Provisional

**For participants only**

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# International Law Commission
**Seventieth session (first part)**

**Provisional summary record of the 3404th meeting**
Held at Headquarters, New York, on Wednesday, 16 May 2018, at 10 a.m.

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***Present***:

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

***Secretariat***:

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| 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 of the Special Rapporteur on provisional application of treaties (A/CN.4/718).

**Mr. Nolte** said that he wished to thank the Special Rapporteur for his rich and thought-provoking report, which contained a comprehensive review of the development of the topic in the Commission thus far, together with an extensive collection of materials and a number of final proposals. It would provide a useful basis for the Commission's deliberations on the topic. He welcomed the third memorandum on the topic by the Secretariat (A/CN.4/707), which was a valuable source of relevant treaty practice.

Regarding the two new draft guidelines proposed by the Special Rapporteur, like Mr. Murase, Ms. Galvão Teles and Mr. Murphy, he saw no need for draft guideline 8 bis (Termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach). A clear and simple special procedure for termination was provided for in article 25 (2) of the 1969 Vienna Convention on the Law of Treaties that did not require terminating States to provide any reasons or follow any of the procedures set out in articles 65 to 68 of the Convention that would, on the contrary, apply to the termination of a treaty under article 60 of the Convention. Article 25 (2) covered all contingencies that had so far been relevant in practice. Consequently, he also saw no reason to refer to article 60 in the context of the current topic.

Although there was admittedly some truth to the maxim *a maiore ad minus*, to which Mr. Reinisch had referred, it could not be the complete answer. In keeping with the explanations provided by Mr. Nguyen and Mr. Murphy, he was of the view that a separate draft guideline 8 bis, as proposed by the Special Rapporteur, ran the risk of creating misunderstanding and unnecessary confusion regarding the relationship between termination under article 25 (2) and termination under article 60. Such difficulties would be compounded if the Commission went a step farther, as had been proposed by Mr. Reinisch, and referred also to other grounds for termination. It should be sufficient to have a general draft guideline that indicated that the draft guidelines were without prejudice to the rules of the 1969 Vienna Convention.

Concerning the proposed draft guideline 5 bis (Formulation of reservations), he too did not think it would be useful to adopt a draft guideline on reservations, particularly if it consisted only of a "without prejudice" clause, which could lead to misunderstanding. The Special Rapporteur had indicated in his introductory statement that many of the examples that had been submitted to him were not reservations but interpretative declarations. Mr. Murphy had expressed the view that the lack of practice in that respect was, in and of itself, sufficient reason not to address the question of reservations in a draft guideline. In his own view, a lack of practice did not make it impossible to state the law, as courts were, after all, sometimes confronted with that situation and were required to make a decision, even if by analogy. He nevertheless agreed with Mr. Murphy and Mr. Nguyen that there were no simple answers to that question and that the Commission should therefore not address reservations in the context of the current project.

On the question of the model clauses proposed by the Special Rapporteur, he wished to keep an open mind. Their purpose was to offer States a full panoply of choices regarding provisional application. However, those proposed in the report were few in number and very abstract, and they failed to address some of the most important issues related to provisional application. One such issue was the widespread use of clauses containing agreed limitations on the scope of provisional application in order to ensure that provisional application was compatible with internal laws, in whole or in part. It would be very useful for States to have model clauses for that purpose. The Secretariat had noted in its memorandum that clauses on provisional application were often formulated in rather general terms. It would therefore be helpful if the Commission could provide States with clauses from practice that did not overly restrict the scope of provisional application, while ensuring that there would be no need to amend their internal laws, particularly their parliamentary legislation, in order to enable ratification and entry into force of the treaty. In that sense, he agreed with Mr. Murphy that the Commission should select some clauses from State practice that it found particularly useful from among those compiled by the Secretariat in its excellent memorandum.

Concerning the designation of the Commission's outcome on the topic, model clauses certainly ought to be conceived of as "guidelines". However, to the extent that the current draft guidelines constituted interpretations of article 25 of the 1969 Vienna Convention and were based on State practice and case law, they could just as well be called "conclusions". On the other hand, in contrast to the draft conclusions on the topics "Subsequent agreements and subsequent

practice in relation to the interpretation of treaties" and "Identification of customary international law", the Commission's output on the current topic did not concern methodological questions and was addressed not to a broad range of users but rather to specialists in government ministries. Accordingly, the output could be referred to as "guidelines". Nevertheless, the designation "guidelines" did not indicate a greater degree of normative force in the strictly legal sense.

In conclusion, he was not persuaded that the two proposed draft guidelines were necessary or useful for the project, and he agreed with Mr. Murphy that they should not be referred to the Drafting Committee. If they were referred to the Drafting Committee, it should be on the understanding that the latter had the liberty to decide whether draft guidelines on termination and reservations should be proposed at all. The draft model clauses, on the other hand, should be referred to the Drafting Committee, with the understanding that additional model clauses from the memorandum should be considered as well.

**Mr. Jalloh** said that he wished to thank the Special Rapporteur for his thoughtful, detailed and helpful report, as well as for his valuable past contributions to the important topic under consideration. As one of the newer members of the Commission who had arrived somewhat late in the Commission's consideration of the topics related to treaty law, he was grateful for the chance to participate, at the first-reading stage, in the consideration of the current topic, which sought to further clarify the existing regime of provisional application under article 25 of the 1969 Vienna Convention.

He wished to express his appreciation to the Secretariat for its third memorandum which, together with the other two on the topic, were of tremendous value in advancing the Commission's work. The importance of having informed discussions based on State practice could not be emphasized enough, especially given the practical utility of the Commission's work for States and international organizations, which were increasingly resorting to provisional application because of the flexibility it afforded them in their treaty relations. Indeed, more than 440 bilateral and multilateral treaties subject to provisional application had been deposited or registered with the Secretary-General in the last two decades alone, while the total number of treaties that were provisionally applied was actually much higher.

The Special Rapporteur's report was a clear, well-structured and succinct document in which he carefully addressed the comments, observations and recommendations of the representatives of over 44 States and international organizations on the first set of provisionally adopted draft guidelines and the commentaries thereto. He endorsed the Special Rapporteur's assessment in paragraph 14 of the report that it was necessary to clarify three aspects that had elicited some concern from States and international organizations: the reference to a possible declaration by a State or an international organization that was accepted by the other States or international organizations, contained in draft guideline 4; the extent of the binding effect of provisional application, in connection with the wording of draft guideline 6; and the modalities for the termination and suspension of provisional application, in relation to draft guideline 8. Although it had provisionally adopted all those draft guidelines at its sixty-ninth session, the Commission should heed the Special Rapporteur's advice to exercise caution when revisiting those issues, in order to avoid being overly prescriptive. It should endeavour not to lose the balance between providing normative guidance and maintaining a degree of flexibility, which was highly valued by States in that particular aspect of treaty law.

