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International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3517th meeting

Held at the Palais des Nations, Geneva, on Thursday, 6 May 2021, at 11 a.m.

Contents

Present:

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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

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

Mr. Reinisch said that he wished to commend the Special Rapporteur for his sixth report (A/CN.4/738), which contained an excellent summary of the debate so far and, in particular, of the comments made by States on the draft guidelines that had been adopted by the Commission on first reading in 2018.

Turning to draft guideline 1, he said that he agreed with the proposed amendment indicating that the draft guidelines concerned the provisional application of treaties by States and international organizations.

He was also in agreement with the Special Rapporteur that draft guideline 3 should be presented as a general rule and should remain separate from draft guideline 4.

Concerning draft guideline 4, while he basically supported the Special Rapporteur's proposed amendment, he was unsure whether it fully reflected the Special Rapporteur's views. In paragraph 78 of the report, the Special Rapporteur stated his view that the expression "that is accepted by the other States or international organizations concerned" should be understood to apply to both "declaration" and "resolution adopted by an international organization or at an intergovernmental conference". In annex I of the report, however, the Special Rapporteur proposed the addition of the words "if such resolution has not been opposed by the State concerned". That wording would suggest that while a declaration must have been accepted, a resolution merely should not have been opposed. The intended result could instead have been achieved more easily with the use of a plural verb form rather than a singular one at the end of the sentence, so that it would read "a resolution adopted by an international organization or at an intergovernmental conference or a declaration by a State or an international organization that are accepted by the other States or international organizations concerned". That would indicate that both resolutions and declarations required such acceptance.

With regard to draft guideline 6, he supported the proposal that the controversial phrase "as if the treaty were in force" should be deleted. The phrase added little and its deletion would not affect the important message that provisional application created a legally binding obligation.

Draft guideline 7 had attracted intensive debate and interest on the part of both the members of the Commission and the States commenting in the Sixth Committee. In his view, the idea underlying draft guideline 7, namely the freedom of States to formulate reservations upon accepting the provisional application of a treaty, should be maintained. He agreed with the Special Rapporteur that States would not often resort to that possibility, given that they could agree to provisionally apply only parts of a treaty. However, some States might wish to exclude the legal effect of the provisional application of certain parts of a treaty that other parties might want to provisionally apply. The possibility of modifying the legal effect of parts of a treaty to be provisionally applied would raise an important issue and, as had been pointed out, might also increase the willingness of parties to proceed with provisional application. As a matter of principle, he would favour the view that nothing prevented a State or international organization from formulating a reservation upon accepting the provisional application of a treaty. A draft guideline on the possibility of formulating reservations should thus be maintained, in order to acknowledge that point.

Some States had asserted that the expression "*mutatis mutandis*" did not clarify which rules of the 1969 Vienna Convention on the Law of Treaties were relevant to provisional application. While he did not believe that any alternative to that expression or a detailed list of potentially relevant provisions of the Convention would be of much assistance, a minor amendment to draft guideline 7 (1) might be reasonable in the light of the comments made by States. Since draft guideline 7 exclusively addressed reservations, he wished to suggest the introduction of a reference to part II, section 2, of the Convention, which included the rules pertaining to reservations. Draft guideline 7 (1) would therefore begin: "In accordance with the relevant rules set forth in part II, section 2, of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*, …". Such a reference would align the wording of draft

guideline 7 (1) with that of draft guideline 9 (3), which stated that the draft guideline was "without prejudice to the application, *mutatis mutandis*, of the relevant rules set forth in part V, section 3, of the Vienna Convention on the Law of Treaties".

With regard to draft guideline 9, he agreed with the suggestions made by the Special Rapporteur. The new paragraph 4, on rights, obligations or legal situations created by provisional application, was a very useful addition. In draft guideline 9 (2), he supported the replacement of the words "of its intention not to become a party to the treaty" with the words "irrespective of the reason for such termination". The new formulation allowed for more flexibility and did not limit the grounds for termination of provisional application to the refusal of a State to become a party to a treaty, although in practice that might be the most common reason. While that change would represent a departure from the wording of article 25 (2) of the 1969 Vienna Convention, he was in favour of its adoption, in the light of the comments received and the need for flexibility.

