

Provisional

For participants only

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Provisional summary record of the 3556th meeting

Held at the Palais des Nations, Geneva, on Friday, 30 July 2021, at 3 p.m.


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Present:

Chair: Mr. Hmoud

Members: Mr. Cissé

Ms. Escobar Hernández

Mr. Forteau

Ms. Galvão Teles

Mr. Gómez-Robledo

Mr. Hassouna

Mr. Jalloh

Ms. Lehto

Mr. Murase

Mr. Murphy

Mr. Nguyen

Ms. Oral

Mr. Ouazzani Chahdi

Mr. Park

Mr. Rajput

Mr. Ruda Santolaria

Mr. Saboia

Mr. Tladi

Mr. Vázquez-Bermúdez

Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 3 p.m.

Draft report of the Commission on the work of its seventy-second session *(continued)*

Chapter V. Provisional application of treaties (continued) (A/CN.4/L.945, A/CN.4/L.945/Add.1, A/CN.4/L.945/Add.2 and A/CN.4/L.945/Add.4)

The Chair invited the Commission to resume its consideration of chapter V (E) (2) of the draft report, as contained in document A/CN.4/L.945/Add.2, beginning with paragraph (6) of the commentary to draft guideline 3 and paragraph (4) of the general commentary to the Guide to Provisional Application of Treaties, both of which had been left in abeyance at the previous meeting.

Commentary to draft guideline 3 (General rule) (continued)

Paragraph (6) (continued)

Mr. Gómez-Robledo (Special Rapporteur) said that, following informal consultations, he wished to propose that, in the first sentence, the phrase “does not specify which States or international organizations may provisionally apply a treaty” should be replaced with “does not use this formulation”. In the second sentence, the phrase “signed or acceded to the treaty” should be replaced with “consented to provisional application of the treaty”. In the fifth sentence, the words “in terms of their connection to” should be replaced with “by reference to their participation in the negotiation of”, and the words “historically” and “in the past” should be deleted. The last sentence should be redrafted to read: “For these reasons, the draft guideline simply restates the basic rule without reference to ‘negotiating States’ or ‘negotiating States and negotiating organizations’.” Lastly, in footnote 19, the title of “Protocol No. 14” should be spelled out in full.

Mr. Murphy said that he agreed with the changes proposed by the Special Rapporteur. However, he continued to be of the opinion that the penultimate sentence of paragraph (6) should be deleted, as its purpose was unclear. The idea that provisional application of a treaty could be undertaken by States or international organizations that were not negotiating States or negotiating organizations of the treaty was already captured in the second sentence of the paragraph and, even more extensively, in draft guideline 4.

Mr. Gómez-Robledo (Special Rapporteur) said that, although he was not wholly convinced that the penultimate sentence was unnecessary, he would, in the interests of consensus, agree to its deletion, together with that of footnote 20.

Paragraph (6), as amended, was adopted.

General commentary (continued)

Paragraph (4) (continued)

Mr. Gómez-Robledo (Special Rapporteur) said that, following informal consultations, footnote 7 to paragraph (4) had been redrafted. The essence of the original footnote had been retained, but the style and format had been aligned with those of the other footnotes. In addition, the footnote no longer referred exclusively to the practice of the United Kingdom, but also to that of other States and entities, such as the European Union.

The first sentence of footnote 7 had been deleted and the second sentence had been redrafted to read: “Provisional application was used in connection with the United Kingdom’s withdrawal from the European Union.” The next sentence began with the words “Three new European Union-United Kingdom treaties were provisionally applied:”; the sentence then cited the full titles of the three treaties, with the deletion of the short titles given in the original text of the footnote. The following sentence had been left unchanged and the subsequent sentence had been redrafted to read: “The United Kingdom has also made use of provisional application in respect of other treaties in the context of withdrawal from the European Union, both bilateral and multilateral (see, for example, www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries).”

