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Provisional summary record of the 3516th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 5 May 2021, at 11 a.m.

Contents

***Present*:**

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

***Secretariat*:**

Mr. Llewellyn	Secretary to the Commission

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

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

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

Mr. Gómez-Robledo (Special Rapporteur), resuming his introduction of the report, said that he wished to draw members' attention to paragraphs 274 to 284 of the Commission's report on the work of its seventy-first session (A/74/10), which summarized the informal consultations held by the Commission on 10 and 18 July 2019 to consider the draft model clauses on provisional application of treaties. He also wished to recall paragraph (7) of the general commentary to the draft Guide to Provisional Application of Treaties, in which it was noted that the clauses would reflect best practice with regard to the provisional application of both bilateral and multilateral treaties and that they were in no way intended to limit the flexible and voluntary nature of provisional application of treaties and did not pretend to address the whole range of situations that might arise.

Drawing attention to paragraph 124 of his report, and in particular to the understanding that the draft model clauses should be accompanied, for reference purposes, with examples of clauses contained in existing treaties, he said that the footnotes in annex A to the Commission's report on the work of its seventy-first session provided numerous examples, some very recent, and thus served to document existing practice.

In order to give members the opportunity to express their views on the draft model clauses, he was proposing few changes to the version of the clauses circulated in 2019. The changes, which concerned draft model clause 1 (2) and draft model clause 5, should not be controversial, since they related to aspects that had been duly considered by the Commission during its analysis of some of the draft guidelines.

Turning to paragraph 130 (c) of his report, he said that requesting the Secretary-General to prepare a volume of the United Nations Legislative Series would not have any budgetary implications, as the Secretariat already had the necessary funds.

In conclusion, he hoped that the Commission would recommend the referral of the draft guidelines and the draft model clauses to the Drafting Committee for its consideration, with a view to completing the second reading of the draft Guide at the current session.

Mr. Rajput said that he wished to thank the Special Rapporteur for his sixth report, which provided the Commission with a solid basis for its debate and for completing its consideration of the topic. He would make comments on five broad themes.

The first was the question of whether the approach adopted with regard to the draft Guide should be opt-in or opt-out. Although the Commission had, in the past, clarified that the Guide was voluntary and non-binding, some States remained apprehensive in that regard, as reflected in paragraph 40 of the report. In paragraph 44, the Special Rapporteur appeared to blame those States for failing to grasp the issue fully. He personally did not think that there had been a misunderstanding on the part of States. The effect of the last sentence of paragraph (5) of the general commentary to the draft Guide was to make the Guide binding on States and international organizations that did not opt out. That unintended effect had been rightly pointed out by Turkey and the United States of America, with the former arguing that "it would be more suitable for the concept of provisional application to be included in treaties as a voluntary option which States can choose to apply by making a declaration to that end, and not as a legal obligation which States would have to opt out of or make reservations to".

The solution would be to adopt an opt-in approach, meaning that the draft guidelines would not be applicable unless a State or international organization specifically applied them or expressed an intention to do so. That would increase the acceptability and use of the draft Guide in the actual practice of States and international organizations. He therefore suggested the deletion of the last sentence of paragraph (5) of the general commentary.

The second theme was the meaning of, and relationship between, "provisional entry into force" and "provisional application". Slovenia had suggested that the Commission

should elaborate on those matters in draft guideline 1 or in the commentary thereto. In paragraph 52 of his report, the Special Rapporteur stated that the two phrases were used indiscriminately and that the issue had been settled both in the Secretariat's memorandum on the negotiating history of article 25 of the 1969 Vienna Convention on the Law of Treaties and in his first report. However, Slovenia was not requesting to reopen the debate. It was simply asking the Commission to reiterate the distinction and relationship between the two phrases.

Clarifying that distinction in the commentary was necessary and important. As some former members of the Commission had noted during debates on the topic of the law of treaties, "provisional entry into force" implied compliance with requirements under domestic law, whereas "provisional application" did not. Interestingly, the two Special Rapporteurs on the law of treaties who had dealt with provisional application relied on treaty language referring to provisional application and yet continued to call it "provisional entry into force". During the negotiation of the Vienna Convention, "provisional entry into force" had been replaced with "provisional application". One of the reasons for that had been to address the concern of some States, including Latin American States, that using "provisional entry into force" would mean that a treaty would become binding even if it had not entered fully into force as per the relevant procedures under domestic law. Thus, "provisional application" had been chosen, even though one of the Special Rapporteurs, Sir Humphrey Waldock, who had participated in the negotiations as an expert, had called the term "inelegant and not commonly used". In his personal view, the Special Rapporteur should elaborate on the meaning of, and distinction between, "provisional entry into force" and "provisional application" in the commentary, and revisit paragraphs 44 to 55 of the memorandum prepared by the Secretariat in 2013 (A/CN.4/658).

