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International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3519th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 11 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. Murase
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	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 a.m.

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

Mr. Cissé said that he wished to commend the Special Rapporteur for his sixth report (A/CN.4/738), which was well written, concise and well researched. The topic of provisional application of treaties was a complex one, since it involved filling a gap that article 25 of the 1969 Vienna Convention on the Law of Treaties had not succeeded in closing, thus leaving the door open to various and contradictory interpretations of the applicable legal regime. Further, the provisional application of treaties must be aimed at safeguarding the stability of inter-State relations without affecting the cardinal principle of State sovereignty and its corollary, the principle of consent, especially in respect of the conclusion, adoption and application of international treaties.

He had no specific observations to make with regard to draft guidelines 1, 2 or 3, since, on the whole, States had expressed satisfaction with them during the debates in the Sixth Committee and they were supported by the vast majority of Commission members. He wished to state, however, that he saw no reason to merge draft guidelines 1 and 2, which dealt with completely different aspects of the topic.

In general, draft guideline 4 was satisfactory in that it alluded to respect for the principle of the consent of States to be bound by international treaties. Given that the provisional application of treaties was exceptional and voluntary in nature, the form of agreements on provisional application should not be subject to excessively strict requirements. Draft guideline 4 successfully preserved the flexibility inherent in the provisional application of treaties, while also complying with the letter and spirit of article 25 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. It would have been useful, however, to consider the question in connection with article 24 (4) of the 1969 Vienna Convention. He preferred to maintain draft guideline 4 as adopted on first reading. However, it might be necessary to clarify, in the commentary, the extent to which a resolution adopted by an international organization could be regarded as an agreement on the provisional application of a treaty. Moreover, the wording "In addition to the case where the treaty so provides" was somewhat imprecise, insofar as it implied that there was another form of agreement in addition to those listed in draft guideline 4 (a) and (b). If the Special Rapporteur was referring to cases in which the treaty itself contained a provision allowing for its provisional application, the draft guideline should be reformulated to make that unambiguously clear.

Draft guideline 5 was relatively straightforward, in the sense that the commencement of provisional application of a treaty was at the discretion of the States concerned. The fact that the commencement of provisional application could be agreed in various ways gave States the necessary leeway to adapt the treaty to any situation that might subsequently arise. However, the wording of the draft guideline should be amended to clarify when a treaty took effect provisionally pending its entry into force. Since the draft guideline stated that provisional application took effect "on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed", the relevant date would appear to be the date of signature of the treaty.

As for draft guideline 6, he supported the proposal to delete the phrase "as if the treaty were in force", which seemed to result more in confusion than in clarification. The phrase introduced a legal fiction that was inappropriate in the context of the draft guidelines.

Turning to draft guideline 7, he said that, as the provisional application of treaties was voluntary, States should be free to decide whether or not to accept reservations to treaties that were being applied provisionally. It was therefore important to include specific provisions on reservations in the draft guidelines. In its current form, draft guideline 7 implied that States themselves could agree to be legally bound by reservations. As the binding force of reservations had its legal foundation in the free choice of the States concerned, the purpose of the provisional application of a treaty, which was based on consent and flexibility, could hardly be said to be in any way undermined if the treaty allowed for reservations in the

context of provisional application. Draft guideline 7 was therefore in line with the 1969 Vienna Convention, article 19 of which allowed States to formulate reservations when signing, ratifying, accepting, approving or acceding to a treaty. Article 25 of that Convention did not prohibit States from formulating reservations, which, to some extent, could serve to indicate the degree of a State's consent in the fulfilment of its obligations under a treaty that was being provisionally applied. The absence of relevant practice was not a valid reason for the deletion of the draft guideline.

With regard to draft guideline 8, the fact that provisional application was exceptional and non-binding in nature did not mean that States were exempt from responsibility for violating an obligation arising from the provisional application of a treaty. In other words, the violation of an obligation arising from a treaty or part of a treaty that was provisionally applied entailed international responsibility insofar as the provisional application of the treaty created a binding obligation to respect the provisions of the treaty.

He supported the inclusion of the draft model clauses, provided that they were set out in an annex to the draft guidelines. However, it should be clarified that States were not obliged to use them and that their purpose was to provide States with practical tools for the negotiation of treaties. The Commission should identify relevant best practices on the basis of existing treaties, select those that were most commonly used and avoid taking too broad an approach by attempting to examine all possible situations that could hypothetically arise. The absence or insufficiency of State practice in that regard should not be considered a major obstacle to the formulation of the draft model clauses, which gave the Commission a good opportunity to progressively develop the international law of treaties.

