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Provisional summary record of the 3405th meeting
Held at Headquarters, New York, on Thursday, 17 May 2018, at 10 a.m.

Contents

18-08029 (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. Saboia
	Mr. Šturma
	Mr. Tladi
	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. Huang said that the Special Rapporteur's report systematically brought together the comments and observations of States and international organizations and made it possible to examine the topic in greater depth. The Secretariat was also to be commended for its ambitious, nuanced and very valuable memorandum (A/CN.4/707). Much of the analysis contained therein could be incorporated into the draft guidelines and commentaries.

The provisional application of treaties was a special rule in treaty law whose primary purpose was to facilitate the swift implementation of treaties and help address obstacles to their entry into force. In recent years, provisional application had become increasingly prevalent in both bilateral and multilateral treaty practice. However, since the 1969 Vienna Convention on the Law of Treaties did not clearly define provisional application, or clarify the rights and obligations of parties, the specific provisions on that issue in different treaties varied greatly. Disputes had thus arisen between certain States regarding the interpretation of provisional application. Given the importance of the topic, the Commission had been working to clarify the issue without attempting to amend the Convention. Its work was highly relevant to treaty practice and of great importance to Member States, as evidenced by the significant increase in the number of State representatives who had spoken on the topic in the Sixth Committee during the seventy-second session of the General Assembly.

In examining the topic, three relationships must be properly addressed. The first was the relationship between flexibility and certainty. State practice showed that the rules on provisional application were flexible, something that could contribute to the prompt and universal implementation of treaties. However, with the increase in treaty practice, the inadequacies of provisional application as a consequence of that very flexibility were increasingly evident and various controversies had ensued. The Commission should therefore spell out the connotations and legal effects of provisional application, address the relationship between flexibility and certainty, and develop the normative aspect of the rule while retaining an appropriate degree of flexibility.

Secondly, the Commission should address the relationship between provisional application and the other rules of treaty law, particularly the other clauses of the Vienna Convention, including article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), article 26 ("*Pacta sunt servanda*"), article 27 (Internal law and observance of treaties) and article 46 (Provisions of internal law regarding competence to conclude treaties). The guidelines therefore must be consistent with the 1969 and 1986 Vienna Conventions. They should include a detailed analysis of the relationship and linkages between and among relevant clauses, so that additions and improvements could be made within a framework of overarching principles.

Thirdly, it was important to clarify the relationship between provisional application and internal law, which was one of the more controversial aspects of the topic. Although article 25 of the Vienna Convention made no reference to that relationship, most treaties that provided for provisional application stated that such application was without prejudice to an internal law of a State, thus leaving the legal force and legal consequences of the provisional application open to repeated challenges. In his view, the solution lay in striking a reasonable balance between provisional application and internal law, leaving room for States to apply the treaty selectively in accordance with their internal law and retaining the precondition that there should be no prejudice to internal law. A number of treaties had included such provisions, and the relevant practice should be reviewed and placed within a normative framework.

When the topic had first been introduced, he had pointed out that the Commission should rely on the practice of States and international organizations, to which the Special Rapporteur had given increasingly in-depth consideration. Unfortunately, those commendable efforts had been hampered by a dearth of relevant practice of States and international or regional organizations, aside from more universal organizations such as the United Nations and the World Trade Organization. The memorandums of the Secretariat were valuable in that regard in providing a means to ground the Commission's work in a richer, more substantial and mature practice. It might also be possible to analyse and review the considerations or legal misgivings that had prevented some States or international organizations from accepting provisional application clauses in their treaty practice.

Moreover, even a type of conduct or problem that had not yet arisen in current practice might do so in the future. The Commission's task was not only to review

and distil the current international practice, but also to foresee potential gaps and provide guidance for practitioners. Its study should therefore be comprehensive and forward-looking, rather than merely reacting to existing practice.

Some States, such as the Islamic Republic of Iran, the Russian Federation and Turkey, had made the valuable suggestion that the provisional application of bilateral treaties and the provisional application of multilateral treaties could be addressed separately. A similar approach was found in the memorandum by the Secretariat, which examined the two subitems in separate categories. He believed that the Commission should consider using that format.

Some members of the Commission had argued that the two new draft guidelines, namely 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) and draft guideline 5 bis (Formulation of reservations), were not rooted in State practice and that there was no requirement for them. He shared that view, which was supported by a body of empirical evidence set out in the memorandum by the Secretariat. He had always maintained that the work of the Commission should proceed from the practice and needs of States. Although the need for the proposed new draft guidelines was questionable, he would not oppose referring them to the Drafting Committee for further consideration.