In paragraph 64 of his report, the Special Rapporteur indicated that a number of States from different geographic regions had expressed an interest in the issue of termination and suspension of provisional application, an issue which had been analysed in the Special Rapporteur's fourth report (A/CN.4/699 and A/CN.4/699/Add.1). However, it was questionable whether an additional guideline on such a complicated issue, such as the proposed draft guideline 8 bis, was necessary, given the frank admission in paragraph 65 of the current report (A/CN.4/718) that the Special Rapporteur had been unable to identify any practice concerning the termination of provisionally applied treaties. That led to the question whether it was indeed a genuine problem for States. Taking into account Mr. Murphy's suggestion that it was possible to have a different reading of the nature of the interest expressed by the 10 or so States that had commented on the issue, and given that some States were indeed inviting the Commission to explore that issue further and perhaps even develop a new draft guideline to cover such scenarios, he was not opposed to assisting States and international organizations — who were the Commission's clients, so to speak — if they might find that valuable.

He concurred with Mr. Murase's comments and appreciated the thoughtful comments by Mr. Park, Mr. Reinisch and Mr. Nguyen on that issue. As recalled by Mr. Murase, the Commission had provisionally

adopted guideline 8 (Termination upon notification of intention not to become a party) at its sixty-ninth session, which had been modelled on article 25 (2) of the 1969 Vienna Convention. Given the relative ease of any party to terminate provisional application under draft guideline 8 upon mere notification, the question arose whether States or international organizations would need to invoke a provision like the one in draft guideline 8 bis. Perhaps, as Mr. Reinisch had suggested, the added value of draft guideline 8 bis was clearer in the case where a party wished to end or suspend the provisional application of a treaty vis-à-vis a State that had committed a material breach but not with respect to other parties and did not intend to not become a party to the treaty. However, that suggestion seemed to have elicited some controversy among members.

Moreover, article 18 of the 1969 Vienna Convention stipulated that States had an obligation not to defeat the object and purpose of a treaty prior to its entry into force. When taken together, articles 25 (2) and 18 left only a limited number of situations in which draft guideline 8 bis could prove useful, and those situations might prove more theoretical than real, as seemingly evidenced by the lack of State practice in that regard. Even if the utility of the provision could already be established, the Commission might have to provide sufficient safeguards in situations where the parties of the treaty had unequal power, as in the case where some States or international organizations had ratified the treaty, but others had not. In such cases, the parties to a treaty could terminate or suspend the operation of the treaty only in the case of its material breach, whereas those that were not yet parties but applied the treaty provisionally merely needed to notify the other parties of their intent not to be bound by the treaty in order to terminate such provisional application. That difference seemed to put those provisionally applying the treaty in a privileged position and encouraged States to extend the period of provisional application rather than to ratify the treaty and become bound by it, which entailed more difficult hurdles to overcome and fewer options for reducing their participation in the treaty.

Further clarification of the nature of a treaty — bilateral or multilateral — as well as of the status of States — being parties to a treaty or provisionally applying it — would likely be helpful. It could also be helpful to consider whether other grounds for termination or suspension of the provisional application of a treaty should be addressed, such as those relating to an unconstitutional change of Government. He wondered whether the regime of part V of the 1969 Vienna Convention, especially section 2 on invalidity of treaties and section 3 on termination and suspension of the operation of treaties, could also have implications for provisionally applied treaties.

The formulation of reservations to a treaty was a very important part of the treaty-making process, and provisions addressing reservations were contained in articles 19 to 23 of the 1969 Vienna Convention. Those articles applied to normal treaty situations and not, in his view, to provisionally applied treaties, as such. It was perhaps for that reason that the Special Rapporteur and the Secretariat had been unable to find a treaty that provided for the formulation of reservations as from the time of provisional application, or even provisional application provisions that referred to the possibility of formulating reservations, as indicated in paragraph 67 of the report. He tended to agree with the Special Rapporteur that, in principle, nothing could prevent a State from formulating reservations as from the time of its agreement to apply a treaty provisionally; however, the Commission should give careful thought to the implications of extending to provisionally applied treaties the complex reservations regime which, in the 1969 Vienna Convention, was more developed in respect of normally applied treaties.

In the Commission’s 2011 Guide to Practice on Reservations to Treaties, it had apparently not taken a position on the provisional application of treaties. Even though, in all fairness, provisional application had not been the focus of that study, he wondered why it had not done so. It might be necessary for the Commission to answer that question before adopting a firm position on the inclusion of a draft guideline on the formulation of reservations to a provisionally applied treaty, given the complexities and sensitivities involved. In view of the wide array of fields in which provisionally applied treaties were found, as confirmed in the report and the memorandum, the Commission might wish to explore further what differences, if any, existed in the way in which reservations might operate, say, in a commodity agreement, which was of a purely reciprocal nature (for example, the 1994 International Coffee Agreement), and the way in which they might operate in a humanitarian treaty, which did not provide for such reciprocity (for example, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms).

Indeed, as the International Court of Justice stated in its 1951 advisory opinion on *Reservations to the Convention on Genocide*, contracting States did not have any interests of their own when it came to human rights treaties; they merely had, one and all, a common interest, namely, the accomplishment of those high purposes which were the *raison d’être* of the Convention. Consequently, in a convention of that type,

there could be no reference to individual advantages or disadvantages to States, or the maintenance of a perfect contractual balance between rights and duties. The high ideals, which inspired such human rights conventions, meant that it was possible that other States could formulate objections to any reservations that had been entered in relation to provisionally applied human rights treaties. Those were weighty issues, and the Commission needed to consider them without taking away the flexibility that provisional application offered States.

