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Chair: Ms. Al-Thani . . . . . (Qatar)
later: Ms. Krutulytė (Vice-Chair) . . . . . (Lithuania)

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21-15485 (E)

The meeting was called to order at 3.05 p.m.

Agenda item 82: Report of the International Law Commission on the work of its seventy-second session (*continued*) (A/76/10)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V and X of the report of the International Law Commission on the work of its seventy-second session (A/76/10).

2. **Mr. Geng** Shuang (China) said that, against the backdrop of a rapidly evolving global governance system, the Commission should play an even greater role in upholding international law and safeguarding the basic norms of international relations enshrined in the Charter of the United Nations. To that end, it should enhance its communication with Member States and take their views into account in its work, so that its products would duly reflect State practice. The selection of topics for consideration by the Commission should be based on the urgent needs of the international community and explicit requests from Member States. Otherwise, it would be difficult for its draft texts to be universally accepted. The Commission should also optimize its working methods to ensure that its products reflected the diversity of the world and different legal traditions. To the extent possible, its work should be consensus-based. His Government had nominated Huang Huikang for re-election to the Commission for the quinquennium 2023–2028 and hoped that Member States would support his candidacy.

3. With respect to the topic "Protection of the atmosphere", certain elements of the draft guidelines, such as the third preambular paragraph, draft guideline 3 (Obligation to protect the atmosphere) and draft guideline 4 (Environmental impact assessment) could be wrongly understood as establishing new rules. In that regard, any interpretation of the text should be in line with the 2013 understanding regarding the scope of the Commission's work on the topic, as reflected in the eighth preambular paragraph. It should be borne in mind that the protection of the atmosphere was a relatively new subject of study in international law and that the relevant rules were still being developed.

4. Turning to the topic of provisional application of treaties, he said that his delegation was pleased that the draft Guide to Provisional Application of Treaties reflected, to some extent, the comments made by States and international organizations. In accordance with customary international law, a treaty could be provisionally applied only with the consent of the States concerned.

5. With regard to Chapter X of the report, concerning other decisions and conclusions of the Commission, he said that the Commission's work on the topic "Subsidiary means for the determination of rules of international law", which was now on the long-term programme of work, should be rigorous, prudent, inclusive and balanced. It should be focused on the consideration of Article 38 of the Statute of the International Court of Justice and a wide range of State practice.

6. His delegation commended the Commission for finding innovative ways to continue its work during the coronavirus disease (COVID-19) pandemic and encouraged it to continue to consider the realities on the ground and explore ways to further improve the format of its meetings.

7. **Mr. Visek** (United States of America), referring to the topic "Provisional application of treaties", said that his delegation generally supported the draft Guide to Provisional Application of Treaties, which helpfully confirmed the basic features of the legal regime for provisional application. However, some of the guidelines and commentaries thereto were neither necessary nor supported by international law or State practice, which could give rise to confusion.

8. With regard to draft guideline 4 (Form of agreement), his delegation appreciated the Commission's efforts to address its concerns regarding the potential for confusion about the use of means other than a treaty to establish an agreement to provisional application. In an earlier version of the draft guideline, it had been stated that such agreements could take the form of a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that was accepted by the other States or international organizations concerned, with no mention of the fact that the resolution or declaration should reflect the agreement of the States or international organizations concerned. That formulation had given undue consideration to the forum in which an agreement was reached or the adoption of a resolution, whereas the focus should be on the consent of the parties. A resolution adopted at an international conference or in a similar forum that did not reflect the consent of all States assuming rights and obligations pursuant to provisional application, such as a text adopted without the participation or consent of all concerned States, would not establish a valid agreement for a treaty to be applied provisionally in respect of the States that had not participated or consented. His delegation therefore welcomed the clarification in the commentary to the draft guideline that the States or international

organizations concerned must consent to provisional application. However, with regard to declarations by States or international organizations that were accepted by other States or concerned international organizations, his delegation reiterated its view that the Commission, in the commentary, identified little support in State practice for the view that such declarations could serve as a basis for provisional application. Moreover, the Commission failed to establish persuasively in the commentary that such declarations were most appropriately understood as involving provisional application rather than the law concerning unilateral declarations by States. Such declarations were described in the commentary as an "exceptional possibility", which underscored the ambiguity of State practice on that point. His delegation therefore continued to question the soundness of that element of the draft guideline.

9. The draft Guide was also lacking evidence of State practice in other areas. Of particular note was the indication in the commentary to draft guideline 7 (Reservations) that there was no significant practice concerning reservations relating to provisional application. Despite such concerns, and others stated previously, his delegation considered that, on balance, the draft Guide could serve as a useful source of reference for States and international organizations in the negotiation and conclusion of provisions on provisional application.

10. As for the topic "Protection of the atmosphere", his delegation remained concerned that, at a time when clarity and action on the protection of the atmosphere were vitally important, the draft guidelines could actually inhibit progress by creating confusion about the content of international environmental law. Of particular concern were the draft guidelines that seemed to suggest the existence of new and unfounded international legal obligations, such as draft guidelines 3 (Obligation to protect the atmosphere), 4 (Environmental impact assessment) and 8 (International cooperation), which all contained the assertion that "States have the obligation" to take certain actions. Since the Commission stated in its commentary that it did not desire to impose on current treaty regimes rules or principles not already contained therein, it was not clear what purpose such draft guidelines served, beyond reminding States to comply with their existing obligations.

11. Draft guidelines 5 (Sustainable utilization of the atmosphere), 6 (Equitable and reasonable utilization of the atmosphere), 7 (Intentional large-scale modification of the atmosphere) and 8 (International cooperation) were essentially recommendatory or hortatory in nature. There was no authoritative legal foundation for the affirmation in draft guideline 8, paragraph 1, that "States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation". Given that none of the sources referenced in the commentary to the draft guideline established such an obligation, the provision was best understood as a recommendation. Similarly, draft guidelines 5 to 7 contained assertions about what States "should" be doing with regard to certain activities. They were therefore policy recommendations and, as such, fell outside the scope of the Commission's mandate.

12. His delegation welcomed the Commission's acknowledgement that the purpose of the phrase "common concern of humankind", which appeared in the preamble to the draft guidelines, was to indicate that the protection of the atmosphere was a concern of the entire international community rather than to create rights or obligations, in particular *erga omnes* obligations.

13. Regarding other decisions and conclusions of the Commission, his delegation supported the decision to include the topic "Subsidiary means for the determination of rules of international law" in the long-term programme of work, since the Commission had already examined the other sources of international law referred to in Article 38 of the Statute of the International Court of Justice. Moreover, the Commission's input on the subject might be beneficial, given that practice relating to subsidiary means was somewhat unclear and inconsistent.

14. It was regrettable that only seven women had ever served on the Commission, and that only 4 of the 34 current members were women. His delegation was pleased that eight highly qualified women, including one from the United States, Evelyn Aswad, would run in the upcoming election, but urged the Commission to do more to correct the gender imbalance.