Draft guideline 8 bis referred to a scenario in which a material breach entitled the States or international organizations concerned to invoke the breach as a ground for terminating or suspending the provisional application of a treaty or part of a treaty in accordance with article 60 of the 1969 and 1986 Vienna Conventions. The term “concerned” was elusive: it did not appear in article 60 of the two conventions. He therefore suggested that the Commission should seek inspiration from the wording of article 60 and replace the phrase “the States or international organizations concerned” with “the other parties” or “the other, affected State or international organization”.

The rules on reservations to treaties were by nature very complex. The current draft provided for States and international organizations to formulate reservations at the stage of provisional application. However, further work was required in order to clarify the forms, nature and effects of such reservations. In view of the scarcity of relevant practice, it could be worth asking States and international organizations to comment further on the issue. In the light of the two Vienna Conventions, he believed that draft guideline 5 bis should include separate clauses on issues related to the formulation of reservations. It would also be useful, as was the case in draft guideline 8 bis, to state explicitly which specific clauses of the Vienna Conventions were being invoked.

He did not believe that draft model clauses were necessary. In his view, Governments were equipped to deal properly with technical issues concerning the provisional application of treaties. In his hands-on experience of treaty negotiations over two decades, he had found that even small and least developed countries had no lack of expert international law professionals who could engage very actively with such issues as climate change. The questions at stake were political ones, such as whether States parties should allow the early or provisional entry into force of a treaty, rather than technical ones, such as precisely when provisional application should begin. The situation was analogous to that of reservations to treaties, where the central question was not how to formulate reservations but whether the formulation of reservations was necessary in relation to specific clauses of a treaty. Rather than developing draft model clauses on the provisional application of treaties, the information on relevant practice that was contained in the memorandum by the Secretariat could be annexed to the draft guidelines, so that States could refer to it as needed.

The legal effect of the provisional application of treaties and that of their entry into force were extremely important issues that deserved further in-depth study. One view equated the legal effect of provisional application with that of entry into force when the treaty parties did not indicate otherwise. However, that approach should be treated with caution, as it represented a radical change in the interpretation of the rules set forth in the Vienna Convention. In his own view, the key was to ascertain the real intentions of the treaty parties and to examine all of the relevant State practice, including any exceptions that might exist. It was also important to clarify whether the legal effect of provisional application and that of entry into force were different in special circumstances, for instance in the context of reservations to treaties or succession of States.

The Drafting Committee might wish to explore additional issues, such as the provisional application of part of a treaty and the provisional application of amendments to a treaty. The latter, in turn, raised a series of subsidiary questions, including whether an amendment could be applied provisionally on its own, independently of the treaty, and to what extent provisional application was binding for the various parties, when the parties to the amendment were different from the parties to the treaty.

Mr. Grossman Guiloff said that he was grateful to the Special Rapporteur for his work on the topic, which was of great practical importance, and for his careful and thorough report. He also wished to thank the Secretariat for its memorandum. He supported referring the two new draft guidelines and the draft model clauses to the Drafting Committee. As had been suggested by Ms. Galvão Teles and several other members of the Commission, not to mention a number of States, the voluntary nature of provisional application should be stressed. For that purpose, and to emphasize the importance of the flexibility of provisional application, he agreed with Mr. Petrič and other Commission members that it might be helpful to prepare a draft guideline stating that States were free to participate in the provisional application of treaties.

Turning to draft guideline 5 bis, he said that, according to one point of view, States did not have the right to make reservations to the provisional application of treaties. He did not agree: in accordance with the *Lotus* principle, States had the ability and the right to formulate reservations to treaties, unless restricted by international law. Accordingly, he agreed with the Special Rapporteur that nothing would prevent a State from formulating reservations as from the time of its agreement to apply a treaty provisionally. Valid concerns had been raised regarding the lack of such a provision in previous treaties and the lack of extensive State practice. As Mr. Murphy and others had pointed out, those concerns needed to be addressed and the issue should be fleshed out in the commentary. Nevertheless, he believed that there was sufficient basis in the law and in the nature of State sovereignty for the inclusion of a separate draft guideline. Despite the admitted scarcity of State practice to support the inclusion of draft guideline 5 bis, it was, as Mr. Nolte had noted, possible to make logical inferences and follow legal principles without overstepping the boundaries of the Commission's work. Like Mr. Murphy, Mr. Wood, Mr. Reinisch and other members of the Commission, he himself doubted whether a "without prejudice" clause was the ideal way to state that parties to a treaty could formulate reservations with regard to the provisional application of a treaty. As Mr. Reinisch had suggested, it might be clearer to state that the guidelines did not prevent or exclude the right to formulate reservations to a provisionally applied treaty or part of a treaty. In order to compensate for the lack of relevant State practice, it would perhaps be possible, as Sir Michael Wood had suggested, to include a more substantive guideline in the spirit of progressive development.

