it would help States to supplement the information contained in the draft model clauses and to select the most appropriate draft model clause in each case.

With regard to draft model clause 1, she had no objection to the proposed wording. However, the reference to the Agreement of Madrid in footnote 5 should be deleted, since draft model clause 1 described an "opt-out" system, whereas the Agreement of Madrid established an "opt-in" model.

In draft model clause 2, the reference to the Agreement of Madrid should be deleted from footnote 8 for the reasons that she had explained in her comments on draft guideline 4.

Despite the fact that the footnote associated with draft model clauses 3 and 4 contained references to draft guideline 4, she did not believe that draft model clause 3 was fully in line with that draft guideline. The wording of draft model clause 3 was more restrictive than that of draft guideline 4 (b), in which reference was made to acceptance "by the other States or international organizations concerned". She did not object to the inclusion of that draft model clause, but consideration could be given to the point that she had raised.

Lastly, although she had no objection to draft model clause 4, she wished to reiterate the comments that she had made regarding draft guideline 4 and to highlight the need to take into account the internal rules of international organizations, which would influence the type of resolutions that they adopted and the extent to which those resolutions were of a binding character. In that regard, it would be useful to clarify the relevant section of the footnote associated with draft model clauses 3 and 4.

She recommended that all the proposals made in the sixth report should be referred to the Drafting Committee. She was confident that, thanks to the Special Rapporteur's efforts and with his guidance, it would be possible to adopt a draft Guide to Provisional Application of Treaties that would be of great use to States and international organizations and would help to clarify some of the essential elements of provisional application that could not easily be deduced from a reading of article 25 of the 1969 Vienna Convention and article 25 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

Ms. Lehto, speaking via video link, said that she was grateful to the Special Rapporteur for his clear and well-organized sixth report on the provisional application of treaties, which offered an excellent basis for the completion of the second reading of the draft Guide to Provisional Application of Treaties at the current session. The draft Guide would provide States and international organizations with welcome clarification and guidance as to how the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between

International Organizations should be interpreted and applied in relation to provisional application. It represented a valuable addition to the Commission's long-standing work on the law of treaties.

She found the Special Rapporteur's proposals to be generally well founded. With regard to draft guideline 1, she supported his proposed amendment to the text, which would clarify that the project as a whole concerned provisional application by both States and international organizations. She would not object to merging draft guidelines 1 and 2.

Noting that widespread support had been expressed, in the comments and observations received from States and international organizations, for the wording of draft guideline 3, she said that she agreed with the Special Rapporteur's decision not to propose any changes to the text. The phrase "the States or international organizations concerned" was sufficiently general to cover the various situations addressed in draft guideline 4. The use of that phrase could be said to reflect contemporary practice; it did not exclude actors that had not participated in the negotiations, which might include States or international organizations that intended to accede to the treaty at a later stage.

In her view, it would be better not to merge draft guidelines 3 and 4 so as to avoid overburdening a single draft guideline. She agreed that the various comments discussed in paragraphs 60 to 66 of the report, in particular those concerning mixed agreements, could be dealt with in the commentary.

As for draft guideline 4 (b), she could support the additional wording proposed by the Special Rapporteur. She could also see merit in Mr. Grossman Guiloff's suggestion that the words "except for those States that have opposed such resolution" could be used instead. In her view, non-opposition was sufficient for a resolution adopted by an international organization or at an intergovernmental conference, as it could be assumed that all participating States were aware of the resolution and its content. If necessary, a reference to the rules of international organizations could be added to the commentary.

As discussed in paragraph 75 of the report, the phrase "a declaration by a State or an international organization that is accepted by the other States or international organizations concerned", which appeared in subparagraph (b) of draft guideline 4, referred to the fairly exceptional situation in which a State or international organization proposed to provisionally apply a treaty or a part of a treaty at its own initiative. Whether such a proposal resulted in provisional application of course depended on acceptance by the other States or international organizations concerned. It was clear that provisional application could not result from unilateral declarations as such. What was less clear, however, was whether subparagraph (b) also covered the more common scenario in which declarations or notifications were reciprocal or a declaration formed part of a broader arrangement between the States or international organizations concerned, in the absence of any treaty basis for the provisional application. It would in any event be useful to clarify, in the commentary, how that scenario differed from genuine unilateral declarations, the legal effects of which did not depend on acceptance by other States.

