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Seventieth session (first part)

Provisional summary record of the 3403rd meeting
Held at Headquarters, New York, on Tuesday, 15 May 2018, at 10 a.m.

Contents

18-07821 (E)

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Provisional application of treaties (agenda item 5) (*continued*) (A/CN.4/707 and A/CN.4/718)

The Chair invited the Commission to resume its consideration of the fifth report on the provisional application of treaties (A/CN.4/718).

Mr. Park said that he wished to express his appreciation for the Special Rapporteur's report and the memorandum by the Secretariat on the provisional application of treaties (A/CN.4/707). The memorandum clearly set out the similarities and important differences between bilateral and multilateral treaties with regard to provisional application, on the basis of an analysis of the practice of States and international organizations.

Chapter I of the Special Rapporteur's report contained useful information on the views and practice of States. It would be worth continuing to gather information on relevant practice of States and international organizations in order to build a solid basis for further work on the topic. The French prime ministerial circular cited in paragraph 30 of the report, which prohibited provisional application when the agreement might affect the rights and obligations of individuals, was of particular interest. In that connection, he noted that the fifth report did not address the question of the provisional application of treaties that enshrined rights of individuals, even though the Special Rapporteur had stated in his fourth report (A/CN.4/699) that it would. It was unclear what the Special Rapporteur's intention had been in that regard; perhaps he had considered that scenario to be a possible reason for limiting the provisional application of treaties.

Chapter II provided valuable insight into the provisional application of treaties by international organizations.

Turning to Chapter III, he said that a careful approach must be taken to the two proposed new draft guidelines, 5 *bis* (Formulation of reservations) and 8 *bis* (Termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach), since no State practice had been identified in those areas. In principle, he supported the inclusion of draft guideline 8 *bis*, since its *raison d'être* was not the same as that of draft guideline 8 (Termination upon notification of intention not to become a party). He recommended that it should be placed before draft guideline 7 (Responsibility for breach), considering the logical relationship between those two draft guidelines.

There was still room to improve draft guideline 8 *bis*. Bilateral treaties and multilateral treaties should be considered separately, because while the draft guideline as it stood could be applied to bilateral treaties, in the case of multilateral treaties it might be necessary to consider separately the relations among States that had all agreed to provisional application, the relations between States that had agreed to provisional application and States that had not, and the relations between States that had agreed to provisional application and States for which the treaty was already in force.

Furthermore, draft guideline 8 *bis* was somewhat simplistic, as it did not take into account possible situations not covered by article 60 (Termination or suspension of the operation of a treaty as a consequence of its breach) of the 1969 and 1986 Vienna Conventions on the law of treaties. For instance, in the case of a multilateral treaty between States A, B and C that States A and B had agreed to apply provisionally, it was not clear whether State C, a contracting State that had not agreed to provisional application, could invoke a material breach by State A that affected State C as grounds for suspending the provisional application of the treaty, in whole or in part. It might therefore be worth expanding draft guideline 8 *bis* to cover such situations. Article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) of the 1969 Vienna Convention was relevant in that regard.

Turning to draft guideline 5 *bis*, he said that the debate on the formulation of reservations with regard to the provisional application of treaties was necessarily hypothetical and theoretical, since no practice had been identified. He agreed with the statement in paragraph 69 of the report that it would be useful to add a draft guideline on the issue, out of an abundance of caution. Since the provisional application of a treaty or part of a treaty produced the same legal effects between the States concerned as if the treaty were in force, there was no reason why the reservations regime should not apply during provisional application.

He concurred with the Special Rapporteur's view, expressed in paragraph 72 of the report, that there was no need for a draft guideline on the provisional application of treaty amendments.

He took note of the non-exhaustive set of model clauses proposed in chapter IV of the report and the Special Rapporteur's indication in paragraph 73 that the idea of model clauses had been widely supported by States. In his own view, proposing model clauses could have both positive and negative results. They might be useful, considering that provisional application was