With regard to draft guideline 8 bis, some members of the Commission had argued that there was not enough State practice regarding the suspension and termination of the provisional application of treaties to warrant referring that draft guideline to the Drafting Committee. Again, however, State practice could be deduced or inferred logically from existing legal principles and concepts. While he did not believe that draft guideline 8 bis would cause confusion, he did consider that it should be clarified.

He agreed with Mr. Reinisch and Sir Michael Wood that draft guideline 8 bis could be a useful addition to the established options for termination or suspension of the provisional application of a treaty or part thereof following a material breach. Some members had argued that article 25 of the Vienna Convention already provided that States could suspend or terminate the provisional application of treaties at any time, and that draft guideline 8 bis was therefore irrelevant. However, there might be special circumstances that required specific guidance. For example, as Mr. Reinisch had suggested, there might be a situation in which a party wished to terminate or suspend the provisional application of a treaty in respect of one State that had committed a material breach, without wishing to do so in respect of other parties and without declaring its intention not to become a party to the treaty. Draft guideline 8 bis would provide a solution, and would thus add to the grounds provided for in draft guideline 8, which dealt with the specific cases addressed in article 25 (2) of the Vienna Convention. Although he broadly concurred with the comments made by Sir Michael Wood, he believed that addressing the matter in the commentary would not reflect the richness and variety of the discussion. In any event, care should be taken to ensure that draft guideline 8 bis was fully consistent with the important procedural rights and requirements set forth both in article 60 and in part V, section 4, of the Vienna Convention. It might also be worth discussing whether the draft guidelines should acknowledge the ability of States to terminate the provisional application of a treaty and subsequently rejoin the treaty regime through ratification or accession.

Turning to the provisional application of treaty amendments, he said that he agreed with Ms. Galvão Teles that a new draft guideline or a revision of draft guideline 4 (b) would be useful in providing clarity on an issue that often arose in the practice of international organizations, since competent organs established under a treaty frequently took decisions on provisional application of amendments, even when the treaty itself was silent on the subject.

He supported the idea of model clauses because of their practical utility for States and international

organizations. In his own experience of capacity-building in other areas of the law, model clauses had served as a useful toolkit for States with limited capacity. One member of the Commission had suggested that the proposed model clauses should be replaced with an annex setting forth actual examples of clauses agreed by States. His own view was that model clauses were a valid approach, and that there were relatively few examples of practice. It might, however, be possible to combine the two options. As Mr. Šturma had pointed out, when examples did not abound, the Commission could formulate norms deductively and, in so doing, it would be acting in a manner consistent with its legal tradition.

He supported the text of draft model clauses 1, 2, 3 and 4 on commencement. Ms. Galvão Teles had suggested inserting an additional draft model clause that would reflect examples of the practice of the European Free Trade Association, referring to the "constitutional requirements" of the parties as a prerequisite for the possible provisional application of the treaties. He supported the idea of following that approach or of creating a completely different set of model clauses pertaining specifically to the constitutional requirements of the parties.

He supported the guidance provided in draft model clauses 5 and 6, regarding termination, and draft model clauses 7 and 8, regarding the scope of provisional application. Some members had suggested systematizing the model rules; he would be interested in hearing the Special Rapporteur's reaction to that proposal. He agreed with Mr. Nolte that the Commission should provide States with clauses from practice that did not overly restrict the scope of provisional application in order to ensure that internal law was applied. Although the task was complex, he believed that the expertise of the Special Rapporteur, the contributions of the members and dialogue with Member States would make it possible to strike a balance.

Mr. Rajput, referring to the comment by Mr. Grossman Guiloff regarding the need to strike a balance between the provisional application of treaties and internal law, asked whether he understood provisional application as a binding norm that needed to be balanced against the scope of internal law.