15. **Ms. Bhat** (India), referring to the topic "Protection of the atmosphere", said that the draft guidelines and commentaries thereto consolidated the main principles and concerns related to the protection of the atmosphere. In the text, the Commission sought to assist the international community in addressing critical questions concerning transboundary and global protection of the atmosphere, which was now known to be a limited resource and a medium for the dispersion of polluting and degrading substances. Her delegation took particular note of draft guideline 8 (International cooperation), as international cooperation was an

effective means of ensuring harmony between the different instruments and bodies dealing with the protection of the atmosphere. Paragraph 2 of the draft guideline, which provided that States should cooperate in enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation, could be implemented through measures such as capacity-building, technology transfer and the exchange of information.

16. With regard to draft guideline 9 (Interrelationship among relevant rules), her delegation considered that, since each area of international law had its own subject matter, scope and treaty regime, in-depth study was required in order to identify the relevant elements of the law common to the protection of the atmosphere and other fields of international law. The core objectives of established treaty regimes in other fields would have to be considered in order to determine whether they could be applied to the protection of the atmosphere. As a general comment, the atmosphere was a common resource that all States had a duty to protect for present and future generations, particularly those in developing and less developed countries, and those in island States that were at risk of sea-level rise.

17. Turning to the topic "Provisional application of treaties", she said that the draft Guide to Provisional Application of Treaties would serve as a comprehensive manual for States and international organizations. In countries with dualist legal systems, such as India, domestic law typically provided that provisional application was possible only if national law was already in conformity with the treaty or was brought into conformity with it. Her delegation considered that treaties should, as a rule, be applied after their entry into force and that provisional application should be regarded as an exception that was left to the discretion of States. The draft model clauses proposed by the Special Rapporteur in his sixth report (A/CN.4/738) should therefore serve only to guide States and international organizations that wished to apply certain bilateral or multilateral treaties provisionally; they should not prejudice the flexible and voluntary nature of provisional application. It would be more appropriate for provisional application to be included in treaties as a voluntary mechanism that States could choose to apply, rather than as a legal obligation that could be avoided only by opting out or by formulating a reservation.

18. **Mr. Zanini** (Italy) said that constructive dialogue and interaction between the International Law Commission and the Committee were key to the effective discharge of the General Assembly's mandate for the codification and progressive development of international law. With regard to the topic "Protection of the atmosphere", Italy had always been a strong supporter of the Commission's role in the codification and progressive development of international law, including international environmental law. Consequently, it welcomed the adoption of the draft guidelines on the protection of the atmosphere and the commentaries thereto. While the material scope of the draft guidelines had been limited by the decision taken in 2013 to exclude important principles of international environmental law, such as the polluter-pays principle, the precautionary principle and the common but differentiated responsibilities principle, the text was nevertheless a valid contribution to the advancement of international law on the protection of the atmosphere. Furthermore, while the draft guidelines themselves were intended to be a soft-law instrument, they restated important principles and norms of international environmental law and related them specifically to the protection of the atmosphere. His delegation drew attention to the statement in the preamble to the effect that the draft guidelines were not intended to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein.

19. His delegation welcomed the inclusion of the phrase "common concern of humankind" in the third preambular paragraph of the draft guidelines, as it was the legal expression most commonly used in both binding and non-binding multilateral environmental instruments, including the Paris Agreement. Since the expression pointed to a common legal interest of all States in protecting the atmosphere, draft guideline 3 (Obligation to protect the atmosphere) should be interpreted as entailing an *erga omnes* obligation. Italy supported the formulation of draft guideline 10 (Implementation), which was framed in terms of due diligence, leaving States to determine what means they would adopt to implement their international legal obligations relating to the protection of the atmosphere. His delegation also welcomed the reference to facilitative compliance procedures in draft guideline 11 (Compliance), which was in line with other modern multilateral environmental instruments, and the reference in draft guideline 12 (Dispute settlement) to the use of scientific and technical experts in the settlement of disputes.

20. As for the topic of provisional application of treaties, the draft Guide to Provisional Application of Treaties constituted a practical and flexible instrument that would facilitate the work of legal practitioners. A balance was struck in the text between the need to preserve the rules set out in 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 and the need for clarity with regard to certain legal issues arising from the increasing use of provisional application. At the same time, Italy, as a country in which the entry into force of international treaties was regulated by the Constitution, welcomed the reassurance in the general commentary that it was in no way claimed that the draft Guide created any kind of presumption in favour of resorting to the provisional application of treaties, and that provisional application was neither a substitute for securing entry into force of treaties, which remained the natural vocation of treaties, nor a means of bypassing domestic procedures.

21. His delegation was pleased that draft guideline 4 (Form of agreement) did not limit the forms in which States and international organizations could agree to adopt a treaty provisionally, while still highlighting that resolutions and decisions adopted by international organizations and intergovernmental conferences could be used for that purpose. In the light of the distinction drawn in the commentary to draft guideline 6 (Legal effect) between legal obligations deriving from an agreement to provisionally apply a treaty and legal obligations deriving from the provisionally applied treaty itself, reference should have been made in draft guideline 8 (Responsibility for breach) to the two kinds of obligation that could be breached. His delegation supported the formulation of draft guideline 7 (Reservations), since there was very little practice concerning reservations to provisionally applied treaties. His delegation also welcomed the Commission's decision to provide examples of provisions from existing treaties in the annex to the draft guidelines. While those treaties did not have any binding effects on non-parties, they provided useful insight into past and current practice.

22. With respect to other decisions and conclusions of the Commission, his delegation considered that the topic of subsidiary means for the determination of rules of international law fulfilled the criteria established by the Commission in 1998 for the selection of new topics. It was also relevant to the Commission's broader work on the sources of international law, which had gained momentum over the past decade. Given the growing judicialization of international law and the increasing production of academic literature, it would be very useful for States to have detailed guidance from the Commission on how the subsidiary means for determining rules of international law should be applied. Italy therefore supported the consideration of the topic by the Commission.

23. His delegation considered that the Commission had a key role to play in advancing the rule of law at the international level and promoting the progressive development and codification of international law. Development of and compliance with international law were fundamental tools for the implementation of the 2030 Agenda for Sustainable Development. Italy would continue to advocate an effective and efficient Commission that was able to assist States and international organizations in addressing global challenges such as those related to security, climate and humanitarian crises. His delegation hoped that the lessons learned during the pandemic would be used to optimize the working methods of the Commission.

24. **Mr. Bandeira Galindo** (Brazil) said that the Commission should continue to enhance its working methods, with a particular focus on building a fluid and constructive relationship with the Committee. In that connection, the General Assembly could provide more guidance on strategic and policy priorities regarding the codification and progressive development of international law, including on the identification of new topics for consideration by the Commission. At the same time, since it was challenging for some countries, especially developing countries, to draft written comments on the Commission's work, the Commission could contribute to increased diversity of inputs when studying a topic if it prepared questionnaires that required simple and direct answers on State practice. The Commission should also meet frequently in New York, to provide more opportunities for interaction with representatives of Member States. It would also be useful if the Commission's Working Group on methods of work could clarify the taxonomy for the various outcomes of its discussions, whether articles, principles, conclusions or guidelines, including the criteria it applied when deciding on the type of output.

