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INTERNATIONAL LAW COMMISSION

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Provisional application of treaties

Statement of the Chairpersons of the Drafting Committee

Mr. Aniruddha Rajput

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Mr. Chairperson,

It is with great pleasure that I introduce the first report of the Drafting Committee for the present session of the Commission, which deals with the topic "provisional application of treaties".

The Drafting Committee held four meetings on the topic, on 2, 3, 5, and 9 May 2017, respectively. The focus was on completing the consideration of the draft guidelines referred to the Drafting Committee last year, namely draft guidelines 5 and 10, as had been proposed by the Special Rapporteur in his third and fourth reports, respectively.

If you recall, two years ago, the then Chairperson of the Drafting Committee, Mr. Forteau, introduced draft guidelines 1 to 3, as had been provisionally adopted by the Drafting Committee at that session. At last year's session, the Chairperson of the Drafting Committee, Mr. Pavel Sturma, introduced draft guidelines 4 and 6 to 9, as provisionally adopted by the Drafting Committee. In his statement, Mr. Sturma, had indicated that the Drafting Committee could not complete consideration of draft guidelines 5 and 10. There was disagreement within the Drafting Committee, with draft guideline 5 as it stood then. The Special Rapporteur suggested that the consideration of draft guideline 5 be deferred to

the next year and he would come with a fresh proposal. Also, the consideration of draft guideline 10, as had been proposed by the Special Rapporteur in his fourth report, and which was referred to the Drafting Committee last year, was also deferred to this year due to paucity of time. Furthermore, the Plenary, at its 3349th meeting, held on the 2nd of May this year, decided to refer all the draft guidelines taken note of in the last two years, namely draft guidelines 1 to 4 and 6 to 9, back to the Drafting Committee with a view of having a consolidated text prepared and provisionally adopted this year.

The Drafting Committee adopted draft guidelines 10 to 12. The details of which, I will come to soon.

I should mention that, regrettably, the Drafting Committee was unable to undertake consideration of draft guideline 5, for lack of time. It is envisaged, time permitting, that the Drafting Committee might consider the draft guideline during the second part of the session, the result of which would be reflected in a further report from the Drafting Committee. Nonetheless, the prevailing view in the Committee, and indeed that of the Special Rapporteur, was that the report of the Drafting Committee on those draft guidelines that have been adopted so far be transmitted to the Plenary now, so that it can take necessary action as soon as possible in order to allow for the preparation of commentaries.

Before addressing the details of the report, I wish to pay tribute to the Special Rapporteur, Mr. Juan Manuel Gomez Robledo, who demonstrated a constructive and innovative approach, which facilitated the work of the Drafting Committee. I also thank 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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Mr. Chairperson,

Turning now to the work undertaken this year, I draw the attention of the Plenary to document A/CN.4/L.895 which contains the texts and titles of draft guidelines 1 to 4 and 6 to 12 provisionally adopted by the Drafting Committee in 2015 to 2017. As already indicated, I will only focus on those draft guidelines provisionally adopted by the Drafting Committee at the meeting of the Drafting Committee at the present session, namely draft guidelines 10

to 12. In other words, my statement should be read together with the respective statements of my two predecessors, which are available on the Commission's website. Please allow me also to indicate, for the record, that the Drafting Committee decided to consider draft guideline 10 first, to be followed by draft guideline 5, which, as I indicated earlier, did not happen.

The time allocated to the Drafting Committee was spent on developing a "package" of three draft guidelines which arose out of the consideration of the Special Rapporteur's proposal for draft guideline 10. The proposal had sought to reflect the provisions of Articles 27 and 46 of the Vienna Convention on the Law of Treaties of 1969 in a single provision. The Drafting Committee decided to reflect the text of the relevant provisions of the Vienna Convention in the draft guideline. This meant that a single provision was essentially dealing with the different scenarios reflected in the two Articles of the Convention. The provision became further complicated by the fact that the scope of the draft guidelines was enlarged, last year, to include treaties entered into by international organizations. Accordingly, it was felt that account needed to also be taken of the corresponding provisions in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. To simplify matters, the Drafting Committee decided to separate out the two sets of issues, relating to the operation of internal law, into two separate draft guidelines, namely 10 and 11, each with two paragraphs dealing with the position under the 1969 and 1986 Conventions, respectively. A third draft guideline, number 12, was later added to deal with agreement regarding the limitations deriving from internal law of the State or from the rules of the international organisation, and which I will revert to in due course. All three provisions underwent a series of drafting refinements, particularly with a view to making them more specific to provisional application, and by way of aligning the text as much as possible with that in the draft guidelines previously adopted. Nonetheless, the commentary will clarify that draft guidelines 10 and 11 are without prejudice to Articles 27 and 46 in both Vienna Conventions.