The third theme was the relationship between the draft Guide and article 25 of the 1969 Vienna Convention. The Commission had to be careful about using the phrase "other rules of international law" in draft guideline 2. In paragraphs (2) and (3) of the commentary to the draft guideline, it was explained that the purpose of referring to "other rules of international law" was to highlight that the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations also applied and that there were relevant rules of international law outside the 1969 and 1986 Vienna Conventions. He supported that position, but also agreed with Austria that the reference to "other rules of international law" should not detract from the primacy of article 25 of the 1969 Vienna Convention. The draft Guide was intended to supplement that article, not replace or undermine it. Strikingly, in paragraph (2) of the commentary to draft guideline 2, the Special Rapporteur referred to "other relevant rules of international law" rather than "other rules of international law". He wondered whether that had been a deliberate choice or just a slip. In his view, the best way to reflect the existence of other rules of international law, their effect on provisional application and their relationship with article 25 would be to use the words "other related rules of international law". The word "related" created a stronger link with article 25 than "relevant". Also, the reason for avoiding a specific reference to both Vienna Conventions in draft guideline 2 might have been that the 1986 Convention was not yet in force, but some of its provisions were generally accepted as customary international law. While he was certainly not inviting the Special Rapporteur to make observations on the customary nature of those provisions, he did think that specific references to both Vienna Conventions were needed in the text.

The fourth theme was international organizations and the effect on provisional application of their resolutions and declarations, which, as pointed out by the Special Rapporteur, was the most complex facet of draft guideline 4. Paragraph (b) of the draft guideline set out four methods for agreeing to the provisional application of a treaty or a part of a treaty other than through a separate treaty, namely through "any other means or arrangements", "a resolution adopted by an international organization", a resolution adopted "at an intergovernmental conference", or "a declaration by a State or an international organization that is accepted by the other States or international organizations concerned". While the first method was fairly uncontroversial, the other three required close scrutiny. All four methods involved resolutions or declarations by States or international organizations, which complicated matters. The wording of the first part of the fourth method was unproblematic. It referred to "a" State, using the indefinite article, while the second part,

regarding international organizations, raised the questions of whether a declaration by an international organization would be valid and who would be bound by it. The second and fourth methods both created the impression that international organizations could, like States, apply any treaty provisionally if they so wished, in contradiction of article 6 of the 1986 Vienna Convention, according to which "the capacity of an international organization to conclude treaties is governed by the rules of that organization". In article 2 (1) (j) of the Convention, "rules of the organization" were defined as "in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".

There was a need to reflect that limitation on the treaty-making power of international organizations as it would apply also to provisional application. Since reference was made to international organizations at two points in draft guideline 4 (b), to avoid repetition, one solution would be to insert the phrase "subject to the rules of the international organization" at the beginning of the paragraph. In the commentary, it would be useful to elaborate on the limitation and to reproduce the definition of "rules of the organization" as contained in article 2 (1) (j) of the 1986 Vienna Convention.

Turning to the third method, namely a resolution adopted at an intergovernmental conference, many States had emphasized that such a resolution should be unanimous. He agreed with the proposal by the United Kingdom to add the word "unanimous" before "intergovernmental conference". To prevent paragraph (b) from becoming unwieldy, the four methods could be addressed in separate subparagraphs.

He found it difficult to agree with the Special Rapporteur's proposal to insert, in paragraph (b), the words "if such resolution has not been opposed by the State concerned". The addition would mean that, if there was no opposition from a State, a treaty would apply to it provisionally, which ran counter to the fundamental premise of the topic that provisional application was voluntary. He therefore did not support the change proposed by the Special Rapporteur. Conversely, he fully agreed that draft guidelines 3 and 4 should not be merged.

The fifth and final theme was reservations. He was grateful to the Special Rapporteur for inviting the members of the Commission to comment on whether to retain draft guideline 7. Owing to the intense controversy surrounding the issue within the Commission, a specific request had been made to States to express their views. Interestingly, States had put the ball back in the Commission's court by asking it to elaborate on the legal effects of reservations.

It might appear harmless to include a provision on reservations and it could be argued that such a provision would serve only to further States' freedom of contract. However, it was futile to provide for reservations, since States could provisionally apply not just a whole treaty but also a part of it, as noted in draft guidelines 3 and 5. Moreover, having a reference to reservations left the door open to including the regime of reservations in its entirety, and even situations in which States could not make reservations or in which their reservations would be invalid under certain circumstances. As stated by Finland on behalf of the Nordic countries, "any reservation in relation to provisional application should be made in accordance with the relevant rules of the Vienna Convention".

In its advisory opinion on *Reservations to the Convention on Genocide*, the International Court of Justice had noted that a reservation could not be made if it was contrary to the object and purpose of a treaty. The inclusion of a provision on reservations by the Commission would result in an anomalous situation. He would explain with an example. State A had decided to provisionally apply an entire treaty and had made a reservation to a clause of the treaty. However, the reservation was invalid because it ran counter to the object and purpose of the treaty. Despite the reservation, State A was effectively bound by the clause in question because it had provisionally applied the entire treaty and the reservation was invalid. State B had decided to provisionally apply the entire treaty with the exception of that clause. Since State B had not applied that clause provisionally, it was not bound by it. Thus, the regime of reservations could negate freedom of contract. If the Commission retained a draft guideline on reservations, States would be bound by a clause even if they had made a reservation to it while applying a treaty provisionally. Such a scenario would only scare States away from resorting to provisional application, or, even more damagingly, from engaging with a treaty altogether.