Mr. Grossman Guiloff said that, while various elements were relevant, constitutional requirements could not be ignored. The Commission was establishing the scope of principles grounded in international law, as opposed to domestic law. The decisive element would therefore be how the matter was regulated in international law. Domestic law should, however, also be taken into account, given the importance of State practice.

Mr. Hmoud said that, as a practitioner, he could understand that some organizations had difficulties bringing treaties into force owing to regional requirements. However, the output of the Commission should generally have a universal character, and it would not be appropriate to prepare draft guidelines simply to meet the needs of certain regional organizations.

Mr. Rajput said that he wished to place on record his serious reservation regarding the idea that domestic constitutions could be set aside for the provisional application of a treaty. The issue was one of *pacta sunt servanda* and depended on negotiations. The Commission's output must not in any way disrupt constitutional requirements or internal law.

Mr. Nolte said that he believed there had been a misunderstanding. It was not his impression that the Special Rapporteur or Mr. Grossman Guiloff had implied that the Commission or international law should restrict domestic constitutional law. The question was how States parties should seek to reconcile the provisional application of a treaty with respect for the existing domestic law. The parties needed to agree on a clause that would achieve that aim. However, it had been noted that some such clauses might be too broad to serve their intended purpose.

Mr. Saboia said that, like Mr. Rajput, he had wished to indicate that he would be against any interpretation that would restrict the domestic constitutional law of States. However, his original understanding of the topic had been the same as that of Mr. Nolte, and his concerns had been somewhat allayed by Mr. Nolte's comments.

Mr. Petrič said that he was in full agreement with Mr. Rajput: it would be absolutely unacceptable to impose by any means, including model clauses, any obligation on States that could limit their full freedom to choose whether or not to apply a treaty provisionally, according to their constitutional arrangements. His understanding from the outset had been that no such obligation would be imposed. If the project was as Mr. Nolte had described it, he had no objection; otherwise, it was problematic.

Mr. Grossman Guiloff said that a false dilemma had been posited between national sovereignty and international law. He had not suggested that such a dilemma existed. He therefore agreed with the view expressed by Mr. Petrič and appreciated Mr. Rajput's

comments, which had enabled the situation to be clarified.

Mr. Gómez-Robledo (Special Rapporteur) said that, while some members had suggested that some of the model clauses could also include wording concerning the situation provided for in draft guideline 11, namely the possibility that States that applied a treaty provisionally could establish, in the treaty itself or otherwise, limitations on that provisional application deriving from their internal law, or that a new model clause could be drafted in that regard, he had not heard any member call into question article 26 ("*Pacta sunt servanda*") or article 27 (Internal law and observance of treaties) of the Vienna Conventions. At the appropriate time, the Drafting Committee should consider whether it was relevant or necessary to include a model clause reflecting the aforementioned considerations regarding draft guideline 11.

Mr. Hassouna said that the Special Rapporteur's clear and well-written report contained valuable proposals that built upon those made in the previous reports. He fully supported the Special Rapporteur's aim of enabling the Commission to complete its first reading of the draft guidelines and draft model clauses during the current session, since the topic was of great practical importance to States. The final product would contribute to a greater understanding of the provisional application mechanism and provide legal certainty for States opting to resort to provisional application. He was also grateful for the useful memorandum prepared by the Secretariat, especially its thorough analysis of the practice concerning the legal basis for provisional application, as well as its consideration of the practice relating to the commencement and termination of provisional application.

Turning to the content of the Special Rapporteur's report, he said that the fact that 44 delegations had spoken on the topic in the Sixth Committee in 2017, as mentioned in the introduction, was a reflection of States' growing interest in the topic. The practice of resorting to provisional application had become widespread among States for various reasons, including precaution, urgency and flexibility. With regard to the views expressed by States in the Sixth Committee, he concurred with those arguing that the Commission should focus on clarifying the existing legal regime of provisional application while remaining within the framework of the 1969 Vienna Convention. He also agreed with those that considered it important to underscore the voluntary nature of provisional application, and with those that had stressed the need to consider bilateral and multilateral treaties separately. In that regard, he welcomed the Special Rapporteur's assurances that delegations' suggestions would serve to guide the discussions within the Commission and the Drafting Committee.