sometimes necessary and important. However, they could also give the false impression that the Commission was advocating provisional application. Model clauses elaborated by the United Nations usually took one of two forms: model provisions to facilitate the implementation of international law at the domestic level, such as the Model Legislative Provisions against Organized Crime, or model treaties, such as the Model Treaty on Extradition. In both cases, the objective was to encourage States to adopt certain laws or treaties. Moreover, the Commission had described its 1958 Model Rules on Arbitral Procedure as a set of draft articles which States could use as models in concluding bilateral or multilateral arbitral agreements or in submitting particular disputes to *ad hoc* arbitration. Given that context, the elaboration of model clauses on provisional application could suggest that the Commission wished to encourage States to apply treaties, or parts of treaties, on a provisional basis, when in fact its members were in agreement that greater use of provisional application could weaken control over the formal entry into force of bilateral and multilateral treaties and create unnecessary legal confusion by complicating the relations between contracting States. Further explanations might be necessary to clarify that matter. Moreover, the Commission should consider whether it was appropriate to propose a model for only one of the forms of agreement contemplated in draft guideline 4 (Form of agreement), namely separate agreements, when the draft guideline also covered resolutions adopted by international organizations and unilateral declarations by States and international organizations.

With regard to the set of draft guidelines, he first reiterated his view that, for the sake of clarity, the draft guidelines should not refer to States and international organizations in the same sentence. He hoped that the Commission would revisit that matter following the adoption of the draft guidelines on first reading. Secondly, while he recognized that the Special Rapporteur was eager for the Commission to complete its first reading of the draft guidelines at the current session, he believed that a number of issues must be addressed first. For instance, if the provisional application of a treaty affected the rights or obligations of a State that had not agreed to provisional application, section 4 of part III of the 1969 Vienna Convention (Treaties and third States) could be applied by analogy, though, in that case, the term "third States" would encompass States that had not agreed to provisional application, in addition to States that were not parties to the treaty.

Ms. Galvão Teles, expressing her gratitude to the Special Rapporteur for the extensive information contained in his report, said that she was confident that the Commission would be able to accomplish in the current session its first reading of the draft guidelines on the provisional application of treaties, a topic that was of great practical importance, as reflected in the interest it had generated in the previous year's debate in the Sixth Committee. Recourse to provisional application of treaties was more and more frequent because of the increasingly rapid pace of international dealings, which had translated into a significant amount of practice by States and international organizations, usefully surveyed by the Secretariat in its 2017 memorandum on the topic. Notwithstanding that growing trend, it was important to bear in mind that provisional application remained voluntary — a point stressed by several States but not reflected in a separate draft guideline nor yet sufficiently highlighted in the commentaries to draft guidelines 1 and 2. Due attention to that question might still be given during the first reading, or at least during the second reading. She had taken note of the Special Rapporteur's comments on the views expressed by delegations in the Sixth Committee on draft guidelines 4, 6 and 8, provisionally adopted at the Commission's sixty-ninth session in 2017, and stood ready to discuss them further in the Drafting Committee during the current session or at a later stage.

Turning to the proposed new draft guidelines, she said that, although she did not oppose the addition of draft guideline 8 *bis* — which, in view of the apparent lack of practice in that area, the Special Rapporteur had submitted for consideration *ad cautelam* — its precise drafting and implications would need to be carefully analysed in view of the detailed regime provided for in article 60 of the 1969 and 1986 Vienna Conventions. Similarly, while she did not oppose the addition of draft guideline 5 *bis*, it would be necessary to analyse carefully its precise drafting and implications in view of the complex regime provided for in articles 19 to 23 of the two Vienna Conventions. She noted in that connection that the Special Rapporteur had encountered neither a treaty that provided for the formulation of reservations at the time of provisional application, nor provisional application provisions that referred to the possibility of formulating reservations. Moreover, the Commission's 2011 Guide to Practice on Reservations to Treaties, as detailed as it was, did not include such a possibility.

Although there was some relevant practice concerning the provisional application of treaty amendments, the Special Rapporteur had decided not to propose a new draft guideline on that issue, considering

that it was to some extent covered by draft guideline 4 (b), although that provision did not expressly refer to amendments as such. Since the issue arose with some frequency in the practice of international organizations and decisions on provisional application of amendments were often taken by the competent organs established under a treaty, even when the treaty itself was silent on the subject, it would in her view be useful to have a new draft guideline addressing the matter or, at least, a revision of draft guideline 4 (b) to make the possibility clearer.