Germany supported draft guideline 7 and had given the example of mixed agreements as a context in which reservations might have a role to play. However, such agreements were a unique feature of the European Union and, in any case, concerned the division of competence between the European Union as an institution on the one hand, and its member States on the other. Their purpose was to protect third States from *ultra vires* acts related to their entering into a treaty that was beyond their mandate, which was a completely different context. Moreover, Germany did not appear to have provided specific examples of the use of reservations in that context.

For the time being, he would refrain from making detailed comments on the draft model clauses, which were far too numerous to be taken into account by the Commission in the time at its disposal. He was certain, however, that the Drafting Committee would be able to go through them carefully.

He supported the referral of the draft guidelines and the draft model clauses to the Drafting Committee. In paragraph 19 of his report, the Special Rapporteur said, somewhat poetically, that "the Commission's well-known and abiding interest in the law of treaties is such as to suggest that the 1969 Vienna Convention has not yet revealed all its secrets". He could say with confidence that, in his report, the Special Rapporteur had succeeded in revealing secrets of article 25, one of the Convention's most mysterious provisions.

Mr. Grossman Guiloff, in a pre-recorded video statement, said that he was grateful to the Special Rapporteur for his continued efforts to ensure that the final output of the Commission's work on the topic of provisional application of treaties was of the highest quality. In general, the proposals that the Special Rapporteur had put forward in the sixth report were appropriate and reflected a meticulous analysis of the comments and observations received from States and international organizations.

Turning to the text of the draft guidelines, he said that he agreed with the Special Rapporteur's proposal to include an explicit reference to international organizations in draft guideline 1.

As the implementation of that proposal would necessitate an adjustment of the following draft guideline, he suggested that, in draft guideline 2, the words "the principles contained in" should be inserted after "on the basis of". The addition of such wording would ensure that the principles set out in article 25 of the 1986 Vienna Convention were also covered, since that article and article 25 of the 1969 Vienna Convention had broadly the same legal rationale and structure.

The current text of draft guideline 3 was consistent with the voluntary and flexible nature of provisional application. In his view, there was no significant risk that the words "A treaty or a part of a treaty may be provisionally applied" would be misinterpreted. Nevertheless, he shared the Special Rapporteur's view that the concern expressed by Slovenia in that regard could be addressed in the commentary. One possibility would be to clarify that the use of the word "may" indicated that provisional application depended on a voluntary agreement between the States and international organizations concerned. He agreed with the Special Rapporteur that draft guidelines 3 and 4 should not be merged, since they served different purposes.

He had several observations regarding the commentary to draft guideline 3. In his view, the fourth sentence of paragraph (3) of the commentary, which addressed the question of whether the term "negotiating States" in article 25 (1) (b) of the 1969 Vienna Convention would prevent non-negotiating States or non-negotiating international organizations from entering into an agreement on provisional application, was ambiguous and should be clarified or omitted. It was clear that, if a treaty so provided, States and international organizations that had not negotiated it could participate in its provisional application. The same reasoning applied to the other possible bases for agreement. In addition, the sentence in question seemed to be at odds with paragraph (7) of the commentary.

In the fifth sentence of paragraph (4) of the commentary, it was stated that the possibility of provisional application of only a part of a treaty also helped to overcome the problems arising from certain types of provisions. Although he understood the rationale for citing operational clauses establishing treaty-monitoring mechanisms as an example of those

types of provisions, it should be borne in mind that, in some cases, treaty bodies could be established and exercise their functions even during the stage of provisional application. An example could be found in article 30.7 (3) (d) of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, which provided that: "The CETA Joint Committee and other bodies established under this Agreement may exercise their functions during the provisional application of this Agreement. Any decisions adopted in the exercise of their functions will cease to be effective if the provisional application of this Agreement is terminated under subparagraph (c)." He therefore suggested that reference should be made to that possibility in the commentary.

In paragraph (5) of the commentary, it was noted that there existed examples of provisional application continuing "for some States or international organizations after the entry into force of a treaty itself, when the treaty had not yet entered into force for those States and international organizations". To ensure that the broad range of possible scenarios discussed by the Special Rapporteur was covered, he suggested adding to the paragraph in question a reference to provisional application by a State for which the treaty had entered into force with respect to those States for which the treaty had not yet entered into force. The mere fact that the treaty had entered into force for a particular State did not relieve that State of the obligation to continue its provisional application with respect to those other States and certainly did not bring the treaty into force with respect to them. His suggested addition would be fully consistent with paragraph (4) of the commentary to draft guideline 5.

With regard to draft guideline 4, he was grateful for the clarification provided in paragraph 78 of the report, which confirmed that agreement to provisional application required acceptance by the subjects concerned not only in the case of declarations issued by third States but also in the case of resolutions adopted by international organizations. However, the wording that the Special Rapporteur proposed to insert in the draft guideline could be improved. In order to avoid giving the impression that the opposition of a single State might prevent provisional application by all the others, he suggested that the words "except for those States that have opposed such resolution" should be inserted instead.