The text following the hyperlink had been deleted up to the sentence beginning “The flexibility provided in article 25”; in that sentence, which began a new paragraph, the reference to “paragraph 1 (a)” had been changed to “paragraph 1 (b)” and “has proved helpful” had been changed to “proved helpful”. The beginning of the following sentence had been amended to read “Sometimes the treaty partners were able to agree to provisional application by an exchange of notes: for example, the exchange of letters”; the rest of the sentence had been left unchanged and all the text following that sentence had been deleted.

Mr. Jalloh said that his concerns about the length and neutrality of the footnote had been addressed; he supported the amendments made.

Mr. Rajput said that he did not support the wording of the second paragraph of the revised footnote, which seemed advisory in tone. In addition, it was not clear, in the first sentence, to whom the “flexibility provided in article 25 (1) (b)” of the 1969 Vienna Convention on the Law of Treaties had “proved helpful”. Generally speaking, the first and second sentences of that paragraph appeared to have been drafted from the point of view of the United Kingdom. He therefore proposed that the first sentence of the second paragraph of the footnote should be deleted and that, in the second sentence, the phrase “Sometimes the treaty partners were able to agree to provisional application by an exchange of notes” should be replaced with “In some situations, provisional application was agreed through an exchange of notes”. Following the colon, only the name of the agreement itself should be given.

Sir Michael Wood said that, while he agreed that the first sentence of the second paragraph of the footnote could be deleted, the reference to article 25 (1) (b) of the 1969 Vienna Convention should be retained. The new first sentence of the paragraph could read: “The treaty parties were sometimes able to agree to provisional application by an exchange of notes on the basis of article 25 (1) (b) of the 1969 Vienna Convention.”

Mr. Forteau proposed that, in the new first sentence of footnote 7, the words “Provisional application was used in connection with” should be replaced with “For example, provisional application was used recently in connection with”.

Mr. Gómez-Robledo (Special Rapporteur), noting that the footnote, as originally drafted, had started with the words “Recent practice”, said that he agreed with the amendment proposed by Mr. Forteau, as it was important to show that the Commission had referred to recent practice in its work on the topic. As to the second paragraph of the revised footnote, while he did not necessarily believe that the Commission should avoid making value judgments, he would not object to the amendments proposed by Mr. Rajput and Sir Michael Wood.

Mr. Forteau said that it would be useful to retain a reference to the flexibility mentioned in paragraph (4). He proposed that the second paragraph of the footnote should start with the words “The flexibility provided in article 25, paragraph 1 (b), of the 1969 Vienna Convention was illustrated, for instance, by the fact that the treaty parties were able to agree, on some occasions”.

Sir Michael Wood said he agreed that a reference to “flexibility” should be retained.

Mr. Rajput said that he supported Mr. Forteau’s proposal but wished to suggest that “were able to agree” should be changed to “agreed”, since what followed was an example of practice.

Paragraph (4), with footnote 7 as amended, was adopted.

Commentary to draft guideline 4 (Form of agreement)

Paragraph (1)

Mr. Forteau proposed that, in the second sentence, the word “expressly” should be deleted, since it did not appear in article 25 of either the 1969 Vienna Convention on the Law of Treaties or the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

Sir Michael Wood said that he supported the deletion of the word “expressly” and that, in the same sentence, the word “permit” should be replaced with “provide for” and the word “have” should be inserted immediately after the words “international organizations”.

Mr. Murphy said that he supported the amendments proposed by Mr. Forteau and Sir Michael Wood. In the same sentence, the phrase “the treaty in question might” should be replaced with “the treaty might itself”.

Paragraph (1), as amended, was adopted.

New paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) said that, on the basis of several members’ suggestions, he wished to propose the insertion of a new paragraph (2) in order to provide examples of how a treaty might itself address provisional application. The new paragraph would read:

“The first possibility, where the treaty being applied addresses itself provisional application, may do so in different ways. For example, the treaty may require that the negotiating or signatory States apply the treaty provisionally. Alternatively, the treaty may allow such States, for example by filing a declaration or through notification to the depositary of the treaty, to opt into or opt out of provisional application.”