25. With regard to the topic of protection of the atmosphere, the draft guidelines were a useful starting point for discussion, but draft guidelines 10 (Implementation), 11 (Compliance) and 12 (Dispute settlement) might require further review, given that the text was intended to be non-binding. It would also be important to ensure that the references to principles, including the precautionary principle, in draft guideline 2 (Scope) were consistent with the Rio Declaration on Environment and Development.

26. Turning to the topic "Provisional application of treaties", he said that while the draft Guide to Provisional Application of Treaties shed light on a practice that was important to some States, Brazil did not practise provisional application, which – as highlighted in the general commentary to the draft

Guide – was a voluntary mechanism. The Constitution of Brazil did not permit provisional application, and Brazil had accordingly formulated a reservation to article 25 of the Vienna Convention on the Law of Treaties. No part of the Commission's text, including draft guideline 10 (Internal law of States, rules of international organizations and observance of provisionally applied treaties) was applicable to Brazil. His country's objection did not affect its obligation under article 18 of the Vienna Convention not to defeat the object and purpose of a treaty prior to its entry into force and was without prejudice to article 24, paragraph 4, of the Convention, which provided that matters arising necessarily before the entry into force of the treaty applied from the time of the adoption of its text. Brazil had not formulated reservations to those articles, and they were not directly reflected in the draft Guide. While Brazil could not itself apply a treaty prior to parliamentary approval and ratification, it did not object to other States provisionally applying bilateral or multilateral treaties, including in respect of Brazil.

27. As for the other decisions and conclusions of the Commission, as discussed in Chapter X of the Commission's report, his delegation noted with interest the decision to include the topic "Subsidiary means for the determination of rules of international law" in its long-term programme of work. His delegation hoped that, should the Commission take up the topic, it would enhance the clarity and predictability of international law by providing guidance on the interpretation of Article 38, paragraph (1) (d), of the Statute of the International Court of Justice, while giving due regard to all regions of the world in its work. His delegation hoped that the Commission would soon take up the topic of extraterritorial jurisdiction, which was already on the long-term programme of work.

28. **Ms. Orosan** (Romania) said that her delegation would be interested to know what topics the Commission was considering moving to its current programme of work, given the recent completion of work on two topics. Her delegation supported consideration of the topics "Prevention and repression of piracy and armed robbery at sea", "Universal criminal jurisdiction" and "The settlement of international disputes to which international organizations are parties". With regard to Chapter X of the report, there was some merit in the Commission's decision to include the topic "Subsidiary means for the determination of rules of international law" in the long-term programme of work; however, other topics should be taken up first.

29. With regard to the topic of protection of the atmosphere, the draft guidelines reflected in a systematized manner a growing set of norms that could be used to address the profound impact of atmospheric pollution and atmospheric degradation. Her delegation wished to highlight that the draft guidelines were without prejudice to the polluter-pays principle, the precautionary principle and the common but differentiated responsibilities principle and did not affect the status of airspace under international law or questions related to outer space. The draft guidelines were rather progressive in character; for example, they contained a reference to the interests of future generations, including in terms of human rights protection and intergenerational equity.

30. The obligation of States to prevent significant adverse effects arising from transboundary atmospheric pollution was well established in customary international law, as confirmed in the Commission's articles on prevention of transboundary harm from hazardous activities and in the case law of international courts and tribunals; however, the question of whether a similar obligation existed in relation to global atmospheric degradation remained unsettled. Her delegation was pleased that the draft guidelines and the commentaries thereto reflected the responsibility of States to exercise due diligence to ensure that the activities of individuals and private industries within their jurisdiction or control did not have significant adverse effects on the atmosphere. It also welcomed the fact that the draft guidelines stipulated that States had the obligation to cooperate, as appropriate, to protect the atmosphere from atmospheric pollution and degradation. That obligation was an integral part of the general obligation to protect the atmosphere, since the atmosphere was a resource that could not be separated by national boundaries. The Commission had sought to avoid the fragmentation of international law relating to the protection of the atmosphere by taking into account the provisions of relevant instruments in fields such as international trade law, international human rights law and the law of the sea. All in all, the draft guidelines would greatly contribute to strengthening international action to protect the atmosphere.

31. Turning to the topic of provisional application of treaties, she said that the draft Guide to Provisional Application of Treaties was a useful practical tool for States and international organizations. The decision to split subparagraph (b) of draft guideline 4 (Form of agreement) into a chapeau and two subparagraphs made clearer the distinction between the two different means or arrangements, besides a separate treaty, through which provisional application could be agreed. The explanation of the broader understanding of the term "intergovernmental conference" in the commentary to the draft guideline was equally useful. Her delegation

supported the decision to remove the phrase "as if the treaty were in force" from draft guideline 6 (Legal effect). Not only had its inclusion been controversial, but it might implicitly have encouraged recourse to provisional application in lieu of the completion of the national legal procedures necessary for the entry into force of a treaty. Her delegation was pleased that draft guideline 9 (Termination) had been amended to take into account other grounds for termination of provisional application besides the intention of a State or international organization that was provisionally applying the treaty not to become a party to the treaty. While her delegation had previously supported the development of model clauses on provisional application, it understood the rationale for limiting the content of the annex to the draft Guide to examples of provisions in existing instruments and did not oppose that course of action. Her delegation commended the Commission for the completion of its valuable work on the topic and supported its recommendation that the General Assembly request the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling the practice of States and international organizations in the provisional application of treaties, together with other materials relevant to the topic.

32. **Ms. Flores Soto** (El Salvador), referring to the topic "Protection of the atmosphere", said that the draft guidelines would make a valuable contribution to international law at a time when it was crucial for the law to address emerging challenges. Her delegation supported the Commission's recommendation to the General Assembly concerning the draft guidelines. The obligation of the State to protect natural resources was enshrined in her country's Constitution. El Salvador strongly supported the harmonization of the environmental obligations of various actors and, accordingly, had recently ratified the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer. The draft guidelines complemented the existing legal framework governing the protection of the atmosphere by providing guidance for the development of international and national normative instruments and for other relevant negotiation processes, without prejudice to the substance of such instruments or processes. Her delegation was pleased that the text included guidance on how States could engage in international cooperation, in particular through the enhancement of scientific and technical knowledge. Certain parts of the text could have been further clarified, however. In draft guideline 2 (Scope), it would have been appropriate to reflect the complementary nature of the draft guidelines, alongside the saving clauses, and in paragraph 2 of draft guideline 5 (Sustainable utilization of the atmosphere), it would have been preferable to include a reference to social development, since it was one of the pillars of sustainable development.

33. With regard to the topic "Provisional application of treaties", her delegation supported the Commission's recommendation to the General Assembly, including that it request the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling the practice of States and international organizations in the provisional application of treaties, to assist in the interpretation and application of the draft Guide to Provisional Application of Treaties. The draft Guide would be particularly useful for countries such as El Salvador that practised provisional application. The Commission's approach of taking its work on the law of treaties as a starting point, which her delegation had supported, had been successful.

