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Sixty-seventh session (second part)

Provisional summary record of the 3270th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 15 July 2015, at 10 a.m.

Contents

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Present:

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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Provisional application of treaties (agenda item 5) (*continued*) (A/CN.4/687)

The Chairman invited the members of the Commission to resume their consideration of the third report on the provisional application of treaties (A/CN.4/687).

Mr. Murphy congratulated the Special Rapporteur on his excellent third report, which contained analysis that would serve as an extremely helpful basis for the discussion on the topic. He thanked the secretariat for the two very well-researched documents it had prepared to help the Commission in its work, namely the memorandum of November 2014 (A/CN.4/676), which traced the negotiating history of article 25 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations in the Commission and at the 1986 Vienna Conference, and the table annexed to the third report, which listed some 50 treaties that had been concluded between 1969 and 2013 and that contained provisions on provisional application. On the issue of whether provisions on provisional application that were contained in the national laws of States should be examined further for the purposes of the topic, he was of the view that such research would present a major logistical challenge and would ultimately be of marginal benefit to the Commission's work. While an attempt could certainly be made to catalogue the legislation and practice of States on methods of treaty adherence, whether provisional or not, given that such legislation and practice varied considerably from one State to the next, doing so would require a very laborious effort that would not be directly pertinent to identifying relevant rules on the law of treaties applicable under international law. The Special Rapporteur should therefore focus instead on the international law dimension of the topic.

He had strong doubts about the assertion contained in paragraph 122 of the report that the provisions of the 1986 Vienna Convention had full legal effect because they reflected norms of customary international law. At its sixty-sixth session, the Commission had been careful to avoid classifying certain rules of the 1969 Vienna Convention on the Law of Treaties as rules of customary international law. It would therefore be unlikely for the Commission to declare at the current session that the entirety of the 1986 Vienna Convention reflected customary international law, especially if it did so on the basis of a single scholarly source and given that the Convention had only 43 parties and still had not entered into force almost 30 years after its adoption. By contrast, it might be plausible, in light of the analysis of practice contained in the memoranda by the secretariat of 2013 and 2014 and in the scholarly literature, that article 25 of the 1969 Vienna Convention, and perhaps article 25 of the 1986 Vienna Convention, reflected a rule of customary international law — a conclusion that the Special Rapporteur appeared to endorse in paragraph 85 of his third report, although he did not provide a focused analysis of that issue. Such an analysis was important, however, since the Commission had not said anything about the customary status of article 25 in its work prior to the 1969 Vienna Conference, and some recent case law had cast doubt on its customary status. Some scholars who supported the idea that article 25 of the 1969 Vienna Convention reflected customary international law nevertheless made a distinction between paragraphs 1 and 2 of that article, especially since the latter had been drafted during the diplomatic conference and had not been proposed by the Commission. He believed that article 25 did reflect customary international law and encouraged the Special Rapporteur to address the matter more squarely in a future report.

Although he had no objection to the inclusion in the draft guidelines of references to both article 25 of the 1969 Vienna Convention and article 25 of the 1986 Vienna Convention, he believed that the guidelines would be more readable if the Commission did not refer to both conventions simultaneously throughout the project. He worried that, as

currently drafted, the guidelines might be interpreted by the casual reader as applying only to treaties to which both States and international organizations were a party; the commentaries might also give rise to such confusion. For example, in paragraphs 116 and 117 of the report, the Special Rapporteur appeared to equate the actions of an international organization that had been established as a result of the provisional application of a treaty with the provisional application of a treaty by the organization itself, which was not possible when the international organization was not a signatory to the treaty. A better approach would be to draft the guidelines with reference only to the 1969 Vienna Convention and to add a final guideline, accompanied by an explicit commentary, to the effect that all of the guidelines also applied in the context of the 1986 Vienna Convention. That proposal could perhaps be considered by the Drafting Committee.

Turning to the draft guidelines themselves, he proposed that each guideline should have a title that clearly identified its subject. Draft guideline 1 appeared to cover certain general aspects of the provisional application of treaties and included elements that appeared in article 25 of both the 1969 and 1986 Vienna Conventions. The Special Rapporteur was right in considering that article 25 set the minimum standards for the provisional application of treaties, but the formulation used in draft guideline 1 duplicated what came in subsequent guidelines, ignored some important elements of article 25 and introduced other elements that were ambiguous. For example, it did not indicate that the provisional application of a treaty was relevant only prior to the entry into force of the treaty for the party concerned; the use of the word "may" rather than "is" might be construed to mean that the Commission was rejecting the language of the 1969 Vienna Convention and was instead returning to the formulation it had originally proposed for article 25. Furthermore, even though it did not appear to be the Special Rapporteur's intent, the reference to the "internal law of the States" suggested that States could invoke provisions of their domestic law to escape an obligation of provisional application, which was inconsistent with the overall approach taken in the 1969 Vienna Convention. There were only two instances in which it would be relevant to refer to internal law: when the party concerned was deciding initially whether or not to agree to the provisional application of a treaty, or when the terms of its agreement to provisionally apply the treaty made such application conditional on national law. For those reasons, he was of the view that the wording of draft guideline 1 could be improved by clearly defining the scope of the draft guidelines. In addition, he would be in favour of making a more explicit reference to the Vienna Convention (or the Vienna Conventions, if that was the approach adopted), as had been done in draft conclusion 1 of the project on subsequent agreements and subsequent practice. Draft guideline 1 would then read:

"Draft guideline 1
Scope

1. The present draft guidelines address the provisional application of treaties.

2. Article 25 of the Vienna Convention on the Law of Treaties sets forth the general rule on provisional application of treaties."

Such a text would situate the draft guidelines, at the outset, in the context of article 25 of the Vienna Convention and allow for a more in-depth analysis of the meaning of the general rule in the subsequent guidelines.

Draft guideline 2, which addressed the forms for agreeing to apply a treaty provisionally and echoed article 25, paragraph 1, of the 1969 Vienna Convention, might be entitled "Forms of agreement". The general guidance seemed sound, but the Drafting Committee might improve the wording, perhaps by drawing on the text of article 25. The provision to the effect that the agreement for the provisional application of a treaty "may be derived" from the terms of the treaty seemed to suggest that the agreement need not be

explicitly formulated. It would seem more appropriate to say that the agreement "may be established" from the terms of the treaty. Similarly, the words "or by other means" should be replaced with the words "including by", since in all instances there had to be an agreement on provisional application. Rather than mentioning only the resolution of an international organization as another means of agreement for provisional application, it would be preferable either to add other examples or not to refer to any in the draft guideline itself and instead to mention several in the commentary.