The concern was expressed that the Commission was envisaging a regime of provisional application that went beyond that provided for in Article 25 of the Vienna

Convention of 1969. In terms of another view, the flexibility implicit in the regime on provisional application already existed within the Vienna Conventions themselves.

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Draft guideline 10

Mr. Chairperson,

With this introduction I propose to deal with each new draft guideline in turn, starting with the substance of draft guideline 10. The draft guideline deals with the problem of the invocation of internal law, or in the case of international organizations their rules, as justification for failure to perform an obligation arising under a treaty being provisionally applied or a part thereof. In principle, the Drafting Committee decided to track the language of Article 27 of the Vienna Convention as closely as possible, and, if any changes were made, to reflect those changes in both paragraphs. Accordingly, except where indicated otherwise, the modifications I am about to describe apply to both paragraphs.

The text in each paragraph can be divided into three parts. First, the opening clause, "[a] State" or "international organization that has agreed to the provisional application of a treaty", is a streamlined version of that found in the Special Rapporteur's proposal, which had initially referred to consent to "undertake obligations by means of …provisional application". An earlier version included a reference to "consent" to provisional application. This was refined so as to read "agreed" as an indication of both the voluntary nature of provisional application, and the fact that it is based on an underlying agreement to provisionally apply the treaty. The Drafting Committee further included the standard reference to the provisional application of a "treaty or part of a treaty", thereby aligning the text with the draft guidelines adopted at the previous session.

The middle clause, in each paragraph, "may not invoke the provisions of its internal law as justification for its failure to perform", is drawn verbatim from the respective Vienna Conventions. Again, the policy of the Drafting Committee was to hew as closely as possible

to those treaties. This is to be understood as a further manifestation of the position taken in draft guideline 3, that the Commission's work on this topic should be based on the Vienna Convention of 1969, and other rules of international law, which would include the 1986 Convention.

Having said so, the Drafting Committee did, however, depart from the Vienna Convention language, where the concluding words "a treaty", in both conventions, were replaced by the phrase "an obligation arising under such provisional application", which reflected the scope of the draft guidelines. Such formulation had its origins in the initial proposal of the Special Rapporteur, which, as already mentioned, made reference to "consent to undertake obligations by means of provisional application of a treaty, or part thereof", and accordingly, that internal law could not be the basis for non-compliance "with such obligations". It also reflects the position in draft guideline 7, adopted last year, that provisional application produces legal effects. The language underwent various modifications, mostly of a linguistic nature, resulting in the version that is before you now. For example, the reference at the end to "obligation arising under such provisional application", was inserted in order to clarify that the obligation flows not from the treaty itself, but from the agreement to provisionally apply the treaty.

The title of the draft guideline is "[i]nternal law of States or rules of international organizations and observance of provisionally applied treaties". The title is structured in a manner to indicate that what is being referred to is not internal law about provisional application of treaties, per se, but rather the effect of internal law on the provisional application of treaties.

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Draft guideline 11

Mr. Chairperson,

I now turn to draft guideline 11, which, as I explained earlier, serves as the analogue for Article 46, paragraph 1, of the 1969 Convention, and paragraph 2 of its 1986 counterpart. At first, the Special Rapporteur, in his initial proposal, had followed the approach of the 1969 Convention of including a reference to Article 46 only in the form of a without prejudice clause contained in the second sentence in Article 27. However, as I mentioned earlier, the Drafting Committee took a decision early on to reflect the full text of the respective parts of Article 46 of the two Vienna Conventions, in the draft guidelines. The Drafting Committee also quickly realised that doing so within draft guideline 10 was complicated since it meant dealing with two distinct questions of internal law within a single provision. Hence, the Article 46 scenario of the invocation of internal law or rules regarding competence, was shifted into a separate provision, namely new draft guideline 11.

Once again, the provision is organised in two paragraphs, dealing with States in the first, and international organizations in the second. As was done with draft guideline 10, the Drafting Committee tried as much as possible to keep to the formulation of the relevant provisions in both Vienna Conventions. Indeed, the modifications were limited to introducing an express reference to "provisional application". Hence the reference to "consent to be bound by a treaty" in the two conventions, was modified to read "consent to the provisional application of a treaty or a part of a treaty". Likewise, the phrase "competence to conclude treaties", in the two conventions, has been rendered as "competence to agree to the provisional application of treaties".