He also wished to propose an additional footnote, at the end of the proposed new paragraph, which would read:

“An example of consent to be bound by the provisional application of a part of a treaty by means of a declaration, but which is expressly provided for in a parallel agreement to the treaty, is contained in the Protocol to the Agreement on a Unified Patent Court on Provisional Application (see www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreement_on_Unified_Patent_Court_on_provisional_application.pdf).”

Mr. Forteau said that, while he supported the addition of the new paragraph, he wondered whether the proposed new footnote could begin with an example of a treaty, rather than a parallel agreement to a treaty, that provided for provisional application, such as the Arms Trade Treaty. The example in the proposed new footnote could be retained, but as a second example.

Mr. Murphy said that he supported the proposed new paragraph, as it helped to explain the first clause of draft guideline 4, and agreed with Mr. Forteau’s proposed addition to the new footnote. He proposed that the first sentence of the new paragraph should be reworded to read: “Where the treaty being applied provisionally itself addresses provisional application, the treaty may do so in different ways.”

Mr. Gómez-Robledo (Special Rapporteur), noting his agreement with the amendments proposed by Mr. Forteau and Mr. Murphy, said that he also wished to add a third reference to the footnote, namely the Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data.

Mr. Rajput said that the words “The first possibility” at the beginning of the proposed new paragraph should perhaps be retained, given that the following paragraph, as amended in the informal revised draft that had been circulated to the members, began with the words “The second possibility”.

Mr. Park, recalling that paragraph (1) referred to a first and a second possibility, said he agreed with Mr. Rajput that the two paragraphs that followed should use similar wording for the sake of clarity.

Mr. Jalloh said that removing the reference to the “first possibility” would have consequences for other paragraphs of the commentary as well. It might therefore be easiest to keep the wording consistent in all paragraphs.

Mr. Murphy said his understanding was that paragraph (1) of the commentary introduced the two possibilities in a way that made it obvious that the proposed new paragraph (2) was addressing the first possibility. However, given the concerns expressed by

other members, he was willing to revise his earlier suggestion for the first sentence to read: “The first possibility is where the treaty being applied provisionally itself addresses provisional application, in which case the treaty may do so in different ways.”

Mr. Gómez-Robledo (Special Rapporteur) said that he had no objection to Mr. Murphy’s proposed amendment.

The proposed new paragraph (2), as amended, was adopted.

The Chair said that the subsequent paragraphs of the commentary would be renumbered accordingly at a later stage. For the moment, the Commission would proceed with the adoption of the commentary based on the original numbering as contained in document [A/CN.4/L.945/Add.2](#).

Paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) said that his proposals, as reflected in the informal revised draft that had been circulated to the members, were to insert the word “second” before “possibility” in the first sentence and to delete the words “an alternative basis for” before “provisional application”.

Mr. Rajput said that, in the reference to draft guideline 3 in the third sentence, the word “broad” could be deleted before “meaning”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Gómez-Robledo (Special Rapporteur) said that paragraph (3) had been discussed extensively with Mr. Zagaynov, who had proposed that, in the second sentence, the words “interpreted generically as embracing” should be replaced with “interpreted as covering”. A cross-reference to the first possibility should be added to the beginning of that sentence, to read “As is the case for the first possibility, and ...”. In the last sentence, the phrase “or notification to the depositary of the treaty if it has been so agreed” should be deleted.

Mr. Rajput said that the current formulation of the second part of the first sentence – “which should be distinguished from the treaty that is provisionally applied” – was somewhat confusing and might suggest legal implications other than those intended. He therefore proposed that the words “should be distinguished” should be replaced with the words “would be different”.

Sir Michael Wood said he agreed that the formulation “which should be distinguished from” in the first sentence was questionable; in his view, the word “should” sounded rather didactic. He would propose instead that the words “is distinct from” should be used. In the last sentence, the word “exchange” should be in the plural for consistency with the other items in the list.