In draft guideline 3, he proposed replacing the words "having regard to" with "in accordance with" and specifying that a treaty could be applied provisionally only prior to its entry into force for the relevant party. He supported the idea expressed in draft guideline 4 that an agreement to apply a treaty provisionally was legally binding. That position, which had been taken by the Commission in its 1996 draft articles on the law of treaties, was also supported by the negotiating history of the Vienna Convention, by leading legal scholars such as Mark Villiger, who had noted that if the future parties provisionally applied the treaty, they would be subject to the *pacta sunt servanda* rule, and by the reasoning advanced in recent cases by arbitration tribunals that had been constituted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. He was not convinced, however, by the language used in the draft guideline, particularly the expression "legal effects", which was not sufficiently clear in his view. If the Special Rapporteur wished to emphasize the idea of good faith performance (the *pacta sunt servanda* principle), draft guideline 4 should mirror the language of article 26 of the Vienna Convention, so as to read:

> "Draft guideline 4
> Legally binding agreement
>
> An agreement to apply a treaty or a part of a treaty provisionally is binding upon the parties to the agreement and must be performed by them in good faith."

Draft guideline 5 addressed two instances in which the provisional application of a treaty could come to an end: when the treaty entered into force and when one party notified the other parties of its intention not to become a party to the treaty. With regard to the former situation, the proposed language might cause some confusion: when a multilateral treaty entered into force, provisional application ended only for those States that had ratified or acceded to the treaty, but it continued for those that had not yet done so until the treaty entered into force for those States, which was not stated in the text. With regard to the latter situation, it would be preferable to repeat the exact terms of article 25, paragraph 2, of the 1969 Vienna Convention rather than to simply make reference to that provision. Furthermore, a provision should be added to the effect that those rules applied "unless the treaty otherwise provides or the negotiating States have otherwise agreed" so as to indicate that it was possible to set specific terms for the termination of the provisional application of a treaty, such as the obligation to provide six months' written notice. He would provide the Special Rapporteur with his proposed draft in writing.

Turning to draft guideline 6, he proposed giving it the title "Responsibility for breach" and replacing the words "obligation deriving from the provisional application of a treaty" with "obligation to apply a treaty provisionally". In conclusion, he endorsed the Special Rapporteur's proposed future programme of work and was in favour of sending all of the draft guidelines to the Drafting Committee.

Mr. Murase said that the provisions of the 1969 Vienna Convention on the Law of Treaties analysed in the part of the report on the relationship of provisional application to other provisions of that Convention were certainly relevant to the topic, but other provisions — such as those on the interpretation of treaties, the invalidity, termination and suspension of the operation of treaties, treaties and third States, and reservations — also

warranted examination. It would have been more useful if the analysis contained in that part had been included in the first report. While he welcomed the reference to the *Yukos* case, he was not sure that he agreed with the analysis of the award in paragraphs 62 to 70 of the report. The Special Rapporteur discussed the case in the light of article 27 of the 1969 Vienna Convention, according to which internal law could not be invoked to evade international obligations. However, that was not the context in which the issue of internal law had been examined in that case. Article 45, paragraph 1, of the Energy Charter Treaty provided that: "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." The Russian Federation had thus been perfectly within its rights to question, as a matter of treaty interpretation, whether provisional application was consistent with its internal law. It had never claimed that the relevant provision of the Energy Charter Treaty was not binding on it because the provision was contrary to its internal law but simply that the provision in question was not applicable to the Russian Federation because the conditions for its application had not been satisfied. The tribunal had ultimately found that the provision was not inconsistent with the internal law of the Russian Federation and that the Russian Federation should thus provisionally apply the Treaty. He therefore believed that, with regard to the question of internal law, a distinction should be made between arguments related to treaty interpretation and those related to article 27 of the 1969 Vienna Convention.

Regarding part IV of the report on provisional application with regard to international organizations, he was having difficulty understanding its structure, particularly in terms of why the memorandum prepared by the secretariat on the legislative development of article 25 of the 1986 Vienna Convention and the provisional application of treaties to which international organizations were party were dealt with in two separate sections, even though the 1986 Vienna Convention specifically covered treaties concluded between international organizations, as opposed to those concluded between States, which were dealt with in sections C and D and came under the 1969 Vienna Convention. Even if a treaty was negotiated within an international organization or at a diplomatic conference convened under the auspices of an international organization, the conclusion of such a treaty was an act of a State and not of an international organization.

Turning to the draft guidelines, he said that it was regrettable that the Special Rapporteur had not explained the reasoning behind each guideline. Even though the substance of article 25 was identical in both the 1969 Convention and the 1986 Convention, he was not convinced that it was appropriate to deal with States and international organizations together. However, if they were to be addressed simultaneously, a guideline on scope would have to be added at the beginning of the project, stating that the draft guidelines applied *mutatis mutandis* to international organizations and States.

With regard to draft guideline 2, he had reservations about the relevance of the reference to "a resolution adopted by an international conference", which in many cases could not be equated with an agreement establishing provisional application. He had no comments on draft guideline 3 but was of the view that the intention and objective of draft guideline 4 were unclear and that the words "legal effects" needed to be qualified. One of the issues raised in the *Yukos* case had been whether the obligation of provisional application extended to the whole treaty or only to select provisions of it. The tribunal had rejected the theory of partial application advanced by the Russian Federation, suggesting that such a "'piecemeal' approach" would run "against the grain of international law". Of course, the issue must be considered on a case-by-case basis depending on the terms of the clause that provided for provisional application, but a guideline on the matter might be useful in cases where the clause in question was ambiguous. The provisional application of a treaty could continue to have legal effects after its termination. That also depended on what the treaty provided for; for example, the Energy Charter Treaty continued to produce

effects for 20 years after the termination of its provisional application, which meant that Yukos investors would be protected until 2029.

There should be a separate guideline on the object and purpose of the draft guidelines the aim of which would be to emphasize that recourse to provisional application should be limited to clearly defined exceptional circumstances, such as the need to address urgent matters, build trust among signatory States regarding certain sensitive issues or deal with legal gaps created by successive treaty regimes (as in the case of filling the post-Kyoto Protocol vacuum).