With regard to draft guideline 6, she supported the Special Rapporteur's proposal to delete the words "as if the treaty were in force", which had proved controversial. Their inclusion might be misleading in situations in which only a part of the treaty was provisionally applied.

She believed that draft guideline 7 was useful and should be retained in the draft Guide. The fact that the issue of reservations in the context of provisional application had not been addressed in the 2011 Guide to Practice on Reservations to Treaties was all the more reason to address it in the draft Guide to Provisional Application of Treaties.

She agreed that there was nothing to prevent a State that agreed to provisionally apply a treaty or a part of it from making a reservation. Moreover, from a practical standpoint, it would be awkward if a State that wished to make a particular reservation was required to apply the entire treaty during the period of provisional application, which might be lengthy. In the case of the Free Trade Agreement between the European Union and the Republic of Korea, for example, the ratification period for the European Union had lasted five years, while provisional application had begun six months after signature. The same was true of

European Union mixed agreements more generally, since the participation of national parliaments prolonged the ratification process considerably.

In addition, the possibility that a State or international organization might exclude a part of a treaty from provisional application could hardly be said to provide an adequate solution for the other signatories. It would be better if they knew the precise reservations that the State or international organization wished to make.

It was explained in the commentary to the draft guideline that the use of the phrase "*mutatis mutandis*" was meant to indicate "the application of some, but not necessarily all, of the rules of the 1969 Vienna Convention applicable to reservations in case of provisional application". In the light of some of the comments made by States, it might be useful to elaborate on that explanation. She could support the suggestion put forward by Mr. Reinisch that an explicit reference to part II, section 2, of the 1969 Vienna Convention should be added, thereby aligning the text with draft guideline 9 (3).

With regard to draft guideline 9, she welcomed the Special Rapporteur's proposal to replace the words "of its intention not to become a party to the treaty" with "irrespective of the reason for such termination", since the reasons that might exist for the termination of provisional application were not limited to the intention not to become a party to the treaty. In that connection, Mr. Reinisch's remarks on the question of when such termination would take effect should be reflected in the commentary and perhaps also in draft model clause 1. The new paragraph that the Special Rapporteur was proposing to add to the draft guideline, which clarified the issue of the consequences of the termination of provisional application and restated the content of article 70 (1) (b) of the 1969 Vienna Convention, would successfully address the concerns expressed by States in that regard.

She had two comments regarding the draft model clauses, which served as a useful complement to the draft guidelines and had been welcomed by several States. First, as noted by the Nordic countries and the European Union, one issue that could be addressed in the draft model clauses was that of provisional application that began not on a date specified in the treaty but on a later date, following notification by the State concerned that its internal procedures for provisional application had been satisfied. Second, it would be of interest to States and international organizations to add a draft model clause to cover the situation in which provisional application was agreed through a resolution adopted by an international organization or at an international conference, as envisaged in draft guideline 4 (b).

She supported the referral of all the draft guidelines to the Drafting Committee.

Mr. Forteau said that the Special Rapporteur's sixth report had placed the Commission in an excellent position to be able to adopt the draft Guide to Provisional Application of Treaties on second reading. He wished to make observations on some of the draft guidelines, then on the relationships between provisional application and domestic law, and finally on the issue of model clauses.

The draft Guide regrettably contained no reference to article 24 (4) of the 1969 Vienna Convention, which provided for the automatic, immediate application of certain final treaty provisions without the need for an agreement on their provisional application. Such a reference would provide useful clarification and could be added to draft guideline 5 as a second paragraph.

With respect to draft guideline 4, several States and members of the Commission had expressed support for restricting the circumstances in which provisional application could result from a resolution of an international organization to those where there had been express acceptance. The Special Rapporteur had, similarly, proposed limiting such circumstances to those where the State concerned had not objected to the resolution in question. In his view, however, such restrictions were inconsistent with international law, which required only the existence of an agreement on provisional application and did not prescribe any particular form. What mattered was the parties' intention with respect to provisional application, and that intention did not have to be manifested expressly or through a lack of objection.