One situation that was not addressed in the draft guideline was that in which a treaty regulated the legal effects of a resolution concerning provisional application. That situation had been mentioned in the Sixth Committee. In his view, it was essential to include a "without prejudice" clause in the draft guideline, since it might be established in a treaty that the relevant resolution was binding even for those States that had voted against it or that it did not produce obligations for those States that had abstained.

Concerning the phrase "that is accepted by the other States or international organizations concerned", it was important to identify the States whose acceptance should be sought, since the declaration of a third State would have legal effects only once acceptance had been secured. A closely related question was whether acceptance by all the other States and international organizations concerned was required or whether provisional application by a third State could also be accepted by only some of those States or international organizations, which would then enter into a legal relationship with the third State.

For the reasons explained in paragraph 84 of the report, he agreed with the Special Rapporteur that there was no need to alter the wording of draft guideline 5.

As for draft guideline 6, he suggested replacing the word "apply" with "comply with" in order to avoid any risk of confusion, since the word "application" appeared earlier in the sentence. On reading the comments outlined in paragraph 89 of the report, it had occurred to him that the opening clause of the draft guideline was tautological. The mere fact of provisionally applying a treaty was not the source of the obligation concerned; rather, the obligation derived from the agreement by which such provisional application had been decided. He would therefore suggest that the opening clause should be reworded to read: "The agreement to provisionally apply a treaty or a part thereof produces a legally binding obligation …"

He was in favour of retaining draft guideline 7. He was not persuaded by the arguments outlined in paragraph 94 of the report, since the possibility of formulating reservations for the purposes of provisional application was fully consistent with the flexibility of that legal institution, and the draft guideline would be useful to States that were

willing to agree to it within the framework of a multilateral treaty. Moreover, the deletion of the draft guideline could be interpreted as implying that a State willing to formulate a normal reservation could not avail itself of the content of the draft guideline for the purposes of provisional application. He saw no legal basis for such an outcome.

The two paragraphs of the draft guideline both ended with clauses that, like the opening clause of draft guideline 6, were tautological. He therefore proposed that the last clause of each paragraph should be amended to read: "… formulate a reservation purporting to exclude or modify the legal effect of certain provisions of that treaty in respect of its provisional application."

A substantive issue that was not addressed in the draft guideline was whether a reservation made upon signature excluded or modified the effect of the treaty in respect of its provisional application. That was an important issue that should be addressed in the commentary.

As for mixed agreements, which were discussed in paragraph 95 of the report, it should be recalled that, without prejudice to their multilateral character, mixed agreements between the European Union and third States were shaped in synallagmatic terms: they established reciprocal obligations between the European Union and its member States, on the one hand, and the third State, on the other. Accordingly, their structure followed a bilateral rationale, and they owed their multilateral character to the distribution of competences between the European Union and its member States. Their underlying bilateral logic meant that they were not amenable to reservations.

He had no comments to make regarding the text of draft guideline 8, but he welcomed the Special Rapporteur's proposal to include a reference to the principle of *pacta sunt servanda* in the commentary to it, in line with the observations made by some States.

With regard to draft guideline 9, he had no objection to the Special Rapporteur's proposal to delete the words "of its intention not to become a party to the treaty", which served to address the comments received from States regarding situations in which a State decided to terminate the provisional application of a treaty without linking that decision to an intention not to become a party to the treaty. However, that proposal did raise two important issues.

The first issue concerned the moment at which the provisional application would terminate. It was observed that notification of the decision not to become a party to a treaty should relieve a State of the obligations arising under article 18 of the 1969 Vienna Convention with immediate effect, unless otherwise agreed. Although article 25 (2) of the 1969 Vienna Convention was silent on the matter of the date on which provisional application would end, a reading of that article together with article 18, which was related to the question of notification, provided grounds for reaching the same conclusion. However, if the termination of provisional application was detached from the notification provided for in article 18 of the 1969 Vienna Convention, such a reading would no longer be pertinent, and the moment at which termination took effect would have to be identified under the general rules of part V, section 4, of the Convention, which provided for a period of 12 months from the date of notification. It was for that reason that it was so important to include a "without prejudice" clause concerning special rules agreed to by the parties, including shorter notice periods.

The second issue raised by the Special Rapporteur's proposal was whether a notification issued pursuant to article 18 of the 1969 Vienna Convention would have any effect on provisional application. What would happen if a State or an international organization gave notification that it did not intend to become a party to the treaty but did not refer to provisional application? He could see no reason to compel that State or international organization to continue its provisional application beyond any notice period that might have been agreed or to require a separate notification for terminating provisional application beyond that period. He suggested that a new paragraph should be added to the draft guideline to clarify those issues.

He fully supported the Special Rapporteur's proposal to add a fourth paragraph to the draft guideline to address the comments discussed in paragraph 108 of the report.

He also fully supported the Special Rapporteur's proposal not to alter the wording of draft guideline 12. That said, he would be grateful if the Special Rapporteur could clarify the argument made in paragraph 120 of the report. Concerning the comments made by Greece, he noted that the text of draft model clause 5 covered only cases in which the limitations deriving from internal law were specified in a separate notification; it did not address cases in which the agreement itself incorporated such limitations in generic terms, as in article 45 (1) of the Energy Charter Treaty. Accordingly, he would supplement the text of that draft model clause with an alternative example, which could be worded as follows: "Each signatory agrees to apply this Treaty provisionally pending its entry into force, to the extent permitted by its domestic law."