He also concurred in principle with the Special Rapporteur's conclusion that no element relating to article 18 of the 1969 Vienna Convention should be incorporated into draft guideline 9. However, he did not quite agree with one of the arguments that the Special Rapporteur had put forth in that connection. In paragraph 114 of the report, the Special Rapporteur stated that considerations of undue delay in the entry into force of a treaty, as reflected in article 18 of the Convention, should not be brought within the scope of article 25 of the Convention. That assertion appeared to contradict the amended version of draft guideline 9 (2), which now emphasized the right to terminate provisional application "irrespective of the reason for such termination", thereby also including termination for reasons of undue delay. Furthermore, in the Commission's previous deliberations on the law of treaties, Special Rapporteur Sir Humphrey Waldock, in his first report on the law of treaties (A/CN.4/144), issued in 1962, had proposed a provision under which provisional entry into force could be terminated "if … the entry into full force of the treaty [was] unreasonably delayed". Similar views were found in jurisprudence, such as the 1982 decision in *Government of Kuwait v. American Independent Oil Company (Aminoil)*, where the arbitral tribunal had held that "it would be natural that a party … should be able to give notice to bring [provisional application] to an end if the conclusion of the definitive agreement was unduly delayed. This is what Article 25 of the Vienna Convention may be taken as implying". The focus of the reasoning for not including article 18 of the Convention should therefore be placed on the distinct nature of the obligation to provisionally apply a treaty, as set out in article 25 of the Convention, and the obligation not to defeat a treaty's object and purpose, as set out in article 18 of the Convention, as the Special Rapporteur had mentioned in his report.

More importantly, however, in its current formulation, draft guideline 9 did not address the question of when the termination of provisional application became effective, and in particular whether it would take effect immediately upon notification. That question warranted some attention, particularly because draft guideline 9 (3) stipulated that the draft guideline was "without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in part V, section 3, of the Vienna Convention on the Law of Treaties". Those rules of the Vienna Convention stipulated that, in the absence of a termination clause in the treaty itself, a proper termination would follow the applicable rules set out in the Convention, particularly in article 56. It might be useful to discuss whether, in the absence of a pertinent agreement or treaty provision, the notice period of 12 months stipulated in article 56 (2) should be understood to apply *mutatis mutandis* to the termination of provisional application as well. Thus, the question arose as to whether a presumption that a notice to terminate provisional application took effect immediately would be in line with the general intention not to adversely impact the rights, obligations or legal situations of the parties created prior to the termination of the treaty.

It appeared that Sir Humphrey Waldock had also considered that specific issue. In his first report on the law of treaties (A/CN.4/144), he had included in what had then been draft article 21 a notice period of six months for the termination of the provisional application of a treaty. The commentary to that draft article noted that withdrawal from the provisional application of a treaty would be an "orderly process" if at least six months' notice was given before the withdrawal became effective.

Treaty practice appeared to support the premise that some kind of notice period would be necessary for the termination of provisional application of a treaty, as evidenced by the 60 days' notice stipulated in article 45 (3) of the 1994 Energy Charter Treaty and paragraph 5 of the 1947 Protocol of Provisional Application of the General Agreement on Tariffs and Trade. Similarly, article 29 of the Vienna Convention on Succession of States in Respect of Treaties required "reasonable notice" of the termination of provisional application of a treaty and clarified that unless the treaty provided for a shorter period or the parties otherwise agreed, such reasonable notice should be 12 months.

Turning to the draft model clauses, he said that they offered useful guidance to States and international organizations negotiating the provisional application of a treaty, although they could not cover every conceivable situation that negotiators might encounter. He wished to commend the Special Rapporteur for drafting the model clauses and providing detailed and illustrative examples of treaty practice, which would give treaty negotiators an overview of the different options. Nonetheless, as some States had indicated, further examples of treaty practice could be included so as to provide an even more comprehensive overview of the actual practice.

He was generally in agreement with the proposed amendments to the draft model clauses. With regard to draft model clause 1 (2), he believed that the changes adequately reflected the proposal by some States that the termination of provisional application should not necessarily be linked to a State's expression of its intention not to become a party to the treaty. The draft model clause now corresponded to the amended version of draft guideline 9.

