9. Colombia

Communication transmitted to the Secretariat, 1 August 2022:[24]

1. Provisional application of treaties: jurisprudence of the Constitutional Court of Colombia

The provisional application of treaties, as a concept of public international law, embedded in the Vienna Convention on the Law of Treaties, has historically been applied in the Republic of Colombia particularly in the case of international economic and trade agreements generated within an international organization, thus expediting their processing, incorporating them into the country's laws and giving effect to the international obligations enshrined in the instrument, while it goes through the internal ratification process provided for in the Constitution.

Since the enactment of the 1991 Constitution, Colombia has provisionally applied a very limited number of treaties, including the following:

— *Exchange of notes constituting an agreement between Colombia and Brazil for reciprocal exemption from double taxation in favour of the maritime or airline companies of both countries*;

— *Economic Complementarity Agreement—Free Trade Agreement—between the Republic of Colombia, the United Mexican States and the Bolivarian Republic of Venezuela—Seventh Additional Protocol*;

— *Partial scope trade agreement between the Republic of Colombia and the Bolivarian Republic of Venezuela*;

— *Trade Agreement between the European Union, Colombia and Peru*, signed in Brussels, Belgium, on 26 June 2012;

— *Economic Complementarity Agreement No. 72*, entered into between the Governments of the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, States parties of the Southern Common Market (MERCOSUR), and the Government of the Republic of Colombia, signed on 21 July 2017.

It should, however, be noted that Colombia formulated a reservation to article 25 of the Vienna Convention, given that, while the 1886 Constitution was in force, the provisional application of treaties was prohibited.

The reservation was reflected in Decree No. 3703 of 1985, in the following terms:

> (…) Reservation by Colombia.
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> With regard to article 25, Colombia formulates the reservation that the Political Constitution of Colombia does not recognize the provisional application of treaties; it is the responsibility of the National Congress to legislate, and thereby to exercise its right to approve or disapprove any treaties and conventions which the Government concludes with other States or with international legal entities, in general entities subject to international law (…).

[24] Unofficial translation (from Spanish) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/colombia_s.pdf.

However, in the preparatory work for the 1991 Constitution, currently in force in Colombia, the National Constituent Assembly considered it necessary to give the President of the Republic the power to provisionally apply treaties, provided that they were of a commercial or economic nature and had been adopted within an international organization.

The subsequent pronouncements of the Constitutional Court, the highest national court, therefore refer to the possibility that treaties may be provisionally applied, under the aforementioned terms, as described below:

Judgment No. C-249 of 1994:

The Court ruled that:

> Although the general principle regarding the application, force and validity of treaties is determined by their approval in accordance with the national laws of each State, it has been established that a treaty or part thereof may be applied without completing the aforementioned procedures. The rationale for the provisional application of a treaty lies in the importance of the issue being regulated or in the urgency for States of its implementation (…).

In that regard, it added the following:

> Provisional application does not imply that the constitutional procedures to be completed by each State in order to approve treaties should be disregarded, since States do not waive the right or the duty to submit the respective agreement to the competent entity for approval; those procedures, despite the provisional application, must be completed. In addition, when the provisional application clause is agreed upon, it is subject to the condition of subsequent ratification.
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> The 1991 Constitution enshrined the concept of the provisional application of treaties, restricting its use to treaties of an economic and commercial nature. Thus, when a treaty covers these specific issues, a provisional application clause may be agreed upon, in which case the Government must immediately submit the respective treaty to Congress for approval. If a treaty deals with matters other than those covered in the aforementioned article, and this special clause is included, the negotiator will have to formulate a reservation (…).

The Court thereby noted that the provisional application of treaties was expressly enshrined in article 224 of the 1991 Constitution, which restricted its use to treaties of an economic and commercial nature. When a treaty covers these specific issues, a provisional application clause may thus be agreed upon, in which case the Government must immediately submit the respective treaty to Congress for approval. If a treaty deals with matters other than those covered in the aforementioned article, and this special clause is included, the negotiator will have to formulate a reservation.

Judgment No. C-321 of 2006:

The Constitutional Court ruled on the constitutionality of article 25 of the Vienna Convention. On the matter, the Court ruled as follows:

> (…) given that the Colombian reservation to article 25 of the 1969 Vienna Convention modifies the scope of the obligation set forth therein in relation to Colombia, and said reservation is currently in force, the Chamber concludes that it is necessary to interpret said article in conjunction with the reservation—given that the article and reservation determine the scope of the international obligations of Colombia—from which it follows that article 25 is not currently binding on Colombia, pursuant to the reservation (…).

The Court therefore held that as long as the Government of Colombia does not withdraw the reservation, article 25 of the 1969 Vienna Convention will not be internationally binding on Colombia. Thus, *stricto sensu*, the aforementioned article does not apply in a general manner to the Republic of Colombia and therefore the provisional application of treaties has been used only in those cases where such use has been permitted under the domestic legal system.