She was favourable to the inclusion of model clauses, since they were of practical utility for States and international organizations when drafting provisional application provisions. While she supported in general the text of draft model clauses 1, 2, 3 and 4, she suggested the insertion of a further draft model clause, reflecting some of the examples of the practice of the European Free Trade Association, as set out in the annex to the Special Rapporteur's report, which referred to the "constitutional requirements" of the parties as a prerequisite for the possible provisional application of treaties. The additional model clause might be drafted on the following lines: "If its constitutional requirements permit, any party may apply this agreement provisionally. Provisional application of this agreement under this paragraph shall be notified to the depositary". Another option might be to include another set of model clauses referring to the "constitutional requirements of the parties".

She supported draft model clauses 5, 6, 7 and 8 and considered that all the proposed draft guidelines and model clauses should be referred to the Drafting Committee, taking into account the debate in the plenary. She looked forward to the completion of the first reading on the topic. Its outcome would, as a guide to practice, constitute an important contribution that would be of great practical relevance in the application of article 25 of the 1969 and 1986 Vienna Conventions.

Mr. Murphy said that he appreciated the Special Rapporteur's report and its oral introduction. He was also grateful to the Secretariat for the preparation and presentation of the memorandum on the provisional application of treaties, which provided very useful information on aspects such as the legal basis for provisional application, and the commencement, scope and termination of provisional application. He hoped that the Special Rapporteur would take into account the improvements to the commentary that had been suggested by States during the debate in the Sixth Committee, in particular the idea of expanding the examples of State practice contained in the commentary by including those identified in the Secretariat's memorandum.

He did not support the referral of draft guideline 5 *bis* to the Drafting Committee, for several reasons. First, the inclusion of a "without prejudice" provision concerning reservations might imply that the draft guidelines were "with prejudice" to many other aspects of treaty law as they related to provisional application.

Secondly, the reference to "the right of a State or an international organization to formulate reservations" seemed to go beyond the 1969 Vienna Convention, which did not mention any right to make reservations and in fact prohibited reservations under certain circumstances.

Thirdly, as noted in paragraph 67 of the report, the Special Rapporteur had not encountered a treaty that provided for the formulation of reservations as from the time of provisional application or provisional application provisions that referred to the possibility of formulating reservations, nor had the Secretariat identified any treaties providing for the formulation of reservations concerning provisional application or cases where a State had formulated reservations to a treaty that was being applied provisionally. Thus, draft guideline 5 *bis* was based on the merely conjectural possibility that reservations could be made to agreements on provisional application. In that regard, it might be worth recalling the rather strong admonition made by the representative of France in his statement on the topic in the Sixth Committee in 2017. The Commission's adoption of draft guidelines in respect of which there was no State practice had suggested to France that the Commission was operating outside its mandate. Whether or not that were the case, the lack of practice by States or international organizations might reasonably lead to the conclusion that, in contradiction with draft guideline 5 *bis*, reservations with regard to provisional application were not permitted, unless the agreement on provisional application provided otherwise.

Fourthly, and most importantly, he did not consider draft guideline 5 *bis* to be correct in asserting that a State or international organization had the ability to formulate a reservation with regard to the provisional application of a treaty. A temporal issue came into play, as the agreement on provisional application would be made before the entry into force of the treaty and it was not evident that reservations, at least as envisaged in the Vienna Convention, could have a legal effect at that point in time. Furthermore, claims that there was a right to formulate reservations to agreements on provisional application appeared to be based solely on the idea that

if reservations could be made when consenting to be bound to a treaty, they could also, by analogy, be made when consenting to its provisional application. However, taking into account the temporal issue, the situation might just as well be analogized to that arising under article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) of the 1969 Vienna Convention. Under article 18, there was no possibility for a State to make a reservation, upon signature or exchange of instruments, concerning its obligation not to defeat the object and purpose of the treaty. Thus, analogy alone was not sufficient to provide a definitive answer to the question of whether reservations to provisional application were possible.