If the Commission wished to include draft guideline 5 bis, bearing in mind the much-discussed decision of the Permanent Court of Arbitration in *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, with respect to the Energy Charter Treaty, which had been referred to by Mr. Murase, he was willing to go along in order to recognize the importance of the parties' ability to formulate reservations. However, in that case, he would suggest that the standard should perhaps be changed. Rather than the phrase "without prejudice to the right of a State or an international organization" to formulate reservations, he could agree to wording that imposed an affirmative duty on States to explicitly declare the non-application of a particular reservation to a treaty. In that way, the Commission was ensuring that the obligations of each party were clear. Without such a duty, a party could formulate a reservation upon finding issue with a particular provision of a treaty rather than making clear from the beginning its intention not to provisionally apply a particular provision. That would likely help to ensure fewer disagreements between the parties to a provisionally applied treaty, which was one of the main reasons for the formulation of draft guidelines in the first place.

The Special Rapporteur had set out eight draft model clauses in the report in an effort to address the concerns of some States. In paragraph 7 of his fourth report (A/CN.4/699), he had noted that there was general support for the formulation of model clauses, provided that they were flexible enough not to prejudge either the will of the parties involved or the vast repertoire of possibilities that had been observed in practice with respect to the provisional application of treaties. That was an issue that the Commission had to address in order to reflect the needs and desires of States, which were the ultimate actors of international law.

He strongly supported the inclusion of model clauses covering termination and commencement, and even the development of wording to delineate the scope of application, if such clauses would be of practical utility to States and international organizations when provisionally applying treaties. He had noted the textual amendments proposed by Ms. Galvão Teles and other members, as well as Mr. Murphy's suggestion that, instead of drafting model clauses, the Commission should consider including a select set of actual examples of clearly worded clauses that could be used for provisional application. He wished to remain flexible on that point and could see the advantages and disadvantages of both the Special Rapporteur's and Mr. Murphy's approaches. That said, if the decision was to keep the model clauses because the Commission was able to find broad support for them, his main suggestion would be for the Commission to discuss each of them thoroughly and carefully in the Drafting Committee. In so doing, it might wish to review its past experience in preparing model rules of arbitral procedure, using that experience to adapt the model clauses to its own purpose and improve them so that they were especially useful for States and international organizations. Instead of the footnotes to the draft model clauses referred to in paragraph 77 of the report, perhaps an explanatory note to each model clause might offer better guidance for future users.

In conclusion, notwithstanding his reservations about certain aspects of the proposals, he supported sending all the draft guidelines and the draft model clauses to the Drafting Committee for further discussion. With regard to the proposed final form of the project, he fully concurred with the Special Rapporteur that guidelines would be particularly appropriate for the topic.

**Ms. Escobar Hernández** said that she wished to thank the Special Rapporteur for his report, including the chart containing information on the practice of various international organizations that was included in the annex. She also wished to thank him for his detailed and interesting oral introduction, which had provided a wealth of useful information for the consideration of what might be his last report to the Commission, given the goal of considering the adoption of the draft guidelines on first reading at the current session.

The Secretariat was to be commended for its memorandum, which reviewed State practice in respect of treaties that had been subject to provisional application in the light of information available to the Secretary-General in his role as depositary of treaties. The memorandum also provided other important information, including a description of the provisional application of Protocol No. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which had been adopted by the Council of Europe. Both the systematic and detailed analysis of the

memorandum and its final conclusions provided elements that complemented the two previous memorandums on the topic and would be useful for the Commission's work. In particular, she wished to highlight the parallel but separate analysis of bilateral and multilateral treaties, which was very valuable and could be useful when drafting the model clauses.

Certain aspects of the report before the Commission distinguished it from the Special Rapporteur's previous reports. To begin with, it included a detailed analysis of the opinions expressed by States, both in their oral statements in the Sixth Committee and in the written commentaries they had submitted in 2017 in response to the Commission's request. The analysis of those opinions was very interesting and useful, enabling the Special Rapporteur to increase the number of examples of State practice under consideration and, in the light of such practice, to introduce some new draft guidelines.

Although the Special Rapporteur had already referred to the relationship between reservations and provisional application at the Commission's sixty-eighth session and had presented an interesting analysis of the problems that arose in that connection, he had stopped short of formulating any draft guidelines on the subject at that time. His current report, however, included a proposed new draft guideline 5 bis, on the formulation of reservations. As she had already indicated during the debate on the topic at the sixty-eighth session, she largely endorsed the Special Rapporteur's approach to the question in his fourth report, which, if she understood correctly, was reflected in draft guideline 5 bis. If, from the time of a State's declaration of provisional application, a treaty began producing effects comparable to those that would be produced upon its entry into force, it seemed reasonable to conclude that the State was not more strictly bound by the provisional application than it would be upon the entry into force of the treaty. Thus, there were no logical grounds, in her view, for a State not to be able to formulate a reservation with regard to the provisional application of a treaty.

However, the manner in which such a reservation was expressed as well as its nature and effects were another matter, and a number of questions that she had first raised in 2016 remained a concern: whether a reservation formulated at the time of acceptance of provisional application was equivalent to a reservation formulated at the time of signature of the treaty, albeit with different effects; whether such a reservation must be confirmed at the time of expression of consent; whether the effects produced by the provisional application of a treaty to which a reservation had been formulated were affected if, at the time of the expression of consent, the reservation had not been confirmed; and whether limitations introduced unilaterally by a State upon acceptance of the provisional application of a treaty could be regarded as a special form of reservation. The fact that those questions remained unanswered did not undermine her position that draft guideline 5 bis deserved serious consideration.

Nevertheless, a different question — and one closely related to a comment made by Mr. Reinisch — also bothered her. In her view, the problem in analysing draft guideline 5 bis was its wording, which, despite aiming for simplicity, actually introduced a number of confusing elements. It was not clear what the Special Rapporteur meant by the phrase "to formulate reservations with regard to the provisional application of a treaty". If it referred to the possibility of formulating a reservation to a provision of a treaty that was being provisionally applied, then she would have no problem accepting the draft guideline. If, on the other hand, it referred to the possibility of formulating reservations to the mechanism of provisional application itself, then she was not sure that draft guideline 5 bis should be retained. That was because provisional application was, by its very nature, a consensual mechanism with regard to the decision of whether or not to permit the provisional application of a treaty under article 25 of the 1969 and 1986 Vienna Conventions. On the contrary, a State's ability to declare unilaterally that it did not accept provisional application (in the case of multilateral treaties) did not, in and of itself, constitute the formulation of a reservation, but rather the simple application of an option that the treaty itself offered States in order to facilitate provisional application by those wishing and able to do so. In any event, draft guideline 5 bis dealt with an important issue, as had been highlighted by several States, and she therefore had no objection to its referral to the Drafting Committee.