34. While the draft Guide fulfilled the purpose of contributing to the progressive development of international law on provisional application, her delegation wished to reiterate that at the end of the phrase "or if in some other manner it has been so agreed" in draft guideline 3 (General rule), it would be helpful to more clearly establish the normative connection between that draft guideline and draft guideline 4 (Form of agreement). Furthermore, the Commission should explicitly address, in the commentary to draft guideline 4, the role of the depositary of a treaty in relation to an instrument containing an agreement on provisional application agreed through the "other means or arrangements" referred to in the draft guideline.

35. Her delegation welcomed the reference to article 19 of the Vienna Convention on the Law of Treaties in the commentary to draft guideline 7 (Reservations). However, in order to bring the draft guideline into line with guideline 2.1.7 of the Guide to Practice on Reservations to Treaties, the Commission should also indicate the possible implications of addressing a reservation to the depositary of the treaty. In that regard, it should be explicitly stated that if a treaty expressly prohibited reservations, that prohibition should also be understood to apply to the provisional application of the treaty. In that connection, the depositary would be able to conduct a legal assessment to determine whether a declaration made by a party to a treaty was a reservation to provisional application and notify the other parties to the treaty accordingly.

36. With regard to the other decisions and conclusions of the Commission, referred to in Chapter X of the report, El Salvador welcomed the decision to constitute the Planning Group to examine the programme,

procedures and working methods of the Commission. The Group's work would be crucial in enhancing the Commission's working methods, which had had to be adapted in response to the pandemic.

37. **Mr. Klanduch** (Slovakia), referring to the topic "Provisional application of treaties", said that the Commission's recommended course of action with regard to the draft Guide to Provisional Application of Treaties would enable the widest possible dissemination of the text, provide support to practitioners and contribute to the further harmonization of practice. The main value of the draft Guide lay in its explicit enunciation of rules and understandings that were only implied in article 25 of the Vienna Convention on the Law of Treaties.

38. With regard to draft guidelines 3 and 4, which both covered means of agreeing to the provisional application of a treaty, his delegation reiterated that the consent of a State to provisional application must be explicit, meaning that in order for an act adopted by an international organization or at an intergovernmental conference to constitute a legal basis for provisional application, its adoption must unequivocally reflect the consent of the State concerned.

39. His delegation understood draft guideline 9 (Termination) to contain two forms of termination: through the treaty's entry into force and through notification by a State of its intention not to become a party to the treaty. Since paragraph 2 of the draft guideline did not address the temporal aspect of such notification, it was unclear whether the notifying State could determine unilaterally when provisional application terminated. Moreover, the decision of a State to terminate the provisional application of a treaty should not necessarily be regarded as notification by that State of its intention not to become a party to the treaty, as paragraph 2 presupposed.

40. Turning to the topic "Protection of the atmosphere", he said that his delegation had previously expressed a number of concerns about the general approach taken by the Commission, some of which had not been fully addressed in the draft guidelines. The Commission had chosen to take a highly abstract approach, stating obvious and often basic general rules or principles of international law that were not specific to the protection of the atmosphere, while a number of difficult questions that would have benefited from elucidation had been excluded from the scope of the text, under draft guideline 2, paragraph 2.

41. Despite its concerns, his delegation would not oppose the General Assembly taking action on the draft guidelines, as recommended in the Commission's report. Although the draft guidelines would have no normative value, they could potentially serve as model clauses or provisions for use in the future negotiation of instruments relating to the protection of the atmosphere. Nevertheless, his delegation maintained that the topic had been unsuited for consideration by the Commission and should not have been taken up in the first place. While the protection of the atmosphere was a very relevant issue, the Commission did not have the tools to address it properly. To prevent such a situation from recurring, the criteria established by the Commission for the selection of topics should be applied strictly.

42. As for other decisions and conclusions of the Commission, Slovakia welcomed the inclusion of the topic "Subsidiary means for the determination of rules of international law" in the long-term programme of work, as consideration of the topic would complement the Commission's work on the rules pertaining to the sources of international law. Bearing in mind the complexity of the matter and the Commission's current workload, the topic should be included in the programme of work only after consideration of the topic "General principles of law" had been concluded. His delegation advocated restraint with regard to the inclusion of new topics in the programme of work, given that some topics were contentious. A more streamlined programme of work would facilitate in-depth discussion between Member States and the Commission and promote progress on the topics currently under consideration.

43. **Mr. Arrocha Olabuenaga** (Mexico), referring to the topic "Protection of the atmosphere", said that the draft guidelines set out a number of important concepts, such as protection of the interests of future generations through the long-term conservation of the quality of the atmosphere. They also covered the need for State conduct with regard to the protection of the atmosphere to be based on general principles such as the sustainable, equitable and reasonable utilization of the atmosphere, the need to undertake environmental impact assessments, and the obligation to engage in international cooperation to avoid and, to the extent possible, reverse the damage caused by atmospheric pollution and degradation. Moreover, it was made clear in the draft guidelines that atmospheric resources should be utilized in accordance with the principle of the sovereign equality of States and the understanding that all States had the right to benefit from the atmosphere and an obligation to protect it. The text would serve to guide discussions on the protection of the atmosphere and the adoption of relevant measures at the national, regional and international levels.

44. As for the topic "Provisional application of treaties", the draft Guide to Provisional Application of

Treaties would be an extremely useful tool for States and international organizations, as it provided clarification of the scope and legal effects of provisional application and thus shed light on a matter that had previously been little studied and was often misunderstood. While it would have been preferable for the annex to include a set of model clauses, in line with the initial intention of the Special Rapporteur, the examples of provisions from existing instruments were of illustrative value, and both their merits and their shortcomings would be instructive. Provisional application was an important aspect of treaty law, and the international community would benefit enormously from the draft Guide, which would help to establish clear rules in that regard. His delegation supported the Commission's recommendation concerning the preparation of a volume of the *United Nations Legislative Series* on practice in the provisional application of treaties.

45. With respect to other decisions and conclusions of the Commission, as contained in Chapter X of the report, his delegation considered that, following the recent conclusion of the work on two topics, the timing was right to include the topic of universal criminal jurisdiction in the Commission's current programme of work. Consideration of the topic by the Commission would inform the Committee's deliberations and prevent the topic from remaining neglected on the long-term programme of work, as had happened with a number of other topics that had eventually been forgotten after remaining on the long-term programme of work for decades. Lastly, Mexico supported the suggestion that the Commission meet more frequently in New York, in order to strengthen its relationship with the Committee, on the understanding that it would remain based in Geneva.

46. **Ms. Nir-Tal** (Israel), referring to the topic "Protection of the atmosphere", said that her Government's commitment to the protection of the atmosphere was expressed in agreements, arrangements and treaties to which it was a party, and also in its domestic law and policies. Israel welcomed the adoption of the draft guidelines on the topic, despite the fact that a number of its concerns had not been adequately addressed. Existing legal frameworks relating to the protection of the atmosphere already included suitable mechanisms for addressing the issues of compliance and dispute settlement. The establishment of additional mechanisms in draft guidelines 11 and 12 could, therefore, constitute unnecessary duplication and lead to undesirable fragmentation of international law. It was also inconsistent with the 2013 understanding, pursuant to which the outcome of the work on the topic was to be draft guidelines that did not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. Furthermore, the binding wording that appeared in several of the draft guidelines was inconsistent with the non-binding nature of the text, and her delegation was concerned about the effect that such wording might have on political negotiations regarding the protection of the atmosphere.

