

(Check against delivery)

STATEMENT OF THE CHAIR OF THE INTERNATIONAL LAW COMMISSION,

MR. EDUARDO VALENCIA-OSPINA

Cluster Two

Let me now turn to the remaining draft guidelines 10 to 12, which were adopted at the present session of the Commission. They address, respectively, questions of implementation, compliance and dispute settlement.

The Commission decided to transmit the draft guidelines, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by **15 December 2019**.

Let me now turn to Chapter VII of the annual report.

Chapter VII: Provisional application of treaties

Mr. Chair,

Chapter VII of the Commission's report concerns the topic "**Provisional application of treaties**". This year, the Commission considered the fifth report of the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, as well as a memorandum by the Secretariat reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto.

The fifth report of the Special Rapporteur continued the analysis of views expressed by Member States, provided additional information on the practice of international organizations, and addressed the topics of termination or suspension of the provisional application of a treaty as a consequence of its breach, and formulation of reservations and amendments. In his fifth report, the Special Rapporteur also proposed eight draft model clauses covering different aspects of provisional application. Those model clauses were drawn from identified State practice. In addition, the fifth report provided a bibliography on the topic.

At this session, the Commission finalized the first reading and adopted a complete set of 12 draft guidelines, with commentaries thereto, entitled the "Guide to Provisional Application of Treaties", which can be found at paragraphs 89 and 90 of the annual report. I would like to reiterate words of deep appreciation of the Commission to the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, for his outstanding contribution, which had enabled the Commission to bring to a successful conclusion its first reading of the draft Guide to Provisional Application of Treaties

As indicated in the general commentary, the purpose of the Guide to Provisional Application of Treaties is to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties. The objective of the Guide is to direct States, international organizations and other users to answers that are consistent with existing rules and most appropriate for contemporary practice

As you may recall, draft guidelines 1 to 11 had been provisionally adopted by the Commission last year. Those draft guidelines were renumbered as a result of the adoption of further provisions this year. Based on the Special Rapporteur's proposals, the Commission adopted new draft guideline 7 on reservations, and new draft guideline 9 on termination and suspension of provisional application, which incorporates the former draft guideline 8 on termination. The Commission also made substantive changes to draft guideline 6 on the legal effect of provisional application.

Mr. Chair,

No changes were made to draft guidelines 1 to 5, as provisionally adopted last year. Draft guidelines 1 and 2 are concerned, respectively, with the scope of application and purpose of the draft guidelines. In particular, draft guideline 2 reiterates that the guidelines are based on the 1969 Vienna Convention and other rules of international law, including the 1986 Vienna Convention.

The general rule on the provisional application of treaties is stated in draft guideline 3. That is: "A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed."

Draft guideline 4 deals with forms of agreement, on the basis of which a treaty, or a part of a treaty, may be provisionally applied, in addition to when the treaty itself so provides. The structure of the provision follows the sequence of article 25 of the 1969 and 1986 Vienna Conventions. Draft guideline 5 deals with the commencement of provisional application. The draft guideline is modelled on article 24, paragraph 1, of the 1969 and 1986 Vienna Conventions, on entry into force.

Draft guidelines 6 dealing with the legal effects of provisional application was modified to address comments made by Member States and members of the Commission. Two types of "legal effect" might be envisaged: the legal effect of the agreement to provisionally apply the treaty or a part of it, and the legal effect of the treaty or a part of it that is being provisionally applied. According to draft guideline 6: "[t]he provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed." The reference to "a legally binding obligation to apply the treaty or a part thereof" is designed to add more precision in the depiction of the legal effect of provisional application.

Let me now turn to draft guideline 7. This draft guideline, which was provisionally adopted this year, deals with the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of a treaty. As indicated in the commentary, in view of the relative lack of practice on the matter, the Commission is only at the initial stage of considering the question. According to paragraph 1: “In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.” Some rules of the 1969 Vienna Convention applicable to reservations are indeed relevant in case of provisional application. The formulation of this paragraph is neutral on the question as to whether reservations exclude or modify the legal effect arising from the provisional application of the treaty, or that of the agreement between the parties to provisionally apply the treaty as such. Paragraph 2 provides for the formulation of reservations by international organizations to parallel the situation of States envisaged in paragraph 1.

No change was made to draft guideline 8, which was adopted last year as draft guideline 7. This draft guideline deals with the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is being provisionally applied.

Let me now turn to draft guideline 9, which addresses the termination and suspension of provisional application. The provision expands on that adopted last year, as then draft guideline 8, on “[t]ermination upon notification of intention not to become a party”, through the inclusion of two new paragraphs covering additional scenarios. Paragraph 1 addresses termination of provisional application upon entry into force. This is the most frequent way in which provisional application is terminated. Paragraph 2 concerns situations when the intention not to become a party to the treaty is communicated by the State or international organization provisionally applying the treaty or a part of a treaty to the other States or international organizations between which the treaty or a part of a treaty is being provisionally applied. It follows closely the formulation of paragraph 2 of article 25 of the 1969 and 1986 Vienna Conventions. Paragraph 3 confirms that draft guideline 9 is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in part V, section 3, of the 1969 Vienna Convention or other relevant rules of international law concerning termination and suspension.

Mr. Chair,

Let me conclude briefly this overview of the Guide to Provisional Application of Treaties with draft guidelines 10, 11 and 12, the text of which remained unchanged from the draft guidelines adopted last year. Only their titles were slightly modified to avoid translation issues.

Draft guideline 10 deals with the observance of provisionally applied treaties and their relation with the internal law of States and the rules of international organizations. Draft guideline 11 addresses the effects of the provisions of the internal law of States and the rules of international organizations on their competence to agree to the provisional application of treaties. Draft guideline 12 relates to the limitations on States and international organizations that could derive from their internal law and rules when agreeing to the provisional application of a treaty or a part of a treaty.

Mr. Chair,

In accordance with articles 16 to 21 of its statute, decided to transmit the draft guidelines to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by **15 December 2019**.

Before concluding on this Chapter, I would like to stress that, because of lack of time, the Commission could not conclude its consideration of the draft model clauses proposed by the Special Rapporteur in his fifth report, the text of which is reproduced at footnote 996 of the annual report. The Commission intends to resume such consideration at its seventy-firs

considered by the Committee. Its Chair presented two interim reports to the Commission on the progress made at the present session, which can both be found on the website of the Commission.

Let me now address a few highlights of the debate within the Commission, the summary of which is reproduced in the annual report.

The Special Rapporteur introduced his third report, and his proposed draft conclusions, which dealt with the consequences and legal effects of peremptory norms of general international (*jus cogens*).

In particular, the debate focused on the specifi

This concludes my introduction of cluster II.