Turning to draft guideline 8 bis, she said that in his fourth report (A/CN.4/699), the Special Rapporteur had included an interesting analysis of the termination of treaties, with particular attention to termination or suspension of a treaty as a consequence of its breach in accordance with article 60 of the 1969 Vienna Convention. That analysis had focused on the breach of a treaty as grounds for termination, perhaps influenced by the fact that consideration had already been given to the international responsibility entailed by the breach of an obligation arising under a treaty that was being provisionally applied. She had already expressed some scepticism during the consideration of the fourth report in 2016 about dealing with that subject in a draft

guideline, not because she opposed the reasons that might be given for doing so, nor because of a lack of practice in that regard, but for more pragmatic reasons. Although the analysis provided in the fourth report was intriguing, and she could even go so far as to share the Special Rapporteur's views on the question of principle (meaning, the existence of a legal relationship between the parties that arose out of a provisionally applied treaty), she felt compelled to reiterate, for the same reasons she had stated in 2016, that the hypothetical scenario on which draft guideline 8 bis was based seemed artificial and unlikely to arise in practice.

That was particularly true since a State that considered its interests to have been affected by a serious breach of a treaty that was being provisionally applied could always relieve itself of the obligations contained in the treaty simply by triggering the mechanism for the termination of provisional application provided for in article 25 of the 1969 Vienna Convention. That mechanism had the major advantage of not being subject to any substantive or procedural requirement other than giving formal notice. Practically speaking, it was difficult to imagine that, given the choice of using a simple and automatic mechanism, a State would opt for a much more complex, lengthy and unpredictable mechanism — one involving the invocation of grounds for terminating the provisional application of a treaty under article 60 of the Convention and subject to the procedure for giving notification of termination of the treaty set forth in articles 65 to 68 of the Convention. Mr. Murphy had made a similar point at a previous meeting. That said, she was not opposed to the referral of draft guideline 8 bis to the Drafting Committee so as to allow for a livelier exchange of views, as well as to give the Special Rapporteur an opportunity to reconsider the draft guideline and whether or not to retain his proposal or to submit alternative wording.

With regard to the provisional application of treaty amendments, she agreed with the Special Rapporteur that it was not necessary to include a new draft guideline on that issue, not only because of the absence of practice in that regard (echoing what other members of the Commission had said in relation to the proposed draft guidelines), but also for much more substantive reasons. Amendments to treaties, in her view, fulfilled a specific function in the nomogenetic system, namely to make it possible to adapt the rights and obligations set forth in a new treaty to the new needs and interests of States parties, or to changes, including structural changes, in the international community. That function could therefore be justified only for treaties in respect of which States had formally expressed their intention and consent, from which, as a rule, they could not be released and which, furthermore, was accepted as immutable. From that perspective, the only treaty that could be amended was one that was in force.

On the contrary, provisionally applied treaties operated under a different paradigm. Provisional application arose for reasons of urgency or out of an immediate need and was aimed at meeting certain objectives quickly. To include a draft guideline on the possibility of amending such a treaty would threaten to undermine both the concept of amendment and that of the provisional application of treaties itself. If a State that was provisionally applying a treaty considered that the rules contained in the treaty required some modification, much simpler mechanisms were available to it, such as a unilateral declaration of its intention not to become a party to the treaty, or where appropriate, a proposal to start a new negotiating process for the adoption of a separate treaty that better met its needs and interests.

Ms. Galvão Teles had drawn attention to the fact that provisional application was a mechanism that States could use on a voluntary basis and were thus under no obligation to do so. She had also suggested that it would be useful to include a new draft guideline with an explicit indication to that effect, as well as one indicating that States that applied that mechanism should do so in accordance with their own domestic law. She understood completely and shared the concern expressed by Ms. Galvão Teles and not only from the theoretical standpoint. Rather, she had had direct practical experience, when, as a Legal Adviser in the Ministry of Foreign Affairs and Cooperation of Spain, on several occasions she had had to deal with problems arising from the fact that the domestic law of her country's neighbour, Portugal, did not permit the use of provisional application. Nonetheless, she was not fully convinced of the need to include a separate draft guideline on the issue. Perhaps the matter could be addressed in the commentaries to draft guideline 10 and/or draft guideline 11. She was also open to considering other suggestions on that issue that might be useful.

The inclusion of draft model clauses proposed by the Special Rapporteur in the project would undeniably represent a welcome enhancement. Drafting a clause or agreement on the provisional application of a treaty was not as simple an exercise as it might seem; therefore, providing States with an instrument that would assist them in such a task would be very useful. In order to serve that purpose, there were several requirements that the model clauses would have to meet: they should be clear and not repetitive; they should be fully compatible

with the draft guidelines; they should offer States a clear explanation as to their meaning and the situations in which they would be useful; and they should be accompanied by commentaries, just as draft guidelines were.

She wished to make a few additional comments on the form in which the model clauses were presented in the report so as to facilitate the Commission's work. It would be more accurate for draft clauses 1 to 4, which appeared under the heading "Commencement", to cover not only the time of commencement of provisional application but also the forms in which provisional application could be established. A closer look at those model clauses revealed that only draft model clauses 1 and 2 addressed both temporal and formal aspects. Draft model clause 3 appeared to focus more on the formal aspect and to have been devised as a kind of opt-out clause, but did not contain any temporal reference. In her view, there did not appear to be any justification for that. Draft model clause 4 seemed to focus exclusively on the time of the commencement of provisional application, without any reference to the form that the agreement of the parties to provisional application would take or to whether the provisional application was binding or, on the contrary, was subject to some kind of opt-in or opt-out provision.

With regard to the draft model clauses covering the scope of provisional application, there was a need for some revision. For example, draft model clause 8 would be more useful if the wording used in the list of examples of practice was more developed and detailed. Likewise, all ambiguity should be eliminated from the final text of the clause by, for example, avoiding the suggestion that States could freely — and unilaterally — choose which treaty provisions they wished to apply provisionally. In conclusion, she recommended that the draft guidelines as well as the draft model clauses should be referred to the Drafting Committee.

**The Chair** said that, although it was not his custom to make comments on the statements of Commission members, he wished to thank Ms. Escobar Hernández for the substantive comments she had made with regard to the draft model clauses, which would be useful to the Commission at the time of their adoption.