Ms. Oral said that she welcomed the Special Rapporteur's sixth report, which was clear, balanced and reflective of the comments made by States. She shared the concern that had been expressed by States and several members of the Commission that the draft guidelines should not be interpreted as establishing provisional application of treaties as a default rule that should be routinely included in treaties or that should prevail over treaty provisions concerning entry into force.

She agreed with the proposed inclusion of the words "by States and international organizations" in draft guideline 1, as it provided factual clarity on the scope of application of the guidelines. The phrase "other rules of international law" should be retained in draft guideline 2, to make it clear that the draft guidelines not only were based on the 1969 Vienna Convention, but also took account of subsequent developments in international law and the practice of both States and international organizations. Draft guidelines 1 and 2 should be maintained as separate provisions.

Regarding draft guideline 4 (b), she supported the suggestion made by some States that the commentary to the draft guideline should clarify when a resolution of an international organization might be considered to be an agreement on the provisional application of a treaty. The Drafting Committee should consider the proposal made by Ms. Escobar Hernández, at the Commission's 3518th meeting, that the draft guideline should make specific reference to decisions adopted at conferences or meetings of the parties to treaties. It should also address the call made by some States for the draft guideline to be amended to establish the principle that provisional application was always subject to the express consent of the States concerned; such caution was particularly important in the case of non-treaty-based agreements such as resolutions and declarations. She agreed with the amendment proposed by Mr. Grossman Guiloff at the Commission's 3516th meeting, to replace the words "if such resolution has not been opposed by the State concerned" with "except for those States that have opposed such resolution", as it would avoid conveying the idea that the opposition of a single State might prevent provisional application by all the others. If the version proposed by the Special Rapporteur was adopted, she would support Mr. Reinisch's proposal, made at the Commission's 3517th meeting, to replace the words "that is accepted" with the words "that are accepted", both for consistency and to avoid confusion. She further agreed with the Special Rapporteur that draft guidelines 3 and 4 should be kept separate.

Concerning draft guideline 6, she supported the suggestion that the words "as if the treaty were in force" should be deleted.

While she understood the concerns expressed by some States regarding the inclusion of draft guideline 7, on reservations, because of the limited State practice on the matter, she was in favour of maintaining it. She agreed with the view, expressed by more than 10 States and more than 7 Commission members, that there was no reason why States should not be able to formulate reservations in order to modify or exclude the legal effect of provisional application in respect of treaties under which reservations were allowed. Explanations, including of the limited State practice that existed, could be included in the commentary.

Regarding draft guideline 9, she understood the value of reflecting a more flexible approach to the termination and suspension of provisional application, in the light of the development of State practice, and thus supported the Special Rapporteur's suggestion that the words "of its intention not to become a party to the treaty" should be replaced with "irrespective of the reason for such termination". Furthermore, if draft guideline 9 (2) was retained, the "without prejudice" clause in draft guideline 9 (3) should also remain, with an explanation provided in the commentary. However, as the "without prejudice" clause might be inadequate to address situations that did not fall within the framework provided for in paragraphs 1 and 2, she supported the proposed addition of draft guideline 9 (4), which would address the consequences of the termination of the provisional application of a treaty in line with the provisions of article 70 (1) (b) of the 1969 Vienna Convention.

She supported the Special Rapporteur's proposal concerning the final form of the Commission's output and recommended that the draft guidelines and the draft model clauses should be referred to the Drafting Committee.

Mr. Zagaynov, noting that the aim of the draft guidelines, which were non-binding in nature, was to clarify and explain the provisions of the 1969 Vienna Convention on the Law of Treaties, said that the Commission's recommendations should not represent a departure from the applicable provisions of the law of treaties.