With regard to draft model clause 1, he said that paragraph 1 should be revised with a view to addressing the concern expressed by Chile in the Sixth Committee, namely that the word "unless" seemed to imply that, if one State did not consent to be bound by such provisional application, the treaty would not be provisionally applied between any of the subjects concerned. In paragraph 2, the matter of the moment at which provisional application would terminate should be clarified, at least in the commentary. More generally, that paragraph should be amended in the light of the observations that he had made regarding draft guidelines 3 and 6.

Concerning draft model clause 3, it should be specified whether all the negotiating States needed to manifest their acceptance of the declaration of the third State or only those that had agreed to the provisional application of the treaty. In addition, it was worth noting that it was the legal effects of the declaration that depended on the acceptance of other States, and not the formulation of the declaration itself.

In addition, it was not specified whether the effect of the notification was to exclude certain provisions of the treaty from the scope of provisional application.

As for the final form of the Commission's output, he agreed with the Special Rapporteur's proposal, in paragraph 130 of the report, that the Commission should recommend that the General Assembly take note of the draft Guide to Provisional Application of Treaties and commend it, and the commentaries thereto, to the attention of States and international organizations. He was convinced that the conclusion of the Commission's work on the topic would provide a useful and practical tool for addressing the various questions that arose in the practice of provisional application. The Commission would thereby have remained faithful to its objectives and shown its capacity to address a traditional topic with the same high level of detail and high standards that had always characterized its work.

Mr. Jalloh said that he was grateful to the Special Rapporteur for his devoted work since 2012 and his excellent sixth report. He was confident that, with the Special Rapporteur's able guidance, the Commission would be able to complete the second-reading stage at the current session.

The practice of the provisional application of treaties was essential to ensuring greater stability in the legal relationships of States. Article 25 of the 1969 Vienna Convention on the Law of Treaties was the foundation of the Commission's work on the topic. In that article, States had contemplated a purely voluntary mechanism for giving immediate effect to all or some of the provisions of a treaty, before the formalities required for its full entry into force had been completed. Nonetheless, as noted in the sixth report, article 25 was silent on a number of issues that deserved the Commission's attention. At the same time, to ensure that its work on the topic was of practical value, the Commission had to look beyond article 25 to take into account State practice over the five decades since the adoption of the 1969 Vienna Convention.

In that context, he was pleased that States had welcomed the Commission's decision to provide non-binding guidance in the form of the draft Guide to Provisional Application of Treaties. Nevertheless, it was regrettable that, despite the popularity of provisional application in Africa, Asia and Latin America, only two States from those three regions had provided written comments and observations on the text adopted on first reading and the commentaries thereto. Provisional application of treaties represented a "fundamental element of treaty law" and was of "practical relevance to States", as Argentina had noted in its written

comments, but should remain an exception to the general rule of entry into force, as other States had emphasized. Provisional application was therefore a flexible tool that States could use to tailor their treaty relationships to diverse circumstances.

At a general methodological level, he supported the approach taken in the sixth report, which, for the most part, was to refrain from altering text that had received widespread support among States and other observers. He agreed with the Special Rapporteur that, at the current stage, the Commission's principal goal should be to finalize a workable set of draft guidelines that could be used by States, at their discretion, and to "avoid any temptation to be overly prescriptive", as was noted in the general commentary. Some States had requested clarification regarding the meaning of those words, and he wished to make two comments in that connection.

First, his understanding was that the Commission still considered article 25 of the 1969 Vienna Convention to represent the default that governed all situations of provisional application. Through its work on the topic, the Commission was seeking merely to furnish "guidance" and "guidelines" in full recognition of the inherently flexible nature of provisional treaty application. Indeed, recourse to the provisional application of treaties was "absolutely voluntary", to borrow the words used by the Special Rapporteur. States and international organizations were free to resort to provisional application, one of the hallmarks of which was a simpler process for termination, under article 25 (2) of the 1969 Vienna Convention, than would be the case after entry into force. As noted in paragraph 44 of the report, there was nothing in the draft Guide or in the commentaries to suggest that the draft guidelines constituted "a legally binding instrument as such". Several States had expressed their approval of the fact that the draft guidelines were not intended to be binding.

Second, the Commission should be careful not to suggest, inadvertently, that there existed a presumption in favour of provisional application. To avoid giving the impression that the exception of provisional application should subsume the general rule of entry into force, an explanation of the normative weight of the Commission's guidelines could be included in the general commentary. The question of the normative weight of the Commission's draft guidelines, as compared to its draft articles, draft conclusions and draft principles, was of increasing interest to States in the context of several of the topics on the agenda. In that regard, he looked forward to considering the potential for a systematic approach when the discussion of his proposal on the matter was resumed in the context of the Working Group on methods of work.

Greater clarity on the matter would also be generally consistent with the approach that the Commission had recently taken for other topics at the second-reading stage. The Commission could also consider whether it would be appropriate to include, in the general commentary, a statement to the effect that some aspects of the draft guidelines reflected *lex lata*, while others were more recommendatory in nature. The formula used in paragraph (4) of the introduction to the Guide to Practice on Reservations to Treaties could serve as a source of inspiration.

