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Provisional application of treaties

Statement of the Chairman of the Drafting Committee

Mr. Pavel Sturma

9 August 2016

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

The Drafting Committee held eight meetings on the topic, on 5, 11, 12, 13, 26 and 27 July 2016, respectively. The primary focus was on completing the consideration of the draft conclusions referred to the Drafting Committee last year. If you recall, at last year's session the Chairman of the Drafting Committee, Mr. Mathias Forteau, introduced draft conclusions 1 to 3 as provisionally adopted by the Drafting Committee. Mr. Forteau's statement is available on the Commission's website.

Today, I will introduce a further five draft guidelines provisionally adopted at this year's session, by the Drafting Committee. The entire set of draft guidelines, namely draft guidelines 1 to 3 provisionally adopted last year, and draft guidelines 4, 6, 7, 8 and 9, provisionally adopted this year, are to be found in the report of the Drafting Committee, contained in document A/CN.4/L.877.

Allow me to also indicate that the Drafting Committee decided to suspend its consideration of one draft guideline, namely draft guideline 5, which, in a revised proposal of the Special Rapporteur, dealt with the possibility of provisional application of a treaty by means of a unilateral declaration. It is my recommendation, Mr. Chairman, that the draft guidelines be

referred back to the Drafting Committee at next year's session in order to complete its consideration of draft guideline 5, as well as an outstanding matter concerning draft guideline 8, which I will describe shortly. The Drafting Committee, next year, will also have before it the Special Rapporteur's proposal for draft guideline 10, on internal law and the observation of provisional application of all or part of a treaty, as contained in his fourth report. That provision was referred to the Drafting Committee on 27 July. However, the Drafting Committee was unable to complete its consideration of the provision owing to a lack of time.

Before addressing the details of the report, let me pay tribute to the Special Rapporteur, Mr. Juan Manuel Gomez Robledo, whose constructive approach, and flexibility greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and significant contribution. Furthermore, I wish to thank the Secretariat for its invaluable assistance.

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Draft Guideline 4

Mr. Chairman,

Draft guideline 4 deals with additional forms of agreement, on the basis of which a treaty, or a part of a treaty, may be provisionally applied, other than where the treaty itself so provides. Accordingly, the provision expands on the reference at the end of draft guideline 3 to "in some other manner it has been so agreed", which is expressly envisaged in article 25, paragraph 1(b), of the Vienna Convention on the Law of Treaties, of 1969. Two such categories of additional methods are identified in the sub-paragraphs. According to the first, provisional application may take place by means of "a separate agreement". In the second scenario, provisional application could take through "any other means of arrangements", of which some examples are provided. The Drafting Committee considered the possibility of reflecting the content of the draft guideline in the commentary to draft guideline 3, or to add it as a second paragraph in draft guideline 3. However, the Committee decided that it was useful to retain a separate draft guideline.

The origin of this provision is the Special Rapporteur's proposal for draft guideline 2, as contained in his third report, discussed at the sixty-seventh session in 2015. The Drafting

Committee worked on the basis of a series of revised proposals for the draft guideline, made by the Special Rapporteur, first at last year's meetings of the Drafting Committee, and then again at this year's meeting. The revised proposals took into account the views expressed during the debate in the Commission in 2015, and, subsequently, the suggestions made in the Drafting Committee.

The main focus of the Drafting Committee was to align the proposed text with what was provisionally adopted in 2015, particularly in draft guideline 3, with a view to minimizing the overlap between the two. The other concern of the Drafting Committee was to bring the drafting into line with the formulation of article 25 of the Vienna Convention.

I will provide a brief description of the drafting of each element of the provision, starting with the chapeau. As indicted earlier, draft guideline 4 follows on from draft guideline 3. This is indicated by the opening phrase "[i]n addition to the case where the treaty so provides", which is a direct reference to the same phrase in draft guideline 3. The reference to "treaty so provides" tracks the language of article 25.