Provisional application was, by its nature, exceptional, in that it was intended to allow for the immediate or accelerated entry into force of a treaty or part of a treaty. There were examples in the literature of its justified use, in line with the explanation given in paragraph (3) of the general commentary adopted on first reading. However, practice showed that it was sometimes used in cases where there was no objective need for it. That situation did not serve the interests of legal certainty and could lead to conflict between a State's obligation to apply a treaty and its domestic law. He shared the concern that the draft guidelines might give the impression that the Commission was advocating the use of provisional application. In response to that concern, the Special Rapporteur had highlighted the completely voluntary nature of its use, which was clearly stated in the commentary. However, that principle was self-evident, as all treaty obligations were undertaken by States voluntarily. The issue went beyond the question of States' freedom to decide whether or not to resort to provisional application. For example, Germany had noted that a provision on provisional application was not considered a routine clause to be included in every treaty and that it was important to carefully assess international needs of urgency in regulating a certain situation; the United Kingdom had stated that its practice was to use provisional application only on an exceptional basis and with caution (A/CN.4/737). A more detailed explanation in the commentary would thus be helpful, with an express indication that the draft guidelines did not create a presumption in favour of provisional application and that it was for States to assess the appropriateness of its use in each case.

Concerning the proposed amendment to draft guideline 1, to specify that the draft guidelines covered international organizations as well as States, he referred to Mr. Nguyen's observations on agreements with non-State parties to an armed conflict, and proposed that other cases, such as those involving agencies that were not international organizations, or entities that were not independent States, should also be taken into account.

In draft guideline 3, the use of the word "may" was not appropriate. The wording of draft guideline 4 (b) raised some concerns, as readers might not understand why resolutions of international organizations or intergovernmental conferences or the declarations of States were given as examples. He agreed with those States that were in favour of specifying that provisional application always depended on the express consent of all States and that the absence of objection could not necessarily be taken to indicate consent. For instance, some

resolutions of international organizations called on States to provisionally apply an international agreement, yet such resolutions were not expressions of the States' consent to provisional application in the sense of the 1969 Vienna Convention. That fact should be taken into account in the commentary.

He agreed with the arguments advanced by other Commission members to the effect that the phrase "as if the treaty were in force" in draft guideline 6 should be deleted.

Concerning the Special Rapporteur's proposal to replace the words "of its intention not to become a party to the treaty" in draft guideline 9 with "irrespective of the reason for such termination", he wondered how that suggestion to depart from the language of article 25 (2) of the 1969 Vienna Convention, a fundamental international treaty, was compatible with the aim of the Commission's work on the topic, which was to clarify and explain the provisions of the Convention. Furthermore, article 25 (1) of the Convention directly linked the provisional application of a treaty with the process of its entry into force, as was also reflected in draft guideline 3. Provisional application was an expression of the intention of States not only to apply a treaty for a limited time, but also to take the domestic measures necessary for its full entry into force, as had been noted in the general comments submitted by the United Kingdom (A/CN.4/737). It was surely logical to expect a State that was terminating provisional application to express its intentions clearly if, for instance, the treaty in question was an arms control agreement, since that information might be important for the other States concerned. He wondered how the Commission's use of the proposed wording would be interpreted in respect of existing international agreements and how a State that intended to terminate the provisional application of a treaty would know whether to rely on article 25 (2) of the Vienna Convention or draft guideline 9 (2). Indeed, the proposed change might create unnecessary legal uncertainty.

The examples provided showed that, when the drafters of a treaty wished to provide for termination of provisional application not related to an intention not to become a party to the treaty, they included express wording to that effect in the text of the treaty. That approach was fully in line with article 25 (2) of the 1969 Vienna Convention and no cases of any other practice had been found. The principle of freedom of contract, which allowed parties a wide variety of options for the termination of provisional application, could be referred to in the draft model clauses. Any fundamental breach of the conditions of a treaty by one of the parties did not need to be addressed in draft guideline 9 (2), as it would be covered under draft guideline 9 (3).

One of the key differences between provisional application and the application of a treaty in force was in how application was terminated. While the commentary adopted on first reading offered one possible scenario for termination of provisional application – a breach of the treaty by another State – it also explained that the Commission did not intend to decide which of the grounds or scenarios mentioned in part V, section 3, of the 1969 Vienna Convention might serve as an additional basis for the termination of provisional application. It might be useful to specify, in the commentary, the Commission's approach to the issue of whether and to what extent the grounds set out in part V, section 3, of the Convention were warranted or necessary in the case of provisional application.

As no reference was to be made to the 12-month period of notice laid down in article 56 (2) of the 1969 Vienna Convention, which was also in part V, section 3, he would be in favour of including a mention of the period of notice in the commentary, as suggested by Mr. Reinisch. It would be particularly useful to suggest relevant wording in one of the draft model clauses to remind States of the desirability of clarity in that respect.