**Mr. Rajput** said that he wished to thank the Special Rapporteur for his report and for his oral introduction, during which he had extensively reviewed the development of the project for the benefit of experts who had been elected to the Commission in the current quinquennium. He also wished to thank the Secretariat for its latest memorandum on the topic, for its oral introduction and the clarifications provided, and for the previous two memorandums it had prepared. A cumulative reading of all the reports and memorandums showed that there was a wealth of treaty practice but that such practice was disparate and the agreements in question encompassed a variety of specialized areas, such as commodity agreements, air service agreements, security-related agreements and agreements establishing or regulating affairs relating to regional organizations. The comments from States on the subject further illustrated that fact.

Provisional application was fundamentally the outcome of a choice made by the parties to a treaty rather than any kind of primary or secondary norm of international law. That was reflected in the first memorandum prepared by the Secretariat (A/CN.4/658), in which it had traced the drafting history of article 25 of the 1969 Vienna Convention. In paragraph 73 of the memorandum, it had noted that "the question of the legal nature of the provisional application of a treaty was discussed primarily in the context of the principle of *pacta sunt servanda*". That point was further developed in paragraphs 74 to 79 of the same document.

The consent-based nature of provisional application made it a moving target, and there were limitations on the extent to which general conclusions could be drawn. Although the Commission had adopted certain guidelines, it must also clarify that the nature, scope and operation of provisional application was primarily an outcome of a *quid pro quo* bargain between States and was thus within the domain of *pacta sunt servanda*. Accordingly, he agreed with Ms. Galvão Teles and the other members who had supported her point that there was a need to clarify the voluntary nature of the draft guidelines. That goal could be achieved by adding a paragraph 2 to draft guideline 1 that would read: "The present draft guidelines acknowledge that the provisional application of treaties is based upon the consent of the parties that have agreed to apply a treaty or a part of a treaty provisionally." In his view, that clarification belonged in the draft guideline itself rather than in the commentary.

A variety of expressions such as "provisional application", "provisional entry into force", "temporary application" and "interim application" had been used in relation to the subject matter of the current topic, but those expressions did not necessarily all represent the same principle. It was worth recalling that some States had sounded a note of caution in that regard in their comments on the draft guidelines.

Turning to draft guidelines 5 bis and 8 bis, he said that the Special Rapporteur had admitted that there was

no State practice or treaty practice to support either of them. However, to respond to the requests of States, he had taken a creative approach to clarifying the relationship between provisional application and other provisions of the 1969 and 1986 Vienna Conventions. To achieve that, he had had to put aside the Commission's usual methodology to develop the reasoning that would underlay draft guidelines 5 bis and 8 bis. He commended the Special Rapporteur for his flexibility and creativity in that regard. In principle, it was not necessary, in his view, to include an independent reference to the termination or suspension of the provisional application of a treaty as a consequence of its breach. That said, the termination of provisional application that was described in draft guideline 8 (Termination upon notification not to become a party), which had been provisionally adopted by the Commission at its sixty-ninth session, was insufficient. It provided for the complete end to the provisional application and was silent with regard to the reasons for such termination. Draft guideline 8 bis, on the other hand, referred to a specific situation arising out of a material breach of a treaty, opening the possibility that a State could react to a material breach by either complete termination or suspension of the provisional application, although it did not need to terminate the provisional application completely under draft guideline 8 or article 25 (2) of the 1969 Vienna Convention. The underlying ideas behind draft guideline 8 and 8 bis were distinct and justifiable. There might also be further legal repercussions that a State might or might not be able to address through the termination of provisional application under draft guideline 8, but which could be addressed through termination or suspension on the grounds of a material breach under draft guideline 8 bis. One example of such legal consequences was dispute resolution proceedings.

Although he fully sympathized with the rationale for the introduction of draft guideline 8 bis, it created an anomaly in that it referred only to article 60 of the Vienna Conventions — a point that Mr. Murase had articulated very well. He also agreed with Mr. Park and Mr. Murphy that article 60 provided for several layers of operation, in relation to both bilateral and multilateral treaties. In his own view, the Convention contained an entire framework relating to the termination or suspension of a treaty as a consequence of its material breach. The procedure for invoking a material breach as a ground for termination or suspension was set out in part V, section 4, of the Convention, comprising articles 65 to 68. Hence, reference to article 60 alone in draft guideline 8 bis was not sufficient — it might incorporate all the nuances of a bilateral or multilateral treaty but not the procedure set out in section 4. That problem could be addressed by replacing the reference to article 60 with a generic reference to termination and suspension under the 1969 and 1986 Vienna Conventions.

That suggestion might make draft guideline 8 bis workable, but he wondered whether it was worth making a reference to termination or suspension for material breach. The answer to that question also affected the utility of draft guideline 5 bis, on reservations. Since the provisional application of a treaty had the effect of giving full life to the treaty, even if only provisionally, there could be no principled objection to permitting reservations to provisional application. Those would be regulated by the entire reservations regime under the two Vienna Conventions and the Commission's Guide to Practice on Reservations to Treaties. As Mr. Murphy and Mr. Nolte had pointed out, if the Commission singled out only certain provisions of the 1969 Vienna Convention for inclusion in "without prejudice" clauses, it was creating unnecessary confusion. It was unclear why the Commission was being selective in its choice of provisions and why it was not referring to other provisions of the Convention that might have some role or effect on provisional application, such as the effect of provisional application on third parties, coercion or a fundamental change of circumstances. Apart from undertaking a speculative exercise that was unsupported by State practice, there was hardly any vital clarification that the Commission could provide by attempting to discuss the relationship of provisional application to each of the provisions of the Vienna Conventions. It also created the possibility of a further set of innumerable draft guidelines that would make the text bulky.

A better course of action would be to make a general reference to the role and effect of the Vienna Conventions on the provisional application of treaties. That could be achieved by adding a paragraph 2 to draft guideline 6 that would read: "Unless the treaty otherwise provides or is otherwise agreed, during the provisional application of a treaty or a part of a treaty, all relevant provisions of the 1969 and 1986 Vienna Conventions apply." Draft guideline 6 was an appropriate place to add the paragraph because it was entitled "Legal effects of provisional application". That suggestion might appear simplistic, but it left enough flexibility for determining the relationship between provisional application and other provisions of the Vienna Conventions, while avoiding the possibility of the Commission venturing into areas of policy. There could be some clarifications in the commentary in relation to certain provisions that the Commission considered to be relevant to provisional application.