In the light of his observations on the need to clarify whether termination of provisional application took effect immediately upon notification, the draft model clause should perhaps provide for a notice period similar to one of the precedents he had already mentioned and thereby serve as an example of a transparent termination clause. Even if such a notice period was not eventually discussed in the guidelines, the mention of notice periods in the model clauses might provide useful guidance for negotiators in the future.

He also supported the proposal by some States and the European Union to include, in draft model clause 2, a paragraph on the possibility that provisional application of a treaty might be agreed upon by means of a resolution of an international organization. In its current form, the draft model clause provided only for separate agreements, but not for resolutions. Against the backdrop of draft guideline 4, an additional paragraph on resolutions and declarations could be added.

In conclusion, he wished to express his support for referring the draft guidelines and the draft model clauses to the Drafting Committee.

Mr. Tladi said that he wished to thank the Special Rapporteur for his sixth report and congratulate him for leading the Commission to a point where the adoption of a full set of draft guidelines on second reading was within reach.

The topic of provisional application of treaties was both very important and very complicated. The Commission was seeking to provide clarity on a legal institution provided for in the Vienna Convention on the Law of Treaties that was often referred to, but whose full implications had frequently been misunderstood. The differing views of States, as expressed in their written comments, regarding the legal implications of provisional application served as an indicator of the complexity of the institution in question. In addition to the efforts of the Special Rapporteur, the three memorandums by the Secretariat had helped the members in their work on the topic. In general, the Special Rapporteur had assessed the comments from States, both favourable and critical, in a comprehensive and balanced manner, thus helping the Commission arrive at a balanced outcome.

Turning to draft guideline 1, he said that while he agreed with the substance of the comment by Austria that resort to provisional application depended on internal law, that point did not pertain to the scope of the draft guidelines. He shared the view of Czechia and Slovakia that draft guideline 1 should be deleted, since all the elements it contained also appeared in draft guideline 2. He did not, however, agree with the reasons that had been advanced to support that suggestion, since the outcome of the Commission's work would not

take the form of a treaty. The conclusions on identification of customary international law and the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted by the Commission in 2018, both contained a provision on scope. Nevertheless, since draft guidelines 1 and 2 contained the same elements, it would be useful to truncate and merge them.

With respect to draft guideline 2, he agreed with the Special Rapporteur that no change was necessary. While he was sympathetic to the proposal by Czechia to move the reference to article 25 of the 1969 Vienna Convention to draft guideline 3, he feared that there was a real danger that doing so might be interpreted as undermining the centrality of that article. Moreover, it would be very difficult to incorporate a reference to article 25 in draft guideline 3.

In his view, the wording of draft guideline 3 was fairly clear. He did not think it would be wise to change the word "may", since it would not always be the case that a treaty that provided for provisional application would in fact be applied provisionally. For example, a treaty might provide for provisional application in respect of those parties that expressly accepted such provisional application. In such a case, it could not be said that the treaty would be provisionally applied to a State that had not expressed its consent. He also thought it unnecessary to insert the words "the negotiating States", in line with article 25 of the Vienna Convention. As had been noted by the United Kingdom, a treaty that permitted a non-negotiating State to avail itself of provisional application could be provisionally applied to such a State if that State chose to do so.

While he was sympathetic to the observation by the United States of America regarding the need to make clear that provisional application was also possible in cases where a treaty had entered into force for other States, that possibility seemed to be reasonably clear already, since international law acknowledged that multilateral treaties might enter into force for different parties at different times. He would not, however, object to the change proposed by the United States.

He agreed with those States that had cautioned that the draft guidelines as a whole should not be interpreted in a way that would suggest that provisional application could bind a State that had not consented thereto. That requirement applied irrespective of whether the source of the provisional application was the treaty to be provisionally applied, a separate treaty or so-called other arrangements. He therefore supported an amendment to the draft guidelines as a whole to make clear that the consent of the State concerned was necessary for provisional application. However, the amendment should appear in draft guideline 3 rather than in draft guideline 4, as some States had suggested. Given that the same concern applied in relation to a number of draft guidelines, including draft guideline 5, it should be addressed at the very beginning, as part of the general rule.

With regard to draft guideline 6, he agreed with the Special Rapporteur's assessment of the various views of States. His preference would be to delete the phrase "as if the treaty were in force", as recommended by the Special Rapporteur. As a general rule, treaty provisions that were being provisionally applied were binding only to the extent provided for in the provisional application instrument and not always as if the treaty were in force.