He noted that Chapter I (Continuation of the analysis of the views expressed by Member States) and Chapter II (Additional information on the practice of international organizations) contained many examples relating to the European Union and the Council of Europe. While he appreciated the wealth of information provided on European practice, he considered that more detailed information could have been supplied on organizations in other regions. For instance, provisional application was increasingly used in relations between African States. As mentioned in the fourth report (A/CN.4/699), the States members of the Economic Community of West African States (ECOWAS) had over the years included a clause on provisional application in their treaties. Any additional information on the practice followed by the members of the African Union would also have been of great value to the Commission's analysis.

One of the main challenges faced by the Special Rapporteur was the lack of State practice and the difficulty of accessing it when it did exist. In his view, that was attributable to the novelty and diversity of such practice in treaty relations. The varying State practice in the provisional application of treaties, the different purposes of treaties and the influence of external factors dictating the parameters of provisional application made identifying State practice difficult. The Special Rapporteur deserved particular credit for overcoming that challenge and accomplishing his task to the best of his ability.

A number of important points regarding the provisional application of treaties should be taken into consideration in the Commission's analysis of the individual draft guidelines. First, the voluntary nature of provisional application must be emphasized, since provisional application was based on the consent of the parties. Secondly, the distinction between bilateral and multilateral treaties should be recognized from the outset. Thirdly, provisional application should take account of each State's constitutional requirements.

Turning to draft guideline 5 bis, he said that he supported the Special Rapporteur's conclusion that "in principle, nothing would prevent a State from formulating reservations as from the time of its agreement to apply a treaty provisionally." However, he also agreed that the formulation of reservations in the context of provisional application was a complex subject and that the current wording of draft guideline 5 bis did not sufficiently clarify some aspects. For

instance, the relationship between reservations formulated in respect of provisional application and those formulated in respect of entry into force should be addressed by the Special Rapporteur. Moreover, the "without prejudice" clause should be replaced with a more substantive provision. On the other hand, he did not share the view that reservations should not be addressed in the draft guidelines and did not doubt the need for the draft guideline. In short, he was in favour of the Drafting Committee further developing the content of the draft guideline and reformulating it.

With regard to draft guideline 8 bis, he considered that it dealt with a situation not covered by draft guideline 8 and could therefore be of value to States. However, he agreed that it should be carefully redrafted to address all the complexities. He also supported the suggestions that reference could be made to other grounds for termination of provisional application, that bilateral and multilateral treaties should be considered separately, and that the situation could be covered by a "without prejudice" clause. All those suggestions should be considered by the Drafting Committee with a view to clarifying the scope, formulation and content of the draft guideline.

He agreed with the Special Rapporteur that there was no need to propose a draft guideline on the issue of the provisional application of treaty amendments, since there was little practice in that regard and it was covered to some extent by draft guideline 4 (b).

In Chapter IV of his report, the Special Rapporteur had proposed eight draft model clauses, which might be useful for guiding States and international organizations that had decided to provisionally apply a treaty and for promoting the consistent use of terms in agreements for provisional application. He commended the Special Rapporteur for making the clauses sufficiently flexible and general and noted that States had widely supported the idea of including model clauses. Commission members had also welcomed that intention. However, to be effective, model clauses must not only be flexible and general, but also sufficiently clear and unambiguous.

When introducing his report, the Special Rapporteur had explained that the wording of the model clauses had not come from specific treaties and that the accompanying footnotes did not represent an exhaustive list of treaties that used similar language. The Drafting Committee should therefore consider and expand on the model clauses to ensure that they reflected a comprehensive review of clauses used in the provisional application of treaties. It should examine those clauses with a view to adjusting their wording and including additional clauses as appropriate. He agreed with the suggestion that the Commission should prepare an annex to the draft guidelines containing actual examples of State practice in respect of treaties that provided for provisional application, such as those referred to in the Secretariat's memorandum. However, that annex should complement, rather than replace, the annex containing model clauses. The Drafting Committee could then consider both annexes and harmonize their content.

Lastly, the two new draft guidelines and the proposed model clauses should all be referred to the Drafting Committee. In spite of the reservations expressed by some members regarding certain proposals made in the report, it was the Commission's practice to examine such reservations together with any revised proposals by the Special Rapporteur in the Drafting Committee, which had always been able to find the right solution.

In conclusion, he would like to thank the Special Rapporteur for his stimulating and valuable report. He hoped that it would allow the Commission to complete its first reading of the draft guidelines and draft model clauses at the current session and to prepare a draft guide to practice for submission to the General Assembly.

