

INTERNATIONAL LAW COMMISSION

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Provisional application of treaties

Statement of the Chairperson of the Drafting Committee

Mr. Aniruddha Rajput

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Mr. Chairperson,

It is my pleasure to introduce the seventh report of the Drafting Committee. In this report, I will return to the topic “provisional application of treaties”. This topic was dealt with in an earlier report considered during the first part of the session. If you recall, further to the introduction of that earlier report, on 12 May 2017, the Commission adopted a set of 11 draft guidelines on the provisional application of treaties. At the time, draft guideline 5 was left in abeyance, owing to the fact that the Drafting Committee had not had enough time to consider the draft provision. It was also suggested, at the time, that a further opportunity could be given to the Drafting Committee to consider draft guideline 5 and undertake a toilettage of the text as worked out thus far.

The Drafting Committee was subsequently able to hold one further meeting, on 24 July 2017, at which time it undertook both tasks. The outcome of the work of the Drafting Committee is to be found in a revised version of the draft guidelines which is contained in

document A/CN.4/L.895/Rev.1, which has been circulated and is available on the Commission's website.

Before addressing the details of the report, allow me once again to pay tribute to the Special Rapporteur, Mr. Juan Manuel Gomez Robledo, for his constructive 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.

Mr. Chairperson,

I will first deal with the question of the proposal for a draft guideline 5 on provisional application by means of unilateral declaration. The Drafting Committee proceeded on the basis of a revised proposal initially presented by the Special Rapporteur in 2016, which sought to take into account some of the concerns that were expressed in the Commission on the possibility of provisional application by way of unilateral declaration.

The proposal contained two components. The first dealt with the possibility of provisional application arising from a unilateral declaration, where such outcome is envisaged in the treaty itself or it is in some other manner agreed. The second dealt with the situation where the treaty is silent, and the possibility that a State could give effect to the provisional application of a treaty by means of a unilateral declaration, provided that no objection is made in that regard.

The prevailing view in the Drafting Committee was that the first proposition could feature within the draft guidelines, as an additional means by which provisional application could be agreed. The Drafting Committee focused on a proposal to include the idea within the existing text of draft guideline 4, either as an additional specification in subparagraph (b), or in a new subparagraph (c), or in the commentary explaining the meaning of the phrase "other means or arrangements".

In the end, the Drafting Committee opted for an express reference in the text of draft guideline 4 itself, though the addition of the phrase, at the end of subparagraph (b),

“or a declaration by a State or an international organization that is accepted by the other States or international organizations”. The basic point is that by including the reference in draft guideline 4, such declaration has to take place within the context of an agreement between the parties. This is made clearer by the fact that the text refers to a “declaration by a State”, as opposed to “unilateral declaration”, so as to distinguish the two. There was agreement with a suggestion that the possibility be subject to acceptance, as opposed to non-objection, since the latter was potentially too uncertain in practice.

The necessary agreement could arise in advance (such as by means of a treaty clause or by means of a resolution of a conference) allowing each party the freedom to separately elect to provisionally apply the treaty. The commentary will explain further how such declaration might manifest itself and that acceptance of such a declaration must be explicit (and not merely acquiescence based on non-objection). The commentary will also discuss the fact that the opening clause “[i]n addition to the case where the treaty so provides” to draft guideline 4, covers the situation where the treaty may be silent, but the parties nonetheless agree to provisional application through other means, including by means of acceptance of a declaration.

An earlier version of the text referred to acceptance being “in written form”, but the Drafting Committee decided that it was best left to the commentary which will make the point that the acceptance must be “express”, and that most known examples are of agreement in writing. At the same time, by not referring to acceptance having to be in writing, the draft guidelines retain a certain flexibility to allow for other modes of acceptance.

As regards provisional application by means other than through agreement, some members were concerned that the legal effects of unilateral acts were, *stricto sensu*, outside of the scope of the topic, and accordingly should not feature in the text. Others stressed the nature of the text as being that of draft guidelines, which could provide guidance on such alternative modes, regardless of how infrequently they may arise. The prevailing view was that the matter was best not dealt with in the text, but could be referred to in the commentary to draft article 4.

I should mention here that, for the sake of clarity, the Drafting Committee decided to change the reference in subparagraph (a) from “separate agreement” to “separate treaty”, since subparagraph (b) also dealt with agreement, albeit through other modes.

The title of the draft guideline was amended to read “[f]orm of agreement” to further emphasise the purpose of the provision.

Mr. Chairperson,

With the inclusion of the idea within draft guideline 4, subparagraph (b), there was no longer a need for a distinct provision for draft guideline 5 on unilateral declarations. Accordingly, the subsequent draft guidelines were renumbered. As I mentioned earlier, the Drafting Committee also undertook a toilettage of the entire text.

As regards draft guideline 2, there was a proposal to make an express reference to the 1986 Vienna Convention. Instead, it was agreed that the commentary will treat the two Vienna Conventions as not being on the same level, as is implied from the text of draft guideline 2.

Draft guideline 3 was aligned with draft guideline 6, with the addition of the phrase “between the States or international organizations concerned”.

On draft guideline 6 [7], a concern was expressed by one member, who had questioned the text during its adoption in Plenary in May, that member objected to the reference in the text to the provisional application of the treaty producing “the same legal effects as if the treaty were in force” does not reflect the legal position, since, inter alia, termination of provisional application would not be the same, as was apparent from draft guideline 9. Some members raised a procedural objection to addressing this matter and the substance of the proposed change. According to them, the Drafting Committee was at the

stage of toilettage and the Drafting Committee had given detailed consideration to this topic, the plenary had approved the draft guideline, and the matter should not be reopened now.

The Drafting Committee considered an alternative formulation that would indicate that the provision was “without prejudice to draft guideline 8[9]”. However, the Drafting Committee was hesitant to introduce any such modification, at this stage. It was proposed that the issue could be addressed in the commentary. The Special Rapporteur agreed to reflect it in the commentary to that extent. Also, if necessary, the draft provision could be reconsidered during the second reading.

In draft guideline 8 [9], the reference to “shall” was changed to “is”, which follows the existing style of the Commission for draft guidelines.

Finally, the title of draft guideline 11 [12] was amended through the replacement of the word “regarding” with the phrase “to provisional application with”. Some further minor technical changes were made to the provision.

Mr. Chairperson,

This concludes my introduction of the seventh report of the Drafting Committee for the sixty-ninth session. It is my recommendation that the Plenary re-adopt draft guidelines, in revised form, as presented by the Drafting Committee.

Thank you.