Concerning the draft model clauses, he had some reservations. Model clauses could be helpful where there was lack of expertise. Judging by the memorandum prepared by the Secretariat, the responses of States and the annex to the fifth report, there could be no doubt that States were adept at drafting provisional application clauses and had been regularly doing so in keeping with the requirements of their domestic law. The Commission might not be in a position to make a noticeable contribution by proposing model clauses. Moreover, the wording of the clauses included as examples of provisional application in the annex appeared to differ depending on the treaty, its context and the political bargaining that had taken place before its adoption. The Commission did not have the expertise to capture most of those political situations, yet it was trying to capture all possible circumstances that could be represented through model clauses. He therefore did not support the idea of including model clauses in the project.

He preferred not to express any strong view about the referral of the draft guidelines to the Drafting Committee and would be willing to go along with whatever was ultimately decided by Commission by consensus. Nevertheless, clear reference to the voluntary nature of provisional application of treaties was indispensable and should be addressed at the *toilettage* stage.

**Sir Michael Wood** thanked the Special Rapporteur for his report, which contained new material on the practice of States and international organizations in relation to treaties to which they might become parties and their practice as depositaries. He also thanked the Secretariat for its memorandum (A/CN.4/707), which was an excellent study of recent practice and constituted an important contribution to international law regarding the provisional application of treaties.

The two new draft guidelines proposed by the Special Rapporteur needed to be seen in the context of the full set of draft guidelines, with commentaries, provisionally adopted by the Commission in 2017, and of the comments of States on those texts. As the Commission had made clear in paragraph (3) of the general commentary, it was impossible to address all the questions that might arise in practice and to cover the myriad of situations that might be faced by States and international organizations. True, the Commission had to choose what to cover in the draft guidelines and what to leave aside, but it ought also to explain its choices. Since it was starting with article 25 of the Vienna Convention and adding elements thereto, the Commission must explain why it was choosing those particular elements.

One of the choices already made by the Commission was to include draft guideline 7 on responsibility for breach, even though that was really a distinct area of the law, namely State responsibility. Draft guideline 6, which provided that provisional application produced the same legal effects as if the treaty were in force, arguably covered that element and a great deal more: for example, it might be thought to cover the question of the effect of breaches on termination or suspension.

Essentially, the questions raised in his report were whether to cover in separate draft guidelines termination and suspension because of breach, reservations and amendments, or whether to refer to them at suitable points in the commentaries.

Regarding draft guideline 8 bis on the termination or suspension of provisional application as a consequence of breach, he tended to agree with Mr. Reinisch that it would often be sufficient for a State to end provisional application in accordance with article 25 of the Vienna Convention, but that draft guideline could still be useful when a State wanted to terminate or suspend the provisional application of a treaty vis-à-vis a State that had committed a material breach, without wanting to end such provisional application in relation to other States and without intending not to become a party to the treaty. That was potentially an important matter, but he himself was not convinced that the Commission should offer a separate draft guideline on a matter which could be covered in the commentary to draft guideline 6, for example.

If the Commission did include a draft guideline on termination or suspension for material breach, it would need to choose its words very carefully. The wording proposed in the fifth report raised questions. Article 60 of the Vienna Convention concerned the right to invoke material breach as a ground for termination or suspension, but it did not stand alone: it had to be read with the important procedural requirements set out in section 4 of Part V of the Convention. Moreover, the Commission would need to consider referring to grounds of termination or suspension other than material breach, as Mr. Murphy had eloquently explained; otherwise, there could be an *a contrario* inference.

Another point that would need attention if the Commission was to proceed with a draft guideline, which he did not think it should, was that it should presumably refer to the suspension of provisional application of a treaty, not suspension of the treaty. The wording could be simplified by referring to "terminating

or suspending such provisional application". He queried the express reference to the 1986 Vienna Convention, something the Commission had avoided doing elsewhere in the draft guidelines, not least because that Convention was not yet in force.

Turning to draft guideline 5 bis, presented as a "without prejudice" clause concerning the formulation of reservations "with regard to the provisional application of a treaty or a part of a treaty", he said that it raised a number of very interesting issues, both of substance and of drafting. If the Commission was going to deal with those issues, however, something more elaborate and substantive might be needed. Like Mr. Reinisch, he thought that it should be possible to make a reservation that was effective at the time of provisional application, but he had doubts whether the "without prejudice" clause proposed was adequate to serve that purpose.

The proposal for draft guideline 5 bis had to be read in the light of paragraphs 22 to 39 of the fourth report (A/CN.4/699), where the Special Rapporteur had analysed the matter briefly, had found that there was no practice, but nevertheless had concluded that "nothing would prevent the State, in principle, from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty". That was broadly correct, but the matter was much more complex.

Article 19 of the Vienna Convention provided that a reservation might be formulated on certain specific occasions — signature, ratification, acceptance, approval or accession. The occasions listed in article 19 did not include acceptance of provisional application. But that was not conclusive, because the drafters of the Vienna Convention had not sought to set out a full regime of the law applicable to provisional application, far from it. The occasions on which reservations could be made had been expanded in the 1986 Vienna Convention to include formal confirmation by an international organization, and in the 1978 Vienna Convention on Succession of States in Respect of Treaties, to include notification of succession. Interestingly, the Commission's 2011 Guide to Practice on Reservations to Treaties did not address reservations in the context of provisional application — a gap in what was otherwise a rather comprehensive text.

He welcomed the fact that the Special Rapporteur had raised the matter and thought the Commission should try to address it. To do so would not be outside its mandate. Even if the Commission found that there was little or no practice, the matter could properly be dealt with as progressive development. Reservations should be possible as a matter of principle, even if they were not referred to in the Vienna Convention.

Reference had been made by previous speakers to article 18 of the Vienna Convention, but that seemed to be a different matter. He also did not understand why the expression "most if not all agreements on provisional application" should be interpreted as implicitly precluding reservations, though he would be happy to explore that proposition further. Of course, as with most of the law of treaties, any rule the Commission proposed would be a fall-back option, subject to any specific provisions on the matter, expressed or even implied, in the relevant treaty or agreement on provisional application. He tended to think that where reservations to a treaty were permitted, States should be able to formulate reservations even if the treaty was only being applied provisionally. Otherwise, the Commission would be taking a very strange position. A State would have to apply all the provisions of a treaty that it was applying provisionally pending the entry into force of the treaty, and only once the treaty had entered into force could it exclude the legal effects of some of the provisions of the treaty.