A guideline on the forms of acceptance of the provisional application of treaties would also be useful. In his second report, the Special Rapporteur had indicated that the intention to provisionally apply a treaty could be communicated either expressly or tacitly. The *Yukos* case offered a valuable lesson in that regard, given that, when signing the Energy Charter Treaty, the Russian Federation had not made the declaration provided for in article 45, paragraph 2, of the Treaty that it was not able to accept provisional application. That gave rise to the question whether signatories were required to expressly refuse to provisionally apply a treaty in order to avoid its provisional application. It might be useful to add a guideline on that point. The Special Rapporteur had provided an interesting explanation of the treaty practice of the Economic Community of West African States (ECOWAS), and he looked forward to the analysis of the practice of regional organizations in the next report. As he did not have any comments on draft guidelines 5 and 6, he recommended sending all of the draft guidelines to the Drafting Committee.

Mr. Tladi said that, in part II of the report, the Special Rapporteur resumed his analysis of internal law and of the way in which provisional application fit within different domestic legal systems. He, like other members of the Commission, had been somewhat surprised by draft guideline 1, given the content of the report and the language of article 25 of the 1969 Vienna Convention. In his report, the Special Rapporteur seemed to suggest that provisional application was not dependent on the domestic law of States that accepted it. In paragraphs 60 and 70 of the report, for example, he stated that the execution of provisionally applied treaties by the parties "cannot depend on, or be conditional to, their respective internal laws" and that "internal law may not be invoked as justification for failure to comply with the obligations deriving from provisional application". Yet, according to draft guideline 1, the provisional application of a treaty was possible only if the internal law of the State or the rules of the international organization did not prohibit it. It might be that the Special Rapporteur was pointing to a particular nuance there, but if that was the case, he had not explained it. In addition, article 25 of the 1969 Vienna Convention did not appear to subject provisional application to the provisions of internal law. Of course, if the treaty itself contained provisions to that effect, its provisional application would obviously be dependent on internal laws and processes, although that was surely not a general rule.

The tension between the content of the report and the draft guidelines aside, he was sympathetic to the views of Commission members who, at previous sessions, had said that domestic rules could not simply be ignored. In other words, provisional application should not encourage States to bypass their domestic laws and thereby undermine their constitutional systems. It would therefore be useful to analyse the different domestic laws and practices concerning the processes to be followed prior to consenting to the provisional application of a treaty, in order to gain greater insight into how States saw the nature of provisional application as a legal phenomenon, as well as to analyse the practice of States with regard to the matter at the international level. It would be worth analysing in more depth, for example, whether States took the view that article 25 applied only if their domestic law so provided.

In paragraph 19 of the report, the Special Rapporteur noted that, for some States, the provisional application of a treaty was subject to the same procedure as was followed for accession to a treaty. However, if provisional application existed precisely to provide an easier and quicker means to apply a treaty pending its entry into force, why would a State resort to provisional application over accession if both procedures were the same? Did that not defeat the whole purpose of provisional application?

Other general questions might be worthy of deeper analysis. For example, it would be helpful to know whether the Special Rapporteur had identified any trends in the type of treaties, and more specifically treaty provisions, that were generally applied provisionally, and whether his analysis of the practice revealed a greater likelihood of States provisionally applying substantive, institutional or procedural rules. The Special Rapporteur should further consider whether certain kinds of treaties generally had similar provisions on provisional application and which States benefited from the provisional application of a treaty by another State. Did all States benefit or only those that had also agreed to provisionally apply the treaty, those that had signed the treaty even if they had not agreed to provisionally apply it or those that had participated in the negotiation of the treaty? Those were very important questions that merited much more detailed analysis in the light of the practice of States and doctrine.

It was clear from part III of the report that the relationship of provisional application to other provisions of the 1969 Vienna Convention was largely determined by its legal basis, whether that was the treaty itself or a separate agreement by the States concerned. For example, as had been shown by the Special Rapporteur, a treaty could stipulate that its provisional application automatically came into effect upon signature or else that it depended on the internal law of each State. However, the Special Rapporteur did not make a clear distinction between provisional application and entry into force, even though there was surely a difference in their legal effects, if only because provisional application did not entail the application of all provisions of a treaty. The Commission was agreed that the entry into force of a treaty and its provisional application had one common consequence: a treaty, or relevant provisions thereof, that was subject to provisional application was to be applied in the same way that it would be if the treaty were in force. In other words, the provisionally applied provisions were binding. But that was not the same as saying, as the Special Rapporteur had done, that “the legal consequences of the provisional application of a treaty are the same as the legal consequences of its entry into force”. For example, the termination of obligations arising from a treaty was effected differently, depending on whether the treaty was being applied provisionally or had entered into force.

By way of example, he recalled that the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization would be able to carry out on-site inspections only once the treaty had entered into force, which suggested that the provisional application of a treaty did not have the same effects as its entry into force. Furthermore, the legal regime established by the Preparatory Commission was based on agreements with individual Member States. Given that some of the agreements were already in force, while some had merely been signed or had not been signed at all, and that each of the agreements provided for the establishment of a separate monitoring system, each State was subject to a different regime of obligations and rights, which would probably not be the case if the treaty had entered into force.

In his view, that example raised a fundamental point. The Commission had, for the present topic, adopted an approach based on the assumption that provisional application created binding obligations. He did not object to that assumption, provided that the binding nature of such obligations was dependent on the interpretation of the provision forming the basis for provisional application. He did not agree, however, that a provision permitting a State to provisionally apply a treaty created a legally binding obligation to do so. In

paragraph 118, the Special Rapporteur mentioned an amendment to the Kyoto Protocol that had been adopted prior to the second commitment period. It had been decided that "Parties may provisionally apply the amendment" and that they were to "provide notification of any such provisional application". In his view, that did not imply any obligation for the parties to the Kyoto Protocol to meet the quantified emission limitation and reduction commitment for the second commitment period. That was supported by a statement by the European Union on 26 November 2012 that read: "We are prepared to adopt an amendment to the Kyoto Protocol that inscribes a new QELRO [Quantified Emission Limitation and Reduction Objective] for the European Union and its Member States in Annex B. Even more than that, we have already put the legislation in place which translates our QELRO into a legally-binding commitment … . This legislation already implements the QELRO into a legally-binding commitment under EU law … the EU will start the immediate application of the second commitment period … regardless of the timing of ratification by other Parties. We will also initiate our ratification processes as soon as possible. We want a legally binding second commitment period."

It could be said that, in that statement, the European Union was committing to provisionally apply the amendment. However, it was clear that the commitment was binding only as a matter of European Union law. It was also noteworthy that, in the statement, the European Union linked the idea of a legally binding second commitment period (presumably under international law) with the ratification processes and not with provisional application. With that in mind, he believed the Commission should be cautious about categorically stating that provisional application created a binding obligation.

