

INTERNATIONAL LAW COMMISSION
Sixty-seventh session
Geneva, 4 May – 5 June and
6 July – August 2015

Check against delivery

Provisional application of treaties

Statement of the Chairman of the Drafting Committee,
Mr. Mathias Forteau
4 August 2015

Mr. Chairman,

It is with pleasure that I introduce the seventh report of the Drafting Committee for the sixty-seventh session of the Commission, which deals with the topic “provisional application of treaties”.

The Drafting Committee held three meetings on the topic, on 29 and 30 July 2015. However, owing to lack of time, the Drafting Committee was unable to conclude its consideration of the six draft guidelines referred to it by the Plenary. Accordingly, my statement today is in the form of an interim report, intended to provide the Commission with information on the progress made in the Drafting Committee thus far. It is expected that the Drafting Committee will revert to its consideration of the draft guidelines at its sixty-eight session, next year.

In addition to the draft guidelines proposed by the Special Rapporteur in his third report, the Drafting Committee had before it a new set of revised draft guidelines, also prepared by the Special Rapporteur, taking into account the various views expressed and drafting suggestions made during the debate in the plenary. The Drafting Committee also had before it, a proposal by the Special Rapporteur for some additional draft guidelines which, following suggestions made

in the Plenary, could usefully supplement the guidelines he had proposed. The Drafting Committee proceeded to work on the basis of these new proposals and was able to adopt three draft guidelines, in the time allocated to it. The text of the draft guidelines is annexed to my statement for information purposes.

Mr. Chairman,

Before proceeding, I wish to explain the sequence in which the three draft guidelines were adopted. The Drafting Committee first considered and adopted what is now draft guideline 3, which is based on the initial draft guideline 1 as proposed by the Special Rapporteur in his third report submitted this year. The Committee subsequently felt that the draft guideline, in view of its introductory character, would be usefully supplemented by two additional draft guidelines dealing with “scope” and “purpose”, respectively, following the usual practice of the Commission. The inclusion of such provisions was done, following suggestions made in the plenary, and as a necessary corollary to the Special Rapporteur’s proposal for a provision laying down the general rule on the provisional application of treaties. The Drafting Committee subsequently decided to sequence the draft guidelines with a provision on “scope” first, followed by that dedicated to the “purpose” of the instrument being developed, and then the draft guideline stating the general rule. It was felt that this structure appropriately oriented the opening provisions of the text, initially covered by the draft guideline 1 as proposed by the Special Rapporteur and reviewed in light of the debate in the Plenary.

I would also like to say a quick word about the use of draft guidelines as opposed to draft conclusions. I wish to recall that there was a proposal in the Plenary that the Commission should set out to adopt draft conclusions as opposed to draft guidelines, which would accord with the approach taken in other topics it is working on. The Drafting Committee considered this question but decided, on a provisional basis, to stay with developing draft guidelines. It was felt that the purpose of the exercise, in particular as described in the Syllabus annexed to the 2011 Report of the Commission, was to provide guidance for States seeking to provisionally apply treaties, and that developing a text in the form of draft guidelines was more conducive to that purpose.

Draft Guideline 1

Mr. Chairman,

Turning to draft guideline 1, entitled “scope”. Two issues were discussed in relation to this provision. First, as a matter of drafting, there was a question as to what the appropriate verb should be. In the initial proposal of the Special Rapporteur, he had suggested the word “address”, but this did not find favor in the Committee by members who considered it not to be a term usually employed in texts of the Commission. The phrase “applies to” was considered, but the Committee felt that such terminology was usually employed in the context of draft articles laying down rules applicable to States. In this case, the Committee settled for the word “concern”, which it felt was more suitable for draft guidelines which purport only to provide guidance to States.