Mr. Gómez-Robledo (Special Rapporteur) said that he agreed with the proposals made by Sir Michael Wood.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Gómez-Robledo (Special Rapporteur) said that, in the first sentence, the words “other means” should be replaced with “any other means”, purely for editorial reasons and to reflect the wording of subparagraph (b) of the draft guideline itself.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Forteau proposed that, in the fifth sentence, the word “necessarily” before “depends on” should be deleted, as the current wording did not, in his view, reflect the compromise that had been reached in the Drafting Committee.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Gómez-Robledo (Special Rapporteur) said that he had proposed a number of drafting changes to the paragraph in the informal revised draft, which he hoped would not be problematic. The most important proposal was to replace the word “practice” with “possibility” in the first sentence. Following consultations with members, he wished to propose that, in footnote 25, the first two sentences and the last sentence should be deleted. The beginning of the third sentence of that footnote, which would thus become the first sentence, should be amended to read “An example is the declaration by the Syrian Arab Republic”. In that way, the Commission would avoid making any judgment as to whether or not that example genuinely constituted a case of provisional application. Proposed amendments had also been made to the final sentence of paragraph (6) based on calls by a number of members to strengthen the distinction between declarations on provisional application and the legal regime concerning unilateral declarations. The amended final sentence would read: “The term ‘declaration’ is not meant to refer to the legal regime concerning unilateral declarations of States, which do not deal with the provisional application of treaties.”

Mr. Rajput said that, in the second sentence of paragraph (6), the meaning of the formulation “the declaration must be verifiably accepted” was not entirely clear.

Mr. Forteau said that he agreed with the Special Rapporteur’s proposals. In footnote 25, in order to make the text even more factual, the word “neutrally” should be deleted from the fourth sentence in the reference to the reply of the Director-General of the Organisation for the Prohibition of Chemical Weapons.

Mr. Murphy said that he supported all the changes proposed by the Special Rapporteur, including the amendment to the third sentence of footnote 25 concerning the declaration by the Syrian Arab Republic. He had no objection to the formulation “the declaration must be verifiably accepted” in the second sentence of paragraph (6); it expressed the fact that the declaration must be accepted by the other States or organizations concerned. In the final sentence of that paragraph, the proposed wording “do not deal with” should be replaced with “does not deal with”.

Mr. Cissé said he agreed with Mr. Rajput that the formulation “verifiably accepted” in the second sentence was problematic. It could perhaps be replaced with the words “explicitly accepted” or “expressly accepted”.

Mr. Park said that he had a similar concern about the words “verifiably” in the second sentence and “verifiable” in the fourth. In the text adopted on first reading, the sentence corresponding to the current fourth sentence had read: “The draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is expressed.” He therefore agreed with Mr. Cissé that the word “verifiably” could be replaced with “expressly” in the second sentence, and wished to suggest that “verifiable” should be replaced with “expressed” in the fourth sentence.

Mr. Rajput said that “verifying” and “expressing” were different normative concepts. Mr. Murphy’s comments had helped to clarify the meaning of the phrase in question. He proposed that the second sentence should be amended to read: “However, the acceptance of a declaration by the other States or international organizations concerned must be verifiable.”

Mr. Murphy said he agreed that the words “verifiably” and “verifiable” could be replaced with “expressly” and “express”, respectively.

Mr. Gómez-Robledo (Special Rapporteur) said that he could agree to revert to the original formulation for the fourth sentence – “on the condition that such acceptance is express” – and to change “verifiably accepted” to “expressly accepted” in the second. He also agreed with the other proposals made by Mr. Forteau and Mr. Murphy.

Paragraph (6), as amended, was adopted.

Commentary to draft guideline 5 (Commencement)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) said that he wished to propose that the words “refers to” should be replaced with “uses” in the third sentence.

Mr. Rajput proposed that the word “defines” should be replaced with “specifies” in the second sentence.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

The Chair said that, in the Special Rapporteur’s revised draft, it was proposed that the word “on”, before “other means or arrangements”, should be replaced with “some”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Gómez-Robledo (Special Rapporteur) said that paragraph (5), which had not appeared in the text adopted on first reading, reflected the position taken by Mr. Forteau in the debate concerning the scope of article 24 (4) of the 1969 and 1986 Vienna Conventions.