He also believed that the Special Rapporteur should address in more detail the interim nature of provisional application and, ultimately, the effect of a delay in the ratification of a treaty. The Special Rapporteur had repeatedly noted in his three reports that one purpose of provisionally applying a treaty was to contribute to its eventual entry into force. There was no doubt that, as stipulated in article 25, a treaty was applied provisionally pending — and principally to facilitate — its entry into force. However, in paragraphs 114 and 115 of the report, the Special Rapporteur referred to provisional agreements that "have every appearance of continuing indefinitely" and stressed that the value of provisional application extended beyond its purely preparatory function. The Special Rapporteur had also stated in paragraph 58 that the legal effects of provisional application were definite and could not be called into question in view of the "provisional" nature of the treaty's application. While he agreed that a State could not justify a breach of a provisionally applied treaty on the basis of a delay in ratification, he believed that the notion that the exceptional nature of provisional application could become the norm for an unratified treaty merited further attention. That question was directly connected with the issue that he had raised at the beginning of his statement, namely the tension between the objectives of provisional application and the possibility of undermining constitutionality.

Although it might in some cases be unavoidable, as in the example of the Comprehensive Nuclear-Test-Ban Treaty, the indefinite continuation of provisional application could have undesirable consequences, particularly given that article 25, paragraph 2, provided for a simplified procedure for terminating provisional application. In his view, provisional application must first and foremost serve as a preparatory period for the treaty's entry into force. The two protocols and the memorandum of understanding relating to the Strategic Arms Reduction Treaty, which had been signed in 1991 by the United States of America and the Union of Soviet Socialist Republics and which had entered into force in 1994, were a notable example of a practice that aimed to ensure that the provisional application of an agreement did not continue indefinitely: they had set the duration of provisional application at 12 months, with the possibility of extending it for additional periods if necessary. While it was true that the Commission had to follow the practice of States and not substitute its own preferences, it might nonetheless be useful to

examine the practice of States to determine whether such provisions restricting the duration of provisional application were common.

With regard to draft guideline 2, he agreed with Mr. Murase that a resolution could not, in itself, be considered a sufficient basis for the establishment of an agreement on provisional application because, among other factors, it would have to have been adopted unanimously.

With regard to draft guideline 4, the Special Rapporteur should clarify the nature of the "legal effects" within the text of the guideline itself. It was his understanding that such effects depended on the agreement that served as the basis for provisional application, but, as Mr. Murphy had noted, it would be useful to clarify what was meant by the words "legal effects". Regardless of the final formulation adopted, account should be taken of the terms of the agreement on provisional application. In any case, although the Special Rapporteur made a distinction between entry into force and provisional application in certain paragraphs of the report, that distinction was blurred in others.

Regarding draft guideline 5, he agreed with the content, but believed that the Special Rapporteur should give further consideration to the question of the termination of provisional application, including situations in which it was clear that the treaty would not enter into force, and whether that might provide a ground for terminating provisional application. In conclusion, he said that he was in favour of sending the draft guidelines to the Drafting Committee.

Mr. Park recalled that, with regard to the legal effects of provisional application in relation to articles 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) and 24 (Entry into force) of the 1969 Vienna Convention, a general consensus had emerged from the Special Rapporteur's second report and the Commission's previous discussions that provisional application had legal effects, even if they were clearly different from those produced by entry into force. In his second report, the Special Rapporteur had not explained the extent of the legal effects of provisional application and had simply asserted that such effects went beyond the obligation not to defeat the object and purpose of the treaty, as set out in article 18 of the 1969 Vienna Convention, with no mention of how they compared to those arising from the application of article 24.

In his view, the legal effects of provisional application were practically the same as those of entry into force, at least for States that had agreed to provisionally apply a given treaty, except that the provisional application of a treaty was merely provisional and had legal effects only for the States that had agreed to it, and that only those provisions of the treaty that States had agreed to provisionally apply produced legal effects. The legal effects of provisional application should therefore be considered systematically in the context of the entire regime of the 1969 Vienna Convention; for that reason, it would have been preferable for the Special Rapporteur to have included a comprehensive and systematic analysis of those aspects in his third report.

In his view, it was clear that the *pacta sunt servanda* principle was applicable to provisionally applied treaties, since provisional application also produced legal effects. As he had said at the Commission's sixty-sixth session, that principle could be invoked to limit legal confusion in the event that a State unilaterally terminated provisional application.

The Special Rapporteur had mentioned that he would examine the legal effects of the termination of provisional application in his next report; the relationship of the termination of provisional application to the *pacta sunt servanda* principle also merited further detailed examination in that report.

Article 27 of the 1969 Vienna Convention could also be applied to the provisional application of a treaty, bearing in mind that the applicable provisions of the national law of

each State greatly affected the use of provisional application. The provisional application of a treaty was based on internal law, such as the Constitution, and could easily be terminated if it violated the provisions of that law. In other words, internal law played an important role in the establishment and observance of the provisional application of treaties.

Mr. Forteau had rightly pointed out that there was some inconsistency between paragraphs 10 and 25 of the report, and Mr. Murphy and Mr. Tladi had also mentioned the issue of internal law. He was therefore aware that there were differences of opinion in the Commission, as well as in the Sixth Committee. As he had pointed out during the sixty-sixth session, at a minimum, it was necessary to research the relationship between the provisional application of treaties and the relevant rules of internal law. In that regard, he proposed that the Special Rapporteur should examine in his fourth report whether the provisions of the 1969 Vienna Convention that dealt with the invalidity of treaties, especially article 46 (Provisions of internal law regarding competence to conclude treaties), could be applied to the provisional application of treaties.

In part IV of the report, the Special Rapporteur analysed the provisional application of three categories of treaties by international organizations. Even though all three were applied by international organizations, the application of the first two categories (constituent treaties of international organizations and international regimes, and treaties negotiated within international organizations or at diplomatic conferences convened under the auspices of international organizations) was governed by article 25 of the 1969 Vienna Convention on the Law of Treaties, whereas the application of the third category was governed by article 25 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The Special Rapporteur also recognized that difference in paragraph 74 of his report. That gave rise to the question whether article 25 of the 1986 Vienna Convention had become a provision of customary international law in similar fashion to article 25 of the 1969 Vienna Convention. The structure of the two articles was virtually identical: in its memorandum, the secretariat had noted that, during the 1986 Vienna Conference, draft article 25 had been referred directly to the Drafting Committee without substantive consideration in a plenary meeting and had been adopted without a vote. Although the Special Rapporteur affirmed that the rules contained in the 1986 Vienna Convention reflected “norms of customary international law”, he would recommend a more cautious approach to the issue because there was insufficient practice concerning the application of article 25 of that Convention. Article 25 of the 1969 Vienna Convention and article 25 of the 1986 Vienna Convention should therefore not be treated equally in the guidelines.

