

Chapter VIII

PROVISIONAL APPLICATION OF TREATIES

A. Introduction

108. At its sixty-fourth session (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.³⁸³ At the same session, the Commission took note of an oral report, presented by the Special Rapporteur at the 3151st meeting, on 27 July 2012, on the informal consultations held on the topic under his chairpersonship. The Commission also decided to request a memorandum from the Secretariat on previous work undertaken by the Commission on the 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. The General Assembly subsequently, in resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

109. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/664), which sought to establish, in general terms, the principal legal issues that arose in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The Commission also had before it a memorandum by the Secretariat (A/CN.4/658), which traced the negotiating history of article 25 of the 1969 Vienna Convention, both within the Commission and at the United Nations Conference on the Law of Treaties of 1968–1969, and included a brief analysis of some of the substantive issues raised during its consideration.

110. The Commission considered the first report at its 3185th to 3188th meetings, from 24 to 30 July 2013.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE FIRST REPORT

111. The Special Rapporteur explained that the object of his preliminary report was to establish the main parameters of provisional application, so as to encourage greater recourse to it by States. The 1969 Vienna Convention was the logical point of departure. He indicated a provisional preference for not considering the question of

the provisional application of treaties by international organizations, as envisaged in the 1986 Vienna Convention.

112. In providing an overview of his report, the Special Rapporteur pointed to the terminological discrepancy between the draft article adopted by the Commission in 1966, which referred to “provisional entry into force”,³⁸⁴ and article 25, which had been modified at the United Nations Conference on the Law of Treaties so as to refer to “provisional application”. While the record showed that the two phrases had been used somewhat interchangeably, he noted that, upon closer scrutiny, they were distinct legal concepts. The Special Rapporteur further recalled the possible reasons which motivated States to resort to provisional application, as outlined in his report.

113. Concerning the legal effects of provisional application, the Special Rapporteur noted that, as a general matter, such effects could depend on the content of the substantive rule of international law being provisionally applied. The secondary consequences of the breach of an obligation arising from a rule being provisionally applied arose not from the fact of provisional application, but from the normal application of the secondary rules of international law pertaining to breaches of obligations. It was also suggested that the provisional application of treaties had to be considered within the general context of article 31, paragraph 2, of the 1969 Vienna Convention.

114. While it was his intention to consider the question of the legal effects in greater detail at a later stage, the Special Rapporteur recalled that both Sir Gerald Fitzmaurice and Sir Humphrey Waldock, the previous Special Rapporteurs, had been of the view that the provisional application of a treaty gave rise to the same obligations that would arise upon the entry into force of the treaty. He pointed, in that regard, to the relevance of the principle of *pacta sunt servanda*, as reflected in article 26 of the 1969 Vienna Convention. He furthermore recalled the view which had emerged from the informal consultations, held in 2012, that the provisional application of a treaty gave rise to obligations which extended beyond that not to defeat the object and purpose of a treaty prior to its entry into force (article 18 of the Vienna Convention).³⁸⁵

115. He pointed to the key features of the legal regime applicable to the provisional application of treaties, namely that it may be envisaged expressly in a treaty or provided

³⁸³ At its 3132nd meeting, on 22 May 2012 (see *Yearbook ... 2012*, vol. II (Part Two), para. 267). The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex III to the report of the Commission on its work at that session (*Yearbook ... 2011*, vol. II (Part Two), paras. 365–367, and annex III).

³⁸⁴ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 210, draft art. 22.

³⁸⁵ See *Yearbook ... 2012*, vol. II (Part Two), paras. 144–155, in particular para. 147.

for by means of a separate agreement between the parties; that States may express their intention to provisionally apply a treaty either expressly or tacitly; and that termination of provisional application may be undertaken unilaterally or by agreement between the parties.

116. The Special Rapporteur expressed his preliminary view that the topic was best suited to the development of guidelines or model clauses aimed at providing guidance to governments.

2. SUMMARY OF THE DEBATE

117. The Commission joined the Special Rapporteur in expressing appreciation to the Secretariat for preparing the memorandum.

118. The view was expressed that it was inappropriate, as a matter of legal policy, for the Commission to seek to promote the provisional application of treaties. Examples were cited where the provisional application of treaties had discouraged their ratification. Other members pointed out that it was not the task of the Commission to encourage or discourage recourse to provisional application, since such decision was essentially a policy matter for States. From the perspective of international law, States were free to decide to provisionally apply a treaty or not. It was also noted that the significance of the possibility of provisional application was confirmed by its frequent use by States. Far from being a means of undermining treaties, the drafters of article 25 of the 1969 Vienna Convention had viewed it as a practical way of ensuring legal security, e.g. in the case of successive treaties, by providing an expedited path for States to begin cooperation with regard to a treaty.