Turning to those of the draft guidelines that the Special Rapporteur was proposing to amend, he said he generally supported the proposed response to the suggestions made by States regarding draft guideline 1, including the proposal to insert the words "by States and international organizations" at the end of the sentence. The Drafting Committee should also consider the question of whether to merge draft guidelines 1 and 2, as had been suggested by some States. Merging those two draft guidelines would avoid the substantial overlap between them and have the additional benefit of aligning the approach taken in the draft Guide with that taken in the Guide to Practice on Reservations to Treaties, which did not have an opening clause on scope.

However, he believed that further consideration should be given to the proposal by Slovenia to include a reference to the relationship between the terms "provisional application" and "provisional entry into force". The Special Rapporteur's response to that proposal, namely that the issue had been settled in the Secretariat's 2013 memorandum (A/CN.4/658) and the first report on the topic (A/CN.4/664), seemed reasonable. Nevertheless, there would be merit in clarifying that issue in the text itself.

He also saw a close link between the concern expressed by Slovenia and the proposal put forward by Czechia that the terms used in the draft Guide should be defined. The Commission could, for example, add a short draft guideline on the use of terms, taking the language suggested by Czechia as its starting point. Such a provision would serve to clarify that the draft Guide dealt with the same subject matter as the 1969 and 1986 Vienna Conventions and was intended to be consistent with them.

Like the Special Rapporteur, he welcomed States' observations on draft guideline 2, especially those clarifying that the purpose of the draft Guide was to provide guidance to its users without *per se* encouraging them to engage in provisional application. The Drafting Committee should consider the issues raised by States; some of their suggestions could be best accommodated in the commentary.

Draft guideline 3 was particularly important because it set out the general rule on provisional application. While he agreed with the Special Rapporteur that several of the concerns expressed by States in that respect could be addressed in the commentary, there were a few issues that might require the Commission's further consideration. For example, Bahrain had expressed concern that the draft guideline, as currently worded, could potentially be less relevant to bilateral treaties that solely concerned the negotiating States or international organization than to multilateral ones; the Commission should consider addressing, at least in the commentary, differences in how the draft guideline might apply to the two types of treaties.

He believed that Slovenia could be correct in noting that the use of "may", rather than "is", in draft guideline 3 could cause confusion: it did seem to reverse the decision of the Drafting Committee of the United Nations Conference on the Law of Treaties to replace "may" with "is" owing to concerns that the former could imply a non-binding effect. The Commission should therefore consider returning to the word "is" or providing a more detailed explanation in the commentary.

The United States of America was concerned that the phrase "the negotiating States", which appeared in article 25 (1) of the 1969 Vienna Convention, had been omitted from draft guideline 3, potentially causing uncertainty as to the parties whose consent was needed for a treaty to be provisionally applied, and that paragraph (7) of the commentary to draft guideline 3 envisaged the possibility of provisional application by a State or international organization "completely unconnected to the treaty". The Commission should provide further explanations and examples of State practice with respect to the manner of provisional application described. The so-called "mixed agreements" between the European Union and third States, referred to by Germany in its submission, increasingly included African States and showed that such agreements were part of contemporary State practice.

It might be useful to include in the commentary the view, expressed by the United Kingdom, that the current wording of draft guideline 3 did indeed reflect the purpose of article 25 (1) of the 1969 Vienna Convention and was sufficiently broad to encompass both the negotiating States or international organizations and those that intended to accede at a later stage. The examples provided in the submissions of several observers could also be included.

He generally agreed with the Special Rapporteur's recommendations on draft guideline 4. In particular, he supported the amendments proposed in paragraph 78 of the report. However, he would go further. According to at least 12 States, provisional application must always be subject to the express consent of all concerned States. The draft guideline should therefore distinguish between situations where States directly consented to provisional application via a treaty and those where States expressly signalled their consent to be bound through means or arrangements other than a separate treaty. He was uncomfortable with the notion that State consent could be inferred indirectly, through resolutions adopted by international organizations or at intergovernmental conferences or under circumstances where a declaration by a State or international organization would need to be reviewed in order to determine whether the other States or international organizations concerned had accepted the provisional application. The Commission should clarify that a resolution could only be a basis for provisional application where the State concerned had voted in favour of it, and a declaration could only serve as a basis for provisional application

where the declaration had been expressly accepted as such by the other negotiating States. A State's remaining silent or acquiescing or failing to object to a declaration or resolution was not a sound basis for provisional application given the challenges that States, especially developing countries, faced in participating in international organizations and intergovernmental conferences. As a partial solution, the Commission should alert States and international organizations to draft model clauses 3 and 4, both of which provided useful templates to expressly accept or expressly reject provisional application of a treaty.

He generally supported the Special Rapporteur's recommendations regarding draft guideline 6. Like the Special Rapporteur, he thought that the concerns expressed by many States about the phrase "as if the treaty were in force" probably stemmed from "a fear that recourse to provisional application could be abused, to the detriment of domestic legal procedures" – concerns that could not be fully addressed in the commentary alone. He supported the Special Rapporteur's suggestion to amend the draft guideline and urged him to address the issues raised as fully as possible. In addition, the Commission should flag to users that the draft guidelines should be read together with the commentaries.