Turning to the draft model clauses, he said that the fact that they were referred to as "model clauses" suggested some kind of qualitative assessment. He would be inclined to accept any formulation put forward by the Special Rapporteur based on examples if the title used was "compilation of clauses".

Draft model clause 1 raised important questions about the consent of a State to be bound by provisional application. The Special Rapporteur had proposed two options for the date from which provisional application would apply. Under the first option, "from the date of signature", it was clear that the signature was the source of the consent. Under the second option, "or from X date", the source of the consent was not clear. To assert that a State that had participated in negotiations and did nothing at all was deemed to be bound by the provisions of the treaty was a far-reaching proposition. It was unclear whether provisional application applied to all States that had been invited to participate in the negotiations, irrespective of whether the representatives they had sent had actually participated. For example, close to 200 States were participating in the negotiation of an instrument on the conservation and sustainable use of marine biological diversity of areas beyond national

jurisdiction. As part of that process, some States had begun to speak of provisional application. However, not all States that were formally participating were in fact participating. To his knowledge, Eswatini, for example, had never made a statement in those negotiations; it would therefore be rather strange to suggest that it should be deemed to have accepted the provisional application of the treaty.

Mr. Hassouna, speaking via video link, said that the Special Rapporteur's sixth report represented an important step towards achieving a better understanding of the provisional application mechanism and providing legal certainty for States that opted to make use of it.

He agreed with the Special Rapporteur's suggestions, in paragraphs 42 to 45 of the report, concerning the nature and context of the guidelines. He was in favour of merging draft guidelines 1 and 2, in view of their common elements. He agreed with the proposed revised wording of draft guideline 1, which would make clear that it referred to the provisional application of treaties by international organizations as well as by States. He shared the Special Rapporteur's view that non-legally binding documents could still follow a treaty structure and considered that the inclusion of a guideline on "scope" would be not misleading in that respect. In draft guideline 2, he supported the proposal, made by Mr. Rajput at the Commission's 3516th meeting, that the word "related" should be inserted before "rules of international law" to make the reference more specific.

In draft guideline 3, the words "may be provisionally applied" should be retained, as they provided for more flexibility. The phrase "or if in some other manner it has been so agreed" should be clarified, as it was vague and offered little guidance. He agreed with the Special Rapporteur that draft guidelines 3 and 4 should be kept separate.

Draft guideline 4 required further elaboration in the commentary with regard to the means of acceptance and the States concerned, as well as the weight given to different agreements. He was agreeable to the proposed change to the wording of the draft guideline, to include "if such resolution has not been opposed by the State concerned", but thought that it too might need further elaboration.

Given that the different views on draft guideline 6 would be difficult to reconcile, the wording should be kept general, as making it more specific could affect its flexibility. The addition of examples of State practice would allow for case-by-case analysis. There was also a need for more clarity on the distinction between the legal effects of provisionally applied treaties and those of treaties that had entered into full force.

He did not subscribe to the view that draft guideline 7 was not relevant because of the lack of practice and the fact that most cases of provisional application concerned bilateral treaties. In the absence of a prohibition, States could formulate reservations and so should have the right to do so while applying a treaty provisionally; however, according to the 1969 Vienna Convention, that right was not absolute but existed in particular situations and was subject to conditions. He therefore suggested that the words "unless reservations are prohibited by the treaty" should be added at the end of paragraph 1. The commentary should also elaborate on the matter.

On draft guideline 9, he agreed with the school of thought that favoured the consideration of conditions for the termination or suspension of provisional application in addition to those mentioned in article 25 (2) of the 1969 Vienna Convention, for the sake of greater flexibility. That more flexible approach was supported by State practice, and the very purpose of provisional application was to provide increased flexibility and freedom to the parties to agree as they saw fit. He agreed that guidance should be added on how the termination of provisional application would affect the intention to become a party to a treaty. He also agreed with the Special Rapporteur's proposed amendment to draft guideline 9 (2).

He supported the Special Rapporteur's recommendation that draft guidelines 10 to 12 should be left unchanged, although draft guideline 12 would benefit from additional commentary.