47. **Mr. Devillaine Gomez** (Chile), referring to the topic of protection of the atmosphere, said that, as noted in the preamble to the draft guidelines, the degradation of the atmosphere affected in particular low-lying coastal areas and small island developing States. His delegation attached great importance to draft guidelines 8, 9 and 10, in which the Commission made clear that States and international organizations had the obligation to cooperate in a flexible manner to protect the atmosphere from atmospheric pollution and atmospheric degradation. His delegation welcomed the detailed explanation in the commentary to draft guideline 8 (International cooperation) that the obligation of States to cooperate arose from the fact that atmospheric pollution and atmospheric degradation were a common concern of humankind, as had been established in numerous agreements on the subject.

48. His delegation agreed with the emphasis placed in draft guideline 9 (Interrelationship among relevant rules) on the link between the rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including the rules of international trade and investment law, of the law of the sea and of international human rights law, and the need to ensure compatibility among the different sets of rules without establishing any hierarchy among them. The aim was to combine efforts towards a common objective and ensure intergenerational equity. To that end, his delegation noted the exhortation that States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.

49. His delegation recognized the interrelationship between draft guideline 10 (Implementation) and draft guideline 11 (Compliance), which provided for, respectively, national implementation of States' obligations and compliance with their obligations at the international level. As to draft guideline 12 (Dispute settlement), it was his delegation's understanding that, in accordance with the general rules of dispute settlement, all disputes, including those relating to the protection of the atmosphere, should be settled by peaceful means. The Special Rapporteur appeared to indicate that peaceful means were particularly

applicable to the draft guidelines; however, that assertion should be treated with caution, because it would depend on how the legal nature, meaning and scope of the draft guidelines could be interpreted.

50. Turning to the topic of provisional application of treaties, he said that provisional application should never be understood as a disincentive to the full entry into force of a treaty or as a means of bypassing domestic requirements. His delegation agreed that the draft Guide to Provisional Application of Treaties was not legally binding in nature; its purpose was rather to provide assistance to States and international organizations concerning the practice of provisional application, without being overly prescriptive, as that would run counter to the necessarily flexible nature of the practice.

51. In draft guideline 3 (General rule), the Commission reiterated the essentially voluntary nature of provisional application of a treaty, which was in line with article 25 of the Vienna Convention on the Law of Treaties. In paragraph (6) of the commentary to the draft guideline, the Commission explained that the phrase "negotiating States", used in article 25, paragraph 1 (b), of the Vienna Convention, was not used in the draft guideline so as to reflect the fact that States and international organizations that had not negotiated the treaty might also apply it provisionally. His delegation believed, nonetheless, that the provisional application of a treaty should usually be determined by the negotiating States.

52. With regard to subparagraph (b) of draft guideline 4 (Form of agreement), in which it was indicated that provisional application could be agreed by means of a resolution, decision or other act adopted by an international organization or at an intergovernmental conference reflecting the agreement of the States concerned, it should be made clear that, even if such resolutions, decisions or acts were adopted in accordance with the rules of the international organization or intergovernmental conference in question, the agreement of States must still be established. A resolution was not of the same nature as an agreement between States to provisionally apply a treaty. With regard to draft guideline 5 (Commencement), his delegation agreed with paragraph (5) of the commentary, in which it was stated that the draft guideline was without prejudice to article 24, paragraph 4, 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, in accordance with which certain provisions regarding matters arising before the entry into force of a treaty applied from the time of the adoption of its text.

53. With regard to draft guideline 6 (Legal effect), his delegation agreed with the Special Rapporteur that the aim of provisional application was not to lessen the legal effect of the provision or provisions being applied. The formulation initially proposed by the Special Rapporteur, which stated that provisional application produced a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force, had elicited concerns on the part of some States that the draft guideline could be understood as equating provisional application of a treaty with its entry into force. In order to address that concern, the Commission had deleted the phrase "as if the treaty were in force" in the version of the draft guideline adopted on second reading, while making clear the fully binding nature of the provisions being provisionally applied. Provisional application was not an indication of the relative legal value of provisions being provisionally applied or of provisions whose application might be considered discretional. The provisional application of a treaty or a part thereof should be performed in good faith, in accordance with the principle of *pacta sunt servanda* set out in article 26 of the 1969 Vienna Convention. That understanding was reinforced in draft guideline 8 (Responsibility for breach). The same reasoning applied with regard to article 27 of the Convention, which provided that internal law could not be invoked to justify failure to perform a treaty. That article should be understood as having the same meaning and scope for treaties being applied provisionally as for treaties in force.

54. Provisional application should not under any circumstances serve as a new form of entry into force of treaties or be used as a substitute for or in preference to entry into force. Provisional application should also not be seen as a means of circumventing requirements under internal law relating to the expression of consent, as could be seen from an analysis of draft guideline 12 (Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations).

55. The position expressed in draft guideline 8, that the breach of an obligation arising under a treaty or a part of a treaty that was applied provisionally entailed international responsibility in accordance with the applicable rules of international law, was fully consistent with the rest of the draft guidelines, in particular draft guideline 6.

56. According to draft guideline 9, provisional application of a treaty terminated with the entry into force of the treaty. In line with article 25, paragraph 2,

of the Vienna Convention, provisional application could also be terminated in respect of a State if that State had notified the other States between which the treaty was being applied provisionally of its intention not to become a party to the treaty. A State should also have the right to terminate provisional application on other grounds, without necessarily having the intention not to become a party to the treaty once it entered into force, as indicated in paragraph 3 of the draft guideline. Where a multilateral treaty entered into force but some States had not yet expressed their consent to be bound by it, such States should have the right to continue to apply the treaty provisionally until it was fully in force for them.

57. Draft guideline 10 (Internal law of States, rules of international organizations and observance of provisionally applied treaties) reaffirmed the concepts underlying draft guidelines 6 and 8 and provided for the application to international organizations of the principle set out in article 27 of the Vienna Convention.

58. Draft guideline 11, which covered provisions of internal law of States regarding competence to agree on the provisional application of treaties, was a response to article 46 of the Vienna Convention. Lastly, draft guideline 12 was an especially important safeguard for States whose legal systems did not allow for provisional application: such States could invoke their internal law as a limitation on provisional application, in contrast to the situation referred to in draft guideline 10. Provisional application was thus conditioned on the internal rules of each State or international organization.