Subparagraph (a) envisages the scenario of provisional application by means of an agreement separate to the treaty itself. It is worth pointing out here that the word "agreement" refers to an instrument, including in the form of a treaty, and which should be distinguished from the underlying agreement, in the sense of mutual consent, between the parties to provisionally apply the treaty. The Drafting Committee considered indicating the word "instrument", but decided on the more flexible and all-encompassing reference to "agreement".

Subparagraph (b) acknowledges the possibility that, in addition to a separate instrument, provisional application may also be agreed through other "means or arrangements", which broadens the range of possibilities for reaching agreement to provisionally apply a treaty. This is a confirmation of the inherently flexible nature of provisional application. By way of providing further guidance, reference is made to two examples of such "means or arrangements", namely provisional application agreed by means of a resolution adopted by an international organization or at an intergovernmental conference. This is an illustrative list of examples, drawn from recent practice. Other examples will be referred to in the commentary, and might also include declarations by States.

I also wish to recall, as I indicated at the beginning of my statement, that the Special Rapporteur proposed a further draft guideline 5 on provisional application by means of unilateral declaration, as a possible further means in which such provisional application may take place. However, the consideration of the proposal is still pending before the Draft Committee.

The title of draft guideline 4 is “form”.

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Draft guideline 6

Mr. Chairman,

Draft guideline 6 deals with the commencement of provisional application. The draft guideline was based on the proposal for draft guideline 3, contained in the Special Rapporteur’s third report. The Drafting Committee proceeded on the basis of a revised proposal by the Special Rapporteur, which took into account the various suggestions made in the Plenary debate last year. The Drafting Committee subsequently refined the draft provision, and structured it on the model of article 24, paragraph 1, of the Vienna Convention, on entry into force.

I will proceed through each of the clauses in the draft provision. The first clause reflects the standard approach taken throughout the draft guidelines of referring to the provisional application of both the entire treaty or of a part of a treaty. In principle, therefore, unless stipulated otherwise, the draft guidelines apply equally to both scenarios.

The second clause has two components. The first is the reference to “pending its entry into force”. This was added in order to align the text with that adopted in draft guideline 3, thereby importing into the draft guideline the understanding reached last year that “entry into force” refers to both the entry into force of the treaty itself, and entry into force for the State itself. While the Drafting Committee considered leaving the matter to the general rule in draft guideline 3, and including a separate draft guideline on the scope *ratione personae* of the draft guidelines, in other words, between which entities, States or international organizations, can a treaty be provisionally applied. It, however, decided to retain the reference since it would,

nonetheless, make the present draft guideline clearer if the understanding from last year were referred to expressly.

The second component is the inclusion of the reference not only to States, but also international organizations. This reflects the position taken in the Drafting Committee that the scope of the draft guidelines should include treaties between States and international organizations, or between the international organizations. The reference to entry into force "between" the States or international organization is on purpose drafted more generally in order to cover the variety of possible scenarios, including, for example, provisional application between a State for which the treaty has entered into force and another State or international organization for which the treaty has not entered into force.

The clause "takes effect on such date, and in accordance with such conditions and procedures", deals with the triggering of the commencement of provisional application. The Committee initially considered using the verb "commences", but decided to align the text with that adopted in the Vienna Convention, in article 68, which refers to "takes effect". The phrase confirms that what is being referred to is the legal effect in relation to the State electing to provisionally apply the treaty. An earlier version of the draft provision referred expressly to the various modes of expressing consent to be bound by a treaty, along the lines of article 11 of the Vienna Convention. This, however, made the formulation too heavy. The Committee subsequently removed the reference to each mode, as part of the process of simplifying the text, along the lines of the structure of article 24, paragraph 1 of the Vienna Convention, as mentioned earlier. The Drafting Committee understood that, by doing so, the provision no longer only dealt with the temporal aspect of provisional application, but also covered, in part, the legal effects of such application. It, however, understood that the inclusion of the clause was without prejudice to the adoption of a further provision on the legal effects of provisional application, as draft guideline 7.