The Chair said that the Special Rapporteur’s revised draft included a proposal to delete the word “common” before “article 24” in the first sentence.

Paragraph (5), as amended, was adopted.

Commentary to draft guideline 6 (Legal effect)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

The Chair said that the Special Rapporteur had proposed the addition of the words “between them” at the end of the second sentence.

Paragraph (2), as amended, was adopted.

Paragraph (3)

The Chair said that, in the Special Rapporteur’s revised draft, it was proposed that, in the second sentence, the word “decide” should be replaced with the word “agree”. In the third sentence, the words “to whom” should be replaced with “between whom”. In the last sentence, the word “includes” should be replaced with the words “may include”.

Mr. Forteau said that, in the second sentence, the phrase “the legal effect that the treaty would produce” should be amended to use the future tense rather than the conditional.

Mr. Murphy said that the use of the conditional was indeed inappropriate. It would be preferable to amend the phrase to read “the legal effect that the treaty produces”.

Mr. Gómez-Robledo (Special Rapporteur) said that he supported Mr. Murphy’s proposal.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Gómez-Robledo (Special Rapporteur) said that, in the second sentence, the words “or a part of the treaty” should be inserted after the word “treaty”. In the same sentence, the word “existing”, before the words “State practice”, should be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

The Chair said that, in the Special Rapporteur’s revised draft, it was proposed that, in the first sentence, the words “the expectation” should be deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

The Chair said that, in the Special Rapporteur’s revised draft, it was proposed that, in the fourth sentence, the word “exactly” should be inserted before the phrase “the same legal effect”.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Forteau said that the last sentence of footnote 31 should be updated to refer to the Commission’s conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Paragraph (7), as amended, was adopted.

*Commentary to draft guideline 7 (Reservations)**Paragraph (1)*

Mr. Gómez-Robledo (Special Rapporteur) said that the commentary to draft guideline 7 had been revised considerably since the adoption of the commentary on first reading, because the draft guideline itself had changed drastically to become a “without prejudice” clause. The commentary was intended to be neutral because the views of States and those of the Commission had converged on only two points: first, the idea that in principle, there was nothing to prevent the formulation of reservations in the context of the provisional application of treaties; and second, the view that the draft guideline was worth retaining because the application *mutatis mutandis* of the relevant provisions of the 1969 and 1986 Vienna Conventions gave rise to many doubts.

In paragraph (1), the words “deals with” should be replaced with “concerns”. The end of the sentence should be reformulated to read “the legal effect produced by certain provisions of a treaty that is subject to provisional application, either totally or partially”.

Mr. Rajput said that he welcomed the balanced commentary to draft guideline 7, which had been controversial both in the plenary and in the Drafting Committee. In paragraph (1), the words “the possibility of” should be inserted after the word “concerns” to make clear that the Commission was not taking a position on the question.

Paragraph (1), as amended, was adopted.

New paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) said that a new paragraph (2) should be inserted to explain why the Commission had decided to include a “without prejudice” clause and to clarify that existing practice was very limited. The reference to the Commission’s Guide to Practice on Reservations to Treaties that currently appeared in paragraph (4) of the commentary to draft guideline 7 should be moved to the new paragraph (2), which should read:

“The draft guideline takes the form of a saving clause. Given the very limited practice, it is not the purpose of the draft guidelines or this commentary to deal in any detail with the questions that may arise. The Commission’s 2011 Guide to Practice on Reservations to Treaties, while not expressly addressing reservations formulated in connection with provisional application, may nevertheless provide guidance.”

Mr. Park said that the formulation “very limited practice” should be supported by a footnote with references. If insufficient concrete practice could be found, the wording should be reformulated.

Mr. Rajput said that the term “saving clause” should be replaced with the term “‘without prejudice’ clause”.