In addition to the temporal issue, there was the question of the nature of the agreement. While the specific terms of the agreement were the most important element to be taken into account, it seemed plausible to interpret most, if not all, agreements on provisional application as implicitly precluding reservations. Most could be considered comparable to the agreements contemplated in article 19 (a) and (b) of the Vienna Convention, under which certain reservations were prohibited. That was perhaps particularly the case when two States agreed to the provisional application of a bilateral treaty, as the Russian Federation and the United States of America had done in respect of the Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms. It was not possible to infer that either State, having reached a bilateral agreement to apply the treaty provisionally, could subsequently formulate any reservations. Doing so was implicitly precluded by the agreement. The same was typically true for multilateral treaties. While a State could certainly decline to enter into an agreement on provisional application, it was not evident that a State could enter into such an agreement and then refuse to apply the treaty provisionally, in whole or in part, by means of a reservation, unless the agreement provided for that possibility. That would be especially true when reservations to the underlying agreement were precluded, as was the case for the United Nations Convention on the Law of the Sea, but there was no reason to believe that States could alter the terms of an agreement to provisionally apply any multilateral treaty by means of a reservation. In his view, the Energy Charter Treaty, to which Mr. Murase had referred in his comments on the draft guideline, did not seem to permit such a reservation. The provision in article 45, paragraph 2, thereof that "any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application" concerned not a reservation within the meaning of the 1969 Vienna Convention but rather a decision not to accept the agreement on provisional application *ab initio*. Thus, declining to accept a provisional application agreement appeared to be the exclusive means of avoiding provisional application.

Even if reservations to agreements on provisional application were hypothetically possible, it was unclear which rules of treaty law would apply to them. It would have to be determined whether a reservation could be contrary to the object and purpose of the treaty, and whether it could be contrary to the object and purpose of the agreement on provisional application. Moreover, given the unusual nature of provisional application, it was not clear whether all of the other parties to the agreement on provisional application would have to accept the reservation, or whether it would be sufficient for just one to do so. There was also the question of whether acceptance by parties could be either express or tacit and, if tacit acceptance was possible, whether the 12-month rule provided for in article 20 (5) of the 1969 Vienna Convention was applicable.

In light of the foregoing, he considered that the implication in draft guideline 5 *bis* that a State's right to formulate reservations to a treaty also existed in respect of provisional application was unsupported. At the very least, the draft guideline invited many more questions than it resolved, and the dearth of practice made them impossible to answer. He therefore did not support referring the proposed draft guideline to the Drafting Committee. The necessary guidance could be provided in the commentary. The preferred approach of the Special Rapporteur with respect to the issue of provisional application of treaty amendments, as described in paragraph 70 to 72 of the report, which he supported, would also be the most appropriate way to deal with the matter of reservations.

Turning to draft guideline 8 *bis*, he said that, as the Special Rapporteur had noted, there was no practice concerning the termination or suspension of the provisional application of a treaty or part of a treaty as a consequence of its breach. The reason for that seemed obvious: in accordance with draft guideline 8, a State could easily terminate its provisional application of a treaty simply by notifying the other States of its intention not to become a party to the treaty, unless otherwise agreed. There was no need to argue a material breach of the treaty. Another reason for the lack of practice might be that article 25 of the Vienna Convention did not contemplate termination on the basis of material breach. Reading such a concept into that article would be problematic, as it would suggest that a State could not terminate provisional application unless the breach was material, when in fact article 25 was designed to allow termination regardless of whether

there was a material or non-material breach. Moreover, if the draft guidelines were to hypothesize about the termination or suspension of agreements on provisional application on the basis of material breach, it would raise questions about why they did not do the same in respect of termination on the other grounds contemplated in the Vienna Convention, such as consent among the States concerned (article 54), impossibility of performance (article 61), change of circumstances (article 62) or the emergence of a new *jus cogens* norm (article 64), and why there was no draft guideline on invalidity of agreements on provisional application, drawing on articles 46 to 53 of the Vienna Convention.

Another problem with the proposed draft guideline 8 *bis* was that it provided a simple cross reference to article 60 of the 1969 and 1986 Vienna Conventions, while in reality article 60 could not be considered in isolation from the related articles on termination or suspension procedures that must be followed, which included notification of the claim to the other States or international organizations and the response of those other States or organizations (article 65) and compulsory dispute settlement (article 66). He also concurred with Mr. Murase and Mr. Park that the issue of termination based on material breach was very complicated in the case of an agreement that had entered into force for some States while other States were not yet parties to the treaty and were merely applying it provisionally.

In short, it did not seem appropriate to speculate on the law concerning termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach, especially in such a fragmented manner and in the absence of relevant practice. He therefore did not support the referral of the proposed draft guideline 8 *bis* to the Drafting Committee. Termination or suspension, reservations and amendments could all be addressed in the commentary, perhaps by indicating that, while no practice existed, States could certainly address those issues in their agreements on provisional application if they so wished. While States such as Austria, Brazil, the Czech Republic, Greece, the Netherlands, Romania, Slovakia, Singapore, Slovenia and Spain had requested further exploration of the issue of termination, they did not appear to be seeking a discussion of material breach and other bases for termination found in the 1969 and 1986 Vienna Conventions. Rather, they had noted that draft guideline 8 did not acknowledge the most obvious circumstance under which provisional application ended, namely, the entry into force of the treaty. The Drafting Committee might therefore wish to consider amending draft guideline 8 in that regard.