The concern expressed about the possibility of a mere resolution being seen as an agreement was admittedly understandable. However, it was somewhat exaggerated, and should be assuaged by the rigorous approach taken by international courts and tribunals in

assessing the existence of agreements, which had been confirmed by the 2018 judgment of the International Court of Justice in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*. In that case, the Court had had to determine whether a resolution of an international organization or a State's conduct with respect to that resolution had given rise to an agreement or an obligation. After carefully reviewing the facts of the case, the Court, in paragraph 171 of the judgment, had concluded that there was no agreement or obligation, as the resolution in question had contained only a recommendation, and as participating in the consensus for adopting some resolutions did not imply that a State had accepted to be bound under international law by the content of those resolutions. There was no reason to deviate from that jurisprudence by adding an additional requirement of express acceptance of, or failure to oppose, a resolution. It was necessary, and sufficient, for provisional application to have been "agreed", with everything that that entailed. As that requirement was already set out in draft guideline 4, he favoured keeping the text of the draft guideline as adopted on first reading. However, to avoid any misunderstanding, the phrase "by the parties concerned" [*par les parties concernées*] could be added after "may be agreed" in the chapeau of the draft guideline, thereby clearly indicating that the consent of all parties to provisional application was required, and the words "an agreement reflected in" [*un accord reflété par*] could be inserted between the words "including" and "a resolution" in draft guideline 4 (b).

The Special Rapporteur's proposed deletion of the phrase "as if the treaty were in force" in draft guideline 6 would exacerbate an existing problem, noted by Slovenia, relating to the language "produces a legally binding obligation to apply the treaty", which had been added by the Drafting Committee in May 2018. That language could be seen as a distortion of article 25 of the 1969 Vienna Convention, as there was a difference between saying that "a treaty is applied provisionally", as article 25 did, and saying that there was an obligation to apply it provisionally. Two different obligations and two sources of law were being confused, and that would raise a series of legal issues. For example, draft guideline 6, as currently formulated, implied that any non-binding provisions contained in a treaty would become binding, since draft guideline 6 stated that there was an obligation to apply the treaty. Furthermore, it was unclear whether the obligation to apply the treaty provisionally was self-executing and, if it was not, what effect that would have on treaty provisions that were self-executing. Another question had to do with the source of the obligation contained in the draft guideline. Was it, for example, customary law or the agreement that had provided for the provisional application of the treaty? The answer could have a significant impact on the jurisdiction of international courts, owing to, for example, the compromissory clauses that could be relied on to address alleged breaches of the obligation reflected in the draft guideline.

Moreover, there was an inconsistency between draft guidelines 6 and 8, as the latter dealt with responsibility for the breach of "an obligation arising under a treaty", not the breach of an obligation to apply a treaty provisionally. In addition, if one were to follow the current wording of draft guideline 6, reservations referred to in draft guideline 7 would need to be formulated with respect to the obligation to apply a treaty provisionally and not with respect to the treaty itself, and it would then be the general law of treaty reservations that would apply, as the obligation to apply a treaty provisionally would be an obligation in force, not a provisional one. Similarly, it was unclear whether the termination and suspension of provisional application, which was addressed in draft guideline 9, related to the provisionally applied treaty or to the obligation to apply the treaty provisionally. In his view, a thorough review of draft guideline 6, and perhaps others, was called for.

Instead of the phrase "legally binding obligation to apply the treaty", the Commission should perhaps consider using a formulation based on article 26 of the 1969 Vienna Convention and state that every provisionally applied treaty was "binding upon the parties to it and must be performed by them in good faith" unless otherwise agreed.

On a more basic level, the draft guidelines as a whole seemed not to distinguish sufficiently between provisionally applied treaties, on the one hand, and agreements that provided for provisional application, on the other – even though the two were very different, with the latter, unlike the former, entering into force immediately.

In the case of draft guideline 7, it had to be first determined whether the reservation related to the provisionally applied treaty or to the agreement that provided for provisional application. Furthermore, without a sufficiently exhaustive study of current practice, it

seemed unlikely that a guideline on reservations to provisionally applied treaties could be included in the final draft of the Guide. The Commission had not discussed such reservations in its exhaustive 2011 Guide to Practice on Reservations to Treaties and should therefore proceed cautiously. It was true that a reservation could be formulated with respect to provisional application, since nothing prohibited a reservation from being made at the time of treaty signature, but it was uncertain what the effect of such a reservation would be, and the Commission currently lacked sufficient information to be able to resolve that question. A "without prejudice" clause would perhaps be the best solution.