Protection of the atmosphere (agenda item 8) (A/CN.4/711)

Mr. Murase (Special Rapporteur), introducing his fifth report on the protection of the atmosphere (A/CN.4/711), said that the report considered issues relating to implementation, compliance and dispute settlement.

Regarding implementation, the Commission had affirmed some obligations of States under international law in the draft guidelines already provisionally adopted, such as the obligation to protect the atmosphere by exercising due diligence, the obligation to conduct environmental impact assessments and the obligation to cooperate. It was a logical consequence that those obligations would need to be implemented domestically and draft guideline 10, paragraph 1, simply confirmed that requirement. The mode of implementation depended on the obligation. In some cases, States would only need to take appropriate measures within their existing domestic law; in other cases, they would need to amend their existing national law if the obligations required them to follow certain specific methods provided for in a treaty or to maintain a certain legal or factual level specified by a treaty.

Draft guideline 10, paragraph 2, related to situations in which there had been a failure to implement the obligations concerned. If the failure amounted to a breach of obligations, and if the action or omission was

attributable to the State, it entailed the responsibility of the State. The Commission's articles on responsibility of States for internationally wrongful acts, based on the concept of objective responsibility, made no reference to damage or risk as elements for establishing State responsibility. However, it was clear that proof of damage or risk was necessary to establish standing and a claim for reparation in the field of international environmental law.

He wished to remind the Commission that, although in its 2013 understanding it had agreed that the topic would not deal with the question of the liability of States, consideration of the issue of State responsibility was not precluded, and there was a difference between responsibility for wrongful acts and liability for lawful acts, namely acts not prohibited by international law. That said, the present topic was intended primarily to establish and strengthen international cooperation among States, not to mould "shame and blame" matrices for potential polluters. His report therefore emphasized cooperative compliance mechanisms, which would better serve the objective of the draft guidelines, rather than the recognition of State responsibility and enforcement of reparations.

The Commission had made several recommendations in the draft guidelines regarding aspects such as sustainable and equitable utilization of the atmosphere, intentional large-scale modification of the atmosphere and the protection of vulnerable States and peoples. Draft guideline 10, paragraph 3, proposed that those recommendations should also be implemented in good faith.

The issue of extraterritorial application of domestic law also needed to be addressed under implementation. In 2015, the Commission had asked States to supply relevant information on their domestic legislation and Singapore, one of the few States to respond, had sent information on its Transboundary Haze Pollution Act of 2014, including its legislative history and the debate in the national parliament. Extraterritorial application of national law had been prevalent in fields such as antitrust law, criminal law, tax law and environmental law. It could be considered permissible, or more precisely, opposable, if there was a well-founded grounding in international law, such as (a) the objective territoriality principle; (b) the passive personality principle; (c) the protective principle; or (d) the universality principle. The extraterritorial application of the Singaporean Transboundary Haze Pollution Act was based on the objective territoriality principle. Nonetheless, extraterritorial application of domestic environmental law should be exercised with care, taking into account comity among the States concerned, and should be in line with the relevant jurisprudence. By contrast, extraterritorial enforcement of national law was considered a violation of State sovereignty and was not permitted in international law. Those considerations were reflected in draft guideline 10, paragraph 4. He was grateful to the Attorney General's Chamber of Singapore for its assistance in the writing of that part of the report.

Turning to the issue of compliance, he said that there were two major approaches: the facilitative/promotional approach, which aimed to furnish assistance to a non-complying State, and the enforcement approach, which sought to impose a penalty on a non-complying State. Under the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987, the facilitative approach had been given precedence, whereas in the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change an enforcement approach had been favoured, although it had not resulted in the achievement of the stated objective. The 2015 Paris Agreement had returned to the facilitative, non-punitive and non-confrontational approach. The proposed draft guideline 11 simply compared the two approaches, without expressing a preference for either one. However, in the field of international environmental law, it seemed clear that the facilitative approach was a more effective means of securing compliance.

Regarding dispute settlement, it went without saying that all disputes should be settled by peaceful means, as provided for in Article 33 of the Charter of the United Nations. Draft guideline 12, paragraph 1, was therefore closely based on paragraph 1 of that Article. He had omitted the last phrase, namely, "or other peaceful means of their own choice" since he believed that the list in Article 33, paragraph 1, was considered inclusive of all the dispute settlement mechanisms known in international practice. However, he would be open to adding that last phrase if the Drafting Committee considered it appropriate.