Although the Special Rapporteur's report indicated that the draft model clauses were intended to address the most common issues faced by States, the situations to which they referred, such as the expression of consent to provisional application by means of a declaration, appeared to be somewhat unusual, while more typical cases were not included. For instance, no mention was made of the option of consenting to provisional application through the exchange of notes or letters or by notification to the depositary that a treaty was to be provisionally applied as from a specific date, or of the general reference to domestic legislation contained in a number of treaties mentioned in the footnotes.

He supported the view that the draft model clauses should be divided into two groups, pertaining respectively to bilateral and multilateral treaties, as that would obviate the need to find universally applicable wording, which was sometimes to the detriment of the content. He agreed with Ms. Escobar Hernández that the examples of practice that were provided in the footnotes would undoubtedly be very useful to States. The examples should be cited more fully and systematically; they would also be better placed in the body of the text than in footnotes.

Lastly, he trusted that the Drafting Committee would succeed in producing a version of the text that would fully meet the demands and expectations of States and reflect the current stage of development of international law.

Mr. Ruda Santolaria, in a pre-recorded video statement, said that he appreciated the valuable work of the Special Rapporteur, including the sixth report on provisional application of treaties. He fully agreed with the Special Rapporteur regarding the pragmatic approach of the draft guidelines and the voluntary and flexible nature of the provisional application of treaties, as well as the subsidiary character of provisional application compared to entry into force.

He supported the Special Rapporteur's proposed amendment of draft guideline 1, which clarified that the draft guidelines concerned the provisional application of treaties by States and international organizations. In that connection, he welcomed the clear statement, in draft guideline 2, that the purpose of the draft guidelines was to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the 1969 Vienna Convention. He agreed with the Special Rapporteur that it was preferable not to refer also to the 1986 Vienna Convention, since it had not entered into force and there was no agreement on what aspects of its content reflected customary international law, whereas the 1969 Convention had given rise to extensive treaty practice.

In relation to draft guideline 3, he agreed that, as a general rule, the provisional application of a treaty or a part of a treaty should not be limited to the negotiating States or international organizations and should be open to the "States or organizations concerned". That was particularly important in the case of multilateral treaties, accession to which was not limited to States or international organizations that had been involved in the negotiation process.

With regard to draft guideline 6, he agreed with the Special Rapporteur's suggestion that the phrase "as if the treaty were in force" should be deleted. As aptly noted by the Special Rapporteur, it was important to avoid misunderstandings and to draw a distinction between the nature and effects of provisional application and those of entry into force. Draft guideline 6 was consistent with draft guideline 8, which rightly stated that the breach of an obligation arising under a treaty or a part of a treaty that was provisionally applied entailed international responsibility in accordance with the applicable rules of international law.

He fully supported the inclusion of draft guideline 7, which concerned reservations. On the basis of the argument *a maiore ad minus*, if a State or an international organization was able to formulate reservations to certain provisions of a treaty, it should also be able to formulate reservations purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of a treaty. The inclusion of draft guideline 7 was consistent with the aim of the draft guidelines, which was to provide guidance on the law as it related to the provisional application of treaties, in addition to shedding light on practice.

Turning to draft guideline 9, he said that he supported the Special Rapporteur's proposed amendment of paragraph 2 to indicate that a State or an international organization could terminate provisional application for any reason and that such termination was not contingent on an intention not to become a party to the treaty. He also supported the proposed inclusion of the new paragraph 4, which clarified, in line with article 70 (1) (b) of the 1969 Vienna Convention, that unless the treaty otherwise provided or it was otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty did not affect any right, obligation or legal situation created by such provisional application prior to its termination.

He welcomed the fact that draft guidelines 10 and 11 tracked, *mutatis mutandis*, the provisions of articles 27 and 46, respectively, of the 1969 Vienna Convention. He also supported the inclusion of draft guideline 12, which left open the possibility that a State or an international organization could agree to the provisional application of a treaty or a part of a treaty with limitations deriving from the internal law of the State or from the rules of the organization. Lastly, he supported the inclusion of the draft model clauses, which provided added value to the draft guidelines by illustrating how the issue of provisional application could be approached in practice in bilateral and multilateral treaties. He supported the referral of the draft guidelines and the draft model clauses to the Drafting Committee.