It was clear that draft guideline 9 should carry on from the specific termination regime set out in article 25 (2) of the 1969 Vienna Convention. In draft guideline 9 (2), it did not seem advisable, however, to say that unilateral termination was permitted "irrespective of the reason for such termination", as proposed by the Special Rapporteur, since some limitations, such as the requirement of good faith, probably did exist and should be identified. In draft guideline 9 (3), it did not seem appropriate to refer to the application, "*mutatis mutandis*", of the relevant provisions of the 1969 Vienna Convention, since, again, the agreement that provided for provisional application was not provisionally applicable; that agreement entered fully into force immediately and was therefore subject to general treaty law. The suspension or termination was of that agreement, not the provisionally applied treaty, and was therefore covered by the general law of treaties or agreements as such – and not "*mutatis mutandis*" – subject to the special termination regime provided for under article 25 (2) of the Convention.

Although the title of draft guideline 12 was unclear and its text somewhat illogically suggested that a State or international organization could enter into an agreement on its own – when, of course, it took at least two parties to "agree" – the inclusion of draft guidelines 10 to 12, which dealt with the domestic law of States and rules of international organizations, was fully warranted. The effect of those draft guidelines was, however, unbalanced. While it was true that the circumstances under which domestic law could be invoked to block provisional application needed to be limited, there also needed to be a certain degree of protection for domestic law, which could be circumvented by resorting to provisional application. For instance, the Prime Minister of France had issued a circular on 30 May 1997 prohibiting the provisional application of any agreement that could affect the rights or obligations of private individuals or that required the authorization of parliament in order to enter into force.

In his view, draft guidelines 10 to 12 provided insufficient protection for internal law. In order to prevent any undue circumvention of such law, the Commission should perhaps consider recommending the use of clauses like the one contained in the December 2020 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, which made provisional application conditional on the parties notifying each other that their respective internal requirements and procedures necessary for provisional application had been completed. The Commission could also consider drafting a model clause that would go beyond draft model clause 5 and explicitly address that issue.

The draft model clauses would be very useful, provided that they had commentaries. However, those clauses and the commentaries to them should be subject to a first and second reading so that States could express their views on them and so that the practical needs of States and international organizations could be more clearly determined. More in-depth study and discussion might be required before the Commission could decide on how to proceed.

In conclusion, he supported referring the draft guidelines to the Drafting Committee.

Sir Michael Wood said that there had been some recent developments in United Kingdom practice with regard to provisional application, occurring after the country had submitted its written comments on the topic. After the United Kingdom had ceased to be a member of the European Union on 31 January 2020 and the transitional period provided for in the Withdrawal Agreement had ended on 31 December 2020, the country had needed to ensure that some major treaties between itself and the European Union, including the Trade and Cooperation Agreement, would be swiftly applied and that there would be a seamless transition of rights and obligations in the trade field under "continuity" agreements, both bilateral and plurilateral, which essentially replicated European Union agreements with third

countries. Three of the agreements between the European Union and the United Kingdom had been provisionally applied for a period of four months, between 1 January 2021 and 30 April 2021; that period included an extension of provisional application agreed at the end of February 2021. Those agreements were now in force.

Some of the continuity agreements with third countries had had to be provisionally applied so that there could be a seamless transition from the predecessor European Union agreements to the new United Kingdom–third country agreements. In some cases, the need for constitutional procedures to be completed by one or both parties would have prevented immediate entry into force. The treaties concerned often contained clear provisions on provisional application, specifying in particular that provisional application could be terminated by either party on a short period of notice. Moreover, at least in the United Kingdom, all necessary domestic implementing legislation had been in place and in force before the United Kingdom had provisionally applied the treaty. Thus, where it had been constitutionally possible, the parties had resorted to provisional application. Where it had not been possible, the United Kingdom had sought ways to ensure continuity without formal provisional application, mostly through "bridging mechanisms" – in other words, non-binding arrangements with the relevant third country, for example, under memorandums of understanding.

