Provisional

For participants only

14 September 2021

Original: English

International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3555th meeting

Held at the Palais des Nations, Geneva, on Friday, 30 July 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. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 11 a.m.

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

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

The Chair invited the Commission to resume its consideration of the portion of chapter V of its draft report contained in document A/CN.4/L.945/Add.2. He said he wished to remind members that it was no longer necessary to refer to the Guide to Provisional Application of Treaties as a "draft", as agreed at the previous meeting. He took it that the Commission wished to delete the word "draft" whenever it was used as a qualifier for "Guide" in the document before the Commission.

It was so decided.

Text of the draft guidelines constituting the Guide to Provisional Application of Treaties and commentaries thereto

Paragraph 1

Paragraph 1 was adopted.

Guide to Provisional Application of Treaties

General commentary

Paragraph (1)

Mr. Gómez-Robledo (Special Rapporteur) said that the draft general commentary previously submitted to the members of the Commission had undergone considerable revision to adapt it to the changes made to a number of the draft guidelines and to take account of suggestions and observations received from States and Commission members after the discussion of his sixth report on the topic. With regard to paragraph (1), he proposed the deletion of the second part of the final sentence: the commentaries were an integral part of the draft guidelines, not a supplement to them, and each should be read in the light of the other.

Mr. Forteau said that, in the penultimate sentence, the "or" should be changed to "and" to prevent ambiguity. Otherwise, the Commission might appear to be directing States to adopt solutions that were not consistent with the law.

Mr. Jalloh said that the Commission's recent practice had been to open the general commentary with a sentence that clarified for the reader that the commentary was to be read together with the guidelines. The inclusion of such a sentence at the start of the commentary would enhance clarity and consistency. The sentence could be incorporated at the end of paragraph 1, where it would replace the part of the final sentence that the Special Rapporteur was proposing for deletion. The new final sentence would then read: "The commentaries are an integral part of the Guide and, as is always the case with the Commission's output, the guidelines are to be read together with the commentaries."

Mr. Rajput said that, based on the Commission's recent practice, the text proposed by Mr. Jalloh should be placed at the start of paragraph 1. He was strongly opposed to the amendment proposed by Mr. Forteau. The word "or" was preceded by a reference to existing rules, and the Commission had repeatedly emphasized that its work was not predicated on rules. The Special Rapporteur had smartly crafted the sentence so as to suggest that States and other users might refer either to rules or to other solutions, and had thus maintained a degree of openness. Alternatively, the reference to "rules" could be removed altogether so that the commentary referred simply to "solutions".

Mr. Gómez-Robledo (Special Rapporteur) said that he supported Mr. Jalloh's proposal. He had no strong preference as to where the additional text should be placed but it would certainly flow well at the end of the paragraph. Moreover, it would be odd to begin a

paragraph, particularly the opening paragraph of a commentary, with the words “as is always the case”.

He was opposed to Mr. Forteau’s suggestion that “or” should be replaced with “and”, for the reasons set forth by Mr. Rajput. In an earlier draft of the Guide, he had proposed a formulation which indicated that States and international organizations might set rules aside and choose whatever solutions they deemed most appropriate, but some Commission members had indicated that that language could send out the wrong message. He had therefore come up with a more nuanced draft, in which the most important point made was that answers could be found in existing rules of international law or, alternatively, in whatever solutions seemed most appropriate for contemporary practice, the added nuance being that, in the event that existing rules did not work well, solutions chosen by the parties could be adopted instead.

Mr. Murphy said that he also supported Mr. Jalloh’s proposal and agreed that it would be best placed at the end of the paragraph. Assuming that that text was incorporated, he wondered whether it would be necessary to retain the part of the final sentence stating that the commentaries were an integral part of the Guide. In his view, the new sentence on its own captured all that needed to be said.

He was in favour of the change from “or” to “and” proposed by Mr. Forteau. The change was necessary to prevent any implication that solutions that were not consistent with existing rules might be considered acceptable. Furthermore, the existing rules already allowed the flexibility that the Special Rapporteur was seeking to achieve by using “or” rather than “and”.

The Chair, speaking as a member of the Commission, said that he was in favour of maintaining the current language. The intended meaning was not cumulative: therefore, “or” was more appropriate than “and”.

Mr. Jalloh said that he had no issue with retaining, in the last sentence, the reference to the commentaries being an integral part of the Guide. However, as its meaning was to some extent implicit in the new formulation he had proposed, he also had no objection to its deletion.