Mr. Vázquez-Bermúdez said that he wished to thank the Special Rapporteur for his sixth report, which provided an excellent basis for the adoption, on second reading, of the full set of draft guidelines on the provisional application of treaties, together with an annex containing draft model clauses. The draft guidelines would be of great practical use to States, international organizations and all legal practitioners. They reflected the inherent flexibility and the exceptional and voluntary nature of provisional application and provided guidance on the law and practice in that regard, on the basis of article 25 of the 1969 Vienna Convention and other rules of international law. He was in general agreement with the comments and suggestions made by the Special Rapporteur in the sixth report, including the various proposed amendments of the draft guidelines.

The Special Rapporteur had proposed that the words “by States and international organizations” should be inserted in draft guideline 1, as suggested by Greece and Czechia. While such an addition was not essential, it would be a useful clarification of the scope of the draft guidelines and was consistent with the general rule established in draft guideline 3, which explicitly mentioned States and international organizations.

The suggestion put forward by a number of States to merge draft guidelines 1 and 2 should be considered in the Drafting Committee. However, like Mr. Tladi, he took the view that such merging was optional rather than necessary, since the draft guidelines were not a legally binding instrument. “Scope” referred to the content and purview of a given topic, not to the binding or non-binding nature of the outcome of the Commission’s work on that topic. The conclusions on identification of customary international law and the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, recently adopted by the Commission, both contained provisions on scope, as did the draft conclusions on peremptory norms of general international law (*jus cogens*).

Turning to drafting guideline 3, he said that he was in favour of retaining the words “may be”. They emphasized the purely voluntary nature of the provisional application of treaties and, moreover, were consistent with the possibility that non-negotiating States or international organizations could agree to the provisional application of a treaty. He agreed that the reference to “States or international organizations concerned”, rather than to “negotiating States” or “negotiating organizations”, reflected current State practice, as noted by Germany. Such wording provided the appropriate degree of flexibility by allowing for the possibility that States and organizations that had not participated in the negotiation of a treaty could agree to apply the treaty provisionally, as noted by the United Kingdom.

In draft guideline 4 (b), the Special Rapporteur had proposed the insertion of the words “if such resolution has not been opposed by the State concerned”. What was important in that regard was the fact that the provisional application of a treaty must be agreed upon, whether in the treaty itself, in a separate treaty, or through any other means or arrangements. It was obvious that if a State objected to a resolution in which the provisional application of a treaty was agreed, such a State would not be a party to that agreement to provisionally apply the treaty. The addition of “if such resolution has not been opposed by the State concerned” was therefore superfluous. One way to clarify that provisional application must be agreed between the States or international organizations concerned would be to insert the words “between the States or international organizations concerned” in the chapeau of draft guideline 4, after the words “may be agreed”, along the lines suggested by Mr. Forteau. In the case of agreement to the provisional application of a treaty through a declaration by a State or an international organization that was accepted by the other States or international organizations concerned, either the draft guideline or the commentary should specify that such acceptance must be explicit, as noted by several States.

As for the suggestion by some States to merge draft guidelines 3 and 4, he agreed with the Special Rapporteur that it was preferable to keep them separate, given that a number of States had expressed support for the current structure of the draft guidelines, and a single draft guideline incorporating so much text would be unwieldy.

Draft guideline 6 required further consideration in the Drafting Committee. While he appreciated the explanation provided by the Special Rapporteur in paragraph 92 of the sixth report, he still had doubts regarding the phrase "provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof". It would be more accurate to state that an agreement on the provisional application of a treaty or part of a treaty produced such a legally binding obligation. At the Commission's 3518th meeting, Mr. Forteau had raised a number of valid points in relation to draft guideline 6 that should be taken into account in the Drafting Committee.

He supported the suggestion to delete the phrase "as if the treaty were in force", since it did not provide any information that was not already implicit in the phrase "legally binding obligation" and could give rise to confusion with regard to the scope of the draft guideline. Moreover, the words "the treaty" in that phrase were problematic, since provisional application could be agreed in respect of only part of a treaty. However, such an amendment would not resolve all of the potentially confusing aspects of draft guideline 6. The phrase "unless the treaty provides otherwise or it is otherwise agreed" could nullify the legally binding obligation to apply the treaty or a part thereof. In that regard, Sir Michael Wood's suggestion that "unless" should be replaced with "except to the extent that" was a useful one.