Judgment No. C-280 of 2014:

The Court examined the constitutionality of the provisional application of the trade agreement between the Republic of Colombia and the European Union. To that end, it recalled the circumstances under which the measure may be applied in Colombia, noting that, pursuant to the provisions of article 224 of the Constitution, a treaty may be applied provisionally only in cases in which reference is made to a treaty of a commercial nature and when said treaty has been concluded within an international organization.[25]

In the words of the Court:

> (…) Although as a general rule the ratification, entry into force and application of international treaties through which Colombia enters into new obligations are preceded by this procedure, article 224 of the Constitution provides for a special scenario through the provisional application of such instruments. The aforementioned provision provides that the President of the Republic may provisionally apply treaties of an economic or commercial nature agreed upon within the scope of an international organization, if the treaty so provides. In this case, as soon as a treaty provisionally enters into force, it must be sent to Congress for approval. If Congress does not approve it, the application of the treaty shall be suspended.
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> Thus, in these cases the President may implement the instrument without the constitutional procedures detailed in the previous section having been completed, when three conditions are met:
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> (i) The content of the agreement is economic or commercial in nature;
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> (ii) The instrument was negotiated and concluded within the scope of an international organization;
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> (iii) The treaty expressly provides for its advance application (…).

Consequently, it reiterated what it had expressed in previous pronouncements, stating that the legal effect of the provisional application of an international instrument does not waive the requirement to complete the internal procedures provided for at the constitutional level for the incorporation of treaties into domestic law, but to defer the completion of said procedures, enabling these international provisions undertaken by Colombia to be applied and implemented before the act approving them has been issued, this Court has conducted a constitutional review and the treaty has been ratified.

Thus, with regard to the instrument analysed on that occasion, it determined the following:

— It is a free trade agreement, which implies that it is commercial and economic in nature.

[25] Article 224 of the Constitution of Colombia ("Treaties, in order to be valid, must be approved by Congress. However, the President of the Republic may provisionally apply treaties of an economic and commercial nature agreed upon within the scope of an international organization, if the treaty so provides. In this case, as soon as a treaty provisionally enters into force, it must be sent to Congress for approval. If Congress does not approve it, the application of the treaty shall be suspended").

— The treaty clearly contains a provisional application clause.

— However, it was not concluded within an international organization in the usual manner, as in the case of the agreements concluded within the Latin American Integration Association (LAIA); nonetheless, the national Government argued that the requirement was understood to have been fulfilled, since the provisions of the free trade agreement build upon the provisions of the World Trade Organization, which has the legal status of an international organization.

— It was not provisionally applied before being submitted to Congress for approval; instead, the free trade agreement was subject to the debates provided for under the Constitution for this type of instrument and was provisionally applied before it went through the automatic constitutional review conducted by the Constitutional Court.

Taking into account that one of the requirements is that the instrument must have been concluded within an international organization, the Court established that:

> (…) Given that the legal effect of the provisional application of international treaties is the deferral of the parliamentary approval and constitutional review procedures, which are aimed at ensuring good faith and the respect and strengthening of international relations, the democratic basis of international commitments, their suitability for Colombia and their compliance with the Constitution, and in particular with human rights standards, the requirement set out in article 224 of the Constitution, whereby the international agreement for which provisional application is sought must have been concluded within the scope of an international organization, implies that the treaty must build on and be a direct and specific expression of the purpose of the international organization.
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> The rationale behind this is that, given that the constituent instrument of the entity, which determines its purpose, has been subject to parliamentary approval and constitutional review procedures, the advance application of an instrument that builds on and expresses said purpose does not entail or carry with it the risks inherent in the deferral of the standard procedures for entry into force of international treaties (…).

Judgment No. C-254 of 2019:

Finally, when the Constitutional Court ruled on the constitutionality of the free trade agreement concluded with Israel, it established the following with respect to the provisional application of treaties:

> (…) Regarding the possibility of Colombia provisionally applying the free trade agreement, notwithstanding the constitutional validity of such treaty clauses, it can be inferred from the statement submitted by the Ministry of Trade that it did not take place. The Court also noted that, although the President of the Republic may provisionally apply trade treaties concluded within international organizations (art. 224), the treaty may only enter into force if all internal procedures have been completed, including the endorsement provided by the act approving the treaty and the declaration of constitutionality. For the foregoing reasons, the motion of unenforceability filed by one of the intervening parties in the case is not admissible (…).

Given the jurisprudence of the Constitutional Court and the number of cases in which international treaties concluded by Colombia have been provisionally applied, it is evident that this concept is applied on an exceptional basis and should therefore be interpreted as restrictively as possible, without admitting analogies.