59. *Ms. Krutulytė (Lithuania), Vice-Chair, took the Chair.*

60. **Ms. Schneider Rittener** (Switzerland), referring to the topic of provisional application of treaties, said that her delegation supported the Commission's recommendation that the General Assembly take note of the Guide to Provisional Application of Treaties and encourage its widest possible dissemination. Provisional application could be a useful tool, particularly when a treaty needed to be implemented quickly, but it presented a challenge in those countries where treaties had to be approved by the legislature. Under Swiss law, three conditions had to be met for the Government to consent to the provisional application of a treaty requiring parliamentary approval: essential national interests must be at stake, there must be a particular urgency to apply the treaty, and the relevant parliamentary committees must be consulted and not oppose the provisional application of the treaty. If the Government did not submit the treaty for parliamentary approval within six months following the commencement of provisional application, the provisional application of the treaty would cease. The Commission had rightly emphasized in draft guideline 10 that the provisions of internal law could not be invoked to justify a breach of a treaty being applied provisionally. That draft guideline, together with the rest of the draft Guide, would help to ensure legal certainty in international relations. The draft Guide as a whole provided clear rules that supplemented article 25 of the Vienna Convention on the Law of Treaties.

61. **Ms. Mesarek** (Croatia), referring to the topic "Provisional application of treaties", said that her Government welcomed the adoption of the draft Guide to Provisional Application of Treaties and supported the Commission's recommendation that the General Assembly encourage its widest possible dissemination.

62. Turning to the topic of succession of States in respect of State responsibility, she noted that Croatia had been a victim of serious crimes committed during and after the process of dissolution of its predecessor State. As a result, the process of succession had not yet been completed. Croatia agreed with the Special Rapporteur that it was important to ensure consistency, both in terminology and in substance, with the Commission's previous work, in particular the articles on responsibility of States for internationally wrongful acts, and that neither the clean-slate principle nor the principle of automatic succession were acceptable as general rules. Her delegation supported the plans for future work on the topic and reiterated its view that account should be taken of situations in which a part or parts of a predecessor State that became a successor State could bear responsibility for internationally wrongful acts, not only towards third States, but also towards other successor States that emerged from the predecessor State. Paragraph 2 of draft article 17 (Compensation) was an excellent starting point for addressing that important issue in situations related to the dissolution of a State that occurred in a non-peaceful manner.

63. With regard to the topic of general principles of law, her delegation agreed with the Commission's general assessment that the category of general rules formed within the international legal system remained controversial and must be further examined. Croatia supported the Special Rapporteur's plan to address in his subsequent reports the question of the functions of general principles of law and their relationship to other sources of international law. There should be a clear distinction between general principles of law and other sources of international law, especially customary law. It was important to clearly determine the elements necessary for the recognition of general principles of

law; they were not currently clear from draft conclusion 7 (Identification of general principles of law formed within the international legal system), as contained in the Special Rapporteur's second report (A/CN.4/741 and A/CN.4/741/Corr.1). Furthermore, the criteria for the determination and recognition of general principles of law were not objective, as they should be. Bearing in mind the importance of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, clarification was also needed with regard to the reference to jus cogens in paragraph (4) of the commentary to draft conclusion 2 (Recognition) as provisionally adopted by the Commission. Due regard should also be paid to terminological consistency in the draft conclusions. In draft conclusion 4 (Identification of general principles of law derived from national legal systems) as provisionally adopted by the Commission, the phrase "the principal legal systems" should be used instead of "the various legal systems". Lastly, that draft conclusion and draft conclusion 5 were similar in title and content and should therefore be further examined.

64. Turning to the topic of sea-level rise, she noted that, owing to its coastal geography, Croatia was not immune to the threats posed by sea-level rise and therefore appreciated the work of the Commission and the Study Group on the topic. Croatia supported the general position that the integrity of the United Nations Convention on the Law of the Sea needed to be preserved. Furthermore, for the purposes of clarity and consistency, the relevant sources of law, as listed in paragraph 294 of the Commission's report, should be in line with Article 38 of the Statute of the International Court of Justice, including from the point of view of terminology; her delegation had reservations regarding the inclusion of navigational charts. The Commission and the Study Group should take into account as far as possible the work done by the International Law Association's Committee on International Law and Sea Level Rise.

65. **Ms. Silek** (Hungary), referring to the upcoming election of new members of the Commission, said that it was of the utmost importance that States nominate and elect more female candidates to the Commission in order to come closer to achieving gender parity. Hungary, for its part, had put forward a female candidate, Réka Varga, for election.

66. Turning to the topic of protection of the atmosphere, she said that the draft guidelines reflected the complexity of the issues at hand and the need for a systematic approach in respect of legal documents. International treaties and complementary instruments, such as the draft guidelines, were crucial for joint action. In that context, she noted that Hungary had been one of the first countries in the world to ratify the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer and the seventh country to codify in law the objective of achieving climate neutrality at the national level by 2050 with the recent adoption of a national clean development strategy.

67. **Mr. Eick** (Germany), referring to the topic "Protection of the atmosphere", said that his delegation welcomed the designation of atmospheric pollution and degradation as a common concern of humankind in the preamble to the draft guidelines. In the commentary to draft guideline 3 (Obligation to protect the atmosphere), the Commission stated that the draft guideline was without prejudice to whether or not the obligation to protect the atmosphere was an *erga omnes* obligation in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts. Germany acknowledged that there were different views on the *erga omnes* character of the obligation but remained of the view that, because of the unity of the global atmosphere, the obligation to protect the atmosphere was indeed an obligation *erga omnes*.

68. Germany welcomed draft guideline 7, in which the Commission emphasized that activities aimed at intentional large-scale modification of the atmosphere should only be conducted with prudence and caution and that an environmental impact assessment might be necessary in connection with such activities. In certain cases, peaceful uses of nuclear energy might lead to significant deleterious effects that extended beyond the State of origin and that were of such a nature as to endanger human life and health and the Earth's natural environment; they would, consequently, fall under the definition of atmospheric pollution set out in draft guideline 1. With regard to such cases, the statement in the commentary to the draft guideline that "the reference to radioactivity as energy is without prejudice to peaceful uses of nuclear energy in relation to climate change in particular" should not be interpreted as differentiating the peaceful use of nuclear energy from other peaceful activities that could lead to atmospheric pollution. Germany supported the Commission's recommendation that the General Assembly take note of the draft preamble and guidelines in a resolution, ensure their widest possible dissemination and commend them to the attention of States, international organizations and all who might be called upon to deal with the subject.

69. Turning to the topic of provisional application of treaties, he said that the draft Guide to Provisional Application of Treaties was a comprehensive manual on the practice of States and international organizations that would help to foster greater legal certainty. The annex containing examples of provisions on provisional

application would be of particular use during treaty negotiations. The Commission was to be applauded for communicating about its work in a transparent and inclusive manner and for the serious consideration it had given to the feedback provided, including by his own Government.

70. Article 25 of the 1969 Vienna Convention on the Law of Treaties and of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was the basic rule governing the provisional application of treaties; its central importance was recognized in the commentary to draft guideline 2 (Purpose). Although the article constituted a rule of customary law and provided clear instructions on the provisional application of treaties, it was silent on several important matters. For example, contracting parties were free to decide on the scope and conditions of provisional application. The standards developed by the Commission would therefore serve as a valuable resource for contracting parties. A provisional application clause should not be routinely included in every treaty, however. The primary reason for provisional application of a treaty should be the urgent need to regulate a certain situation at the international level; such situations should be carefully assessed, along with any limits emanating from national law. In countries with a dualist legal system, of which Germany was one, the provisional application of a treaty was possible only if national law was already in conformity with the treaty. Furthermore, the principles of *pacta sunt servanda* and State responsibility applied to provisionally applied treaties just as they did to treaties that had entered into force. According to the Basic Law of Germany, general rules of international law were an integral part of federal law. Germany therefore supported the provisional application of treaties because it usually helped to build confidence between the contracting parties, created an incentive to ratify the treaty and enabled the parties to take preparatory measures, thereby strengthening international relations.