Turning to chapter IV of the report, he said that it was useful to see the draft model clauses in print after several years of discussion. However, having reviewed the proposals carefully, he was no longer convinced that it was advisable for the Commission to attempt to synthesize existing practice in order to develop its own model clauses, at least without giving itself sufficient time for the task. He feared that attempts to draft model clauses would be hampered by the same issues that had arisen during the elaboration of the draft guidelines. Moreover, if the Drafting Committee rushed the task, the result might be poorly-crafted model clauses that would not be helpful and, as Mr. Murase had noted, might seem to conflict with the guidelines themselves. For example, in draft model clause 1, the reference to a "subsequent date" was confusing, since the date of the commencement of provisional application had to be set when the agreement was concluded, not at a subsequent date. If the intention was to allow for flexibility with regard to the date of commencement of provisional application, the phrase "from the date of signature (or any subsequent date agreed upon)" should probably be amended to read "[from the date of signature] [from [insert date]]". Draft model clause 6 was also unclear. It mentioned notification to "the other States", but it was not clear whether that phrase was meant to refer to States that had negotiated the treaty, States that had adopted the treaty or States that were provisionally applying the treaty. He proposed that instead of attempting to draft model clauses, the Committee should elaborate an annex to the draft guidelines containing actual examples of clauses concerning provisional application, which could be grouped in accordance with the categories used in the Secretariat's memorandum. When selecting the examples, the Commission could exclude confusing or ambiguous clauses. He would be glad to hear the views of the members on his proposal.

He welcomed the Special Rapporteur's statement in paragraph 14 of the report, and his oral introduction, that the comments from delegations about the draft guidelines already provisionally adopted would serve to guide the discussions within the Commission and the Drafting Committee. In that connection, he considered that, before the completion of the first reading, the Drafting Committee should review a number of draft guidelines that had raised serious concerns for some Governments. There was a precedent for that in the approach taken in 2009 by Mr. Gaja to the first reading of the draft articles on the responsibility of international organizations. He hoped that the Special Rapporteur would express support for such an approach in his summing-up of the debate.

Perhaps the most important concern raised by States related to the wording of draft guideline 6 (Legal effects of provisional application). The delegations of Austria, Brazil, China, France, Greece, New Zealand, Poland, Romania, Singapore, Spain, the United Kingdom, the United States, Viet Nam and the European Union had all expressed doubts in connection with the formulation of the draft guideline or noted that further explanation was needed in the commentary. Several of them had stated that the draft guideline conflicted with the commentary. As the delegation of New Zealand had pointed out, if the provisional application of a treaty had the same legal effects as if the treaty were in force, that would undermine entry-into-force provisions, which were crucial to upholding parliamentary democracy and the rule of law in common-law systems. To address those concerns, he suggested that draft guideline 6 should be reformulated to focus on the binding character of agreements on provisional application, since it was those agreements from which any legal obligations arose. A possible formulation might read: "An agreement on provisional application of a treaty or part of a treaty produces a legally binding obligation to apply that treaty or part thereof."

Draft guideline 3 (General rule) might also be improved on the basis of comments by States. Slovenia had proposed the interesting idea of using the active rather than the passive voice, so that the guideline would read: "States or international organizations may agree in the treaty itself or in some other manner to apply a treaty or a part of a treaty provisionally between certain or all of them pending its entry into force between them".

Algeria, France, Greece, the Islamic Republic of Iran, Poland, Romania, Slovakia, the United States, Viet Nam and the European Union had highlighted a lack of clarity in draft guideline 4 (b) with regard to the conditions under which a resolution of an international organization or a declaration by a State or an international organization could constitute an agreement to provisionally apply a treaty. In particular, they felt that it was not clear how acceptance of such an agreement was to be expressed. It would therefore be worth considering whether subparagraph (b) was actually helpful, or whether it could be deleted. If retained, it should perhaps be amended to read: "any other means or arrangements that reflect the consent of all States or international organizations concerned."