Draft guideline 7, on reservations, was useful. In his view, nothing prevented a State or international organization from formulating a reservation when agreeing to the provisional application of a treaty or a part thereof, provided that the reservation formulated was not prohibited and was not incompatible with the object and purpose of the treaty in question. The draft guideline appropriately indicated that the relevant rules of the 1969 Vienna Convention applied *mutatis mutandis*. The Drafting Committee could examine the amendments proposed by other members of the Commission.

With regard to draft guideline 9, he shared the Special Rapporteur's view that there was a need to address suggestions concerning 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. Requiring such a link would severely limit the flexibility of provisional application and would not be in line with contemporary practice. He therefore supported the Special Rapporteur's proposed amendment of paragraph 2. He also supported the addition of the new paragraph 4, in view of the need to address the consequences of the termination of a treaty provisionally applied in accordance with article 70 (1) (b) of the 1969 Vienna Convention.

The draft model clauses would be extremely useful to States and international organizations in drawing up treaty provisions on provisional application. The Drafting Committee could examine the proposed changes to the draft model clauses.

He agreed that the final outcome of the Commission's work on the topic should consist of two parts: firstly, a compendium of guidelines and commentaries and a set of model clauses and commentaries that together would constitute a Guide to Provisional Application of Treaties; and secondly, a bibliography. He supported the Special Rapporteur's proposal regarding the recommendation that the Commission should make to the General Assembly on the outcome of the work on the topic.

Mr. Šturma said that he wished to commend the Special Rapporteur for his excellent report and his very clear and useful introduction. Under the Special Rapporteur's guidance, the Commission would undoubtedly be able to adopt the full set of draft guidelines on second reading at its current session. Since most of the substantive issues concerned had already been discussed extensively, he would address only those draft guidelines to which the Special Rapporteur had proposed changes or which might require harmonization either with the language of the 1969 Vienna Convention or with other draft guidelines or the draft model clauses.

Concerning draft guideline 1, he agreed with the amendment clarifying that the draft guidelines concerned provisional application by States and international organizations. However, like some States and certain members of the Commission, he was in favour of merging draft guidelines 1 and 2, as they broadly expressed the same idea.

In draft guideline 3, if the Commission wished to maintain consistency with article 25 of the 1969 Vienna Convention, the words "may be" should be replaced with the word "is". He understood that the Special Rapporteur wanted to stress the voluntary nature of provisional application, but that aspect should be covered in the commentaries.

The most complex of the provisions appeared to be draft guideline 4. In his view, what mattered was to maintain the basic idea, as expressed in the general rule, that any provisional application of a treaty was contingent on agreement. The language used in the chapeau and in draft guideline 4 (a) was perfectly clear and stated that any agreement on provisional application could be included in the treaty itself or in a separate treaty. However, the language of draft guideline 4 (b), concerning other means or arrangements, was less clear. His understanding of that provision coincided with the Special Rapporteur's explanation, in paragraph 78 of the report, that the expression "that is accepted by the other States or international organizations concerned" applied to both "declaration" and "resolution adopted by an international organization". He also agreed that draft guideline 4 should be read in conjunction with draft model clauses 3 and 4. In particular, draft model clause 4 included the wording "resolution … to which that State does not agree". That wording, however, was not fully in line with the new language that the Special Rapporteur had proposed in draft guideline 4, namely "if such resolution has not been opposed by the State concerned". It was unclear why resolutions adopted by international organizations or at intergovernmental conferences should be treated differently from declarations by States or international organizations, which, according to draft guideline 4, had to be accepted by the other States or international organizations concerned. The Special Rapporteur's proposed amendment introduced an "opt-out" system that required active rejection by a State or an international organization. That might be appropriate in some cases, but not all. The wording did not distinguish between resolutions that were adopted by consensus without a vote, those adopted unanimously and those adopted by a simple majority, nor did it take into consideration whether a resolution was merely hortatory or whether it was binding and could therefore be taken as establishing an agreement on provisional application. Consequently, after the word "resolution", the words "adopted subject to the rules of an international organization" should be inserted. On balance, he shared the Special Rapporteur's view that draft guidelines 3 and 4 should not be merged, since the text of draft guideline 4 was already long and complex.

In draft guideline 6, he agreed with the proposal to delete the words "as if the treaty were in force".

With regard to draft guideline 9, he agreed with the proposed amendment to paragraph 2. Like some other members of the Commission, he thought that the provision should include the idea of reasonable notice for termination of provisional application. He also supported the Special Rapporteur's proposal to insert a new paragraph 4, for the sake of clarity.