The reference to "as the treaty provides or as are otherwise agreed", is meant to make it clear that the agreement to provisionally apply a treaty is based on an underlying treaty or separate agreement to permit provisional application, and accordingly, is subject to the conditions and procedures established in such treaty or separate agreement.

The title of the draft guideline is "[c]ommencement of provisional application". The word "commencement" is a reference to the temporal component of the provisional application of the treaty.

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Draft guideline 7

Mr. Chairman,

Draft guideline 7 deals with the legal effects of provisional application. Its origins lie in the Special Rapporteur's proposal for draft guideline 4, in his third report. The Drafting Committee proceeded on the basis of a revised proposal by the Special Rapporteur, which included a number of additional paragraphs covering several additional aspects of the issue, raised in the plenary debate at last year's session. The Drafting Committee, however, decided to adopt a provision with a single paragraph. It did so after reflection on which legal effects were being referred to. It understood that two types of "legal effects" might be envisaged: the legal effects of the agreement to provisionally apply the treaty, and the substantive legal effects of the treaty being provisionally applied. The view of the Drafting Committee was that the "legal effects" dealt with by the draft provision should be limited to those of the substantive obligations of the treaty, or of its provisions, being provisionally applied. The treaty being provisionally applied would be considered as binding on the parties provisionally applying it from the point of time that the provisional application commenced. Accordingly, references to the legal effects of the agreement to provisionally apply the treaty were excluded from the provision.

The basic assertion made in the draft guideline is that the legal effect of provisional application of a treaty or a part thereof is to produce the same legal effects as if the treaty were in force between the States or international organizations concerned. This assertion is made in the first part of the draft provision. As already indicated, such legal outcome is drawn from the treaty or separate agreement itself. Accordingly, in cases where the treaty or separate agreement is silent on the legal effects of provisional application, which is common, the draft provision creates a presumption in favour of the same legal effects as if the treaty were in force.

However, this position is qualified by the concluding phrase “unless the treaty provides otherwise or it is otherwise agreed”, which confirms that the basic rule, just mentioned, is not absolute and is subject to the treaty or separate agreement in question, which may provide an alternative end result. The Drafting Committee felt that such arrangement, namely a default presumption in favour of the same legal effects as if the treaty were in force, subject to the possibility that the parties may agree otherwise, reflected existing State practice.

Once the basic structure and orientation of the provision was agreed upon, the formulation was aligned with the draft guidelines adopted earlier, as well as with the Vienna Convention. The opening phrase “the provisional application of a treaty or part of a treaty” follows the phrasing adopted in draft guideline 6. The word “produces”, which was initially rendered as “creates”, is inspired by the formulation found in guideline 2.6.13 of the guidelines on the reservations to treaties, of 2011. An earlier reference to “rights and duties” was modified to read “legal effects” to cover the point that it is not necessarily always the case that both rights and obligations are created. It depended on the treaty. The Drafting Committee also considered a proposal to refer to legal effects “under international law”, so as to clearly distinguish the legal effects that may arise under national law. However, it was understood that the Commission was only working on the position under international law as is its custom, and, accordingly, such specification was not strictly not necessary.

The Drafting Committee considered the possibility of rendering the word “same” legal effects as “full” legal effects, which has appeared in the case-law, but decided against doing so, out of the concern that the meaning of the adjective “full” was less clear in the present context. The phrase “as if the treaty were in force”, which is central to the draft provision, alludes to the effects that the treaty would produce were it in force for the State or international organization. The reference to “between the States or international organizations concerned” was inserted in order to align the draft provision with draft guideline 6. The concluding clause “unless the treaty provides otherwise or it is otherwise agreed”, provides the condition on which the general rule is based, namely that the treaty or separate agreement does not provide otherwise.