2. Most recent cases of provisional application of treaties in Colombia

(a) Trade agreement between the European Union, Colombia, Peru and Ecuador

Of the five treaties mentioned, which Colombia has provisionally applied since it was established in the 1991 Constitution that a provisional application clause could be included in treaties concluded by the Republic of Colombia, provided that the concurrent assumptions set out in article 224 are met,[26] one of the most significant cases is the *Trade Agreement between Colombia and Peru, of the one part, and the European Union and its Member States, of the other part*, signed in Brussels, Belgium, on 26 June 2012.

For Colombia, the internal procedures for its approval by Congress began in November 2012 and concluded with its endorsement by President Juan Manuel Santos, by Act No. 1669 of 16 July 2013. In judgment No. C-335/14 of 2014, the Constitutional Court declared that the agreement complied with the Constitution, with regard to both its procedural aspects and its material content.

Through Decree No. 1513 of 18 July 2013, the President of the Republic provisionally applied the Trade Agreement and the European Union was notified of the completion of the internal procedures required for that purpose. By means of the same Decree, it was also decided that the agreement would be provisionally applied as of 1 August 2013.

The market access commitments entered into by the President of the Republic were implemented through Decree No. 1636 of 31 July 2013. The President applied the aforementioned agreement with the following considerations:

> […] the National Government concluded the "Trade Agreement between Colombia and Peru, of the one part, and the European Union and its Member States, of the other part", signed in Brussels, Belgium, on 26 June 2012;
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> Whereas article 330, paragraph 3, of the aforementioned Agreement provides for it to be provisionally applied, fully or partially; […]
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> Whereas article 224 of the Constitution of Colombia provides that the President of the Republic may provisionally apply treaties of an economic or commercial nature agreed upon within the scope of international organizations, if the treaty so provides;
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> Whereas in the preamble […] the Parties affirm and agree to build on the rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization; […]
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> Whereas in the light of the above, the commitments entered into under the aforementioned Agreement shall be provisionally applied.

From the above, it can be concluded that the agreement is a free trade agreement, of a commercial and economic nature, in which the provisional application clause is established, under article 330, paragraph 3.

Furthermore, among the agreements that Colombia has provisionally applied, this particular one was not applied before it was submitted to Congress for approval. The free trade agreement was, instead, subject to the debates required for this type of instrument and was provisionally applied prior to the automatic constitutional review conducted by the Constitutional Court. Although the constitutional rule that empowers the President to provisionally apply treaties does not, strictly speaking, authorize the President at any

[26] (i) They must be treaties of an economic or commercial nature; (ii) they must be agreed within international organizations; and (iii) once the treaty enters into force provisionally it must immediately be submitted to Congress for approval.

time to provisionally apply the treaty after it has been submitted to Congress or before the required constitutional review, it is also evident that such a situation is not expressly prohibited. Similarly, the fact that approval by Congress is required does not mean that certain fundamental requirements must be met for a treaty to be provisionally applied.

It was also argued that the requirement whereby the treaty should be generated within an international organization was understood to have been fulfilled, since the provisions of the Free Trade Agreement build upon the provisions of the World Trade Organization, which has the status of an international organization.

On 5 November 2014, the National Government issued Decree No. 2247, by which Colombia will continue to apply without interruption, under the terms set forth in Decree No. 1513 of 2013, the Trade Agreement signed with the European Union and its member States, after having complied with all the internal requirements as provided for in Colombian law for its approval.

(b) Economic Complementarity Agreement No. 72 Colombia—MERCOSUR

The agreement was signed on 21 July 2017. Regarding its provisional application, on 20 December 2017, the Government of the Republic of Colombia notified the General Secretariat of the Latin American Integration Association (LAIA) of the issuance of Decree No. 2111 of 2017, which provides for the provisional application of Economic Complementarity Agreement No. 72 between Colombia and those signatory parties that have notified the General Secretariat of LAIA that the Agreement has been incorporated into their domestic law.

On the same date, the General Secretariat of LAIA, through notes ALADI/SUBSE-LC 302/17 and ALADI/SUBSE-LC 303/17, informed the parties that *Economic Complementarity Agreement No. 72* would apply between Colombia and Argentina, and between Colombia and Brazil, as of 20 December 2017. However, its entry into force is pending with regard to Paraguay and Uruguay.

3. Conclusions

— The provisional application of treaties is restricted for Colombia. Colombia formulated a reservation to article 25 of the *Vienna Convention on the Law of Treaties*, given that the provisional application of treaties was prohibited while the 1886 Constitution was in force.

— The 1991 Constitution, currently in force, allows the provisional application only of those treaties that are (i) of an economic or commercial nature and (ii) agreed upon within the scope of an international organization. It further provides that once the treaty provisionally enters into force it must be submitted to Congress for approval immediately.

— The concept is therefore of an exceptional and restrictive nature for Colombia.

— Since the entry into force of the new Constitution, Colombia has provisionally applied a very limited number of treaties.

— The Constitutional Court, which is the highest constitutional court of Colombia, has clarified through its jurisprudence the scope of this concept in domestic law, as described in these comments.