The draft model clauses were useful but should be reviewed and harmonized with the draft guidelines.

In conclusion, he wished to recommend that all the draft guidelines and draft model clauses should be referred to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that he wished to thank the Special Rapporteur for his sixth report, which contained a comprehensive overview of the reactions of States and international organizations to the draft guidelines adopted on first reading and to the draft model clauses. The Special Rapporteur's efforts, over a number of years, in producing reports and researching treaty and State practice and case law relating to provisional application were commendable. Despite the limited scope of the topic, the Special Rapporteur had managed to provide extensive analysis of existing treaty regimes that had been applied provisionally and to deduce the rules that might be applicable in that context, while taking into account article 25 of the 1969 Vienna Convention. The draft guidelines struck the right balance between implementing the Commission's mandate on the topic and not being overly prescriptive or encouraging the practice of provisional application by States

and international organizations. As indicated in the report, the regime of provisional application of treaties was inherently flexible and exceptional. He wished to note, however, that certain draft guidelines were based on *lex lata*, while others were proposed as *lex ferenda*. The commentary must therefore explain the legal basis for each provision and indicate whether it was well established in treaty relations or had been deduced. That was especially important with regard to those draft guidelines that applied the rules of the 1969 Vienna Convention *mutatis mutandis*.

Unlike other projects of the Commission, the draft guidelines did not define the subject matter by describing its elements and content. While article 25 of the 1969 Vienna Convention provided a description of the commencement and termination of the provisional application of treaties, it did not define provisional application *per se*. Such a definition would add value to the draft guidelines, given that the *Treaty Handbook* published by the United Nations Office of Legal Affairs indicated that a State "provisionally applies a treaty … when it unilaterally undertakes … to give effect to the treaty obligations provisionally". The inclusion of that legal description of provisional application in the draft guidelines would be important for their interpretation and implementation.

Turning to the draft guidelines themselves, he said that he found the addition, in draft guideline 1, of the words "by States and international organizations" unnecessary but would not object to it. The reasons for that proposed addition and the value it would add were not clarified in the report.

Draft guideline 3, which reflected article 25 of the 1969 Vienna Convention, should expressly provide for the possibility that non-negotiating States and international organizations could provisionally apply a treaty. The formulation "if in some other manner it has been so agreed" should be expanded to specify whose agreement was required: that of the States and international organizations concerned or that of the States and organizations that intended to become parties to the treaty.

The Special Rapporteur had proposed that draft guideline 4 (b) should be amended to state that the provisional application of a treaty could be agreed through a resolution of an international organization or an intergovernmental conference if such resolution had not been opposed by the "State concerned". There were two issues with that amendment. The first related to the value of the resolution in reflecting the agreement of the States or international organizations concerned on provisional application. As had been indicated by several members of the Commission, the value of such a resolution was dependent upon the treaty regime at hand and the rules of the organization concerned. In his view, that point should be reflected in the text of the draft guideline or, at least, in the commentary, and the circumstances in which such a resolution constituted an agreement of the States and international organizations concerned should be determined.

The second issue with the amendment was that the Special Rapporteur had not specified whether the expression "the State concerned" referred to every State that did not wish to be bound by provisional application or merely to those States whose consent to provisional application was required for its implementation. Moreover, the legal consequences of such opposition were unclear. Did the provision mean that the State concerned would not be bound if it opposed the resolution or that the treaty could not be applied provisionally in the event of such opposition? Further debate was required on whether the wording on opposition was actually needed and whether it should feature in the draft guidelines themselves or in the commentary thereto.

With regard to draft guideline 5, he agreed with the Special Rapporteur that the existing language should be maintained. The words "between the States and international organizations concerned" not only covered a variety of possible scenarios for commencement of provisional application but also made it clear that such commencement was irrespective of the question of whether the treaty as such had entered into force in accordance with its relevant provisions.

Concerning draft guideline 6, on the legal effect of provisional application, he continued to hold the view that the provisional application of a treaty and the entry into force of a treaty did not produce the same legal effects for a State or international organization applying the treaty. For that reason, he welcomed the proposed deletion of the words "as if

the treaty were in force". A unilateral undertaking or declaration did not produce the same legal effects as the fact of being bound by a treaty through the entry into force thereof for the relevant State or international organization. Draft guideline 12 stipulated that the guidelines did not affect the right of a State or an international organization to agree to the provisional application of a treaty with limitations deriving from the internal law of the State or the rules of the organization, thereby demonstrating that provisional application did not have the same legal effect as entry into force. Such a limitation on entry into force, if claimed by a State or international organization, would be considered null and void. In his view, the Commission was missing an opportunity by not tackling the exact legal effects of provisional application or, at a minimum, making a clear distinction between such effects and those arising from entry into force. While the Special Rapporteur acknowledged, in paragraph 90 of the report, that the legal effects were not the same, the report did not elaborate on the matter.