Sir Michael Wood said he agreed that “or” should be used in preference to “and” if the current wording was retained. However, he wished to propose a new formulation that would largely eliminate the issues raised in connection with the use of “or”. In his view, the word “solutions” was effectively redundant since it was synonymous with “answers”. The sentence could therefore be amended to read: “The objective of the Guide is to direct States, international organizations and other users to answers that are consistent with existing rules or that seem most appropriate for contemporary practice” If that formulation was adopted, there would be no pressing need to change “or” to “and”.

With regard to the final sentence, he noted that, in the introduction to the Guide to Practice on Reservations to Treaties adopted in 2011, Mr. Pellet had attached an important qualification to the phrase “the commentaries are an integral part of the Guide”. The full sentence used in that Guide read: “Although they do not have the same weight as the guidelines themselves, the commentaries are an integral part of the Guide, and are an indispensable supplement to the guidelines, which they expand and explain.” He assumed that that text was the origin of the sentence put forward by the Special Rapporteur and that it had become condensed in the drafting process. He suggested that, if the formulation from the 2011 Guide was reproduced, it should be reproduced in its entirety, albeit excluding the words “which they expand and explain”, which were superfluous.

Mr. Gómez-Robledo (Special Rapporteur) said that Sir Michael Wood’s proposal for the penultimate sentence was a good solution. With regard to the final sentence, he agreed with Mr. Murphy’s suggestion that there was no need to retain any of the original text if the new text proposed by Mr. Jalloh was adopted. He had no objections to reproducing the text used in the Guide to Practice on Reservations to Treaties in its entirety, as Sir Michael Wood had proposed.

Mr. Ouazzani Chahdi said that he also considered Sir Michael Wood’s proposal for the penultimate sentence to be a good solution. However, to be consistent with past practice,

he would prefer to have the new final sentence proposed by Mr. Jalloh placed at the start of paragraph 1. Another option would be to incorporate the text in a footnote attached to the heading “Guide to Provisional Application of Treaties”. That option would be in line with academic practice, besides simplifying the text.

Mr. Rajput said that he was opposed to Sir Michael Wood’s proposed solution for the penultimate sentence. A better solution, which would eliminate the word “or” and thus resolve the debate over its potential replacement with “and”, would be to drop the reference to “existing rules”, which gave the text a very normative character, and refer simply to “answers that are consistent with contemporary practice”. If the text proposed by Sir Michael Wood was to be adopted nonetheless, his preference would be to retain “or”.

With regard to the final sentence and the relationship between the commentaries and the Guide, he noted that, whereas the language adopted in the Guide to Practice on Reservations to Treaties provided a qualitative assessment of the value of the commentaries, according them slightly less importance than the text of the Guide itself, the formulation used more recently offered no such assessment. For that reason, he was in favour of the simpler, shorter formulation proposed by Mr. Jalloh. Because the sentence related to the entire commentary, it should be placed at the start of paragraph 1.

Mr. Gómez-Robledo (Special Rapporteur) said that he would be in favour of retaining the original language, and particularly “or”, if that was the preference of a majority of members. If the text was to be amended, the best solutions, in his view, were Sir Michael Wood’s suggestion for the penultimate sentence and Mr. Ouazzani Chahdi’s proposal that the final sentence, as amended by Mr. Jalloh, should be converted into a footnote attached to the heading. He was against deleting the expression “existing rules” because it would affect the substance of the commentary.

Sir Michael Wood said that the need for a footnote was not clear to him. In recent practice, the sentence establishing the relationship between the Guide and the commentary had always been placed at the start of the first paragraph.

Mr. Jalloh suggested that, in view of the lack of agreement as to the best position for the sentence, it was best to keep it at the end of the paragraph, where it would replace the sentence initially put forward by the Special Rapporteur. That was the simplest solution.

Paragraph 1, as amended by Mr. Jalloh and Sir Michael Wood, was adopted.

Paragraph (2)

Mr. Rajput said that the last sentence conveyed an important point that had been emphasized by States and, for that reason, it should be converted into a separate paragraph that preceded the current paragraph 2.

Mr. Gómez-Robledo (Special Rapporteur) said that, while he was not opposed to that idea *per se*, similar assertions that constituted a form of disclaimer in respect of the character of the Guide were contained in the penultimate and last sentences of paragraph 3, and that those sentences would also need to be brought forward and merged into the new paragraph 2 if Mr. Rajput’s suggestion was adopted.