The experience of the United Kingdom could provide useful lessons, particularly in respect of domestic procedures: in terms of international law, it had confirmed the value of article 25 of the 1969 Vienna Convention, with its inherent flexibility, and the importance of the Commission's work on the topic; and it had demonstrated the practical importance of the international legal institution of provisional application as a way to give effect to treaties ahead of their entry into force. When the time came to review the draft model clauses, the Commission could perhaps draw on the provisions drafted in the context of the country's departure from the European Union, such as the provision of the Trade and Cooperation Agreement just mentioned by Mr. Forteau.

Turning to the Special Rapporteur's sixth report, he said that he welcomed the methodology adopted in its preparation, as described in paragraphs 33 and 34. He wished to begin with some general comments. First, article 25 of the 1969 Vienna Convention was the basis for the Commission's work, and the Commission should acknowledge its useful flexibility. Second, he agreed with the Special Rapporteur that provisional application was a "voluntary mechanism" for giving immediate effect to the provisions of a treaty; it was only when States agreed to provisionally apply a treaty that they were bound by their undertaking to do so, for the duration of provisional application. Third, the "premises" on which the Commission had undertaken its study had perhaps not been formulated in the best possible way in paragraph 20 of the report. For example, while one purpose of provisional application might sometimes be to prepare for the entry into force of the treaty, one of its main purposes was surely to ensure that the provisions of the treaty were applied from an early date and, in the case of a multilateral treaty, by the largest possible number of States or organizations pending the general entry into force of the treaty or its entry into force for particular States. Thereafter, entry into force might or might not occur depending on the outcome of national procedures. One author, Danae Azaria, had recently written that there were numerous reasons why States might choose to apply a treaty provisionally, such as urgency, the certainty of ratification, the need for legal continuity between earlier and later treaties on the same subject matter, legal consistency so amendments could be applied as early as possible, and the circumvention of obstacles to expressing consent to be bound and entry into force.

He agreed with many of the Special Rapporteur's proposals regarding the individual guidelines. He also agreed with Mr. Forteau that the principle set forth in article 24 (4) of the 1969 Vienna Convention was important in the context of the Commission's project and should be emphasized, at least in the commentaries. The practical matter of the provisional application of amendments to multilateral treaties, raised in paragraph 9 of the report, was worth addressing, probably in the commentaries.

It was not necessary to expand draft guideline 1 by including a reference to States and international organizations; such a reference might in fact be confusing, for the reasons given by Mr. Murphy at the previous meeting. With regard to draft guideline 2, he agreed with the Special Rapporteur that the reference to "other rules of international law" should be kept and

that the 1986 Vienna Convention, which was not in force, should not be mentioned. The Drafting Committee should find a way to make it clear that the reference to other rules of international law did not detract from the centrality of the 1969 Vienna Convention. He did not favour merging draft guidelines 1 and 2, for the reasons given by Mr. Park.

He also agreed with Mr. Park that the Drafting Committee should consider replacing the phrase "may be provisionally applied" with the language of the Vienna Convention, "is applied provisionally", in draft guideline 3, as some States had suggested. It would be odd, to say the least, for the Commission to reverse the decision of the United Nations Conference on the Law of Treaties to change "may be" to "is" because of the potential ambiguity of "may". Like Mr. Park, he thought that the Drafting Committee should carefully consider the suggestion made by the United States of America for draft guideline 3. Mr. Park's suggestion for a new second paragraph to the draft guideline should also be considered.

He agreed with those who had questioned the proposed addition to draft guideline 4 (b) of the words "if such resolution has not been opposed by the State concerned". The Drafting Committee should consider Mr. Murphy's suggested language for that draft guideline. Draft guideline 5 could be simplified by dropping the words "pending its entry into force between the States or international organizations concerned", which were already included in draft guideline 3.