Mr. Jalloh said that draft guideline 7 reflected a compromise that had been reached after an intense debate in the plenary and in the Drafting Committee. In his view, the words “very limited practice” in the proposed new paragraph should be replaced with the words “absence of any practice”, which should be followed by the words “taking into account the comments and observations of States”. A footnote should also be added to the new paragraph with a reference to the compilation of comments and observations received from Governments and international organizations prepared by the secretariat ([A/CN.4/737](#)).

Sir Michael Wood said he agreed that the phrase “the very limited practice” should be replaced. However, he preferred the phrase “the lack of practice”, which was more ambiguous and less absolute than “the absence of any practice”.

Mr. Cissé suggested the wording “Given that State practice is not yet clearly established”.

Mr. Gómez-Robledo (Special Rapporteur) said that he preferred the wording “the lack of relevant practice”, since it was nuanced and best reflected the range of positions within the Commission and among States. It would also avoid the need to insert a footnote with references to examples of such practice. He supported the addition of a reference to the compilation prepared by the secretariat.

Sir Michael Wood said that the formulation “the lack of relevant practice” was not ideal because it suggested that some practice existed but had been deemed irrelevant by the Commission. Other options included “lack of established practice” or “lack of clear practice”.

The Chair said that the idea that needed to be expressed was the lack of known practice.

Mr. Jalloh recalled that, at the Commission’s 3530th meeting, the Chair of the Drafting Committee had said that the Commission was not aware of any “significant practice”.

The Chair said that there appeared to be a consensus in the Commission regarding the phrase “lack of significant practice”. The Special Rapporteur would draft a new footnote relating to the compilation prepared by the secretariat, and the subsequent paragraphs of the commentary would be renumbered.

The proposed new paragraph (2), as amended, was adopted.

The Chair said that the Commission would proceed with the adoption of the commentary based on the original numbering as contained in document [A/CN.4/L.945/Add.2](#).

Paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) said that, in the first sentence, the word “prohibited” should be replaced with “excluded”. In the second sentence, the words “and international organizations” should be inserted after “States”. In the third sentence, the word “also” should be deleted. The fourth and fifth sentences should be deleted in their entirety.

Sir Michael Wood said that it was appropriate to delete the fourth and fifth sentences, since they raised issues that were not dealt with by the “without prejudice” clause.

Mr. Ouazzani Chahdi said that, in the third sentence, the text appearing between the two sets of parentheses was superfluous and should be deleted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Gómez-Robledo (Special Rapporteur) said that a number of drafting changes should be made to the paragraph, including the deletion of the phrase “of a bilateral treaty” in the middle of the second sentence and the insertion of the phrase “In the case of a bilateral treaty” at the beginning of that sentence. The paragraph indicated that interpretative declarations did not constitute reservations. While other types of declarations, such as those by which States opted out of provisional application, should be distinguished from reservations as such, a legal scholar who had greatly assisted Special Rapporteur Pellet in the preparation of the Guide to Practice on Reservations to Treaties had pointed out to him that certain declarations could have an effect comparable to that of a formal reservation. The fact that numerous issues were not addressed by the draft guidelines was an argument in favour of the inclusion of a “without prejudice” clause, as mentioned at the beginning of the paragraph. The paragraph also addressed the need to distinguish between reservations limited to the period of provisional application and those meant to remain in force beyond that period. Those open issues were touched upon in the paragraph for the sole purpose of enriching the commentary.

Mr. Forteau said that, in order to follow more closely the language used in the Guide to Practice on Reservations to Treaties and to avoid confusion, the word “formal”, which qualified the word “reservations” in the penultimate sentence, should be deleted. An interpretative declaration that had the same effect as a reservation was, in fact, a reservation.

Mr. Murphy said that, in the Special Rapporteur’s revised draft, it was proposed that the phrase “At the same time” should be replaced with “As indicated above” at the beginning of the first sentence. Consequently, the first sentence would refer to an indication “above” of the “limited availability of relevant practice”. Given the amendment that the Commission had made to the new paragraph (2), the words “limited availability of relevant” should be replaced with “lack of significant”.