Mr. Park said that he saw no good reason to change the current format of paragraphs 2 and 3.

Mr. Rajput withdrew his suggestion.

Paragraph 2 was adopted.

Paragraph (3)

Mr. Gómez-Robledo (Special Rapporteur) proposed that, in the first sentence, the words “as such” should be deleted and the words “elaborates upon” should be replaced with “seeks to describe and clarify”; that, in the second sentence, the words “is mainly based on” should be replaced with “takes as a basic point of departure”; that, in the third sentence, the words “in the meaning” should be replaced with “with the meaning”; that, in the seventh sentence, the words “given its exceptional nature” should be deleted; and that, in the eighth

sentence, the words “not supposed to be either” should be replaced with “neither” and that the word “or” should be replaced with “nor”.

Mr. Rajput said that, in the fifth sentence, it was misleading to claim that the draft guidelines were not intended to cover every possible application of all provisions of the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, “particularly where practice has not yet developed”. One of the draft guidelines concerned reservations, which was an area in which practice had not yet developed. He proposed that the words in question should be deleted.

Mr. Gómez-Robledo (Special Rapporteur) said that the third sentence addressed the question of definitions. It had been suggested by Czechia and, in the Commission, by Mr. Jalloh that the Guide should include a draft guideline on definitions. However, the Drafting Committee had requested that the question should instead be addressed in the commentary.

The fourth and fifth sentences had been included to address the concern expressed by States, in particular Brazil and France, that it was excessive, in the context of the draft guidelines, to refer systematically, *mutatis mutandis*, to the rules of the 1969 Vienna Convention. The fifth sentence, which stated that the Guide was not intended to cover every possible application of all provisions of both Vienna Conventions, particularly where practice had not yet developed, was a general statement. It was not intended to cover all 12 of the draft guidelines. It was clear that, in the case of reservations, practice had indeed not yet developed. He would prefer to retain the words “particularly where practice had not yet developed”, which provided useful context along the lines suggested by States and by certain members of the Commission.

Mr. Jalloh said that he fully supported the Special Rapporteur’s proposed amendments. Regarding the new text proposed for insertion in the second sentence, it would be better to omit the word “basic”, which was redundant in the expression “basic point of departure”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Gómez-Robledo (Special Rapporteur) said that the third sentence had been added in response to suggestions by the United States of America, which were similar to a proposal by Mr. Rajput. To some extent, that sentence built on paragraph (1) of the general commentary.

The last sentence had been added to serve as a springboard for a detailed footnote, which he had drafted on the basis of information provided by Sir Michael Wood. The information contained in the footnote was highly relevant.

Sir Michael Wood said that footnote 7 concerned recent practice related to the exit of the United Kingdom from the European Union. He had discussed the matter in the general debate and had provided more detailed information in a note for the Special Rapporteur. However, the text of the footnote was clearly far too long. If the Commission wished to retain the footnote, and he had an open mind as to whether it should, its content should be essentially factual in nature. To that end, he was ready to propose various amendments to the text.

Mr. Forteau said that it would difficult to decide on footnote 7 without seeing a text that incorporated all the proposed amendments. In any case, further work was needed to make the content of the footnote more factual and objective. In the first sentence, for example, reference was made to “practice by the United Kingdom of Great Britain and Northern Ireland”, but the practice in question was in fact also that of the European Union. Both parties to the relevant treaties should be mentioned.

Mr. Gómez-Robledo (Special Rapporteur) said that he agreed with Mr. Forteau’s comments.

The Chair said he took it that the Commission wished to leave paragraph (3) in abeyance pending informal consultations to further rework the text of footnote 7. Members

of the Commission who had comments regarding footnote 7 should share them with the Special Rapporteur before the following meeting.

It was so decided.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Gómez-Robledo (Special Rapporteur) said that paragraph (5) was intended to reflect the fact that the annex now contained not model clauses but just examples found in bilateral and multilateral treaties. He proposed that, in the first sentence, the word “clauses” should be replaced with “provisions” and that, in the second, the word “pretend” should be replaced with “seek”.

Paragraph (5), as amended, was adopted.