In draft guideline 6, he agreed that the words "as if the treaty were in force" could be dropped. However, if they were, it should be made clear in the commentary that their omission was not intended to detract in any way from the binding nature of agreements to provisionally apply treaties and the rights and obligations that flowed therefrom. As the Commission had made clear in its 1966 commentary to what was to become article 26 of the 1969 Vienna Convention, the words "in force" in the *pacta sunt servanda* article also applied to provisionally applied treaties. In addition, according to the Chairman of the Drafting Committee of the United Nations Conference on the Law of Treaties, Mr. Yasseen, the Committee had considered that provisional application also fell within the scope of article 26. It could, for example, be explained in the commentary that the omission of the words simply reflected the clear distinction between the entry into force of a treaty and its provisional application. As the Secretariat had explained in its 2013 memorandum on the provisional application of treaties (A/CN.4/658), that distinction had been made by some members of the Commission during the preparation of the 1966 draft articles on the law of treaties and had then been taken up in the Convention itself. As Mr. Reuter had said in the Commission, "the expression 'provisional entry into force' no doubt corresponded to practice, but it was quite incorrect, for entry into force was something entirely different from the application of the rules of a treaty".

Although it seemed obvious, it would be useful to explain, at least in the commentary to draft guideline 6, that provisional application applied between parties for whom the treaty had entered into force and those who were still provisionally applying the treaty. At the end of the draft guideline, the Drafting Committee might consider replacing the word "unless" with the phrase "except to the extent that" to more accurately reflect the flexibility of provisional application.

He shared the view of many colleagues that draft guideline 7 should be retained. He found the arguments against retention, such as those summarized in paragraph 94 of the report, those set out in document A/CN.4/737 and those voiced by Mr. Forteau, quite hard to follow. The assertion by the United States of America that guideline 7 represented the Commission's "speculative thoughts on essentially academic questions" was not a fair one. The Commission had given a good deal of thought to the draft guideline on first reading, and its inclusion, with the accompanying commentary, represented a useful part of the draft Guide. Mr. Grossman Guiloff had convincingly explained the reasons why draft guideline 7 should be retained. Like Mr. Hassouna, he did not find the absence of practice a good reason for omitting it. He did not think that the absence of a provision on provisional application in the otherwise exhaustive Guide to Practice on Reservations to Treaties had been in any way deliberate.

The Drafting Committee should, however, consider the precise drafting of draft guideline 7. Others had already mentioned the need to clarify the *mutatis mutandis* language.

In addition, the relevant time for making a reservation should perhaps be expressed as being, at the latest, when provisional application took effect for the State concerned, rather than when it agreed to provisional application.

He agreed with the important changes proposed by the Special Rapporteur to draft guideline 9. The Drafting Committee should consider dividing draft guideline 12 into two paragraphs, like draft guidelines 10 and 11, to simplify the reading.

He fully supported the Special Rapporteur's proposals for the final form of the Commission's output and for the Commission's recommendations to the General Assembly and supported sending all the Special Rapporteur's proposals to the Drafting Committee.

Mr. Laraba, speaking via video link, said that he wished to congratulate the Special Rapporteur on his well-crafted, clear and balanced report and on the comprehensive, flexible and intelligent manner in which he had handled the comments and observations received on the draft Guide to Provisional Application of Treaties adopted by the Commission on first reading. More specifically, he welcomed the useful summary of the Commission's consideration of the topic to date and the additional considerations in paragraphs 17 to 31, which undoubtedly clarified certain points that States had raised.

In those paragraphs, the Special Rapporteur succeeded in highlighting both the simplicity and the complexity of the topic. While noting, for example, that article 25 of the 1969 Vienna Convention on the Law of Treaties was "a relatively straightforward provision" and that its second paragraph provided for "an extremely simple and efficient mechanism for terminating provisional application", he was quick to point out the role played by the practice of States and international organizations, which had revealed issues such as a lack of consistency and even some confusion, despite the apparent simplicity of the wording of the article. Differences or divergences between the text and State practice had been the subject of numerous discussions, including at a seminar organized at the University of Grenoble in March 2019 to mark the fiftieth anniversary of the signing of the 1969 Vienna Convention. In that regard, he wished to recall a remark made on that occasion by Mr. Forteau emphasizing that care should be taken not to unravel the fragile fabric woven in Vienna, at the risk of laying bare the law of treaties. He believed that neither the Special Rapporteur's report nor the draft Guide adopted by the Commission on first reading called article 25 of the Convention into question in any way.

On a general note, it appeared, from reading the report, that States had two main concerns. The first related to preserving the integrity of the 1969 Vienna Convention. The second was described by the Special Rapporteur in paragraph 90 of the report as "a fear that recourse to provisional application could be abused, to the detriment of domestic legal procedures relating to the expression of a State's consent to be bound by a treaty".