I wish to place on record that the earlier revised proposal of the Special Rapporteur had included a paragraph, based on a suggestion made in Plenary in 2015, which would have introduced a safeguard that the provisional application of a treaty could not result in the

modification of the content of the treaty. However, the Drafting Committee was of the view that the new formulation adopted this year was sufficiently comprehensive to deal with the point, since the provisional application is limited to producing the same effects as if the treaty were in force. Implicit in the provision, therefore, is the understanding that the act of provisionally applying the treaty does not affect the rights and obligations of other States. Furthermore, it is worth stating that the draft provision should not be understood as limiting the freedom of States to amend or modify the treaty.

The title of the draft guideline is "[l]egal effects of provisional application", which reflects the narrow scope of the draft guideline, which is limited to the legal effects of provisional application, and not of the agreement to provisionally apply.

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Draft guideline 8

Mr. Chairman,

Draft guideline 8 deals with the question of responsibility for breach of an obligation arising under a treaty or part of a treaty that is being provisionally applied. The Drafting Committee again proceeded on the basis of a revised proposal, presented by the Special Rapporteur, which was based on his proposal for draft guideline 6 as presented in his third report.

The revised proposal of the Special Rapporteur took on board several suggestions made during the Plenary debate at last year's session, and contained two paragraphs: the first dealing with the consequences of breach of an obligation to provisionally apply a treaty, and the second on termination or suspension as a consequence of breach.

The Drafting Committee first considered whether it was necessary to have a provision on responsibility at all, since the Vienna Convention of 1969 did not contain such a clause. The prevailing view was that the scope of the draft guidelines was not necessarily limited to that of

the Vienna Convention, and that the inclusion of the present draft guideline was useful since it dealt with a key legal consequence of the provisional application of a treaty.

The Drafting Committee focused on the content of the first paragraph, and similar to what was done with draft guideline 7, re-oriented it towards dealing with breach of an obligation arising under the treaty or part thereof being provisionally applied, as opposed to breach of the agreement to provisionally apply the treaty. The latter agreement or arrangement to provisionally apply the treaty is not covered by the present draft guideline, but would remain regulated by the general regime of the law of treaties. This will be explained in the commentary.

Several further suggestions were considered, including to commence the provision with the clause "[u]nless the treaty otherwise provides or the negotiating States have otherwise agreed", a qualifier which appears in some of the other draft guidelines adopted this year. However, the Drafting Committee declined to do so, out of the concern that it could have unintended consequences for the law of international responsibility.

Another issue was whether it was necessary to refer to "a part" of the treaty. There was a view in the Drafting Committee that an obligation arising under a part of a treaty was by definition an obligation arising under the treaty itself. The Drafting Committee, however, decided to retain the reference in order to add the precision that when part of a treaty is being provisionally applied, it is only that part of the treaty which is susceptible to breach as conceived of under the present draft guideline.

The formulation of the draft provision was aligned with the text adopted in the articles on the responsibility of States for internationally wrongful acts, of 2001. Accordingly, the reference to "an obligation arising under" and the word "entails" were consciously drawn from the 2001 articles. Indeed, the concluding phrase "in accordance with the applicable rules of international law" is intended as a reference, *inter alia*, to the 2001 articles. An earlier version referred to the responsibility of "a State", thereby distinguishing States from international organizations, out of recognition that the 1986 Vienna Convention has not been as widely accepted as the 1969 Convention. However, the Drafting Committee decided not to accept the suggestion, preferring to leave the matter open and to be regulated by the concluding reference to "applicable rules of international law".

As regards the second paragraph, proposed by the Special Rapporteur, the Drafting Committee was of the preliminary view that the matter was distinct from the question of responsibility and should be dealt with separately, possibly in a separate provision, and on the basis of a further report by the Special Rapporteur on other methods by which provisional application may be terminated. I will return to this issue during my introduction of draft guideline 9. Nonetheless, the Drafting Committee decided to defer a final decision on the matter until next year's session.

The draft guideline was initially located after what is now draft guideline 9 on termination. However, the Drafting Committee was of the view that it logically followed draft guideline 7 on legal effects, and the draft guidelines were reordered accordingly.

The Drafting Committee adopted the title of the draft guideline as "[r]esponsibility for breach".