Mr. Jalloh said that the Chair of the Drafting Committee, in the statement to which he had referred earlier, had mentioned that the distinction between bilateral and multilateral treaties would be referred to in the commentaries. He wished to know whether the Special Rapporteur had decided to address that distinction.

Mr. Gómez-Robledo (Special Rapporteur) said that the second sentence of paragraph (3) addressed bilateral treaties and the third sentence addressed multilateral treaties. To make that distinction more clearly, he proposed that, in the third sentence, the clause “Although States have made interpretative declarations in conjunction with agreeing to provisional application of multilateral treaties” should be replaced with “In the case of multilateral treaties, although States have made interpretative declarations in conjunction with agreeing to provisional application”.

Paragraph (3) was adopted with those amendments.

Paragraph (4)

The Chair said that, in the Special Rapporteur’s revised draft, it was proposed that the last sentence of paragraph (4) should be deleted.

Sir Michael Wood, supported by **Mr. Jalloh**, said that the text of paragraph (4) should either be added to the end of the new paragraph (2) or appear as a separate paragraph immediately after the new paragraph (2), since the content of paragraph (4) seemed to be introductory in nature.

Mr. Gómez-Robledo (Special Rapporteur) said that he agreed with Sir Michael Wood. Paragraph (4) should appear as a separate paragraph immediately after the new paragraph (2).

Mr. Cissé said that paragraph (4) should be placed immediately after paragraph (1) of the commentary because both paragraphs referred to the provisional application of a treaty or a part of a treaty.

Paragraph (4), as amended by the Special Rapporteur and Mr. Cissé, was adopted.

Commentary to draft guideline 8 (Responsibility for breach)

Paragraph (1)

The Chair said that, in the Special Rapporteur's revised draft, it was proposed that the clause "It reflects the legal implication of draft guideline 6" in the second sentence should be replaced with "It follows from the legal effect of provisional application described in draft guideline 6" and that the words "a wrongful act" in the third sentence should be replaced with "an internationally wrongful act".

Mr. Murphy said that, in the second sentence, the term "*pacta sunt servanda*" should be followed by the word "rule" and not "principle". In the commentaries to the draft articles on the law of treaties, the Commission had used the word "principle" in reference to *pacta sunt servanda* only once and the word "rule" in the remaining references.

Mr. Forteau said that, at the beginning of the third sentence, the words "in principle" should be inserted after the word "produces" in the clause "Since the treaty or a part of a treaty being applied provisionally produces a legally binding obligation". The clause could not be couched in absolute terms, as, according to draft guideline 6, provisional application produced an obligation unless the treaty in question provided otherwise. In the latter part of the third sentence, the word "necessarily" should be deleted, as there could be circumstances precluding wrongfulness that prevented a breach from giving rise to international responsibility.

Sir Michael Wood said that, while he understood Mr. Forteau's concern, he did not support the use of the phrase "in principle", which introduced a degree of vagueness. To address the concern, the word "Since" could be replaced with the phrase "To the extent that", because the treaty or part of a treaty being applied provisionally would only produce a legally binding obligation to a certain degree, if at all.

Mr. Park said that the reference to *pacta sunt servanda* should not be changed; it should be described as a principle and not merely as a rule. He did not agree with Mr. Forteau's proposal to insert the phrase "in principle" because it would reopen debates that had already been settled and, as Sir Michael Wood had noted, the phrase introduced an element of doubt.

Mr. Gómez-Robledo (Special Rapporteur) said that *pacta sunt servanda* was so central, not only to treaty law but to international law in general, that nothing was lost by referring to it as a principle, and he would prefer to do so. The proposal to insert the phrase "in principle" called into question the balance achieved by the Commission in draft guideline 6, which, in the version adopted on first reading, had used the word "unless"; the formulation "produces in principle" could be misinterpreted. Paragraph (1) of the commentary to draft guideline 8 already included a reference to draft guideline 6 in the second sentence, and he did not wish to introduce too many qualifications in the commentary to draft guideline 8, given the importance of that draft guideline.