In conclusion, he was in favour of referring the existing draft guidelines to the Drafting Committee for *toilettage*, in anticipation of completing the first reading at the current session. He was open to the Special Rapporteur's suggestion that the final outcome of the Commission's work should be entitled "Guide to provisional application of treaties".

Mr. Murase said that he had become convinced, in the light of Mr. Murphy's comments, that the reservations discussed by the Special Rapporteur in connection with draft guideline 5 *bis* were not quite the same as those contemplated in the law of treaties. Nevertheless, in view of the case concerning *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, with regard to the mistake made by the Russian Federation when it did not make a declaration of non-application of the provisional application clause in accordance with article 45 (2) of the Energy Charter Treaty, the question of the non-application of provisional application of treaties should be specifically addressed in the draft guidelines.

Mr. Aurescu said that while, in his report, the Special Rapporteur had duly presented and noted comments made in the Sixth Committee on the draft guidelines and the commentary thereto, it would have been preferable to see more elements of analysis on those comments. He welcomed the inclusion in the report of additional information on the practice of international organizations, namely, the International Organization of la Francophonie, the International Labour Organization and the European Free Trade Association, and the examples given of treaties and their provisional application, such as the Comprehensive Economic and Trade Agreement between the European Union and Canada. It was also a useful initiative to include proposed model clauses on provisional application for the guidance of States and international organizations, with the Special Rapporteur's proviso that they should be flexible enough not to prejudge either the will of the States or international organizations involved or the vast possibilities observed in the related practice.

He did not entirely share the Special Rapporteur's view, expressed in paragraph 79 of his report, with reference in particular to the European Union, that provisional application was sometimes preferred for reasons relating more to its domestic legal effects than to its international effects. The two kinds of effect could not be strictly separated and, indeed, sometimes a treaty needed to be implemented nationally for it to produce effects internationally. Moreover, in order to assess the relevance of the practice of the European Union from that perspective, it was important to take into account the particularities of its legal order, as well as the complex relationship between the national legal order of each of its member States and the legal order at the European Union level, and the interconnectedness of those two legal orders. He was pleased that the Special

Rapporteur had reconfirmed his intention of developing a guide to practice as a practical tool for the users of provisional application of treaties.

He suggested the following reformulation of the proposed draft guideline 8 *bis*: "A material breach of a treaty or of a part of a treaty that is being applied provisionally entitles the States or international organizations to which the breached obligation or obligations are owed to terminate such provisional application or to suspend the application of the treaty or of that part of the treaty, in accordance with the provisions of article 60 of the 1969 and 1986 Vienna Conventions, respectively". Referring to the States or international organizations to which the breached obligation or obligations were owed, rather than simply to the States or international organizations concerned, not only made it clearer which States or international organizations were so entitled but also simplified the text by showing that the breach entitled the States or international organizations to terminate or suspend rather than to "invoke the breach as a ground for terminating and suspending". Moreover, while he was aware that the formula "the treaty's operation in whole or in part" was based directly on article 60 of the two Vienna Conventions, he considered that it would be preferable to replace it with "the application of the treaty or of that part of the treaty" since the term "application", which was also used extensively in the Vienna Conventions and corresponded to the title of the topic, added clarity to the text, while the formula "a treaty or of that part of the treaty" was more in line with the words used in draft guideline 8. Furthermore, it might have been worth distinguishing in the text between the situation of termination or suspension in the case of a bilateral treaty and in that of a multilateral treaty. As for the commentary to draft guideline 8 *bis*, it would be useful to include a presentation of instances where termination applied and where suspension applied. Lastly, bearing in mind that the Special Rapporteur had been unable to identify any practice related to the requirements of article 60 of the 1969 Vienna Convention and had considered the apparent lack of practice in that regard to be confirmed by the Secretariat's memorandum, further efforts were needed to identify relevant practice.

Likewise, although he had no suggestions for changes to the proposed text of draft guideline 5 *bis*, further efforts were needed to identify relevant practice in respect of the formulation of reservations, bearing in mind that the Special Rapporteur had not yet encountered a treaty that provided for the formulation of reservations as from the time of provisional application or provisional application provisions that referred to the possibility of formulating reservations, and that the Secretariat, in its memorandum, had not identified any cases where a treaty had provided for the formulation of reservations in relation to its provisional application or where a State had formulated reservations to a treaty that was being applied provisionally. On the issue of amendments, he agreed with the Special Rapporteur that a draft guideline was not needed.