The next issue had to do with the possibility of adding a qualifying phrase at the end indicating that the provisional application would be “by States and international organizations”. This led to a lengthy debate about the advisability of including international organizations within the scope of the project at the present stage, with different views being expressed. It was recalled that the Special Rapporteur, in his summary of the debate in the Plenary, had indicated his intention to separate out the provisional application by international organizations, so as to deal with the position of States first, in line with some wishes expressed in the Plenary, while returning to the question of international organizations at a later stage. In the end, the Drafting Committee decided that the proposed qualifying phrase was strictly speaking not necessary at this stage, in particular for a provision on scope which is supposed to cover the entire set of draft guidelines to be adopted. Instead, such questions were best left to the commentary, which would include the explanations of the Special Rapporteur. The commentary would, *inter alia*, also include a specification that, notwithstanding the intention of the Special Rapporteur to focus on States first, treaties, such as the United Nations Convention on the Law of the Sea, which include international organizations among their participants, would not thereby automatically be excluded from the scope of application of the draft guidelines being developed. The same is true

with regard to the practice on provisional application of treaties of international organizations such as the European Union, as quoted in particular in the Annex to the third report of the Special Rapporteur.

The title of draft guideline 1 is “scope” which is a title commonly for such provisions in the texts developed by the Commission.

Draft Guideline 2

Mr. Chairman,

Draft guideline 2 concerns the purpose of the text being developed. It is intended as an intermediary provision between that on scope, and that on the general rule in draft guideline 3. The Drafting Committee discussed the text on the basis of a proposal by the Special Rapporteur, which was on an earlier version which he had proposed as a second paragraph to the provision on scope. While the possibility of including the provision in what is now draft guideline 3, it was deemed preferable to present the provision as a separate draft guideline, in line with the practice of the ILC.

The initial version had been formulated in terms of article 25 of the Vienna Convention on the Law of Treaties establishing “the general rule on the provisional application of treaties”. However, while there was no disagreement as to importance of article 25, the proposed text was subject to various criticisms relating to its imprecision as regards the provisional application of treaties to which international organizations are parties, and the possible applicability of other rules of international law, such as those of customary international law. In addition, it was pointed out that, to some extent, Article 25 does not necessarily reflect all aspects of the current practice on provisional application of treaties.

The proposal was accordingly reformulated more along the lines of a “purpose” provision, which the Commission has included in some of its texts, and which seeks to clarify the

purpose of the draft guidelines, which is to provide guidance to users concerning the law and practice on the provisional application of treaties. The drafting was refined, in particular, to replace in the English text an earlier reference to providing “orientation” to providing “guidance”. Likewise, in the earlier version reference was made to “the legal regime of”, which was replaced with “the law and practice on”. The concluding clause was also refined to read “and other rules of international law”, which specifically envisages the applicability of rules of customary international law.

Draft guideline 2 specifies that the purpose of the draft guidelines is to provide guidance “on the basis of” Article 25 and other rules of international law. This term is intended to underline, in particular, that Article 25 of the Vienna Convention is the point of departure of the work of the Commission and the present draft guidelines, a kind of “basic” rule, which needs to, or has to, be complemented by other rules in order to obtain a full set of orientations on the applicable law to provisional application.

The title of draft guideline 2 is “purpose”.

Draft Guideline 3

Mr. Chairman,

Draft guideline 3 states the general rule on the provisional application of treaties. The Drafting Committee worked on the basis of the revised proposal of the Special Rapporteur, which suppressed reference to the internal law of the State or the rules of international organizations, based on suggestions made in the plenary.

In preparing draft guideline 3 the Drafting Committee sought to track the language of article 25 of the Vienna convention as closely as possible. Accordingly, the language of the second and third clauses, namely “pending its entry into force, if the treaty so provides”, reflects the formulation of article 25. The meaning of the reference to “entry into force” was debated

because it seemed at first sight to imply, under the understanding of article 25, the entry into force of the treaty itself. However, the Committee took note of the fact of the examples existed of provisional application taking place after the entry into force of the treaty itself. The sense of the Drafting Committee was that entry into force was to be understood in accordance with article 24 of the Vienna Convention on “Entry into force”, which covers under this heading both the entry into force of the treaty itself and the entry into force for each State. Different drafting solutions were explored, from specifying entry into force “between the States concerned” or “for the State or States concerned” or “States involved”, to even deleting the reference to “entry into force” entirely. In the end, it was decided to stick to the general reference to “entry into force” found in article 25, and to deal with the matter in a possible future draft guideline, which could cover the various permutations which arise from the application of that concept, and which would deal with the question of among which States a treaty, being provisionally applied, would apply, depending on the entry into force of the treaty for each of the States involved.