Disputes relating to the protection of the atmosphere were normally of a fact-intensive and science-dependent character. Even during the initial stage of negotiation, the party raising the issue must provide scientific evidence of the alleged damage or risk. His report devoted considerable attention to judicial settlement, but the argument developed therein also applied to non-judicial phases of the peaceful settlement of disputes.

In the past, scientific evidence had been presented by the parties as part of their assertions, either by the counsels or by scientific experts acting as counsels, who

were not cross-examined. The parties had followed that practice in the cases of the International Court of Justice concerning *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* of 1997 and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* of 2010, but it had been criticized by the Bench and by commentators. In the cases concerning *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* of 2014, and *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* of 2015, the parties had appointed scientific experts, who had not only been cross-examined but also examined by the Court, and the evidence presented had been given greater weight as a result. The Court could be expected to appoint its own experts in future environmental disputes, as it had done recently in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*. Thus, draft guideline 12, paragraph 2, highlighted those methods of supplying scientific evidence.

His report also discussed some procedural rules relating to scientific evidence, which concerned the relationship between law and facts. For instance, the term "scientific research" in the legal sense was defined in article VIII of the International Convention for the Regulation of Whaling of 1946. However, the issue at stake in the *Whaling in the Antarctic* case hinged on such aspects as the actual conduct of Japan in pursuing scientific research on whale species, the method of research, including whether it was lethal or non-lethal, and the amount of the catch. In that case and the *Construction of a Road* case, the Court had conducted a very thorough factual investigation involving vigorous questioning of the party-appointed scientific experts. Although the Court appeared to maintain in principle that it made its decisions on scientific evidence as a matter of law, it had clearly demonstrated its competence to deal with technical issues relating to facts. If courts and tribunals appointed their own scientific experts or assessors, as seemed to be the trend in both the International Court of Justice and other tribunals, then it followed that those courts and tribunals would be able to assume the function of evaluating facts.

His final proposal, draft guideline 12, paragraph 3, thus concerned procedural rules of courts and tribunals relating to law and facts. The *non ultra petita* (not beyond the request) rule barred the Court from judging based on facts not produced by the parties. However, one fact might be difficult to separate from another, in which case the Court might go beyond the facts presented by the parties. Another relevant rule was *jura novit curia* (the court knows the law). If the court knew the law, the court should also know the facts, because law and facts were often inseparable. Those questions were referred to in draft guideline 12, paragraph 3, which stated that in the judicial settlement of disputes relating to the protection of the atmosphere, the principle of *jura novit curia* applied not only to law but also to facts, thereby requiring necessary assessment of scientific evidence, on condition that, under the rule of *non ultra petita*, the scope of the dispute was not exceeded. It was necessary to refer to those procedural rules in the draft guideline to remind States of their importance, given that not just courts and tribunals, but also the parties, should be fully aware of them when scientific evidence was being considered. In that connection, he looked forward to considering more broadly the topic "Evidence before international courts and tribunals", which was currently on the long-term programme of work, when it was taken up by the Commission.

He hoped that the Commission would be able to refer the proposed draft guidelines to the Drafting Committee, with a view to completing the first reading of the topic at the current session.

Among his recent outreach activities in relation to the topic of protection of the atmosphere, he had delivered a four-day course in Beijing in September 2017, as part of a training programme run by China and the Asian-African Legal Consultative Organization (AALCO). He had also given lectures at several universities in China and, in January 2018, he had undertaken a lecture tour in South-East Asia to promote the topic among academics and legal professionals. He had been greatly encouraged by the enthusiasm for the topic that had been evident, especially among young people. He had also submitted a report to the sixth Saltsjöbaden workshop on air pollution held in Sweden in March 2018, which had been organized by the Swedish Environmental Protection Agency and the Swedish Environmental Research Institute in close collaboration with the Convention on Long-range Transboundary Air Pollution (CLRTAP) bodies. The workshop had recommended that the International Law Commission should continue its work related to international law aspects of protection of the atmosphere.

Lastly, he wished to congratulate the Government and people of China on their tremendous efforts to address atmospheric pollution in Beijing. The situation had improved immensely over the past four years, which he had witnessed first-hand as a resident of the city since 2014.

The meeting rose at 11.35 a.m. to enable the Working Group on the Long-term Programme of Work to meet.