Turning to draft guideline 5 bis, he said that a number of expressions were somewhat unclear. The Commission should probably avoid referring to a "right" to formulate reservations, and he was not sure whether the words "in accordance with the 1969 and 1986 Vienna Conventions" qualified the term "provisional application" or the reference to the right to formulate reservations. If it was the latter, that was rather odd, since the Vienna Conventions said nothing about formulating provisional reservations upon provisional application. Furthermore, he was not sure whether the expression "reservation 'with regard to' provisional application" referred to a reservation to provisional application as such, namely a reservation whereby a State declared that it would not provisionally apply a treaty or part thereof, notwithstanding the fact that the treaty permitted provisional application and that the State was otherwise agreeing to provisional application, or whether it referred to a reservation whereby a State purported to exclude or modify the legal effect of certain provisions of a treaty that were being provisionally applied in relation to that State.

In short, he thought a distinction must be made between a reservation "with regard to the provisional application of a treaty or of a part of the treaty", in the sense of a reservation to provisional application as such, and a reservation to a treaty and its provisions. The first hypothesis could be dealt with much more clearly in the draft guidelines. The Commission did not seem to have a guideline referring to the scope *ratione personae* of

provisional application. The question was whether a State could opt out of provisional application, either because opting-out was provided for, in which case the State's action was not a true reservation, or because no such opting out was provided for, in which case the State's action might be regarded as a reservation to the provisional application clause. Rather than saying that the draft guidelines were "without prejudice" to the possibility of formulating a reservation effective during provisional application, perhaps the Commission should include a more substantive provision on that aspect, as a measure of progressive development.

One question that needed to be addressed was whether the effect of a reservation made upon signature or ratification on the obligations that might arise during provisional application was the same as the effect of the reservation when the treaty entered into force. He assumed that it was. Another question was whether a State that had not made a reservation to a treaty when applying the treaty provisionally might still formulate a reservation when it ratified it; in other words, whether the scope of the treaty and the obligations it contained could be broader under provisional application than when it entered into force.

The Commission would benefit from further consideration of those matters, in particular, with due regard to the terminology of the 2011 Guide to Practice on Reservations to Treaties. Perhaps, since the text on provisional application of treaties was about to be adopted on first reading, the Commission should simply acknowledge the issues and indicate that it would come back to them during its consideration of the text on second reading. That would give both the Commission and States time for proper reflection on what was a difficult set of issues.

He agreed with the Special Rapporteur that there was no need for a draft guideline on amendments. On the other hand, the eight model clauses proposed by the Special Rapporteur constituted what was potentially an important practical outcome of the Commission's work that States and others might find helpful. He would have expected the model clauses to deal with provisional application more broadly than simply in terms of the time frame and scope for provisional application, but that was perhaps just a matter of presentation. A more important question was where to finalize the model clauses: in the Drafting Committee, or perhaps in a working group.

In conclusion, he said that despite some doubts, he did not oppose referring the two new draft guidelines to the Drafting Committee, on the understanding that the latter would not necessarily recommend texts on each of the subjects covered. States in the Sixth Committee had made important points concerning one or two of the draft guidelines already adopted. The Commission should try to be responsive to those points before completing its consideration of the text on first reading.

**Mr. Šturma** thanked the Special Rapporteur for his report and welcomed the relevant memorandum prepared by the Secretariat, which provided valuable information concerning the commencement, scope and termination of provisional application that might be used in the commentaries to the draft guidelines.

The two new draft guidelines addressed the relationship of the regime of provisional application to some general rules of the law of treaties, as codified in the 1969 and 1986 Vienna Conventions. That was commendable, as some States had expressed the wish that the Commission should expand its draft guidelines specifically with respect to the termination or suspension of the provisional application of treaties. On the other hand, as noted in the report and in the memorandum by the Secretariat, 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, had not been identified. That lack of State practice was a problem. If the Commission intended to draft guidelines just on the basis of induction, meaning through generalization of State treaty practice, the problem was particularly acute. It was possible to imagine arriving at draft guidelines on the basis of the deductive method, provided that the drafting exercise was logically consistent with the existing rules of the law of treaties. In other words, instead of working on the basis of analogy, the objective would be to derive guidelines from existing rules or to fill a gap in respect of existing rules. Unfortunately, that was not always possible and the report did not provide sufficient guidance in that regard.

Draft guideline 5 bis raised a number of issues and needed to be considered very carefully in the Drafting Committee. He agreed with Sir Michael Wood that if a guideline on reservations was needed, it should clearly differentiate between two scenarios: a reservation to a provision of a treaty and a reservation to an agreement on provisional application. The first scenario related to a reservation as governed by the rules codified in articles 19 to 23 of the Vienna Convention. Unlike Mr. Murphy, he was not thinking only of the "right" to formulate reservations, which was subject to rules in the treaty itself and the object and purpose of the treaty. From a temporal point of view, a State could formulate its reservation upon signature, pending provisional application, but it should confirm said reservation when

expressing its consent to be bound by the treaty, namely upon ratification, acceptance or approval, in accordance with article 23 (2) of the Vienna Convention.

If, on the other hand, the draft guideline concerned a reservation to an agreement on provisional application, which was more likely, although the definition of the term "reservation" in article 2 (1) (d) of the Vienna Convention did not exclude *a priori* such a reservation, it was open to question whether a unilateral statement was a genuine reservation. If it was called a reservation, it could only apply to limitations on the provisional application of multilateral treaties, not bilateral treaties. Even in the case of multilateral treaties, in most cases the possible declarations or actions of a State aimed at excluding provisional application would probably not fall under the concept of reservation, in particular where the consent to provisional application took the form of a separate agreement.

Even in cases like article 45 (2) of the Energy Charter Treaty, where the provisional application of a treaty or a part of a treaty was provided for in the treaty itself, the possibility of opting out seemed to be different from that of a regular reservation. A declaration under article 45 (2) entirely precluded a State from opting out of provisional application, recalling the all-or-nothing approach adopted by the arbitral tribunal in the *Yukos* case. By contrast, a reservation purported to exclude or modify the legal effect of certain provisions of the treaty only.

Consequently, he could only imagine a *raison d'être* for a reservation in rather exceptional cases of multilateral treaties providing for provisional application without any possibility of opting out, and it remained to be seen whether such treaties existed. The very useful annex to the report included clauses on the provisional application of treaties negotiated within the European Free Trade Association. All such clauses were permissive, using the wording that a party "may", and most of them with the added condition that "if its constitutional requirements permit".