119. A further concern was expressed that the provisional application of treaties raised serious questions about the circumvention of established domestic procedures, including constitutional requirements, for participation in treaties. Other members did not share such concerns. It was observed that States were free to establish rules, under their respective internal legal systems, on how to engage at the international level. The Commission had to proceed from the assumption that the provisional application of treaties was undertaken in conformity with the internal laws of the State in question (subject to the applicability of article 46 of the 1969 Vienna Convention). The Commission's task was simply to consider the extent to which contemporary international law was required to take into account limitations under domestic laws, without considering those limitations themselves. From the perspective of international law, the consent of a contracting State was decisive. Once such consent to provisionally apply a treaty had been given, whether in the treaty itself or by means of a separate agreement, the State could not invoke the provisions of its internal law as a justification for its failure to perform its international obligations (article 27 of the 1969 Vienna Convention). It was also suggested that concerns about the circumvention of domestic rules could be met by clarifying that the "provisional application" of a treaty carried with it the consequence that the obligations under the treaty would become binding on the State. This would help States decide whether they were constitutionally empowered to provisionally apply a treaty.

120. It was observed that the Commission's task was to develop a practical guide for States when they negotiated new clauses on provisional application, or when they interpreted and applied existing clauses, especially since the 1966 commentaries on the law of treaties did not deal with important aspects of the text of article 25 as adopted in Vienna.

121. The view was expressed that determining the legal effect of provisional application was the central task at hand. Several members were of the opinion that, unless the parties agreed otherwise, agreement to provisionally apply a treaty implied that the parties concerned were bound by the rights and obligations under the treaty in the same way as if it were in force. The view was expressed that the Commission ought not to ascribe legal significance to the shift in terminology from "provisional entry into force" to "provisional application". Another suggestion was that a distinction could be drawn between treaties being provisionally applied and "provisional" or "interim" agreements. The Special Rapporteur was further encouraged to consider the relationship with other provisions of the 1969 Vienna Convention, including articles 18, 26, 27 and 46. Different views were expressed on the advisability of considering questions of State responsibility within the topic.

122. It was suggested that the Special Rapporteur could seek to ascertain whether the rules in article 25 were applicable, as rules of customary international law or otherwise, in cases where the 1969 Vienna Convention did not apply. A further suggestion was to consider the extent to which the fact that a treaty was being provisionally applied might contribute to the formation of rules of customary international law.

123. Other suggestions for possible discussion included determining whether there existed procedural requirements for the provisional application of treaties; considering the relationship between parties provisionally applying a treaty and third parties; analysing the requirement that the intention to provisionally apply a treaty should be clear and unambiguous; considering the applicability of the rules on reservations to treaties; analysing the distinction between provisional application and the necessary application of certain provisions of a treaty from the time of the adoption of its text (article 24, paragraph 4, of the 1969 Vienna Convention); considering the applicability of the rules on interpretation of treaties; studying the question of the termination of provisional application (including the effect on the legal position of third parties); considering the position of non-signatory or acceding States wishing to provisionally apply a multilateral treaty; considering whether certain provisions of a treaty, such as those establishing monitoring mechanisms, would, by definition, fall outside provisional application; clarifying the temporal scope of provisional application, including the possibility of indefinite provisional application; and considering the question of the retroactivity of obligations once a treaty which had been applied provisionally entered into force. It was further suggested that a general distinction be drawn between provisional application in the context of bilateral and of multilateral treaties.

124. A preference was expressed for including article 25 of the 1986 Vienna Convention within the scope of the topic, since international organizations could also be involved in the provisional application of treaties.

125. Some members were of the view that it was too early to take a position on the eventual outcome of the topic, while several stated that conclusions with commentaries could be a useful way of clarifying various aspects related to the provisional application of treaties.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

126. The Special Rapporteur indicated that the Commission should be guided by the practice of States during the negotiation, implementation and interpretation of treaties being provisionally applied. He stressed his support for the view that the Commission should not be seen as encouraging or discouraging recourse to provisional application. The objective was to provide greater clarity to States when negotiating and implementing provisional application clauses. On the question of terminology, he indicated that, notwithstanding the reference to “provisional entry into force” in the Commission’s earlier work, the focus should be on the terminology used in article 25, that is “provisional application”. He was also of the view that the question of the customary international law character of the provisional application of treaties merited consideration in the situation where two or more States seeking to provisionally apply a treaty were not parties to the 1969 Vienna Convention and no separate agreement existed. He further supported the view that it was not for the Commission to embark on an analysis of the internal rules of States. References to domestic legislation, therefore, were

to be viewed as merely illustrative of the position taken by States, and it was solely for States to ascertain the implications, for their internal legal systems, of resorting to provisional application.

127. He confirmed that he intended to consider the relationship between article 25 and other provisions of the 1969 Vienna Convention, including those on the expression of consent, the entering of reservations, the effects on third States, the applicability of the rules on interpretation, application and termination of treaties, and the invalidity of treaties. He also noted the necessity of considering the temporal component of provisional application, including whether it could last indefinitely. Furthermore, he suggested that the legal effect of provisional application in the context of treaty rules establishing the rights of individuals should be analysed. A further distinction worth exploring was that between multilateral and bilateral treaties.

128. The Special Rapporteur concurred with those members who preferred not to embark on an analysis of the applicable rules of State responsibility in the context of the provisional application of treaties. In his view, it was sufficient to indicate that the breach of an obligation arising from a treaty being provisionally applied triggered the legal consequences arising from the established rules on the responsibility of States for internationally wrongful acts. He also took note of the interest of some members in including the 1986 Vienna Convention within the scope of the topic.

129. The Special Rapporteur indicated that he considered the development of guidelines with commentaries to be an appropriate outcome of consideration of the topic.