Turning to the draft Guide, he agreed with the Czech Republic that draft guidelines 1 and 2 should be merged. The Special Rapporteur provided an excellent summary, in paragraph 60 of his report, of the comments and observations received with regard to draft guideline 3. He supported the Special Rapporteur's recommendation to address the concern of Slovenia, which was reflected in paragraph 60 (a), in the commentary. The expression "A treaty or a part of a treaty may be provisionally applied", which was the subject of the concern, enjoyed broad support from States and should thus not be changed.

The expression "the States or international organizations concerned" had attracted the interest of Bahrain, Belarus, Brazil, Germany, Portugal, the United Kingdom and the United States of America, among others. A minority of States had proposed modifying the expression and the commentary to draft guideline 3. However, he was in favour of the Special Rapporteur's proposal to address the concerns expressed by those States in the commentary.

Regarding draft guideline 4, he agreed with the Special Rapporteur that the expression "that is accepted by the other States or international organizations concerned" should be understood to apply to both "declaration" and "resolution adopted by an international organization or at an intergovernmental conference". He therefore supported the Special Rapporteur's proposed amendment to draft guideline 4. He also agreed that draft model clauses 3 and 4 could help to dispel doubts concerning draft guideline 4 (b).

In view of the sound arguments presented in paragraph 90 of the report, he was in favour of the Special Rapporteur proposing an amendment to draft guideline 6 and, in due course, to the commentary thereto.

The issue of reservations had been the subject of impassioned debate. It was important to consider, in that respect, how the positions adopted by States had been taken into account by the Special Rapporteur in his report. As the Special Rapporteur pointed out, some Commission members had indicated that they would wait until the views of States and international organizations had been ascertained before deciding whether to support or oppose the inclusion of draft guideline 7. He agreed with the Special Rapporteur's view, expressed in paragraph 98 of the report, that further discussion within the Commission would be useful. However, he did not agree that "most of the States" were in favour of retaining draft guideline 7 "with some of them making that stance contingent on further analysis of the issue". Rather, he considered that all the States that had not called for the deletion of the draft guideline were in favour of a more thorough analysis.

He supported the Special Rapporteur's proposal to delve deeper into the issues raised by draft guideline 9.

Concerning the draft model clauses, which were almost unanimously considered useful by States, he agreed with the Special Rapporteur's comments in paragraphs 125 to 127 of the report and had read the revised version of the clauses contained in annex II with great interest. Lastly, he agreed with the Special Rapporteur's suggestions for the final form of the Commission's output.

Ms. Galvão Teles said that she wished to begin by congratulating the Special Rapporteur on the quality of his report. His meticulous analysis of the views expressed by States and international organizations since the adoption of the draft Guide to Provisional Application of Treaties on first reading and his revised proposal for the draft model clauses were commendable and provided an excellent basis for the work of the Commission and the Drafting Committee. While she agreed with most of the Special Rapporteur's proposals for the text on second reading, she would focus only on the points to which she attached great importance or on which she disagreed.

Regarding draft guideline 4 (b), she did not support the Special Rapporteur's suggestion to add the words "if such resolution has not been opposed by the State concerned". First, it was not clear what was meant by "has not been opposed by the State concerned". Whether or not a resolution was adopted by an international organization and the conditions for a certain State not to be bound by that resolution were a matter for the rules of the international organization in question, not for the draft Guide. It was also unclear what should be understood by "the State concerned" and what the position of that and other States was with regard to triggering the provisional application of the treaty.

Secondly, the new language would introduce an excessive political focus and place a legal burden on States to express their opposition, which might not even be possible under the rules of certain international organizations. For example, could a State oppose a United Nations General Assembly resolution providing for the provisional application of a treaty? It could certainly vote against the resolution, but that did not mean that the resolution would not be adopted and trigger provisional application by which it too would be bound.

Although the Special Rapporteur's intention was understandable, it would be more appropriate to refer to the possibility of a State declaring that it did not consent to be bound by a resolution adopted by an international organization, in line with the opt-out approach taken in draft model clause 4. She did not currently have a specific drafting suggestion but was sure that the Drafting Committee would be able to align the language of draft guideline 4 with that of draft model clause 4.