Turning to the draft guidelines, he proposed that they should be given titles based on the stage of provisional application to which they corresponded — for example, introduction, agreement on provisional application, legal effects of provisional application and termination of provisional application. Most importantly, a guideline explaining the concept of the provisional application of treaties, as set out in article 25 of the 1969 Vienna Convention, should be added. The six draft guidelines proposed by the Special Rapporteur dealt with issues related to the provisional application of treaties by States and international organizations. However, as he had already explained, the rules of provisional application that applied to States were considered to be rules of customary international law, whereas those that applied to international organizations did not have the same legal character. Given that rules with disparate legal characters could not be treated equally, he proposed grouping together the draft guidelines on States in the first part and those on international organizations in the second, or mentioning after the draft guidelines on States that the guidelines applied *mutatis mutandis* to international organizations. He proposed adding a new draft guideline to indicate the general direction and purpose of the topic, which could read: “The content and scope of the provisional application of a treaty will depend on the parties’ intention and the terms in which such application is envisioned.”

With regard to draft guideline 2, he wished to raise the question again of whether States could apply article 25, paragraph 1, of the 1969 Vienna Convention when the text of the treaty did not provide for its provisional application — in other words, whether unilateral acts or agreements could be used to authorize provisional application in such cases. In paragraph 5 of his report, the Special Rapporteur stated that the issue had already been clarified in his second report and that, for the time being, it would not be discussed further. It could be assumed that draft guideline 2 reflected the Special Rapporteur's position on the matter when it provided that the agreement for provisional application "may be derived from the terms of the treaty". However, it would be better also to provide a solution for cases in which the parties disagreed on the terms of a treaty and to discuss the possibility of acquiescence by the contracting parties to the provisional application of a treaty by a third State even where the treaty did not expressly allow for provisional application.

It would be appropriate to divide draft guideline 3 into two separate draft guidelines that dealt, respectively, with the means of expressing consent and the starting point of provisional application, as both topics were important to the legal regime of provisional application.

Draft guideline 4 seemed to have been based on the assumption that the provisional application of treaties, although legally distinct from their entry into force, nonetheless produced legal effects and was capable of giving rise to the same legal obligations as those that would arise if the treaty were in force for the State in question. However, the limits of such legal effects should be clearly indicated, namely that provisional application could not result in the modification of the treaty's content. He therefore proposed amending draft guideline 4 to read: "The provisional application of a treaty has legal effects, both internationally and domestically. However, it cannot result in the modification of the content of the treaty."

With regard to draft guideline 5, a sentence should be added to indicate that agreement on the provisional application of treaties could create not only obligations but also rights.

Draft guideline 6 seemed to reflect the Special Rapporteur's initial position and the outcome of the debate in the Commission at its sixty-sixth session, during which it had been agreed that, in principle, a breach of an obligation arising out of the provisional application of a treaty constituted an internationally wrongful act, thereby triggering the rules on the responsibility of States for internationally wrongful acts. However, as currently formulated, the proposed draft guideline seemed to omit the middle stage of the reasoning process, and it would perhaps make sense to follow a two-step approach: the first would address the question of whether the unilateral suspension or termination of the provisional application of a treaty was licit or not and whether it was regulated by part V of the 1969 Vienna Convention, and the second would examine whether such acts constituted a violation of an obligation, in which case the regime of State responsibility could be applied. In his view, the provisional application of treaties and State responsibility were separate legal matters since, according to the International Court of Justice in its judgment in *Gabčikovo-Nagymaros Project* (*Hungary/Slovakia*), "those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility." He therefore proposed that draft guideline 6 should be amended to incorporate the two stages of reasoning so that it would then read:

"1. Article 60 (Termination and suspension of the operation of a treaty as a consequence of its breach) of the 1969 Vienna Convention on the Law of Treaties applies *mutatis mutandis* to the provisional application of treaties.

2. The breach of an obligation deriving from the provisional application of a treaty or parts thereof might engage the international responsibility of the State."

With regard to future work, the Special Rapporteur had said that he would examine the legal effects of the termination of the provisional application of treaties that granted individual rights. It was unclear, however, what exactly was meant by the expression "individual rights". He recalled that the Commission's decision to work on article 25 of the 1969 Vienna Convention had been prompted by the lack of clarity as to when and how the provisional application of treaties ended. The unexpected suspension or termination of the provisional application of a treaty could result in loss for the States concerned. It would therefore be more helpful for the Special Rapporteur to analyse the modalities for the termination of the provisional application of treaties in general.

Ms. Escobar Hernández congratulated the Special Rapporteur on his third report, which contained very interesting elements that would serve to inform the Commission's debates and took account of the comments made by States and various aspects of practice. She emphasized the importance of the proposed draft guidelines, which would allow the Commission to move forward with the topic in the Drafting Committee. She also thanked the secretariat for its memorandum on the legislative development of article 25 of the 1986 Vienna Convention, which was a useful complement to its 2013 memorandum.

Part III of the report was of particular interest, as the comparative analysis it contained would enable the Commission to define the concept of provisional application, distinguish it from other concepts of treaty law, such as entry into force, and thus avoid any unnecessary confusion. On the basis of that analysis, it would also be possible to establish more precisely the scope and effects of provisional application and to determine the extent to which the general provisions of the 1986 Convention also applied to provisionally applied treaties. She supported the ideas expressed in sections A, B, C, D and E of part III, particularly in relation to the obligation not to deprive a treaty of its object and purpose, the full effect of the *pacta sunt servanda* principle and the fact that a violation of internal law could not be used to justify the failure to fulfil obligations arising from a provisionally applied treaty or to justify a reduction of the treaty's effects. In that regard, she did not share Mr. Forteau's view that the effects of provisional application were not necessarily definite, and instead agreed with the Special Rapporteur and other members of the Commission that the effects of provisionally applied treaties were the same as those of treaties that had entered into force, including in respect of future effects. If provisional application was the result of the State's expression of consent (provisional though it might be), the fact that the treaty was being applied provisionally could not be invoked subsequently to argue that the effects it had already produced were invalid (even if those effects had been produced in the context of provisional application). Such an interpretation would amount to a kind of "conditional" consent that was incompatible with the very concept of provisional application.