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Draft guideline 9

Mr. Chairman,

Draft guideline 9 concerns the termination of provisional application in the particular context where a notification of intention not to become a party has been communicated. The Drafting Committee worked on the basis of a revised proposal by the Special Rapporteur drawing from his original proposal for draft conclusion 5, as presented in his third report. It is worth noting that the various proposals of the Special Rapporteur envisaged termination of provisional application in two scenarios: where the treaty enters into force for the State concerned, and where the intention not to become a party to the treaty is communicated. The Drafting Committee decided to narrow the scope of the provision to the latter scenario, thereby tracking more closely the formulation of paragraph 2 of article 25. The main difference with the second paragraph of article 25 of the Vienna Convention then being the additional reference to international organizations, and that to provisional application of part of a treaty.

As regards the scenario of termination of provisional application by means of the entry into force of the treaty itself, the Drafting Committee was cognizant of the fact that such termination was implicit in the reference in draft guideline 6 to "pending its entry into force". Part of the complexity it faced was capturing the constellation of possible legal arrangements which may exist if the treaty has entered into force for the State or international organization provisionally applying a treaty, in relation to other States or international organizations provisionally applying the treaty. It is also worth recalling that article 25, paragraph 2, does not provide for the situation in question. One option considered was to introduce the phrase "pending its entry into force between the States or international organizations concerned", found in draft guideline 6 into the chapeau of the present draft guideline. Another suggestion was to indicate in the commentary that the effect of draft guideline 6 is that provisional application continues until the treaty enters into force for the State provisionally applying the treaty in relation to the other States provisionally applying the treaty.

The question facing the Drafting Committee then was whether to make this explicit in the text of the draft guideline, or whether to keep it implicit and deal with the matter in the commentary. On balance, the Committee settled for doing the latter, in no small measure owing to the fact that it was not easy to find a formulation that could capture the relative nature of the various legal relations that may exist, and be affected, in one way or the other, by the entry into force of the treaty for one of the States or international organizations provisionally applying the treaty. Hence, for example, the reference to the provisional application being "terminated" by the entry into force would not fully capture the possible range of outcomes in such situations.

Various drafting alternatives were considered, with a view to finding a way of accommodating the various possibilities that might arise, including the possibility of dealing with the question in a separate paragraph. However, in the end the Drafting Committee settled for a text which tracked the formulation of paragraph 2 of article 25 of the Vienna Convention. The provision was adopted without prejudice to the possibility of the Commission considering other methods for the termination of provisional application, based on a corresponding study of the practice of States and international organizations, by the Special Rapporteur. Here, it is worth recalling that the 1978 Vienna Convention on Succession of States in Respect of Treaties, in article 29, envisages a number of grounds on which provisional application may be terminated.

The Drafting Committee was also concerned with identifying which States or international organizations should be notified of the intention to terminate. Such specification is indicated in the clause "notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally".

I would also like to place on record that the Drafting Committee considered a proposal to introduce a safeguard in relation to unilateral termination, by applying *mutatis mutandis* paragraph 2 of article 56 of the Vienna Convention, concerning unilateral denunciation. The Drafting Committee declined to act on the proposal, out of concern that it would undermine the flexibility built in to Article 25 of the Vienna Convention.

The intended scope of the draft guideline is further confirmed by the title adopted by the Drafting Committee, which is "[t]ermination upon notification of intention not to become a party".

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Mr. Chairman,

This concludes my introduction of the tenth report of the Drafting Committee for the sixty-eighth session. It is my recommendation that the Plenary take note of the draft guidelines on the provisional application of treaties, as set out in document A/CN.4/L.877, on the understanding that the draft guidelines will be referred back to the Drafting Committee at next year's session with a view to undertaking the consideration of the draft guidelines it was unable to consider at the present session, together with any further draft guidelines that might be referred to it next year. It is anticipated that the Commission will be in a position at next year's session to adopt the draft guidelines and a full set of commentaries thereto.

Thank you very much.