Mr. Murphy said that the phrase "including the *pacta sunt servanda* principle" should be replaced with "including with respect to *pacta sunt servanda*" in order to avoid having to describe *pacta sunt servanda* as either a principle or a rule.

Mr. Gómez-Robledo (Special Rapporteur) said that he agreed with Mr. Murphy's proposed solution regarding the reference to *pacta sunt servanda*. He also supported Mr. Forteau's proposal to delete the word "necessarily", for the reasons that Mr. Forteau had given.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Rajput said that the weak formulation “that is susceptible to giving rise to” should be replaced with “that gives rise to” in order to make a clear statement about the consequences of a breach of a part of a treaty that was being provisionally applied.

Mr. Park said that Mr. Rajput’s proposal was inconsistent with the deletion of the word “necessarily” from paragraph (1). The existing text of paragraph (2) should therefore be maintained.

Mr. Forteau said that, as a compromise, the phrase “that is susceptible to giving rise to” could be replaced with “that can lead to” or “that can give rise to”, both of which avoided the use of the word “susceptible”, which was perhaps too weak.

Sir Michael Wood said that paragraph (2) should be deleted. Given that paragraph (1) already addressed the breach of a treaty or a part of a treaty, it was difficult to see the purpose of paragraph (2).

Paragraph (2) was deleted.

Paragraph (3)

The Chair said that, in the Special Rapporteur’s revised draft, it was proposed that, in the first sentence, the phrase “for internationally wrongful acts” should be inserted between “articles on the responsibility of international organizations” and “of 2011” and, in the last sentence, the words “to those draft articles” should be replaced with “to the applicable rules reflected in those articles”.

Paragraph (3), as amended, was adopted.

*Commentary to draft guideline 9 (Termination)**Paragraph (1)*

Mr. Gómez-Robledo (Special Rapporteur) said that, in the first sentence, the words “and suspension” should be deleted, since draft guideline 9 no longer dealt with suspension. In the second sentence, the phrase “first, when the treaty” should be replaced with “first, to the extent that the treaty”. The reference in the last sentence to the invocation of other grounds had been added to the text contained in document [A/CN.4/L.945/Add.2](#) in light of the addition of the new draft guideline 9 (3).

Mr. Forteau said that the second sentence, with the proposed amendment, indicated that the provisional application of a treaty or a part of a treaty by a State or an international organization ceased to the extent that the treaty entered into force for the State or international organization concerned. However, provisional application would continue with respect to other States for which the treaty had not yet entered into force. The phrase “for the State or international organization concerned” should therefore be replaced with “between the States or international organizations concerned”.

Paragraph (1) was adopted with those amendments.

Paragraph (2)

Mr. Forteau said that footnote 40, which pertained to the last sentence of paragraph (2), contained references to bilateral agreements. However, that sentence of paragraph (2) referred to provisional application in respect of two or more States or international organizations for which a treaty had not yet entered into force, and thus could only apply to multilateral agreements. The footnote should therefore be revisited.

Paragraph (2) was adopted on that understanding.

Paragraph (3)

The Chair said that, in the Special Rapporteur’s revised draft, it was proposed that, at the end of the second sentence, “by others” should be changed to “in respect of others”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

The Chair said that, in the Special Rapporteur's revised draft, it was proposed that, in the first sentence, the word "omits" should be replaced with "avoids".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Forteau said that paragraph (6) should be reformulated to cover situations where States had signed a treaty but had not yet either expressed their consent to be bound by it or accepted provisional application by means of a unilateral declaration. Such a situation existed with respect to the Arms Trade Treaty. The words "have signed the treaty without accepting provisional application or" [*qui ont signé le traité sans accepter l'application provisoire ou*] should be inserted between the words "all States that" and "have expressed their consent" and a footnote regarding the situation of States that had signed a treaty but not accepted provisional application should perhaps be added.

The meeting rose at 5.35 p.m.