He agreed with the Special Rapporteur that the Commission should further debate whether to retain or remove draft guideline 7; despite his initial support for the draft guideline during the 2018 plenary debate, the absence of any State practice to support it was causing him to reconsider. Furthermore, although the provisional application of treaties did involve particular considerations, the Commission had already done extensive work on reservations, culminating in the voluminous 2011 Guide to Practice on Reservations to Treaties, and the time remaining before the completion of the second reading might be insufficient to undertake the rigorous analysis requested by the States and international organizations that favoured retaining the draft guideline.

He supported the Special Rapporteur's suggestions regarding draft guideline 9: the proposed rephrasing of paragraph 2 would effectively address States' concerns about the apparent linkage in the draft guideline of a State's decision to terminate the provisional application of a treaty to an intention not to become a party to the treaty; and the new paragraph proposed as paragraph 4 would provide important clarification with respect to article 70 of the 1969 Vienna Convention. As suggested by the Special Rapporteur, the Commission could address the concerns expressed by several States by drawing attention to draft model clause 1, which allowed for termination by simple notification.

He supported the Special Rapporteur's proposal to include a reference to the *pacta sunt servanda* rule, as requested by States, in the commentary to draft guideline 8, and to leave draft guidelines 5 and 10 as they stood.

The model clauses, which had effectively been adopted following the Commission's informal consultations in 2019, would, happily, now be thoroughly debated in the Drafting Committee. He strongly supported the inclusion of model clauses since, on the basis of States' comments, it appeared that they would be of great practical utility. He was unsure whether the model clauses would be best placed in a footnote, in the body of the Guide or in an annex, but if the Special Rapporteur preferred to have them in an annex, he would support that choice.

In conclusion, he supported the Special Rapporteur's proposal for the final form the Commission's output on the topic should take and fully supported referring all the draft guidelines and the annexed model clauses to the Drafting Committee.

Mr. Nguyen, speaking via video link, said he agreed with the Special Rapporteur that, on second reading, comments should generally focus on clarifying points of uncertainty in the draft guidelines and model clauses rather than on amending their wording. Almost all the States that had commented had accepted the wording of the draft guidelines and model clauses. His comments would therefore mainly focus on the commentaries.

He supported the Special Rapporteur's emphasis on the absolutely voluntary nature of recourse to the provisional application of treaties in the practice of States and international organizations. As had been noted in the third memorandum of the Secretariat on the provisional application of treaties (A/CN.4/707) and by several States, provisional application of treaties was a flexible tool, available to States and international organizations, that was often used in exceptional cases where there was an urgent international need to

regulate a certain situation. Consequently, its use was relatively limited. Thousands of bilateral and multilateral treaties in existence did not incorporate a mechanism for provisional application, clearly demonstrating that such a mechanism was not a prerequisite for there to be a binding obligation to apply a treaty. The lack of such a mechanism in a treaty had no negative legal effects on the application of that treaty when it entered into force. The draft guidelines and model clauses would therefore simply serve as tools to assist those States and international organizations that elected, at their discretion, to use the mechanism and did not promote the provisional application of treaties at all times and in all circumstances.

With regard to draft guideline 1, he supported the view that the scope of the topic encompassed the whole range of situations in which treaties could be provisionally applied, insofar as States and international organizations could be parties to them. He could go along with the proposal to add the phrase "by States and international organizations" to the end of the draft guideline. While it was clear that the draft guidelines did not cover treaties between States or international organizations and other possible parties, from an academic standpoint, the subjects of international law could change and new ones could emerge. It was therefore possible that, in the future, other actors could be allowed to enter into international agreements and provisionally apply certain provisions. The commentary should refer to such a possibility.

For example, in the case of agreements to reach a truce or end a war, the parties could agree to the provisional application of provisions to exchange lists of captured persons or withdraw troops from a ceasefire line in order to build trust and confidence. The success of such agreements depended on the goodwill of all the parties concerned, including insurrectional movements. The Agreement on Ending the War and Restoring Peace in Viet-Nam, signed by the Democratic Republic of Viet-Nam, the United States of America and the two South Vietnamese parties in Paris in 1973, provided a case in point. Under article 3 of the Protocol concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel, the parties had agreed to "exchange complete lists of captured persons". Although article 3 did not include a formal provisional application mechanism, it had provided for the possibility of exchanging such lists before the future obligation to return all captured persons took effect.

In order to avoid confusion with the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which had not yet entered into force, the year "1969" should be inserted before "Vienna Convention on the Law of Treaties" in draft guideline 2. In addition, a detailed reference to article 25 of the 1986 Vienna Convention should be included in the commentary to that draft guideline.

Draft guideline 3 went beyond the letter and spirit of article 25 of the 1969 Vienna Convention in two ways: first, it used "may" rather than "is", thus emphasizing the absolutely voluntary nature of recourse to the provisional application of treaties in the practice of States and international organizations; and, second, it used the phrase "States or international organizations concerned" instead of "negotiating States and negotiating organizations", reflecting the diversity of the provisional application of treaties in the practice of States and international organizations. On the one hand, it was not necessary for all negotiating States and negotiating organizations to provisionally apply a treaty. On the other hand, other States, who had not participated in the negotiation of a treaty but had expressed their consent to be bound by it through accession, could provisionally apply the treaty before its entry into force if they wished to do so. The foregoing point should be further explained in the commentary.