Commentary to draft guideline 1 (Scope)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) said that paragraph (2) contained text that had been adopted on first reading. However, following a suggestion by Mr. Rajput, it had been moved from elsewhere in the commentaries to the commentary to draft guideline 1. Slovenia had emphasized the importance of retaining the content of the paragraph. Some members of the Commission had argued that the fourth sentence, in which it was stated that article 25 of the 1969 and 1986 Vienna Conventions lacked legal precision, was couched in overly critical language. He therefore proposed that the words “nonetheless lacks legal precision” in that sentence should be replaced with “lacks detail and precision and can thus benefit from further clarification”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Gómez-Robledo (Special Rapporteur) said that paragraph (3) was intended to clarify the scope of application of draft guideline 1, which had been amended at the second-reading stage to specify that the draft guidelines concerned the provisional application of treaties “by States or by international organizations”. The last sentence addressed a point raised by Mr. Nguyen: in international humanitarian law, agreements between States and non-State actors could also be applied prior to entry into force. Although none of the examples provided by Mr. Nguyen contained a clause on provisional application, it could not be ruled out that such agreements might be applied prior to entry into force. He proposed replacing the word “provisionally” in that sentence with “prior to entry into force”, since, in the absence of relevant practice, it was unclear whether a non-State actor would be able to invoke provisional application in the formal sense.

Mr. Park said that, as far as he could recall, the Commission had not discussed the question of agreements between States and non-State actors in international humanitarian law. In addition, paragraph 3 did not include any footnotes. It would be better to delete the last sentence. The Commission’s articles on the effects of armed conflicts on treaties contained no reference to provisional application in international humanitarian law. The Commission had previously adopted a very cautious approach to the matter.

Mr. Forteau said that the agreements mentioned in the last sentence of the paragraph were not subject to ratification. The provisional application of treaties was something altogether different. He too would be in favour of deleting the last sentence, as such agreements had not been examined in detail.

Mr. Jalloh said that it was regrettable that the Commission had not had the opportunity to discuss the question of agreements between States and non-State actors in relation to the topic. One example was the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone. Questions had been raised about the validity and nature of the Agreement, and there had been relevant rulings by the Appeals Chamber of the Special Court for Sierra Leone. He would not object to the deletion of the last sentence, but there were important issues relating to the treaty-making capacity of non-State actors, including violent groups, that had not been addressed.

Mr. Rajput said that one solution might be to add the words "there is a possibility that" before "in international humanitarian law" in the last sentence and to move the text of that sentence, as amended, to a new footnote. The corresponding footnote marker could be placed at the end of the second sentence.

Sir Michael Wood said that he was in favour of deleting the last sentence altogether. If it was retained, the Commission would in effect be saying that agreements between States and non-State actors, in international humanitarian law, were treaties. The Commission could not take such a position without having first studied the matter in detail.

Mr. Murphy said that he also supported the proposal to delete the last sentence.

Mr. Gómez-Robledo (Special Rapporteur) said that he had no objection to the deletion of the last sentence if Mr. Nguyen was in agreement.

Mr. Nguyen, speaking via video link, said that he could agree to the deletion of the last sentence.

Paragraph (3), as amended, was adopted.

Commentary to draft guideline 2 (Purpose)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Gómez-Robledo (Special Rapporteur) proposed replacing, in the final sentence of the paragraph, the words "alluded to" with "referred to".

Mr. Rajput said that, in the first sentence, he found "necessarily reflect" to be too strong a formulation. He proposed replacing that phrase with "encompass" so that the text would read "article 25 of the 1969 and the 1986 Vienna Conventions does not encompass all aspects of contemporary practice on the provisional application of treaties".

Mr. Tladi said that "encompass" and "reflect" were not synonyms. "Encompass" conveyed the idea of inclusion, while "reflect" conveyed the idea of consistency with. If the aim was to soften the wording of that part of the first sentence, he would propose deleting "necessarily" instead.

Mr. Forteau said he agreed with Mr. Rajput that "reflect" was perhaps not the clearest formulation. He proposed replacing "does not necessarily reflect" with "does not address".

Sir Michael Wood said it was true that article 25 of the 1969 and the 1986 Vienna Conventions did not address and did not reflect all aspects of contemporary practice on the provisional application of treaties. However, "address" and "reflect" had different meanings. He would be in favour of retaining "reflect", as the Commission had noted that there were some respects in which the practice set out in the Vienna Conventions had been superseded.

Mr. Rajput said that, in the light of Sir Michael Wood's comments, the simplest solution might be to take up Mr. Tladi's proposal to simply delete the word "necessarily" from "necessarily reflect".

