

Chapter VII

PROVISIONAL APPLICATION OF TREATIES

A. Introduction

140. The Commission, at its sixty-third session (2011), decided to include the topic “Provisional application of treaties” in its long-term programme of work,³²⁰ on the basis of the proposal which was reproduced in annex III to the report of the Commission on the work of that session.³²¹ The General Assembly, in paragraph 7 of its resolution 66/98 of 9 December 2011, took note of, *inter alia*, the inclusion of this topic in the Commission’s long-term programme of work.

B. Consideration of the topic at the present session

141. At its 3132nd meeting, on 22 May 2012, the Commission decided to include the topic “Provisional application of treaties” in its programme of work and appointed Mr. Juan Manuel Gómez Robledo as Special Rapporteur for the topic.

142. At its 3151st meeting, on 27 July 2012, the Special Rapporteur presented to the Commission an oral report on the informal consultations held on this topic, under his chairpersonship, on 19 and 25 July 2012 (see paras. 144–155 below). At the same meeting, the Commission took note of that report.

143. Also at the same meeting, the Commission decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the Vienna Convention on the law of treaties (1969 Vienna Convention).

REPORT OF THE SPECIAL RAPPORTEUR OF THE INFORMAL CONSULTATIONS HELD ON THE TOPIC

144. The purpose of these informal consultations had been to initiate an informal dialogue with members of the Commission on a number of issues that could be relevant for the consideration of this topic during the present quinquennium. The Special Rapporteur’s intention was to submit his first substantive report at the Commission’s sixty-fifth session (2013). However, he had shared with the members of the Commission an informal paper outlining some preliminary elements. Those elements were to be read together with the syllabus, prepared by Mr. Giorgio Gaja, containing the initial proposal for this topic, which was reproduced in annex III to the Commission’s 2011

report.³²² In the view of the Special Rapporteur, the very first basis for the Commission’s consideration of this topic should be the work undertaken by the Commission on the topic concerning the law of treaties, as well as the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention.

145. At this initial stage, the Special Rapporteur had deemed it appropriate to seek the views of the members of the Commission on, *inter alia*, the following specific questions: (a) the procedural steps that would need to be considered as preconditions for provisional application and for its termination; (b) the extent to which article 18 of the 1969 Vienna Convention, which establishes the obligation not to defeat the object and purpose of a treaty prior to its entry into force, was relevant to the regime of provisional application under article 25 of the Vienna Convention; (c) the extent to which the legal situation created by the provisional application of treaties was relevant for the purpose of identifying rules of customary international law; and (d) the need for obtaining information on the practice of States.

146. A rich discussion had followed on those specific questions, as well as on other aspects of the topic.

147. The first two questions had given rise to a number of comments and suggestions, which the Special Rapporteur intended to take into consideration in his reports. Concerning, in particular, the relationship between articles 18 and 25 of the 1969 Vienna Convention, the majority of the members who had taken the floor on this point were of the view that provisional application under article 25 went beyond the general obligation not to defeat the object and purpose of the treaty prior to its entry into force. Although related insofar as they both had to do with the period preceding the entry into force of the treaty, those two provisions gave rise to different legal regimes and should be treated as such.

148. As to the question concerning the relevance of the situation created by the provisional application of treaties for the purpose of identifying rules of customary international law, the general feeling was that aspects relating to the formation and identification of customary international law should be excluded from the scope of this topic. An analysis of the customary status of article 25 of the 1969 Vienna Convention could, however, be envisaged.

149. Concerning the practice of States and its possible use, it had been observed that, while the Commission should not be concerned by issues that remained a mere

³²⁰ *Yearbook ... 2011*, vol. II (Part Two), paras. 365–367.

³²¹ *Ibid.*, p. 198.

³²² *Ibid.*

fact from the perspective of international law, the work on the topic could simply not ignore the internal position of States regarding provisional application. In that regard, it had been suggested that having a representative sample of relevant State practice would be useful for the work of the Commission.

150. It had also been suggested that it would be useful for the work of the Commission to have examples of provisional application clauses in treaties.

151. Other points addressed during the discussions included, for instance, the exact meaning of “provisional application” of a treaty; the various forms and manifestations covered by this legal institution; the legal basis for the provisional application of a treaty, namely article 25 itself or a parallel agreement to the treaty; the question of which organs were competent to decide on provisional application and the connection of this issue with article 46 of the 1969 Vienna Convention; whether the legal regime of provisional application was the same for different types of treaties; whether the provisional application of a treaty generated legally binding obligations, the breach of which would entail the international responsibility of the State(s) concerned; and the modalities and effects of the termination of the provisional application of a treaty, which might raise questions related to the law governing the termination and suspension of the operation of treaties as contained in several articles of section 3 of Part V of the 1969 Vienna Convention.

152. The question of the final outcome of the Commission’s work on the topic had been also touched upon during the discussions. In that regard, the general

feeling was that it was still premature for the Commission to take a decision on what should be that outcome. The possibility of elaborating draft articles had been mentioned by some members, but other possible forms, such as guidelines and model clauses, had also been alluded to and should not be excluded at this stage.

153. Some members had mentioned the possibility of requesting the secretariat of the Commission to prepare a memorandum on the topic. After consultations with the secretariat, the Special Rapporteur believed that it would be very useful to have a memorandum on the previous work undertaken by the Commission on this subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention. He therefore proposed that a mandate be given by the Commission to the secretariat for the preparation of such a memorandum.

154. The Special Rapporteur expressed his sincere thanks to all the members of the Commission who had participated in these informal consultations and who had provided him with their invaluable comments and suggestions on numerous aspects of this topic. That exchange of views would greatly facilitate the task of the Special Rapporteur in preparing his first report.

155. The Special Rapporteur indicated that the Commission should not aim at changing the 1969 Vienna Convention. The purpose should rather be to extract whatever was useful for States to consider resorting to provisional application under certain circumstances and conditions. The flexibility that was inherent to that option needed to be preserved.