In his opinion, the draft model clauses offered States helpful guidance on the use of provisional application, but would not necessarily encourage them to use it more than they would have done otherwise. Draft model clause 1, unlike article 25 (1) (b) of the 1969 Vienna Convention, made no reference to either negotiating States or international organizations and

thus broadened the scope of the provision, aligning it with contemporary practice, whereby States or international organizations that had not negotiated a treaty could still apply it provisionally.

As both the general comments and the draft identified differences in practice relating to bilateral and multilateral treaties, notably as to how provisional application was brought into effect, it would be desirable to clarify those distinctions further. Draft model clause 1 could also address the case where a State or an international organization wished to terminate the provisional application of a treaty, but still intended to become a party to that treaty.

Regarding draft model clause 2, which reflected the recognition that provisional application could be subject to limitations deriving from a separate agreement on its application, the commentary should specify whether such an agreement must be in writing and whether tacit acceptance could suffice.

For the sake of clarity, draft model clause 3 should indicate how a declaration whereby a non-negotiating party "opted in" to provisional application might be accepted. In draft model clause 4, which specified that a party could opt out of provisional application provided that it made a declaration to that effect, the text should clarify whether such a declaration must be made in writing and submitted to the head of the organization or the presiding officer of the conference concerned, or whether an oral declaration or objection would suffice.

He was in favour of including a reference, in draft model clause 5 or the commentary, to the interaction between domestic and international law in cases involving mixed agreements, such as those between the European Union and third parties, which touched both on competence exclusive to the European Union and on competence exclusive to its member States or other regional organizations. While the Special Rapporteur had taken limitations under domestic law into account, it should also be remembered that domestic law could have an effect at the international level; that relationship, between domestic procedures and treaty law, should be addressed.

Lastly, the draft model clauses should serve only as a general guide and did not need to be expanded to constitute a comprehensive collection of clauses.

He agreed with the Special Rapporteur that the outcome of the Commission's work on the topic should consist of a set of guidelines together with a set of model clauses and commentaries thereto, in addition to a selected bibliography. He recommended that the proposed draft guidelines and draft model clauses should be referred to the Drafting Committee. The provision of clarity and legal certainty for States opting to resort to the provisional application of treaties mechanism would, in his view, be an important achievement for the Commission.

Mr. Park, speaking via video link, said that he agreed with the proposed insertion of the words "by States and international organizations" at the end of draft guideline 1, as it would make the scope of the draft guidelines much clearer. He was not in favour of merging draft guidelines 1 and 2, as he would prefer to follow the Commission's practice of including a separate provision on the purpose of its texts, for clarification. Furthermore, draft guideline 2 was an important provision that confirmed the basic approach taken throughout the draft guidelines.

Draft guideline 3 was based on article 25 of the 1969 Vienna Convention but departed somewhat from its wording, reflecting the progressive development of the relevant rules. While article 25 of the Convention stated straightforwardly that "A treaty or a part of a treaty is applied provisionally", the draft guideline read "A treaty or a part of a treaty may be provisionally applied", raising concerns among some States, which had noted that there seemed to be no reason to use wording that differed from that of the Convention. He agreed with other members that the Commission should revisit the question.

The use of the expression "the States or international organizations concerned" rather than the Vienna Convention wording "the negotiating States" was, however, reasonable, as the opening of the provisional application of treaties to States other than the negotiating States was already a modern practice. Nonetheless, note should be taken of the concern expressed that omission of the term "the negotiating States" could create uncertainty and potential confusion. The solution proposed by the United States, that the "necessary parties" should be

clarified through the inclusion in the draft guideline or the commentary of the words “by all States or international organizations incurring rights and obligations pursuant to the provisional application of the treaty”, merited reflection.

The phrase “pending its entry into force between the States or international organizations concerned” in draft guideline 3 had been discussed at length in previous sessions of the Drafting Committee, with a view to eliminating the possible legal ambiguity of the words “entry into force”, particularly in the case of multilateral conventions. He wondered whether the explanation given in paragraph (5) of the commentary, together with the current wording of draft guideline 3, might adequately address the concerns expressed by the United States, which had proposed that the draft guideline should directly stipulate that a State could provisionally apply a treaty pending the treaty’s entry into force for that State, even if the treaty had entered into force for other States. In that connection, recalling that the main object of the Commission’s work was to provide a clear guide and a useful tool for States, he suggested that the Commission should clearly and directly address those concerns in a new paragraph 2 of draft guideline 3 or in draft guideline 5 (Commencement of provisional application).