Mr. Gómez-Robledo (Special Rapporteur) said that, in that case, the last part of the first sentence of the paragraph would read "article 25 of the 1969 and the 1986 Vienna

Conventions does not reflect all aspects of contemporary practice on the provisional application of treaties".

The Chair said he took it that the Commission wished to adopt paragraph (3) of the commentary to draft guideline 2, as amended by the Special Rapporteur and Mr. Tladi.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Gómez-Robledo (Special Rapporteur) proposed deleting, in the second sentence of the paragraph, the word "basic" from "basic point of departure", and replacing the words "to obtain a full appreciation of" with "fully to reflect" so that the last part of the sentence would read "in order fully to reflect the law applicable to the provisional application of treaties".

Paragraph (4), as amended, was adopted.

Commentary to draft guideline 3 (General rule)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Gómez-Robledo (Special Rapporteur) proposed inserting, at the beginning of the second sentence of the paragraph, the word "prior" before the word "work". In the interests of readability, he proposed deleting, in the third sentence, "on what it then termed 'provisional entry into force'" so that the text would read "the Commission confirmed that the 'same rule' applied to 'part of a treaty'". In the fifth sentence, he proposed replacing "trade treaties" with "parts of treaties containing trade provisions". He said that he was proposing those changes because, in practice, in the European Union at least, it was not necessarily whole treaties that were subject to provisional application, but rather the parts of those treaties containing trade provisions. In his view, those changes were also justified in the light of footnote 14, which explained that the provisional application of part of a treaty was also common in mixed agreements concluded between the European Union and its member States. He wished to recall that the European Union, and in particular Spain and Germany, had been insistent on the inclusion of a footnote addressing that point.

Mr. Rajput said it was his understanding that the United States of America had provisionally applied the General Agreement on Tariffs and Trade from its adoption in 1947 until the entry into force of the General Agreement on Trade in Services in 1995. In that case, an entire trade treaty, not just a provision, had been provisionally applied. While he understood the Special Rapporteur's desire to pay due attention to mixed agreements concluded between the European Union and its member States, in doing so, he should take care not to exclude full trade treaties from the scope of the paragraph, as such treaties were often provisionally applied between States. With that in mind, he wished to propose reformulating the beginning of the fifth sentence to read: "Furthermore, treaties related to trade are frequently subject to provisional application." That formulation would cover the provisional application of both full trade treaties and trade provisions. Footnote 14 should be expanded to mention trade treaties that were provisionally applied in their entirety.

Mr. Park said that he had no objection to the amendments proposed by the Special Rapporteur. However, the reference to "one party to the Agreement" in the last part of the final sentence of footnote 15 should be clarified. He proposed reformulating that part of the sentence to read "one party to the Agreement, namely Brunei Darussalam, according to article 20.5 of that Agreement".

Mr. Forteau said that, regarding the proposal made by Mr. Rajput, the fifth sentence of the paragraph, as amended by the Special Rapporteur, fitted the context perfectly, since it expanded on the concept of the provisional application of only a part of a treaty mentioned in the preceding sentence. He would be in favour of maintaining the new language proposed by the Special Rapporteur.

Mr. Murphy said that the entire paragraph was devoted to the possibility of applying provisionally only parts of a treaty. He understood the purpose of the amendments proposed by the Special Rapporteur to be to convey the idea that treaties containing trade provisions were among those treaties that could be partially applied in a provisional manner. He agreed with Mr. Forteau that the Special Rapporteur's proposed amendments to the fifth sentence should be retained.

The Chair said he took it that the Commission wished to adopt paragraph (3) as amended by the Special Rapporteur, and footnote 15 as amended by Mr. Park.

Paragraph (3), as amended and with an amendment to footnote 15, was adopted.

Paragraph (4)

Mr. Gómez-Robledo (Special Rapporteur) proposed amending the third sentence of the paragraph to read: "While the expression could be read as referring to the entry into force of a treaty itself, in the case of multilateral treaties, provisional application normally continues for States or international organizations after the entry into force of a treaty itself." The words "as is the case for multilateral treaties" at the end of the sentence would be deleted.

Mr. Forteau said that he would appreciate clarification as to the meaning of the phrase "also implies that" in the final sentence of the paragraph. He wondered whether it meant "implies, in addition, that" or whether it was in fact introducing a new idea into the sentence. "Also" had been translated in the French version of the draft report as *en outre* [moreover], which he suspected was incorrect.

Mr. Gómez-Robledo (Special Rapporteur) said that "also implies" should be translated as *implique elle aussi* and not as *implique en outre* in the French version.