71. As a State member of the European Union, Germany wished to underline the importance of further clarifying, through treaty practice and jurisprudence, the interaction of international and domestic law, especially in the context of so-called mixed agreements concluded between the European Union and its member States, of the one part, and a third party, of the other part. Such agreements covered both competencies exclusive to the European Union and competencies exclusive to each individual member State. In that connection, his delegation noted that the Commission had categorized mixed agreements as bilateral treaties, at least for the purposes of the annex to the draft Guide. Given the increasing importance of other subjects of international law besides States, in particular international organizations, the issue of provisional application of treaties had become more complex. Germany therefore welcomed the Commission's efforts to address in the draft Guide the special issues that arose when agreements were concluded between States and international organizations or between international organizations.

72. Germany would welcome further guidance from the Commission on the provisional application of mixed agreements, to which it had not given detailed consideration. Free trade agreements in particular tended to be applied provisionally. In that area, legislative power rested partially with the international organization in question, such as the European Union, and partially with its member States. Although a State could not invoke the provisions of its internal law as justification for its failure to perform obligations arising under provisional application of those parts of mixed agreements for which the European Union or another supranational organization had exclusive competence and authority, conflicts could nonetheless arise, undermining trust among the contracting parties and the will to provisionally apply the treaty in question. The issue was of great importance to Germany because mixed agreements could modify the residual character of article 25 of the 1969 Vienna Convention as the default rule by removing the provisional application tool from the hands of individual States.

73. With regard to other decisions and conclusions of the Commission, Germany supported the Commission's decision to include the topic "Subsidiary means for the determination of rules of international law" in its long-term programme of work and shared the view that work on the topic would complement the Commission's seminal work on the sources of international law and their identification. It would also contribute to the understanding of the functioning of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice and its interplay with paragraphs 1 (a), (b) and (c).

74. **Ms. Ishibashi** (Japan), referring to the concerns previously expressed by Member States regarding the Commission's heavy workload, said that her delegation expected the Commission to avoid making premature decisions regarding the inclusion of new topics in its programme of work. Japan welcomed the Commission's consideration of the topic of sea-level rise in relation to international law, which it had taken up in response to the expectations of many Member States, and hoped that

the Commission would continue to take into account fully the views of Member States when selecting topics.

75. Turning to the topic of protection of the atmosphere, she said that her delegation welcomed the acknowledgement in the Commission's work of the essential importance of the atmosphere for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems, and appreciated the characterization of atmospheric pollution and atmospheric degradation as a common concern of humankind. Recalling that the Commission's consideration of the topic had been subject to an understanding reached in 2013 regarding the scope of the work, she said that her delegation hoped that in future the Commission would carefully consider whether it was appropriate to set strict conditions for the consideration of a topic when deciding whether to include it in its programme of work. Her delegation supported the Commission's recommendation that the General Assembly ensure the widest possible dissemination of the draft preamble and guidelines on the protection of the atmosphere and commend them, together with the commentaries thereto, to the attention of States, international organizations and all who might be called upon to deal with the subject.

76. **Mr. Smolek** (Czechia), referring to the topic of protection of the atmosphere, said that a framework of legally binding instruments that covered various aspects of atmospheric degradation and established a basis for concerted action against such degradation would be an important element of the effort to protect the atmosphere. However, the draft guidelines on the topic were not sufficiently specific to provide States with any guidance that was not already provided in existing instruments or any approaches or principles that were not already applied in negotiations between States. The real challenge was to find a science-based political compromise with regard to substantive economic, social and political issues on which national priorities often diverged.

77. Draft guidelines 3, 4, 5, 6, 7 and 8 had been improved by the Commission on second reading. However, the principles referred to in those draft guidelines applied more broadly, to issues beyond those related to the protection of the atmosphere. His delegation remained of the view that paragraph 1 of draft guideline 9 (Interrelationship among relevant rules) was inaccurate, for reasons it had already provided in writing. It also agreed with the view that the draft guideline gave the wrong impression that a different regime for resolving the problem of fragmentation of international law applied in the context of protection of the atmosphere. His delegation further noted the criticism expressed by some States that the provision seemed to be an excessive and unnecessary means for ensuring harmony and integration between separate instruments and bodies concerned with protection of the atmosphere. In fact, the draft guideline covered several substantively different issues and proposed an oversimplified solution that seemed to confuse the problems of identification and interpretation of the rules of international law and made no distinction between the rules of customary international law and treaty obligations. The premise that the norms of customary international law should be identified "in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts" was incorrect and inconsistent with the Commission's conclusions on identification of customary international law. Similarly, with regard to the issue of interpretation, there was a discrepancy between the Commission's commentaries to articles 26 and 27 of the draft articles on the law of treaties, which later became articles 30 and 31 of the Vienna Convention on the Law of Treaties, and the text of the draft guideline.

78. With regard to the topic of provisional application of treaties, his delegation agreed with the view that in order to ascertain more precisely the legal effects of provisional application, attention had to be paid both to the practice of States and international organizations and to the relationship between article 25 and other provisions of the Vienna Convention. In the light of divergent State practice, his delegation noted with appreciation the Special Rapporteur's efforts to take on board the comments of Governments and to identify commonalities.

79. The draft Guide to Provisional Application of Treaties reflected the flexible nature of provisional application as a voluntary mechanism and concisely covered the most pertinent issues arising from it. In draft guideline 4 (Form of agreement), the Commission made clear that, in addition to the case where the treaty itself provided for provisional application, there were four forms of agreement on the basis of which a treaty or a part of a treaty could be applied provisionally. It also made clear that the basis for provisional application of a treaty was an agreement between the States or international organizations concerned. With regard to draft guideline 6 (Legal effect), his Government agreed with the principle that unless the treaty provided otherwise or it was otherwise agreed, provisional application produced a legally binding obligation to apply the treaty or a part thereof in good faith, and appreciated the flexibility reflected in the formulation of

the draft guideline. His Government also fully supported the logical conclusion set out in draft guideline 8 that the breach of an obligation arising under a treaty that was provisionally applied entailed international responsibility. It appreciated the fact that draft guideline 7 (Reservations) was formulated as a saving clause, in view of the insufficient practice in that regard. As to draft guideline 9 (Termination), his delegation welcomed the clarification in paragraph 3 regarding the possibility of there being additional grounds for termination of provisional application, and the clarification in paragraph 4 that such termination did not affect the rights, obligations or legal situations created through provisional application prior to its termination. The latter provision contributed significantly to legal certainty and the stability of legal relations.