Although she generally supported the approach taken in part III, she wished to draw the Commission's attention to the fact that it contained questionable elements that warranted further attention. One such element was the practice described in paragraph 41 of the report concerning the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, which, in her view, bore little relation to provisional application. Similarly, the statement contained in paragraph 44 of the report, to the effect that the means of expressing consent to be bound by a treaty could also be used to agree to its provisional application, should be clarified further. In addition, paragraph 67, in which a distinction appeared to be made between the entry into

force of a treaty in the internal order versus in the international order, needed to be clarified, as that distinction was difficult to reconcile with the international nature of treaties, whose effects and validity derived exclusively from rules of international law. In that regard, it would be helpful to distinguish between the entry into force of a given international treaty and the effects it produced in the internal order. The statement in paragraph 66 of the report, to the effect that States had absolute freedom to negotiate the terms of a treaty and, hence its provisional application, should be qualified. Although the absolute freedom mentioned by the Special Rapporteur was entirely relevant under international law, such was not the case under internal law, as States' discretion was restricted by domestic laws that regulated the competence to conclude treaties and the applicable procedure for doing so. It was nevertheless true that those considerations would ultimately depend on each system of internal law, which could not be examined in detail. It was equally true, however, that such internal law restrictions could give rise to legal consequences at the international level, since non-compliance with fundamental domestic provisions on the competence and applicable procedure for the conclusion of treaties could invalidate the treaty whose provisional application had been agreed. Furthermore, the Special Rapporteur's decision to address in his third report only certain aspects of the relationship of provisional application to other provisions of the 1969 Vienna Convention was entirely justified, as he had announced his intention to continue the analysis in his next report, which she awaited with great interest.

As she had pointed out at previous sessions, national legislation on the provisional application of treaties should be examined in detail. Although the Special Rapporteur and other members of the Commission had rightly noted that the topic should be approached from the perspective of international law rather than internal law, she did not agree with the decision not to analyse domestic provisions on that subject. Of course, such an analysis could not be exhaustive and would necessarily be documentary in nature, but it would no doubt identify interesting elements that would give an insight into States' perception of the institution of provisional application in the context of the general treaty law system. Furthermore, the importance of such an analysis was demonstrated by the fact that the Special Rapporteur's third report contained interesting references to State practice, including domestic laws, some of them recent, such as the Spanish law of November 2014. Still on the issue of domestic laws, Spain should be mentioned not only in subparagraph (e) of the Special Rapporteur's categorization in paragraph 25 of the report but also in subparagraphs (a) and (d).

Turning to part IV, she thanked the Special Rapporteur for having examined how all kinds of treaties were provisionally applied by international organizations. As she had pointed out previously, provisional application took on special meaning and presented certain specificities with regard to that category of treaties, primarily because of the purpose of such treaties, which were frequently required to produce immediate effects, and their complexity, which was often linked to the need to provide for the participation, sometimes simultaneously, of the organization's member States and the organization itself. The specificity of the legal order of international organizations and its impact on the provisional application of treaties should be addressed further from two different perspectives. First, it would be useful to analyse the "relevant rules of the organization" referred to in article 5 of the 1969 Vienna Convention and article 5 of the 1986 Vienna Convention and, secondly, to examine the issue with a view to identifying more clearly the types of treaties that were concluded within international organizations or under their auspices, which the Special Rapporteur had addressed jointly in his report. Those issues had already been discussed by the Commission in the context of its previous work, and there would be little point in doing so again unless the intention was to identify elements that were of relevance to the topic at hand. With regard to the first issue, it would be interesting to know whether international organizations had considered provisional application to be a

useful institution and had accordingly decided to incorporate it into their legal systems. A relevant example in that regard was the European Union, given that both article 37 of the Treaty on European Union and article 218 of the Treaty on the Functioning of the European Union expressly established the competence of the Union to conclude international treaties and, in the case of the latter, the possibility of their provisional application. Furthermore, an analysis of the practice of the European Union would be of relevance to the topic at hand because the express mention of the possibility of permitting provisional application was the result, historically, of a variety of problems encountered in practice by the European Union in obtaining the required consent for certain categories of treaties because of its complex procedures. That had been the case for the agreement with the United States of America on the use and transfer of passenger name records to the United States Department of Homeland Security. The annex to the report gave an overview of the practice of the European Union and its predecessor the European Community in relation to primarily institutional agreements. It might be interesting also to analyse the practice of the European Union with respect to bilateral agreements with States that were not of an institutional nature, such as those related to security or international judicial assistance and cooperation. With regard to the second issue — that of categorizing treaties — it would be useful to explore the practice in relation to the ways in which the supreme organs of international organizations, to use the Special Rapporteur's words, could themselves decide on the provisional application of the instruments in question. An analysis of that issue would highlight the differences between treaties concluded within an international organization, under the auspices of an international organization or at an international codification conference. Those differences were not as clear when it came to provisional application as they were for treaty interpretation or other general provisions of the Vienna Convention. In that regard, paragraph 116 of the report contained references to a number of examples, including the Committee of Ministers of the Council of Europe, to support the argument that there were a number of precedents in which the supreme organs of international organizations had decided to provisionally apply amendments, without explicit power in their constitutions. However, it was difficult to be so categorical, given that the practice of the Council of Europe was not uniform, stable or consistent. For example, the Committee of Ministers had not been able to authorize the provisional application of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, even though that instrument had been drafted within the organization and adopted by the Committee itself, and a conference of the parties had had to be convened to that end. In any case, part IV of the report was of particular interest and the Special Rapporteur might wish to examine certain aspects in greater depth or include in a future report a more detailed examination of certain categories of treaties that were associated with provisional application, such as the headquarters agreements frequently concluded between a State and an international organization in view of the hosting of conferences or other one-time events which, by their nature, required immediate application.

Turning to the draft guidelines, she said that, although she generally supported their content, like other members of the Commission, she felt that they were formulated in very general terms, which had its advantages but also meant that some clarification was required, which the Special Rapporteur could no doubt provide based on his previous reports. It would be helpful for the Special Rapporteur to indicate whether he viewed the draft guidelines as a starting point for further work and, if so, whether he intended to endorse the distinction made by Mr. Murase between the guidelines that would apply to treaties concluded only by States and those that would apply to treaties to which international organizations were parties. In conclusion, she said that she supported sending the draft guidelines to the Drafting Committee.

Mr. Šturma said that, as he had mentioned during the preliminary debate and in his comments on the Special Rapporteur's first report, the topic of the provisional application of treaties was very important from the standpoints of both the theory and practice of international law. That was why the Commission should develop a set of guidelines that would be useful for practice. In his third report, the Special Rapporteur seemed to be heading in the right direction. In particular, the annex to the report, which dealt with provisions concerning the provisional application of treaties by international organizations, was very useful and seemed to highlight the complexity of the topic. However, it was regrettable that such an abundance of material had not been used to conduct a more in-depth analysis and to formulate additional guidelines.