He supported the Special Rapporteur's suggestion that draft guidelines 3 and 4 should remain separate, as that allowed for greater elaboration on the phrase "in some other manner", used in article 25 of both the 1969 and 1986 Vienna Conventions as well as in draft guideline 3. To be consistent with draft guideline 3, the different roles of negotiating and concerned States and organizations and the form of agreement must be emphasized. The State or international organization concerned must clearly express, orally or in writing, its agreement to the provisional application of a treaty. A clear, positive undertaking by a State was required for its express consent to have legal effect. A State's silence could not be interpreted as either its acceptance of, or its objection to, a resolution on the provisional application of a treaty. The express consent of one State did not affect how the silence of others should be interpreted,

especially in cases where a resolution was not adopted unanimously. Therefore, the word "expressly" should be inserted before the words "adopted" and "accepted" in draft guideline 4 (b) and the point should be further clarified in the commentary. The Special Rapporteur's proposed amendment to draft guideline 4 (b) – the addition of the clause "if such resolution has not been opposed by the State concerned" – implied that silence was equivalent to acceptance.

The deletion of the phrase "as if the treaty were in force" would not change the content of draft guideline 6. Provisional application and entry into force, within the meaning of article 24 of the 1969 Vienna Convention, were two distinct legal concepts. Provisional application could not give rise to a distinct legal regime separate from the treaty and could not prevent the entry into force of the treaty. States and international organizations were free to agree to provisionally apply the treaties they concluded, in whole or in part, pending their entry into force.

He supported retaining draft guideline 7 because nothing would, in principle, prevent a State or an international organization from formulating reservations from the time of its agreement to provisionally apply a part of a treaty. A reservation made with respect to the provisional application of a treaty as a whole would be tantamount to opposing it. Because provisional application was based on the agreement of the States and international organizations concerned, the rules of the 1969 Vienna Convention on reservations could be applied *mutatis mutandis* to agreements on the provisional application of a part of a treaty between States. When the agreement to provisionally apply a treaty took the form of an agreement separate from the main treaty, it constituted a treaty in all senses of the term. Under article 19 of the 1969 Vienna Convention, it was clear that a State could formulate a reservation unless, *inter alia*, the reservation was prohibited by the treaty. However, the commentary should clarify the nature of the relationship between a reservation made with respect to the provisional application of a part of a treaty and a reservation made with respect to certain provisions of the treaty, as well as the relationship between States that accepted those two types of reservation or a separate kind of reservation with other parties to a treaty.

No change was needed to the wording of draft guideline 8 because it was a logical consequence of draft guideline 6 and the principle of *pacta sunt servanda*. Draft guideline 9 should be maintained because the process of provisionally applying a treaty was distinct from the process of applying it. Because the provisional application of a treaty by the States and international organizations concerned was absolutely voluntary, the termination of the provisional application was also voluntary, except, as indicated in draft guideline 9 (1), when it terminated with the entry into force of the treaty between the States or international organizations concerned. There were different possible scenarios for the termination of the provisional application of the whole or part of a treaty, besides termination as a consequence of the entry into force of the treaty or a notification by a State or international organization of its intention not to become a party to the treaty. As a flexible formula was required to cover all possible scenarios, he welcomed the amendments to draft guideline 9 (2) proposed by the Special Rapporteur.

The wording of draft guideline 9 (1) raised some questions as to what would happen if a treaty entered into force but the application of some of its provisions was delayed, as had happened when the United Nations Convention on the Law of the Sea had entered into force but the application of certain provisions – including those on the establishment of the International Tribunal for the Law of the Sea and on the deadline for submission of details of the outer limit of the continental shelf beyond 200 nautical miles from the baseline – had been delayed. If States had been provisionally applying those provisions, would the provisional application have terminated with the treaty's entry into force? It was also possible for some provisions of a treaty to enter into force before the date of application of the treaty as a whole. The wording of draft guideline 9 (1) should cover those situations even if they were rare in practice.

With regard to concerns that the inclusion of draft model clauses could be interpreted as encouraging States to resort to provisional application, he accepted the arguments set out by the Special Rapporteur in paragraph 124 of his report. In the commentaries to the draft model clauses, the Special Rapporteur's focus – and the Commission's focus too – had been on facilitating the process of negotiating the provisional application of a treaty, in whole or

in part, without replacing the negotiation process or encouraging States to apply a treaty provisionally, in whole or in part. Because the draft model clauses must be consistent with the draft guidelines, draft model clause 1 (2) should be brought into line with draft guideline 9 (2). The Special Rapporteur had proposed replacing the phrase "of its intention not to become a party to the treaty" with "irrespective of the reason for such termination" in draft guideline 9 (2), but the former phrase still appeared in draft model clause 1 (2). As a result, draft model clause 1 (2) covered only one of the cases provided for under draft guideline 9 (2).

The meeting rose at 1 p.m.