Sir Michael Wood said that the point raised by Mr. Forteau was also relevant to the English text. He found the phrase "also implies" to be somewhat obscure. He wished to propose deleting, at the very least, the word "also", but maintained that the final sentence of the paragraph would be clearer if "also implies" was replaced with "reflects the fact that".

Mr. Gómez-Robledo (Special Rapporteur) said that he supported Sir Michael Wood's proposal.

The Chair said he took it that the Commission wished to adopt paragraph (4) as amended by the Special Rapporteur and Sir Michael Wood.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Gómez-Robledo (Special Rapporteur) said that, as members would recall, the paragraph comprised elements from paragraphs (3) and (7) of the commentary to the draft article as adopted on first reading, based on suggestions from Belarus and the United States of America and from Mr. Grossman Guiloff and Mr. Jalloh. He wished to propose replacing, at the end of the second sentence of the paragraph, the words "signed or acceded" with "consented" and, in the fifth sentence, replacing the words "in terms of their connection to the treaty" with "by reference to their participation in the negotiation of the treaty". In the same sentence, he proposed deleting the word "historically" and inserting the words "in the past" at the end of the sentence. The words "in the passive voice" should be deleted from the end of the final sentence.

Sir Michael Wood said that, to his mind, replacing the words "signed or acceded" with "consented" could give rise to confusion, as the text would then imply that only non-negotiating States or international organizations that had subsequently consented to be bound by the treaty in question, as opposed to those who had "signed or acceded" to it, could undertake provisional application, which was not the intended meaning of the sentence. "Signed or acceded" should therefore be retained.

Mr. Forteau said that, while he agreed with most of the changes proposed by the Special Rapporteur, he believed that the words “signed or acceded” should be retained for the reasons set out by Sir Michael Wood, and that the words “in the past” should not be inserted at the end of the fifth sentence, as their inclusion suggested that bilateral treaties were no longer applied provisionally, which was not the case.

Mr. Rajput said that he agreed with the point made by Sir Michael Wood. He found the phrase “draft guideline 3 does not specify which States or international organizations may provisionally apply a treaty” in the first sentence to obscure the message that the Commission was trying to convey, namely, that, unlike article 25 of the 1969 and 1986 Vienna Conventions, draft guideline 3 did not refer to negotiating States or organizations because they might not be involved in the provisional application of treaties. He wished to propose replacing that language with “draft guideline 3 does not use this formulation” to clarify that the Commission was not using the formulation from article 25 and that the scope of draft guideline was in fact broader. While he could go along with the deletion of “in the passive voice” from the final sentence, he wondered whether it might not be better to delete that sentence in its entirety, as it did not add much value.

Mr. Murphy said that he generally agreed with the changes suggested by the Special Rapporteur. However, regarding Sir Michael Wood’s proposal to retain “signed or acceded”, he wished to point out that there were other ways in which a State might have consented to a treaty that was subject to provisional application. For example, a State might have ratified a treaty but that treaty might not yet have entered into force owing to an insufficient number of ratifications or because a specific State had not ratified it, in which case it would continue to apply provisionally. His preference would be to keep the word “consented”, as proposed by the Special Rapporteur, and to further amend the sentence to read “but that have subsequently consented to provisional application of the treaty”.

Secondly, he wished to propose deleting the penultimate sentence in its entirety because the draft guideline did not, in fact, envisage the possibility of a third State completely unconnected to the treaty provisionally applying it. Rather, the draft guideline envisaged an agreement whereby such a State could be involved in the provisional application of a treaty. Moreover, it was not logical to suggest that a State or an international organization completely unconnected to the treaty would somehow be brought into a provisional application arrangement. The fundamental point being made in the commentary was that provisional application could be undertaken by a State that was not a negotiating State of the treaty in question.

Bearing in mind the points made by Mr. Rajput, he wished to propose further amending the final sentence by replacing the words “in a neutral form” with “without reference to negotiating States” so that it would read: “For these reasons, the draft guideline simply restates the basic rule without reference to negotiating States.”

Mr. Grossman Guiloff said that he agreed with the proposals put forward by Mr. Murphy. He himself had raised several points on the issue of “consent” in relation to provisional application of treaties with the Special Rapporteur.

The Chair invited the Special Rapporteur to prepare a new version of the paragraph incorporating the various proposals made by members, with a view to its adoption at a future meeting.

The meeting rose at 1.05 p.m.