Generally speaking, he agreed with the approach adopted by the Special Rapporteur. First, the provisional application of treaties produced legal effects and could create rights and obligations under international law. However, the Commission's analysis could and should go beyond the short statement that made up draft guideline 4. It was important for the guidelines to shed light on complex aspects of the interpretation of article 25 of the 1969 Vienna Convention. Given the wide variety of formulations used in provisions on provisional application, as reflected in the annex to the report, provisional application could produce differing legal effects.

Secondly, the Commission did not need to concern itself with domestic legislation; therefore, the analysis of the provisional application of treaties should focus on the legal effects of such application at the international level. However, there appeared to be some contradiction on that point in the report: on the one hand, the Special Rapporteur stated in paragraph 10 that he would not deal with domestic law, but on the other, he pointed out in paragraph 17 that the Commission had received reports on national practice from only 15 States (including the Czech Republic) and stated in paragraph 137 that he intended to collect more information on State practice before presenting conclusions. His own view was that, although more information on State practice might be useful, it was more important, as Mr. Murase and Ms. Escobar Hernández had also noted, to properly frame the possible implications of internal law and practice for the provisional application of treaties under international law.

Put simply, he agreed with the analysis of article 27 of the 1969 Vienna Convention that was provided in the report, even if it was merely a starting point, as the situation had the potential to be more complex, in particular where the provision relating to the provisional application of a particular treaty itself referred to constitutional procedures or domestic laws and regulations, as was the case in article 56 of the 2010 International Cocoa Agreement.

Based on the examples of relevant provisions provided in the annex to the report, it seemed that the interplay between international law and internal law could take two different forms. First, such provisions ("in accordance with constitutional procedures") could address only the procedure or the conditions for the expression by a State of its consent to provisionally apply a treaty. While the Special Rapporteur had rightly indicated, in paragraphs 61, 68 and 69, that each State could decide whether to allow provisional application and that States sometimes did not make use of provisional application because parliamentary approval was required, a dispute that would be a matter of international law could nonetheless arise in that connection. That could happen, for example, if a State had expressed its consent for provisional application in violation of its constitutional procedures. In that context, the analysis of article 46 of the 1969 Vienna Convention was key. In particular, it was necessary to address the question of whether it should be assumed that the constitutional laws and practice that limited the capacity of a State to provisionally apply a treaty were known to any State that acted in good faith, or whether the State in question

should notify other States of the limitations on its ability to provisionally apply a particular treaty.

The second issue related to the situation in which the relevant provisions of a treaty referred not only to procedure but also to domestic laws and regulations, namely substantive law. For example, article 60, paragraph 2, of the 1994 International Natural Rubber Agreement stipulated that "a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures and its domestic laws and regulations". To give full effect to that formulation, it had to be assumed that a State could refer not just to its constitutional procedures in relation to consent to provisional application but also to the content of its domestic laws. However, that hypothesis raised complex issues concerning the legal effect of such notifications, in particular to what extent they could produce certain of the effects of reservations or, at least, of interpretative declarations.

In addition, other articles of the 1969 Vienna Convention could also be relevant, such as article 60, since a material breach of a provisionally applied treaty by one of the parties could lead another party to suspend or terminate its agreement on provisional application. Turning to the draft guidelines themselves, he noted that most of them were derived from article 25 of the 1969 Vienna Convention and were therefore generally acceptable. Draft guideline 1 reproduced part of the wording of article 25, paragraph 1, and added a very important qualification: "provided that the internal law of States or the rules of the international organizations do not prohibit such provisional application". In light of the above analysis, however, he wondered what would happen in situations in which internal law did not simply prohibit provisional application but restricted it by imposing certain conditions. The aforementioned addition, which departed from the wording of article 25, paragraph 1, would probably require further analysis and justification.

Draft guideline 2 was basically acceptable, in particular because of its open-ended formulation "any other arrangement between the States". In fact, the agreement on provisional application might often arise from a declaration or a notification by a State concerning a treaty provision.

With regard to draft guideline 3, he recommended adding the words "by a State or an international organization" after "A treaty may be provisionally applied" and the words "by that State or that international organization" after "acceptance", because provisional application usually took effect at different times for different States and organizations.

As currently formulated, draft guideline 4 was too general and was thus hardly acceptable; it should be completed by adding paragraphs or guidelines. In his view, the Commission should not shy away from providing more specific guidelines or examples of good practice in order to help States to formulate treaty provisions on provisional application and draft their notifications, in particular where constitutional procedures and domestic law were concerned. It could be stated in a draft guideline, for example, that the provisional application of a treaty had legal effects that were similar to the application of a treaty in force, unless the agreement on provisional application was invalid or had been suspended or terminated, or unless the treaty clearly provided that it could be provisionally applied only within the limits of the domestic laws of the State.

Draft guidelines 5 and 6 were logical extensions of article 25 of the Vienna Convention and the rules on State responsibility. However, it would be sensible to postpone the formulation of draft guideline 6 so that it could be supported by more in-depth analysis.

In conclusion, he recommended sending all of the draft guidelines to the Drafting Committee.

Mr. McRae said that, in many ways, the provisional application of treaties was a classic topic for the Commission, as there was a mandate for it in article 25 of the 1969 Vienna Convention, and there was considerable State practice in that area. Moreover, in his third report, the Special Rapporteur had usefully analysed provisional application in the context of international organizations on the basis of article 25 of the 1986 Vienna Convention. What conclusions could be drawn from the current practice on the provisional application of treaties? On several occasions, the Special Rapporteur had emphasized the flexibility shown in such practice, in particular in paragraph 43 of his third report, but he had not clearly articulated the extent of that flexibility. The question arose as to whether there was so much flexibility that the content of what constituted provisional application had become blurred. There were two examples of that seeming confusion over the content of provisional application.

First, in paragraph 5 of his third report, the Special Rapporteur referred to the discussion on unilateral declarations by States in the absence of an agreement of the parties to permit provisional application. The Special Rapporteur indicated that, in such circumstances, "the provisional application could only lead to obligations incumbent upon the State declaring the unilateral commitment". However, if the obligation was incumbent only upon the State making the unilateral commitment, how could one talk about provisional application of a treaty? How was the term "provisional application" relevant in such cases?