The first and last clauses were the subject of significant debate in the Drafting Committee. The issue at hand was how best to capture in the text both the States which could provisionally apply a treaty, and the States whose agreement was required in order for such provisional application to take place.

The first clause, which states the basic assertion that a “treaty or a part of the treaty may be provisionally applied”, tracks the formulation of the chapeau to paragraph 1 of article 25, but does not specify which States can provisionally apply the treaty. The initial revised proposal of the Special Rapporteur had made reference to a “State” provisionally applying a treaty or part thereof, without specifying the relationship of the State to the treaty (such as whether it was a negotiating or contracting State, etc.). The Drafting Committee held an extensive debate as to whether such reference needed to be qualified by a reference to a more specific group of States, such as the negotiating States, or whether the draft guideline should recognize the possibility, as it seems to result from contemporary practice, of a provisional application being undertaken by States which were not negotiating States.

A similar issue arose as regards the concluding clause, which in the revised proposal of the Special Rapporteur made reference to the agreement of States. The question again was whether to track the position taken in article 25, which limited the agreement to that of negotiating States, or whether to take into account contemporary practice, for example cases of provisional application being agreed to either by only some negotiating States or by States which had not been negotiating States, but which had subsequently acceded to the treaty. Therefore a broader formulation was supported. However, one of the concerns in the Committee was that an open-ended formulation could allow for an interpretation that a third State completely unconnected from the treaty could provisionally apply it. Different formulations were explored, including making a reference to agreement “at any stage”, or “relevant State” which would indicate the requirement of a connection to the treaty.

The solution found by the Drafting Committee was to adopt a formulation, for both the opening and concluding clauses, which did not seek to specify the possible constellation of States which might be involved. Instead, the provision is drafted in the passive form and simply restates the basic rule, in the case of the opening clause, that a treaty or part thereof may be provisionally applied, and, in the final clause, that in addition to a treaty expressly providing for provisional application, such provisional application may also take place on the basis of agreement “in some other manner”. This was adopted on the understanding that the commentary would discuss the fact that contemporary practice has revealed the provisional application of treaties by a variety of groups of States, perhaps in a manner not entirely envisaged by the drafters of article 25, which made it impossible to take a definitive position in the text of the draft guideline itself.

The Drafting Committee also considered a proposal for a second paragraph for the draft guideline, making reference to internal law by emphasizing its potential relevance in cases where the treaty clause specifically referred to or conditioned the scope or content of provisional application to requirements of internal law. The proposed additional text would have read “[t]he agreement to provisionally apply a treaty may limit the scope of the provisional application by referring to the internal law of the States concerned, in whole or in part.” This was suggested as a reflection of the existence of examples of such clauses, as in the case of the Energy Charter. The

view of the Drafting Committee was that the issue was an important one, but was better dealt with in one of the subsequent draft guidelines proposed by the Special Rapporteur, possibly as a stand alone draft guideline.

The title of the draft guideline was provisionally adopted as “general rule”.

Mr. Chairman,

Before concluding my report today, I wish to pay tribute to the Special Rapporteur, Mr. Juan Manuel Gomez Robledo, whose knowledge of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also wish to thank the members of the Drafting Committee for their active participation and valuable contribution to the work undertaken this year. I also wish to thank the Secretariat for its valuable assistance.

I would like, finally, to stress that the Drafting Committee worked in English and French and that the present statement will be posted on the website of the Commission, both in French and English.

Mr. Chairman,

This concludes my introduction of the seventh and last report of the Drafting Committee for the sixty-seventh session. I wish to indicate that the Commission is not, at this stage, being requested to act on the draft guidelines, as they have been presented for information purposes only.

Thank you very much.

Annex

Titles and texts of draft guidelines 1 to 3, provisionally adopted by the Drafting Committee on 29 and 30 July 2015

Draft Guideline 1

Scope

The present draft guidelines concern the provisional application of treaties.

Draft Guideline 2

Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of Article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

Draft guideline 3

General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force, if the treaty itself so provides, or if in some other manner it has been so agreed.