Concerning draft guideline 4, he considered that the proposed amended version, including the words “if such resolution has not been opposed by the State concerned”, would adequately address the concern raised by a number of States to the effect that a resolution adopted by an international organization or at an intergovernmental conference should not be given the same value and weight as an agreement reached between two or more States as a means of deciding on the provisional application of a treaty. He also proposed that the word “expressly” should be inserted after “accepted” in draft guideline 4 (b).

Regarding draft guideline 6, he was of the view that the words “produces a legally binding obligation to apply the treaty or a part thereof” were sufficient to explain the legal effect of provisional application. The phrase “as if the treaty were in force” should be deleted; he agreed with the Special Rapporteur that its inclusion could potentially be abused, to the detriment of domestic legal procedures.

Noting that many States had advocated caution in addressing the question of reservations in draft guideline 7, because of the absence of relevant State practice and the possible theoretical or academic nature of the assumptions behind it, he considered nevertheless that there was no reason not to accept the reservation system for the provisional application of treaties. With the expectation that the Commission would deal more specifically with the question of reservations in the future, he was in favour of retaining the draft guideline in its current form.

He agreed with the Special Rapporteur’s proposal that the phrase “of its intention not to become a party to the treaty” in draft guideline 9 (2) should be replaced with the phrase “irrespective of the reason for such termination”. However, that amendment would require an amendment of draft model clause 1 (2) or the addition of a new model clause. He also agreed with the proposed inclusion of the new paragraph 4 in the draft guideline, considering that it was not contrary to the overall purpose and object of the draft guidelines and clarified the relationship between the party to the termination or suspension of the provisional application of the treaty and third parties to the treaty.

He supported the inclusion of the draft model clauses as a useful supplement to the draft guidelines and a reference for States and international organizations. He was in favour of the proposed insertion of the wording “including those relating to requirements for the expression of consent to be bound by a treaty” into draft model clause 5. The Commission might also usefully consider the comments made by Mr. Reinisch concerning draft model clause 2.

Mr. Murphy, in a pre-recorded video statement, said he hoped that as many examples of State practice as possible would be included in the commentaries to the draft guidelines, in response to the requests received from many States. He supported or was open to most of the Special Rapporteur’s proposed changes, which were grounded in a balanced assessment of the views expressed by Governments. He was not, however, convinced of the need for the proposed addition to draft guideline 1, to include a reference to States and international organizations, as it could raise the question of whether the title of the topic or that of the draft

guidelines should be changed in a similar way. That might create the impression that the topic was focused on treaties between States and international organizations and did not address treaties that only involved States as parties.

Attention should be paid to ensuring consistency throughout the text to avoid any unevenness of treatment between States and international organizations. For example, in draft guideline 4 (b), the Special Rapporteur proposed new language that referred to opposition to a resolution by the "State concerned", but not to opposition by an international organization. He understood that the proposed addition was intended to address the concern expressed by several States that a State might reject provisional application of a treaty when the matter was brought to a vote within an international organization or at an international conference; however, it might simply cause more confusion. The purpose of draft guideline 4 was to indicate the means by which States might agree to the provisional application of a treaty, and not to qualify those means by saying that one or more States might oppose provisional application. The best way to address the concerns of States would be to simplify the text somewhat, to read "any other means or arrangement that is accepted by all States or international organizations assuming rights or obligations in connection with the provisional application of the treaty or a part of the treaty". It could then be explained in the commentary how such an agreement might be reached in a given context, such as an international conference.

He agreed with the Special Rapporteur's proposal to delete the words "as if the treaty were in force" from draft guideline 6, given the concerns that had been raised by States; he also agreed with the proposed modifications to draft guideline 9 (2). A State could notify other States or international organizations that it was terminating its provisional application of a treaty for any reason whatsoever, without necessarily indicating that it had no intention of becoming a party to the treaty. The wording of article 25 (2) of the 1969 Vienna Convention was best understood as indicating just one possible way that termination of provisional application could occur. He also supported the inclusion of the proposed new paragraph 4 of draft guideline 9.

He recommended that all the draft guidelines and the Special Rapporteur's proposals should be transmitted to the Drafting Committee, taking account of the views expressed in the plenary debate.

The meeting rose at 12.20 p.m.