I should also mention that there were suggestions in the Drafting Committee that the draft guidelines also include the second paragraph of Article 46 of the 1969 Vienna Convention, and its counterpart in paragraph 3 of the 1986 Vienna Convention. The respective paragraphs provide a definition of a "manifest violation" for purposes of Article 46 in each convention. The prevailing view was that it was not necessary to include such additional paragraphs in the text itself. Rather, they will be discussed in the accompanying commentary.

The title of draft guideline 11 is “Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties”.

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Draft Guideline 12

Mr. Chairperson,

Draft guideline 12 deals with agreement between the parties, seeking to provisionally apply a treaty, on the limitations deriving from the internal law of States or rules of international organizations. The origin of the draft guideline 12 was in a proposal made in the Drafting Committee to add a chapeau in an earlier version of what has now become draft guideline 10 and 11, conditioning the applicability of those provisions “unless and to the extent that the treaty otherwise provides or it is otherwise agreed”. The rationale was to inject an element of flexibility so as to allow for the possibility that States may in fact agree, for example, to limit provisional application so as to take into account their constitutional provisions on the competence to conclude treaties. It was also recognised that practice existed of treaties expressly making provisional application subject to limitations of internal law, and not necessarily related to the competence to agree on the provisional application of treaties. For some members, the proposed chapeau provided the necessary element of flexibility. However, the Drafting Committee could not agree whether the proposed chapeau should be limited only to draft guideline 11, or whether it could also be included in draft guideline 10. The other concern was that adding the chapeau to either draft guideline could be seen as adding new elements to the two Vienna Conventions. As indicated earlier, the basic policy of the draft guidelines was not to prejudice existing treaty law, but to be consistent with the regime of the two Vienna Conventions.

The solution found was to address limitations deriving from internal law of States or rules of international organizations in a separate provision, which has now become draft

guideline 12. The provision is cast as a without prejudice clause, applicable to the draft guidelines generally. The purpose of the draft guideline is to confirm that States or international organizations agreeing to the provisional application of a treaty, may seek to condition such provisional application on limitations deriving from internal law, in the case of States, or the rules of the respective organization, in the case of international organisations. The recognition of such possibility was largely supported by members of the ILC, during the Plenary debate last year, as well as by member States in the Sixth Committee.

A key element of the provision is the reference to such possibility existing as a "right" of the State or international organisation. Other options considered were "possibility", "freedom", "capability", and "ability". The Drafting Committee also considered a different formulation, which sought to avoid making reference to whether the State was acting as of right or otherwise, by stating that the draft guidelines were "without prejudice to States or international organisations agreeing" on provisional application. However, difficulties in rendering the text in the other official languages meant that the proposal could not be pursued. None of the other options I referred to garnered the necessary support, the concern being that they seemed to refer to the factual existence of the possibility of provisional application, as opposed to the exercise of a legal prerogative inherent in the Vienna Conventions. In the end, the Drafting Committee settled on the text before you, which refers to the "right" to do so.

The commentary will clarify that the reference to "right" should not be interpreted as implying the need for a separate agreement on the applicability of limitations deriving from the internal law of the State or from the rules of the international organisation. It is understood that the existence of any such internal limitations on the provisional application of the treaty would be a condition of the agreement to provisionally apply the treaty, and, accordingly, subject to agreement by the other parties to the provisional application. The commentary will also confirm that this draft guideline should not be construed as an invitation to States, or international organisations, to unilaterally invoke their internal law, or rules, to terminate provisional application.

The title of draft guideline 12 is “[a]greement regarding limitations deriving from internal law of States or rules of international organizations”. The reference to “agreement” was included on purpose to reflect the consensual basis of provisional application.

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Mr. Chairperson,

This concludes my introduction of the first report of the Drafting Committee for the sixty-ninth session. It is my recommendation that the Plenary adopt draft guidelines 1 to 4 and 6 to 12, but without prejudice to the inclusion or not of a further draft guideline, on the basis of the proposal of the Special Rapporteur for draft guideline 5, or its location within the set of draft guidelines. As I indicated at the beginning, I hope that the Drafting Committee will be able to take up draft guideline 5 during the second part of the session.

Thank you.