A unilateral statement by a State that it would regard the provisions of a treaty applicable to it on a provisional basis, in the absence of an agreement by the parties to the treaty or some other means to allow for provisional application, was nothing more than a unilateral declaration whose meaning and status were derived from the law relating to unilateral declarations; it did not fall under the legal regime of article 25 of the 1969 Vienna Convention. Of course, if the other parties to the treaty had accepted the unilateral declaration explicitly or implicitly "in some other manner" within the meaning of article 25 of the Vienna Convention, the situation would be different, and article 25 would apply. However, it would not be correct in that situation to say that the obligations were incumbent only upon the State making the declaration. They were treaty obligations, albeit provisionally applied, that were applicable to all parties. But if the other parties to the treaty had not accepted the unilateral statement, and article 25 therefore did not apply, there was no provisional application, just a unilateral acceptance of obligations. Thus, in each case in which a unilateral declaration was made, it was necessary to ask whether there was an agreement of the parties to allow provisional application, which gave rise to the question whether such an agreement could be implied and whether it could be established following the declaration.

In that regard, the Special Rapporteur had referred in his second and third reports to the declaration by the Syrian Arab Republic that it would provisionally apply the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. However, there was no provision in that Convention that allowed for provisional application or any other agreement of the parties on provisional application. As Mr. Forteau had pointed out, that could hardly be considered an example of provisional application, certainly not within the meaning of article 25. However, as the Special Rapporteur had noted in his second report, the Executive Council of the Organization for the Prohibition of Chemical Weapons had considered the Syrian Arab Republic as having provisionally applied the Convention, even though there was nothing in the Convention itself and no evidence of any agreement of the parties to permit provisional application. When the Syrian declaration had been circulated, had the silence of the parties constituted their implicit agreement to permit provisional application? Or had the Executive Council seen itself as creating some new form of provisional application, since it had stated in its written decision that "this decision is made due to the extraordinary

character of the situation posed by Syrian chemical weapons and does not create any precedent for the future"? In her comment on that incident, Ms. Jacobsson had characterized the Syrian declaration as "a unilateral act of State" and the approach of the Executive Council as "creative" treaty interpretation. Therefore, it was either misleading to characterize the Syrian declaration as "provisional application" or there was a new category of provisional application that was based on practice and that fell outside the scope of article 25 of the 1969 Vienna Convention. The Special Rapporteur should provide clarification on that point so that the Commission had an unambiguous picture of what constituted provisional application.

The second example was the reference to the General Agreement on Tariffs and Trade (GATT), which, as the Special Rapporteur recalled, had been described by Anthony Aust as "the most famous precedent". As he himself had pointed out in his statement on the subject in a plenary meeting of the Commission in 2012, the provisional application of GATT was not covered under article 25. Article 25 dealt with the provisional application of a treaty pending its entry into force. In the GATT case, the treaty that had been meant to come into force had been the Havana Charter, not GATT itself. GATT was a self-standing agreement that would allow for the multilateral trading system to operate until another treaty, the Agreement establishing the World Trade Organization, had entered into force. The use of the term "protocol of provisional application" to describe the instrument that had brought GATT into effect had had more to do with the Government of the United States of America wishing to avoid domestic treaty ratification requirements than it had with the international law concept of the provisional application of treaties. It was true that the United States used the mechanism of executive agreements to provisionally apply a treaty and to avoid having to request Senate authorization, but GATT was not an example of provisional application in the sense of article 25.

That had been clearly understood by the Secretary-General in his 1973 report, to which the Special Rapporteur had referred in paragraphs 89 and following, as GATT had not been included in the list of treaties that established international organizations provisionally, either as an application of article 25 or of article 24 on entry into force. The point was that if GATT was to be seen as an example of provisional application, then the notion of provisional application was again being extended beyond what was provided for in article 25. The Special Rapporteur had not said that that was what he was doing; he had referred to the "useful abuse" of article 25, but he had not clearly indicated what constituted use and what constituted useful abuse of provisional application. In short, the Special Rapporteur should provide a clearer definition, perhaps in his next report, of what was and was not provisional application. It was not sufficient to say that there was flexibility in the provisional application of treaties unless it was clear what constituted and what did not constitute provisional application. If, as in the Syrian example, what was included in provisional application did not meet the requirements of article 25, in what sense was it to be regarded as provisional application? Was there a category of provisional application that stood alongside but was separate from article 25?

Until the members had a clearer picture of the concept of provisional application, it was difficult to make any assessment of the proposed draft guidelines. Did they refer only to provisional application within the meaning of article 25 or to something beyond that?

He agreed with Mr. Forteau that the Special Rapporteur's conclusion in paragraph 85 of his third report, which was that article 25 of the 1969 Vienna Convention reflected a rule of customary international law, was not substantiated in the report and, certainly in the case of article 25 of the 1986 Vienna Convention, was highly problematic. What did it mean to say that article 25, paragraph 1, of the 1969 Vienna Convention reflected customary international law? That paragraph indicated only that States could agree to

provisionally apply a treaty, and provisional application was therefore derived from the *pacta sunt servanda* principle. Further clarification was required on that point.

In draft guideline 1, the phrase "provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application" should be deleted. As Mr. Tladi had pointed out, the Special Rapporteur stressed the fact that domestic law could not be invoked because the issue was one of international law, but the current formulation of the draft guideline suggested that compliance with internal law was a precondition of provisional application, even if that had not been the Special Rapporteur's intention. Again, clarification was required.

As currently worded, draft guideline 4 was simply not meaningful: saying that provisional application had legal effects said nothing about the actual effects of such application. It had been stated at the current session that the draft guideline would indicate that provisional application was binding. However, even that was not clear: did it mean that the treaty was to be applied as though it were in force, or did it mean something else? Again, more detail was necessary. Mr. Murphy had said that it was the agreement on provisional application that was legally binding, but it was perhaps not sufficient merely to make such an assertion, as that agreement could allow only for the possibility for States to provisionally apply the treaty, which certain States might not exercise. The Special Rapporteur should therefore provide a more detailed analysis of the precise legal consequences of provisional application. Draft guidelines 5 and 6, but especially 5, indicated some legal consequences, but the legal basis for those consequences should have been established in the report.

The question remained whether the draft guidelines should be sent to the Drafting Committee. The Special Rapporteur himself had indicated that he was not sure that they should be. Given the many specific proposed amendments made during the plenary debate, it was for the Special Rapporteur to decide whether he would be able to incorporate the proposals into the draft guidelines before the Drafting Committee met or whether he would prefer to wait until the Commission's next session to do so.

The meeting rose at 12.45 p.m.