Turning to the draft model clauses, he welcomed the texts proposed but had doubts about the necessity of draft model clauses 7 and 8, which he found superfluous. There was no need to include such provisions in a treaty since the very purpose of provisional application was that a State or an international organization that provisionally applied all or part of the treaty should be bound to observe all the provisions thereof as agreed with the States or international organizations concerned. In conclusion, he reiterated his appreciation for the work of the Special Rapporteur and said that, taking into account the considerations and options he had proposed, he was in favour of sending the draft guidelines to the Drafting Committee.

Mr. Nguyen said that the two proposed new draft guidelines contained in the Special Rapporteur's excellent and very comprehensive report took into account the observations and comments of members of the Commission as well as the views expressed in the Sixth Committee with regard to the two issues concerned, namely, termination or suspension of the provisional application of a treaty as a consequence of its breach and formulation of reservations. The model clauses proposed, being based on the relevant articles of existing treaties, were of practical use to States and international organizations that decided to apply treaties provisionally.

He shared the Special Rapporteur's view in connection with draft guideline 5 *bis* that, in principle, nothing would prevent a State or an international organization from formulating reservations as from the time of its agreement to the provisional application of a treaty or part of a treaty. However, he did not agree with the Special Rapporteur's explanation, namely, that his view was based on the fact that the provisional application of treaties produced legal effects and that the purpose of reservations was precisely to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State that had formulated the reservation. First, it was important to note the view that article 19 of the 1969 Vienna Convention, which stipulated when reservations could be formulated, did not refer to provisional application and that, accordingly, formulation of a reservation as from the

time of agreement to provisional application of a treaty or a part of the treaty would be inconsistent with that article. Secondly, the purpose of reservations in the case envisaged in draft guideline 5 *bis* was precisely to exclude or to modify the legal effect of the provisional application of a treaty or a part of a treaty but not of certain provisions of the treaty in their application to the State. Thirdly, reservations to the provisional application of a treaty or part of a treaty applied to both States and international organizations, not only to States. Therefore, to avoid inconsistency with article 19 of the 1969 Vienna Convention, draft guideline 5 *bis*, which sought to address the question of reservations with regard to the provisional application of a treaty or a part of a treaty rather than deal with reservations to the treaty itself, needed to be clarified in the commentary. In addition, since the aforementioned article 19 did not refer to provisional application, the words "in accordance with the 1969 and 1986 Vienna Conventions" should not appear in draft guideline 5 *bis* or in the commentary thereto; rather, the Special Rapporteur should clearly state which article of the two Vienna Conventions could apply *mutatis mutandis* to reservations with regard to the provisional application of a treaty or a part of a treaty.

Turning to draft guideline 8 *bis*, he said that, since article 60 of the 1969 and 1986 Vienna Conventions provided for conditions under which a material breach of a treaty occurred after its entry into force, the distinction between the termination or suspension of a treaty in force and the termination or suspension of the provisional application of a treaty or a part of a treaty should be made clearly. Draft guideline 8 *bis* should accordingly be revised to confirm that the material breach of a treaty or a part of a treaty that was being applied provisionally only entitled States or international organizations concerned to invoke that breach in order to terminate or suspend such provisional application, but not to suspend the treaty's operation in whole or in part, as was indicated in the current wording of draft guideline 8 *bis*. Such a revision would also make for consistency between the text of that draft guideline and its title "Termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach". Moreover, the wording "in accordance with the provisions of article 60 of the 1969 and 1986 Vienna Conventions" in the current text of the proposed draft guideline seemed to indicate that a material breach of a provisionally applied treaty could occur under the same circumstances as those provided for in article 60 of the two Conventions. That conclusion must have been confirmed by the practice of States and international organizations. However, it was noted in paragraph 65 of the Special Rapporteur's report that the memorandum by the Secretariat on the subject did not refer to anything related to the requirements of the aforementioned article 60, which confirmed the apparent lack of practice in that regard. It was also stated that the Special Rapporteur had been unable to identify any such practice. In addition, the view that it could not simply be presumed that the legal effects of the provisional application of a treaty or a part of a treaty were exactly the same as those deriving from a treaty in force, as mentioned in paragraph 270 of the Commission's report on its sixty-eighth session (A/71/10), should be noted. Consequently, while he understood and shared the difficulties faced by the Special Rapporteur in the absence of significant practice, he considered that the Special Rapporteur should further address and analyse the matter before referring to the provisions of articles 60 of the 1969 and 1986 Vienna Conventions *mutatis mutandis* in draft guideline 8 *bis*.