Turning to draft guideline 8 bis, dealing with termination of the provisional application of a treaty or a part of a treaty as a consequence of its breach, he said that the proposal set up an analogy with a treaty in force, because a treaty that was being provisionally applied produced the same legal effects as a treaty that was actually in force. If that was the case, as the reference to article 60 of the Vienna Convention suggested, then under the proposal, the possibility of termination or suspension was limited only to cases of a material breach. However, article 25 of the Vienna Convention and the draft guidelines adopted thus far provided for a more flexible way to terminate provisional application in case of breach other than material breach or for any other reason. Nevertheless, the proposed draft guideline might present a certain advantage because it did not require from a State notification of its intention not to become a party, but the issue seemed to be more complex.

First, it was not clear that those States which had expressed interest in the issue of termination or suspension of provisional application had had in mind only the situation of material breach. Secondly, even if the hypothesis of termination or suspension of provisional application as a consequence of a breach was one option, it might be important to distinguish between bilateral and multilateral treaties under the regime of provisional application. It was unclear, at least to him, whether the reference to article 60 implied that the term "party" also applied to a State that had agreed to the provisional application of a treaty or a part thereof. It was also unclear, either from the draft guideline or the report, whether the mere cross-reference to article 60 meant that, in the case of a multilateral treaty, the State concerned could only invoke the breach as a ground for suspension and not for termination of the provisional application. Thirdly, as pointed out by Mr. Murphy, it was not article 60 of the Vienna Convention alone which governed such termination or suspension. Even if the Commission omitted other possible grounds for termination, there were still some relevant provisions under section 4 (Procedure) of the Vienna Convention, such as article 65. Fourthly, as both Mr. Murase and Mr. Park had pointed out, the scenario could become complicated when there were two or even three different groups of States: those for which a treaty had entered into force; those provisionally applying the treaty; and perhaps also those which did not agree to provisional application. That raised the delicate question of who was indeed concerned by the provisional application of a treaty and its breach. Unless that was made clear in draft guideline 8 *bis* and/or the commentary, he had serious doubts if the draft guideline could serve its purpose.

He agreed with the Special Rapporteur that there was no need to propose a draft guideline on the provisional application of treaty amendments. On the proposed model clauses, like Mr. Park, he thought they could have both positive and negative effects. It was questionable whether they were an improvement on the annex with examples of clauses on provisional application. If model clauses were to be used, they should have more added value. It was true that draft guideline 4 envisaged various forms of agreement. Yet

the proposed model clauses seemed to reflect rather simple and uncontroversial situations. It might be more valuable if they also contained some typical clauses inserted into multilateral treaties, in particular consistency or non-consistency clauses, such as those found in article 45 of the Energy Charter Treaty, for it was such clauses that created the main problem for practice. As Mr. Reinisch had rightly stressed, it was consistency with constitutional and other internal legal requirements which was the main practical issue with provisional application.

To sum up, many issues remained to be addressed in the Drafting Committee with respect to both the model clauses and the draft guidelines. He did not object to sending the two draft guidelines to the Drafting Committee, although he believed that they needed substantive changes.

**Mr. Petrič** thanked the Special Rapporteur for his excellent work on a complex topic. He also thanked the Secretariat for the memorandum, which contained valuable material that would help the Commission to bring the work on the topic to completion. Since the Commission was producing a guide to practice, its work should be based as much as possible on research into the practice of States: there was little room for theoretical reasoning as the basis for proposals on the topic.

He agreed with the Special Rapporteur that there was no need for a draft guideline on the provisional application of treaty amendments. On the other hand, he firmly believed that, somewhere in the draft guidelines, the wholly voluntary character of the provisional application of treaties should be clearly set out. Provisional application was a practice resulting purely from the will of States, prompted by their needs at a particular point in time.

Judging from the comments of previous speakers and his own reactions to draft guideline 8 bis, the lack of relevant practice posed a serious problem, but termination or suspension of provisional application was itself also a complex issue, but one that could be constructively dealt with in the Drafting Committee.

On the other hand, he had serious reservations about draft guideline 5 bis, on the formulation of reservations to provisional application. In reality, the question was how to combine two separate legal regimes: the regime of reservations and the regime of provisional application, both of which were prompted, not by logical considerations, but by the needs of States, and took various forms. Flexibility, serious thought and observation of the practice of States would be required in dealing with the matter.

He fully agreed with the Special Rapporteur's reasoning as set out in paragraph 79 of his report, namely that provisional application was sometimes preferred for reasons relating more to the legal effects that it produced in the domestic sphere than to the effects that it produced internationally. As a former constitutional judge, he could say that provisional application was always a problem of constitutional law in a domestic legal system. In addition, it presented a rather interesting situation. Normally, a treaty entered into force by ratification — an act of the legislative branch of government — yet provisional application was in many instances an act of the executive branch.

He strongly believed that it was wrong to try to deal with the problem simply through a "without prejudice" clause, and he opposed the consideration of draft guideline 5 bis by the Drafting Committee. He was not against dealing with the issue of reservations in the commentary or, as Mr. Rajput had suggested, in draft guideline 6 or, to be very ambitious, in an independent clause. A "without prejudice" clause would be misleading, because it would suggest that a reservation to provisional application had no effect, thereby opening the door to legal insecurity: States would not be sure whether they were bound by a reservation to provisional application, when they might be so bound, and when they would not be so bound.

Indeed, with draft guideline 5 bis as currently worded, the Commission would be not only wading into the waters of uncertainty, but also incurring the risk of acting outside its mandate. Under its statute, the Commission's task was codification of the law based on consistent practice, but even in the event of progressive development, a modicum of practice must be shown to exist. In all the years that he had been a member of the Commission, he did not recall it having ever discussed something on which it had not found any existing practice. Ultimately, there was no need for a "without prejudice" clause with respect to something that did not actually exist.

He found the model clauses very interesting and had no major objections to them. However, in dealing with a topic that reflected the practice of States, it would be better to adopt the approach proposed by Mr. Murphy: to develop a systematically presented compendium of the most important examples of clauses actually used in State practice.

Lastly, he shared the Special Rapporteur's hope that work on the current topic could be concluded at the current session. It would be a very positive result, because provisional application was occurring more and more frequently, even in areas that concerned the very

existence of humanity, such as treaties on nuclear weapons.

**Organization of the work of the session** (agenda item 1) (*continued*)

**Mr. Vázquez-Bermúdez** (Chair of the Working Group on Identification of customary international law) said that the Working Group was composed of Mr. Argüello Gómez, Mr. Cissé, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Huang, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria and Mr. Saboia, together with Sir Michael Wood (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), ex officio.

*The meeting rose at 12.15 p.m. to enable the Drafting Committee on Identification of customary international law to meet.*