She fully agreed with the Special Rapporteur's proposal to delete the phrase "as if the treaty were in force" in draft guideline 6. Some States had rightly noted with concern that such a formulation could be interpreted as a default rule that sought to give pre-eminence to provisional application over entry into force. Moreover, it appeared to run counter to paragraph (5) of the commentary to the draft guideline, according to which: "As a matter of principle, provisional application is not intended to give rise to the whole range of rights and

obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties."

She therefore welcomed the amendment proposed by the Special Rapporteur and, in that connection, supported all the references in the commentary adopted on first reading to provisional application being voluntary, to it not being an alternative to, or substitute for, proper entry into force, and to the need to take care not to normalize it, while of course recognizing it as a useful instrument.

During its seventieth session, the Commission had considered that the question of whether to include a draft guideline on reservations at the second-reading stage should be decided on the basis of the comments of States and international organizations. It was clear that most States that had expressed their opinion on the matter since then were in favour of retaining draft guideline 7, notwithstanding opposition from Brazil, China, the Czech Republic, Greece, Poland and the United States of America. There was consensus within the Commission and among the States in favour of retaining draft guideline 7 that nothing should prevent a State from formulating a reservation when accepting the provisional application of a treaty.

In keeping with the majority view expressed by States, and in the spirit of progressive development, she suggested retaining draft guideline 7. While it was true that many treaties applied provisionally were bilateral and that reservations did not apply to bilateral treaties, the draft guideline might be relevant to multilateral treaties that provided for provisional application. Furthermore, it would fill a gap in the Commission's 2011 Guide to Practice on Reservations to Treaties, which did not address reservations in that context.

The Special Rapporteur suggested two changes to draft guideline 9. First, he proposed that the words "of its intention not to become a party to the treaty" in paragraph 2 should be replaced with "irrespective of the reason for such termination". The aim was to reflect situations in which a State might decide to terminate the provisional application of a treaty without linking that decision to an intention not to become a party to the treaty, for instance as a result of a breach; in that case it might decide to terminate provisional application only in relation to the party that had allegedly committed the breach. On that point, she concurred with the Special Rapporteur. States should be given the freedom to agree as they saw fit, in line with the flexibility inherent in the regime of provisional application and with emerging practice.

Secondly, the Special Rapporteur proposed the inclusion of a fourth paragraph to address the consequences of terminating the provisional application of a treaty, in accordance with article 70 (1) (b) of the 1969 Vienna Convention. In so doing, he expressed his support for the applicability, by analogy, of article 70 of the Convention to the termination of provisional application. At the Commission's sixty-sixth and sixty-seventh sessions, some members had stressed the need for such an analogy to be supported by authoritative references and relevant State practice. However, it was her understanding that the Special Rapporteur's subsequent reports had not addressed those concerns. Thus, while she could support the Special Rapporteur's proposal to include a new fourth paragraph in draft guideline 9, the commentary should be enriched with relevant State practice and authoritative references to justify the application of article 70 of the Convention by analogy.

As she had previously stated, she welcomed the inclusion of draft model clauses in an annex to the draft Guide. She believed that the clauses would be of practical utility for States and international organizations and would serve as guidance for the drafting of provisions on provisional application. Since they were model clauses, they did not purport to cover every possible situation. The Special Rapporteur's decision to focus only on model clauses concerning the most important and practical issues, and to base them on existing clauses that were detailed in the footnotes in the annex, seemed sensible and pragmatic.

She had only one comment, regarding draft model clause 5, which was of great importance. She welcomed the Special Rapporteur's proposal to include new language on the requirements for the expression of consent to be bound by a treaty. As was clear from the annex to the fifth report on the provisional application of treaties (A/CN.4/718), the language was in line with the practice of the European Free Trade Association.

She fully supported the Special Rapporteur's proposals for the final form of the Commission's output, including the proposal that the Commission should request the Secretary-General to prepare a volume of the United Nations Legislative Series.

To conclude, she wished to reiterate her deep appreciation for the Special Rapporteur's outstanding report, which would no doubt enable the Commission to complete its consideration of the topic at the current session. The Commission's work on the topic would, in her view, prove to be a highly useful tool in the treaty-making practice of States and international organizations.

The meeting rose at 1 p.m.