80. The draft Guide would provide useful guidance to States and international organizations and would contribute to the consolidation of practice with regard to the provisional application of treaties. His delegation therefore supported the Commission's recommendation that the General Assembly take note of the Guide, commend it to the attention of States and international organizations, and request the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling the practice of States and international organizations in the provisional application of treaties.

81. His delegation noted with interest the inclusion of the topic "Subsidiary means for the determination of rules of international law" in the Commission's long-term programme of work. The Commission should move a topic from the long-term programme of work to the current programme of work only after careful consideration and should explain why it was giving preference to a given topic over others on its long-term programme of work. The topic of universal criminal jurisdiction, which the Commission had included in its long-term programme of work some years before, was the subject of intense debate, was relevant for State practice and met the Commission's criteria for the selection of topics. His delegation therefore supported its inclusion in the Commission's current programme of work.

82. **Mr. Espinosa Cañizares** (Ecuador), referring to the topic of protection of the atmosphere, said that, despite the limitations placed on the scope of the Commission's work by the 2013 understanding, the draft guidelines constituted a useful legal regime for international cooperation for the protection of the atmosphere from pollution and degradation. He noted in particular draft guideline 3 (Obligation to protect the atmosphere), draft guideline 5 (Sustainable utilization of the atmosphere), draft guideline 6 (Equitable and reasonable utilization of the atmosphere) and draft guideline 7 (Intentional large-scale modification of the atmosphere). With regard to the topic of provisional application of treaties, his delegation welcomed the Commission's recommendation that the General Assembly take note of the Guide to Provisional Application of Treaties in a resolution and encourage its dissemination, and that it request the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling practice in the provisional application of treaties.

83. Turning to the topic of general principles of law, he said that the draft conclusions established that a general principle of law existed only if it was recognized as such by the international community; his delegation agreed with that view. It also agreed that to determine the existence of a general principle of law derived from national legal systems, it was necessary to ascertain the existence of a principle common to the various legal systems of the world and its transposition to the international legal system. State practice, jurisprudence and teachings could also be used to demonstrate the existence of general principles of law formed within the international legal system. That was consistent with the concept of international law as a legal system and could help to avoid situations of *non liquet*. All legal systems, whether national or regional, included general principles of law; the international legal system was no exception. There was general agreement within the Commission that the scope of the topic should consist of the legal nature and scope of general principles of law, their functions and their relationship with other sources of international law, as well as the method for identifying them. The Secretariat was to be commended for preparing a memorandum on the topic (A/CN.4/742), which was a valuable source of information on treaties, case law of inter-State arbitral tribunals, and case law of international criminal courts and tribunals of a universal character that contained references to general principles of law.

84. His delegation noted with satisfaction the Commission's decision to include the topic "Subsidiary means for the determination of rules of international law" in its long-term programme of work.

85. **Ms. Nguyen** Quyen Thi Hong (Viet Nam), referring to the topic of protection of the atmosphere, said that it was regrettable that the Commission had excluded the question of the transfer of funds and technology to developing countries, including intellectual property rights, from the scope of the draft guidelines, in line with the 2013 understanding on the basis of which the topic had been included in its programme of work. The Commission should not

confine itself to that understanding in its work on such an important subject. The exclusion of the fundamental principle of the transfer of funds and technology had no reasonable basis and could render the draft guidelines incomplete, which would be a setback for contemporary international environmental law.

86. Furthermore, according to draft guideline 11, paragraph 2 (a), facilitative procedures that could be used to achieve compliance by States with their obligations under international law included the provision of assistance to non-compliant States. Although the Commission did not elaborate in the guidelines or the commentaries thereto on the forms that such assistance could take, her delegation believed that, in view of the challenges that developing countries might face in the discharge of their obligations relating to environmental protection, assistance might include technology transfer and other forms of financial assistance and capacity-building. In addition, assistance would be more effective if it were aimed at enhancing the capacity of States to comply with their obligations before rather than after damage to the atmosphere had already occurred as a result of non-compliance. Lastly, her Government considered that the draft guidelines were non-binding and were not intended to create any legally binding obligations on Member States.

87. Turning to the topic of provisional application of treaties, she said that the draft Guide to Provisional Application of Treaties reflected the Commission's careful study of State practice and would help to address certain practical challenges in provisional application. Her delegation concurred with the view that the provisional application of treaties served several practical and useful purposes. By allowing some or all provisions of a treaty to have immediate effect prior to the completion of internal procedures or international requirements for its entry into force, provisional application could promote international cooperation among States. However, the agreement or acceptance of the States and international organizations concerned must always be secured in order to apply a treaty provisionally. In that regard, the Commission should carefully consider all comments made by States and international organizations. Lastly, although in preparing the draft Guide the Commission had not intended to create a presumption in favour of resorting to provisional application of treaties, her delegation hoped that provisional application would become a more popular practice once the draft Guide was adopted and that it would promote good faith cooperation among States.

88. **Mr. Rakovec** (Slovenia), referring to the topic of protection of the atmosphere, said that his Government supported the draft guidelines, in particular those that referred to the obligations of States, namely draft guideline 3 (Obligation to protect the atmosphere), draft guideline 4 (Environmental impact assessment) and draft guideline 8 (International cooperation).

89. Referring to the topic of provisional application of treaties, he thanked the Special Rapporteur for taking a number of his Government's suggestions on board in his sixth report (A/CN.4/738). With regard to the draft Guide to Provisional Application of Treaties, his delegation fully supported the Commission's view of the legal effect of provisional application and the flexible nature of the mechanism. However, the absence of certain issues from the draft Guide was likely to generate uncertainty. The relationship between provisional application and provisional entry into force was not addressed, other than in the commentary to draft guideline 1 (Scope), where it was implied that provisional entry into force was not to be understood as a substitute for provisional application, without any explanation of what the difference between them might be. It was also not explained in the draft Guide how provisional application under article 25 of the Vienna Convention on the Law of Treaties interacted with the so-called interim obligation of article 18 of the Convention, which related to the same time period before a treaty entered into force. It would be useful to explain, perhaps in draft guideline 9, the effect of termination of provisional application on the interim obligation if the State notified other States that it did not wish to become a party to a treaty, given that the way in which the interim obligation ended under article 18 was very similar to the way in which provisional application ended. Although the draft Guide could be more comprehensive, it was a commendable achievement and would enhance clarity in the conclusion and implementation of treaties.

90. With regard to other decisions and conclusions of the Commission, Slovenia agreed that the working methods of the Commission could be adapted on the basis of lessons learned from the hybrid format of the seventy-second session. With regard to the selection of future topics, Slovenia supported the Commission's engagement in the field of environmental law and encouraged it to continue to address topics that reflected current challenges in international law. Slovenia supported the view that the Commission should take up the topic of universal criminal jurisdiction, a view that was also supported by the Committee of Legal Advisers on Public International Law of the Council of Europe. His delegation encouraged ongoing dialogue between the Commission and other legal bodies, which enriched the work of all parties.

91. Noting that there had been only seven women members in the history of the Commission, Slovenia called for countries to nominate more female candidates for election. The Commission, for its part, could highlight in its annual report the impressive work of its current female members and activities that might contribute to achieving gender parity.

The meeting rose at 6 p.m.