He noted the point made by Mr. Murase regarding situations where some States had already become parties to a treaty while other States had not yet become parties thereto and were merely applying it provisionally. The Special Rapporteur should take Mr. Murase's suggestion into account but should at the same time clarify the scope of the draft guidelines, as set out in draft guideline 1. In conclusion, he again paid tribute to the Special Rapporteur, whose expertise, guidance and cooperation had greatly facilitated the Commission's work.

Mr. Reinisch said that the Special Rapporteur's report contained important information on the topic, which was moving towards its conclusion. The proposed draft guideline 8 *bis* added to the ground for termination of provisional application provided for in draft guideline 8, which dealt with the specific case addressed in article 25 (2) of the 1969 and 1986 Vienna Conventions, namely termination upon notification of the intention not to become a party to a treaty. The idea that the provisional application of a treaty could also be terminated or suspended as a consequence of a material breach seemed to follow from the existence of that possibility for treaties that had actually entered into force. It was based on an *a maiore ad minus* reasoning and should be retained with the reference to the provisions on material breach in the 1969 and 1986 Vienna Conventions. He concurred with a number of other members that there might often be no need to stipulate reasons for the termination or suspension of provisional application since a State or international organization could do so simply by notifying its intention not to become a party to the treaty, as provided for in draft guideline 8 and article 25 (2) of the two

Vienna Conventions. However, draft guideline 8 *bis* appeared a useful addition in regard to the intention of a party to end or suspend the provisional application of a treaty vis-à-vis a State committing a material breach without wanting to end such provisional application in relation to other parties and without intending not to become a party to the treaty eventually. That seemed to be a good reason for keeping the wording of draft guideline 8 *bis*, although it had not been mentioned in the report. He looked forward to hearing the Special Rapporteur's views thereon in the Drafting Committee.

He wondered in that connection whether other grounds for termination or suspension of provisional application should also be addressed. For example, there might be internal political pressure not to abide by treaty provisions, even if only provisionally, unless those provisions had been formally adopted in accordance with legal requirements, often under national constitutional law. A State might consequently have to terminate or suspend the provisional application of a treaty without expressing any definite intention not to become a party thereto, as had recently arisen in the case of trade agreements in Europe. Strictly speaking, a State would not, in such cases, be able to terminate its provisional application of a treaty under draft guideline 8 and article 25 (2) of the 1969 and 1986 Vienna Conventions. It might have to resort to the expedient of asserting its intention not to become a party to a treaty, only to argue later that it had changed its mind. While the Special Rapporteur had stated in his second report (A/CN.4/675) that nothing in the Vienna Convention prevented a State from terminating the provisional application of a treaty and subsequently rejoining the treaty regime through ratification or accession, other States might not consider it to be a perfectly *bona fide* course of action if a State first ended provisional application and then acceded to a treaty, perhaps shortly thereafter. He therefore wondered whether the draft guidelines should not also acknowledge that very important ground for terminating or suspending the provisional application of a treaty.

Turning to draft guideline 5 *bis*, he said that, while he concurred with the Special Rapporteur that it should be possible to formulate reservations in relation to the provisional application of a treaty, he doubted whether the proposed "without prejudice" clause was the best way to express it. The Special Rapporteur's analysis of that proposed draft guideline, set out in paragraph 68 of his report, related to the possibility of excluding or modifying the legal effect of certain treaty provisions being provisionally applied. However, according to the proposed draft guideline 5 *bis*, the draft guidelines were without prejudice to the right of a State or an international organization to "formulate reservations with regard to the provisional application of a treaty", which could be understood to refer to a right to make reservations as to whether provisional application should be possible at all. Given the consensual nature of provisional application, that would not make much sense. It might be preferable to use a formulation indicating that the guidelines did not prevent or exclude the right "to formulate reservations to a provisionally applied treaty or part of a treaty". In conclusion, he commended the Special Rapporteur for his excellent work and expressed his support for the referral of the draft guidelines to the Drafting Committee.

The meeting rose at 11.35 a.m. to enable the Drafting Committee on Identification of customary international law to meet.