With regard to draft guideline 7, he agreed that there was a lack of practice concerning the formulation of a reservation to provisional application; nevertheless, he supported that draft guideline. However, the commentary should clarify that the matter was *de lege ferenda*. He did not agree that the regime on reservations set out in the 1969 Vienna Convention was applicable *mutatis mutandis* to reservations to provisional application. A State or international organization could formulate a reservation when signing, ratifying or acceding to a treaty. However, a State could provisionally apply a treaty without having signed it or agreed to be bound by it through ratification, accession or otherwise. Reservations in those two contexts were not comparable. At a minimum, the draft guideline should specify which rules of the 1969 Vienna Convention applied and which did not, with an explanation of the legal basis in the commentary. Furthermore, there was no practice to indicate that a State could not formulate a reservation to provisional application that was incompatible with the object and purpose of the treaty. The consequences of such a reservation had not been clarified and there was no practice to shed light on whether such a reservation would modify the legal effects of the treaty between the reserving States or international organizations that were applying the treaty provisionally. The legal consequences of a reservation to the provisional application of a treaty should be discussed.

Turning to draft guideline 8, he said that, in line with his comments on draft guideline 6 regarding legal effects, he did not believe that international responsibility always arose under the provisional application regime. If a State or international organization agreed, through a unilateral undertaking or declaration, to provisionally apply a treaty and subsequently violated certain obligations thereunder, its responsibility for the breach depended on whether or not it was bound by those obligations. If the other States or international organizations applying the treaty provisionally were not relying on the performance of the unilateral undertaking by the State or international organization in question, then responsibility for the non-performance might not arise. While the language of draft guideline 8 was flexible, the commentary should clarify that a State or international organization incurred responsibility if it violated its obligation towards the other States or international organizations concerned.

With regard to draft guideline 9, he agreed with the Special Rapporteur that a State or international organization should be able to terminate its provisional application of a treaty for any reason, and not solely if it did not intend to become a party to the treaty. That view was consistent with the flexible nature of the provisional application regime. Any legal obligations arising from provisional application prior to the termination obviously ought to be respected by the terminating State or international organization. That point should be reflected in the draft guideline; he therefore wished to propose that, in the new paragraph 4 of draft guideline 9, the phrase "any right, obligation or legal situation created through such provisional application" should be replaced with "any right, obligation or legal situation that may arise from such provisional application". As had already been mentioned, rights and obligations did not always arise by virtue of the State's or international organization's having provisionally applied the treaty prior to terminating such application. Similarly, he had doubts regarding draft guideline 9 (3) on the application *mutatis mutandis* of part V, section 3, of the 1969 Vienna Convention or other relevant rules concerning termination or suspension. The paragraph was a "without prejudice" clause, but what it reflected was unclear. Provisional application obviously would not prejudice the application of the rules of termination and suspension under the 1969 Vienna Convention to a treaty that was in force.

On the other hand, if the intention behind draft guideline 9 (3) was to apply such rules *mutatis mutandis* to the provisional application itself, he did not see that position as being supported by practice or as a logical conclusion. Part V, section 3, of the 1969 Vienna Convention covered different legal and factual situations that were associated with the legal relationship between parties to a treaty.

Turning to the draft model clauses, he said that for a clause to be a model clause, it should have common elements that applied across the board to various treaties. While the five draft model clauses proposed, or variations thereof, were indeed contained in various instruments providing for provisional application, he was unsure whether they would be applicable to all situations involving provisional application. Different treaties adopted different models for provisional application, whether for commencement, termination, opt-in, opt-out or otherwise. His preferred approach would have been to include various examples of different provisional application clauses in the commentary, rather than highlighting only five such examples and annexing them to the draft guidelines.

Lastly, he reiterated his thanks to the Special Rapporteur for enabling the Commission to recommend a draft text that was informative and useful to practitioners. He recommended that the draft guidelines and draft model clauses should be referred to the Drafting Committee.

The meeting rose at 12.40 p.m.